DON'T ABOLISH EMPLOYEE NONCOMPETE AGREEMENTS

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For over three centuries, Anglo-American courts have assessed employee noncompete agreements under a Rule of Reason. Despite long-standing precedent, some now advocate banning all such agreements. These advocates contend that employers use superior bargaining power to impose such "contracts of adhesion," preventing employees from selling their labor to the highest bidder and reducing wages. Abolitionists also contend that such agreements cannot produce cognizable benefits and that employers could achieve any benefits via less restrictive alternatives without limiting employee autonomy.

This Article critiques the Abolitionist position. Arguments for banning noncompete agreements echo hostile critiques of other nonstandard contracts during antitrust law's "inhospitality era." These critiques induced courts and agencies to condemn various nonstandard agreements. Employee noncompete agreements escaped condemnation because they were governed by state contract law.

The Article recounts how Transaction Cost Economics ("TCE") undermined these critiques. TCE demonstrated that nonstandard agreements, such as exclusive territories, could overcome market failures by preventing dealers from free riding on each other's promotional efforts. TCE also concluded that such agreements were usually forms of voluntary integration, unrelated to market power. These scientific developments induced courts to abandon their hostility to nonstandard contracts, and nearly all such agreements now withstand Rule of Reason scrutiny.

TCE also undermines the case against employee noncompete agreements. Most notably, TCE predicts that most such agreements are voluntary methods of ensuring that employers capture the benefits of investing in employee training and trade secrets by deterring rival firms from free

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riding on such investments and bidding away employees. Application of TCE also rebuts claims that less restrictive alternatives will achieve the same objectives as noncompete agreements.

Finally, TCE undermines contentions that employee noncompete agreements injure employees by preventing them from receiving lucrative bids from competing employers. This account of harm treats hypothesized bids and resulting imagined (higher) wages as an exogenous baseline against which to measure the impact of such agreements. According to TCE, however, such bids are not exogenous. Instead, such bids often occur because noncompete agreements incentivize employers to make investments that increase employee productivity. Banning such agreements will thus reduce employee productivity, eliminating the incentive for rivals to bid for employees. In such cases, claims that noncompete agreements reduce wages invoke an illusory baseline of bids that would not occur but for the enforcement of such agreements.

Empirical evidence confirms TCE's predictions. Many such agreements apparently arise in unconcentrated markets. Most are disclosed in advance, and robust enforcement induces additional employee training. Finally, employees who receive preemployment notice of such provisions earn higher wages than similarly situated employees not bound by such agreements. Thus, many such agreements appear to be voluntary means of protecting investments in employee training, improving employee productivity, and increasing gross domestic product ("GDP").

This is not to say that all employee noncompete agreements produce significant benefits. Some employers decline to disclose such contracts until after employees join the firm. Such agreements apparently depress wages without producing benefits. Moreover, some employee noncompete agreements could raise rivals' costs and enhance employers' market power.

Neither potential impact justifies abolition. States or the Federal Trade Commission ("FTC" or "Commission") could encourage or require pre-contractual disclosure, leaving employers and employees free to adopt provisions that increase their joint welfare. Moreover, even the inventors of raising rivals' costs theory opined that most markets are not susceptible to such a strategy. Abolitionists have made no effort to establish that employee noncompete agreements usually arise in markets where such a strategy is possible. The rare prospect that parties may employ fully disclosed *agreements to pursue such a strategy does not justify abolishing all employee noncompete agreements.*

Indeed, banning all such agreements may have a disparate impact on small, labor-intensive firms by discouraging optimal investments in employee training. This potential impact may help explain labor union support for abolishing such agreements. Unionized firms predictably adopt capital-intensive production processes in response to collective bargaining and resulting noncompetitive wages. Laws that disadvantage nonunion, labor-intensive firms will enhance the demand for the output of unionized firms, increasing the demand for unionized labor. Banning noncompete agreements will thus sometimes boost unionized workers at the expense of their nonunion counterparts.

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INTRODUCTION

Employees who leave their jobs are generally free to work wherever they please or start new firms.[1] Sometimes, however, employee noncompete agreements restrict this freedom. These contracts prevent departing employees from working for rival employers or starting competing businesses. Economists and others describe such agreements as "nonstandard contracts" because they do more than simply mediate the exchange of money for employee labor, but instead constrain employees after the main transaction.[2]

Two bodies of law govern the validity of such agreements. First, the general law of contracts refuses to enforce agreements obtained without mutual assent or via fraud. More importantly, contract law also declines to enforce those agreements that unduly restrict competition between employers for employee services. Second, antitrust law condemns agreements that restrain trade "unreasonably" by producing economic harm in a relevant market.

For more than three centuries, courts applying the law of contracts have concluded that many employee noncompete agreements produce significant benefits that justify their enforcement, despite any impact on employee autonomy and competition. These courts have asked whether such post-employment restrictions are "reasonable," although the content of this inquiry has evolved over time.[3] Most importantly, courts do not require employees challenging such agreements to demonstrate competitive

1. For the sake of economy and readability, the author has minimized the number of footnotes in the introduction. The discussion and footnotes in Parts I–VIII provide ample support for any assertion without footnote support in the introduction.

2. *See* Alan J. Meese, *Robert Bork's Forgotten Role in the Transaction Cost Revolution*, 79 ANTITRUST L.J. 953, 957 (2014).

3. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 368 (1967), *overruled by* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

harm, but instead condemn restraints that are broader than necessary to produce any benefits. Moreover, some courts require employers to demonstrate that such agreements advance legitimate objectives. Despite such robust scrutiny, courts enforce many such agreements.[4]

By contrast, courts assessing employee noncompete agreements under antitrust laws have always taken a "hands off" approach.[5] This was so even during antitrust's "inhospitality era," when agencies and courts condemned numerous nonstandard contracts that likely produced efficiencies and did little harm.[6] Today, antitrust courts assess employee noncompete agreements under a fact-intensive Rule of Reason. Under this standard, challengers must establish that the restraint imposes harm, such as higher prices (or lower wages), reduced output, or lower quality. Plaintiffs virtually always fail to establish such harm, with the result that a decision to assess an agreement under the Rule of Reason is almost a *de facto* rejection of any challenge.

Despite long-standing precedent, numerous scholars and think tank advocates now support abolishing employee noncompete agreements. These Abolitionists contend that employers use monopsony power in labor markets coercively to foist such "contracts of adhesion" on employees.[7] They also contend that such agreements generally reduce wages by preventing employees from selling their labor to the highest bidder. Finally, Abolitionists claim that employers can use such agreements to raise the costs of rival firms by depriving them of access to the labor of potential employees. In this way, Abolitionists say, incumbent firms can enhance their power in product markets.

Abolitionists also contend that such contracts lack any "credible justification."[8] They apparently concede that, without employee noncompete agreements, firms might bid employees away from employers who have provided expensive training or shared trade

4. Sterling L. Miller, *Drafting an Enforceable Noncompete Agreement*, ABA (Nov. 7, 2019), https://www.americanbar.org/groups/business_law/publications/blt/2019/11/noncompete-agreement/.

5. See Harvey J. Goldschmid, Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law, 73 COLUM. L. REV. 1193, 1197–98 (1973).

6. John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 532 n.244 (2019).

7. Open Mkts. Inst. et al., Petition for Rulemaking to Prohibit Worker Non-Compete Clauses 17, 21 (Mar. 20, 2019), *available at* https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf [hereinafter Petition].

8. *Id.* at 3.

secrets, thereby free riding on these beneficial investments. Still, Abolitionists contend that such free riding is just vigorous competition that benefits consumers and society. These advocates also claim that less restrictive alternatives can fully protect investments in training and the generation of trade secrets.

Perhaps the most comprehensive articulation of the Abolitionist position is found in a recent Petition for Rulemaking ("Petition") filed with the Federal Trade Commission ("FTC" or "Commission").[9] Signed by dozens of academics, advocates, nonprofits, and unions, the Petition contends that employee noncompete agreements are "inherently suspect" and thus presumptively unlawful under Section 1 of the Sherman Act.[10] While not per se condemnation, such a determination would allow parties to establish a *prima facie* case against these agreements without proving anticompetitive harm. Even if an employer could demonstrate offsetting benefits, courts and agencies would still condemn the agreement if there is a less restrictive means of achieving the same objective. If less restrictive alternatives really are always available, a declaration that such agreements are inherently suspect will result in wholesale condemnation of these contracts, though nominally on a case-by-case basis.

The Petition also asks the Commission to ban all employee noncompete agreements as "unfair methods of competition" and thus violations of Section 5 of the FTC Act.[11] Such a ban would achieve the same result as declaring such agreements "inherently suspect," albeit without case-by-case adjudication rejecting defendants' futile efforts to justify such restraints. The Commission's announcement seeking comments seemed sympathetic to the Abolitionist position, describing such agreements as "one-sided contract terms that may exacerbate or lock in power disparities."[12]

This Article critiques the Abolitionist view of employee noncompete agreements. Because such agreements control the conduct of (former) employees after the transaction they accompany, they are "nonstandard contracts," analogous to exclusive territories, tying contracts, and exclusive dealing.[13] During antitrust's inhospitality era, economists and antitrust scholars applying

9. *Id.* at 1, 3–5.

10. *Id.* at 4 & n.6, 56–69.

11. *Id.* at 4–5.

12. FTC, *Request for Public Comment Regarding Contract Terms That May Harm Fair Competition*, REGULATIONS.GOV [hereinafter FTC Request for Public Comment], https://www.regulations.gov/docket/FTC-2021-0036 (last visited June 14, 2022).

13. Alan J. Meese, Reframing Antitrust in Light of Scientific Revolution: Accounting for Transaction Costs in Rule of Reason Analysis, 62 HASTINGS L.J. 457, 472 (2010).

neoclassical price theory concluded that nonstandard contracts—even those in competitive markets—were anticompetitive because they reduced commercial rivalry while rarely producing cognizable benefits. The same experts also concluded that less restrictive alternatives sufficed to further any legitimate interests that might justify such agreements. Finally, experts opined that firms used market power to impose these agreements on dealers and consumers.

Not surprisingly, agencies and courts concluded that such agreements were invariably expressions of preexisting market power and efforts to protect such power or obtain additional power. Employee noncompete agreements escaped condemnation as courts generally treated such agreements as the province of state contract law. State courts enforced those agreements that were no broader than necessary to protect employer investments in training and/or trade secrets.

The Abolitionist critique of employee noncompete agreements echoes the inhospitality era critiques of other nonstandard contracts, particularly those governing the distribution of manufactured goods by independent dealers. However, that era is long gone. For more than four decades, economists and antitrust scholars have embraced Transaction Cost Economics ("TCE") and its interpretation of nonstandard contracts. TCE concludes that most such agreements overcome market failures and improve the allocation of productive resources. Unlike neoclassical price theory, then, TCE's account explains how such contracts can arise in competitive markets. Courts and agencies have followed suit, reversing various precedents and enforcement policies. Courts and agencies now assess all employee noncompete agreements under the Rule of Reason, and proponents of such agreements almost always prevail.

TCE also undermines Abolitionists' hostility to employee noncompete agreements. Most Americans work in unconcentrated labor markets, and many such agreements apparently arise in competitive markets. The presence of these agreements in competitive markets supports the inference that some such contracts produce significant benefits.

TCE and additional empirical evidence confirm this inference. Like nonstandard distribution contracts, employee noncompete agreements restrain unbridled rivalry at a particular moment—after the main transaction. However, application of TCE suggests that, like nonstandard distribution restraints, employee noncompete agreements can counteract market failures that result from atomistic post-transaction rivalry, by creating the contractual equivalent of a property right. For instance, such agreements can ensure that employers capture the benefits of investments in training employees, by preventing employers from free riding on such investments and bidding such employees away. Moreover, such contractual property rights can also encourage firms to produce information by precluding former employees from sharing such knowledge with new employers. Transaction cost considerations also establish that the less restrictive alternatives highlighted by Abolitionists will be substantially less effective at achieving these benefits.

TCE also undermines the claim that such agreements are "contracts of adhesion" imposed on unwilling employees. When employers disclose such agreements to prospective employees, TCE predicts that employees will obtain higher wages that offset any future restrictions on their autonomy. Such higher wages share the gains of increased productivity with employees who voluntarily agree to such provisions and receive enhanced training and/or access to information. This increased productivity fosters interbrand competition and translates into long-term improvements in gross domestic product ("GDP"). Such agreements are thus a voluntary "win, win, win" for employers, employees, and the rest of society.

TCE also undermines the Abolitionist account of the harm—reduced wages—that noncompete agreements supposedly produce. This account of harm imagines a world with no restraint where competing firms outbid the original employer for the employee's labor, thereby increasing employee wages. Noncompete agreements thus reduce wages, it is said, by preventing employees from accepting such bids, reducing wages below the nonrestraint baseline.

TCE teaches that the prospect of such bids is not exogenous but instead turns upon the productivity of employees. That productivity depends, in part, upon the training that the original employer provides. Employee noncompete agreements are frequently necessary to induce employer investments that enhance employee productivity and thus give rise to possible outside bidding. Abolitionists and others want employees to "have their cake and eat it too," that is, atomistic competition for labor, unconstrained by noncompete agreements, *and* robust outside bidding. However, this happy state of affairs is often not a sustainable equilibrium. Simply put, the prospect of atomistic rivalry in the labor market will often deter employers from making investments that enhance employee productivity and encourage robust outside bidding. Banning such agreements would therefore discourage the very investments that make employees attractive to other firms. The nonrestraint baseline that Abolitionists invoke is often illusory because judicial enforcement of such agreements is necessary to improve employee productivity and induce competitive bids.

Recent studies apparently confirm the predictions of TCE regarding the function and impact of employee noncompete agreements. Employees in states with average enforcement of such agreements receive significantly more training than employees in states with low enforcement. Moreover, most employees receive preemployment notice of such agreements. Finally, employees who do receive preemployment notice earn significantly higher wages, other things being equal. In short, a significant proportion of such agreements appear to be voluntary means of ensuring that employers capture the benefits of investing in employee training, thereby encouraging such investments.

This is not to say that all employee noncompete agreements produce such benefits. As Abolitionists emphasize, some employers do not disclose such agreements until after the employee joins the firm. Employers may thus impose such agreements even if they do not produce shared productivity gains. Moreover, these agreements can sometimes raise the costs of rivals and thus create market power that harms consumers.

Neither potential impact justifies abolishing noncompete agreements. While lack of pre-contractual disclosure may result in some nonoptimal agreements, states or the FTC could remedy this problem without abolishing all such contracts. Indeed, some states already decline to enforce agreements obtained in this manner unless the employer provides adequate additional consideration. States or the FTC could also prohibit agreements obtained without advanced disclosure. Both such remedies would encourage pre-contractual disclosure and deter agreements that do not maximize the joint wealth of employer and employee, leaving both free to adopt provisions that *do* increase wealth.

Of course, encouraging pre-contractual disclosure will not discourage agreements that raise rivals' costs and thus create market power. Employers will obtain voluntary agreement to such provisions, sharing expected profits with employees by increasing wages. However, successful pursuit of a raising rivals' costs strategy requires the rare coincidence of several independent factors. Indeed, the inventors of raising rivals' costs theory opined that most markets are not susceptible to such a strategy. Moreover, Abolitionists have made no effort to establish that employee noncompete agreements usually arise in markets where such a strategy is possible. The rare prospect that parties may employ fully disclosed agreements to pursue such a strategy does not justify abolishing all such agreements.

If anything, the theory of raising rivals' costs counsels against abolishing employee noncompete agreements. Small firms sometimes employ nonstandard agreements to facilitate activities that enhance interbrand competition against larger rivals. Inhospitality era condemnation of such agreements disadvantaged small firms and hampered such rivalry.

Abolishing employee noncompete agreements could have a similar impact. Many small firms adopt production processes that are labor-intensive compared to larger establishments. These firms rely more heavily on measures designed to enhance employee productivity, such as training, than their capital-intensive rivals. Banning employee noncompete agreements would have a disparate impact on such smaller firms, reducing interbrand competition and enhancing the market power of larger enterprises.

Indeed, this potential impact may help explain why several labor unions support abolishing such agreements. Unionized firms predictably adopt capital-intensive production processes in response to collective bargaining that drives wages above the competitive level. In these circumstances, banning noncompete agreements will impose a disparate impact on nonunion, labor-intensive firms, rendering these firms less productive than they otherwise would be. Unionized firms would thus experience additional demand for their own products and thus demand more (unionized) labor. Banning noncompete agreements will sometimes boost unionized workers at the expense of their nonunion counterparts.

Part I of this Article provides a brief legal history of employee noncompete agreements. Part II summarizes the case for abolishing such agreements, particularly as articulated by the Petition for Rulemaking currently before the FTC. Part III explains that employee noncompete agreements are nonstandard contracts. Part IV describes the hostile treatment other nonstandard contracts received during antitrust's inhospitality era, as well as the economic assumptions that inspired such hostility. Part V refutes the Abolitionist claim that employee noncompete agreements are generally the result of unequal bargaining power or some other defect in the bargaining process. Part VI explains that developments in economic science and new empirical evidence undermine Abolitionist claims that such agreements never produce cognizable benefits. Part VII explains that the unlikely prospect that employers will use such agreements to protect or gain market power in the product market does not militate in favor of a per se ban. Part VIII explains that banning such agreements will predictably raise the costs of small, labor-intensive rivals, thereby protecting larger, capital-intensive firms from interbrand competition.

I. A SHORT HISTORY OF THE LEGAL TREATMENT OF EMPLOYEE NONCOMPETE AGREEMENTS

Employee noncompete agreements prevent departing employees from working for rival employers or starting competing businesses.[14] Foundational antitrust decisions have sketched the historical treatment of employee noncompete agreements and analogous agreements, such as covenants ancillary to the sale of a business.[15]

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14. Orkin Exterminating Co. v. Mills, 127 S.E.2d 796, 797–98 (Ga. 1962) (enforcing agreement by former employee not to work for competing business); Hitchcock v. Coker (1837) 112 Eng. Rep. 167 (KB) (enforcing an agreement precluding former employee from opening a competing business).

15. Of course, the general law of contracts declines to enforce those agreements obtained without mutual assent or via fraud. *See* RESTATEMENT

Initially, courts simply declined to enforce such contracts, regardless of their impact.[16] Early in the eighteenth century, English courts switched course, enforcing such agreements if they were reasonable.[17] While the original case involved a covenant ancillary to the sale of a business, English courts soon employed similar logic to enforce employee noncompete agreements.[18]

Courts initially employed a three-part test to determine if such restraints were reasonable.[19] First, they asked whether the agreement was "general," i.e., governed the entire kingdom or was instead "particular" or "partial," that is, left the former employee free to practice the vocation in part of the realm.[20] Next, courts assessed the extent of consideration that the restrained party received.[21] If the agreement was partial and founded on adequate consideration, the court then asked whether it was broader than necessary in space and/or time to serve the employer's valid objectives.[22]

By the mid-nineteenth century, English courts had abandoned any independent assessment of consideration.[23] Some American courts had already done so.[24] Some American courts also abandoned

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(SECOND) OF CONTS. § 17(1) (AM. L. INST. 1981); *id.* § 164. This article takes these background rules as a given.

16. *See* Standard Oil Co. of New Jersey. v. United States, 221 U.S. 1, 51 (1911) ("Originally all such contracts were considered to be illegal . . . ."); United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (6th Cir. 1898).

17. *See, e.g.*, Mitchel v. Reynolds (1711) 24 Eng. Rep. 347 (QB) 348.

18. *See, e.g.*, *Hitchcock*, 112 Eng. Rep. at 170–71 (enforcing agreement whereby druggist promised to train an employee in return for employee's promise not to open a competing establishment); Horner v. Graves (1831) 131 Eng. Rep. 284 (CP) 284, 288 (declining to enforce agreement precluding dentist's former employee from pursuing this vocation within 100 miles of the former employer's location because such a restriction was broader than necessary to protect employer's legitimate interest).

19. *Mitchel*, 24 Eng. Rep. at 348.

20. *Id.* at 349; *Horner*, 131 Eng. Rep. at 287 (asking whether agreement was "in particular and partial restraint of trade only"). *See also* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 630 (1960) (treating "particular" and "partial" as synonymous in this context).

21. *See Horner*, 131 Eng. Rep. at 287 (inquiring whether agreement was "made upon a good and sufficient consideration"); *Mitchel*, 24 Eng. Rep. at 349 (asking whether agreement was supported by "good and adequate consideration"); *see also* Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1027 (1989) ("Early on, courts stressed that promises not to compete would be enforced only if supported by adequate consideration.").

22. *See* Blake, *supra* note 20, at 632; *see also* Alger v. Thacher, 36 Mass. (19 Pick.) 51, 54–55 (1837) (declining to enforce agreement precluding defendant from pursuing vocation because restriction was unlimited in space).

23. *See Hitchcock*, 112 Eng. Rep. at 174–75.

24. *See, e.g.*, Pierce v. Fuller, 8 Mass. (8 Tyng) 223, 228 (1811) (enforcing covenant not to compete based upon recited consideration of $1).

their refusal to enforce agreements that governed an entire state.[25] By the early twentieth century, courts assessing employee noncompete agreements mainly asked whether: (1) the agreement protected some "legitimate interest" of the employer; and (2) whether the agreement was broader than necessary in time, space, or industry definition to achieve that interest.[26] Some courts also asked, at least rhetorically, whether the restraint imposed undue hardship on the former employee and/or produced public harm in the form of monopoly or higher prices.[27]

Modern courts articulate and apply a similar test.[28] Some courts hold that proponents of the agreement, generally plaintiff-employers seeking to enforce such agreements against former employees, bear an initial burden of pleading and proving that the restraint they urge the court to enforce is reasonable.[29] Proponents of the modern approach contend that this standard strikes the right balance between per se condemnation and automatic enforcement. These scholars argue that this approach gives courts the flexibility necessary to account for the myriad attributes of such agreements, including the industry, occupation, duration, geographic scope, industry scope of the restraint, market shares, and others, that bear upon the reasonableness of such restraints.[30] Thus, a restraint enforceable in one industry because it strikes the right balance may

25. *See* Blake*, supra* note 20, at 644; *see also* Oregon Steam Navigation Co. v. Winsor, 87 U.S. 64, 67 (1873). *But see* Union Strawboard Co. v. Bonfield, 61 N.E. 1038, 1039–40 (Ill. 1901) (declining to enforce covenant ancillary to the sale of a business because it excluded defendant from entire state).

26. *See* Blake, *supra* note 20, at 648–50 (summarizing then-current case law and collecting citations).

27. *See id.*

28. *See* Proudfoot Consulting Co. v. Gordon, 576 F.3d 1223, 1230–31 (11th Cir. 2009) (describing inquiry under Florida law as whether restraint is "reasonably necessary to protect the legitimate business interest[s]" (quoting FLA. STAT. § 542.335(1)(c))); Techworks, LLC v. Wille, 770 N.W.2d 727, 731 (Wis. Ct. App. 2009) (stating that, to survive scrutiny, a restraint "must: (1) be necessary for the protection of the employer or principal; (2) provide a reasonable time restriction; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive to the employee; and (5) not be contrary to public policy" (quoting Gen. Med. Corp. v. Kobs, 507 N.W. 381, 384 (Wis. Ct. App. 1993))); Off. Mates 5, N. Shore, Inc. v. Hazen, 599 N.E.2d 1072, 1080 (Ill. App. Ct. 1992) (describing inquiry as "whether the terms of the agreement are reasonable and necessary to protect a legitimate business interest of the employer").

29. *See Proudfoot Consulting Co.*, 576 F.3d at 1231 (quoting Florida statute, FLA. STAT. § 542.335(1)(c), requiring proponent to "plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant"); *Wille*, 770 N.W.2d at 732 ("[T]he employer has the burden to prove that a noncompete agreement is reasonable . . . .").

30. *See* Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953, 1042–45 (2020).

prove invalid in another because it is broader than necessary to protect the employer's legitimate interest and thus unduly restricts the mobility of the employee.[31] At the same time, a few states, most notably California, decline to enforce such agreements altogether.[32]

The jurisprudence discussed so far has addressed the narrow question of whether courts would enforce an agreement at the behest of one of the parties, a question arising under the general law of contracts. The Sherman Act created the possibility at least that federal courts would affirmatively ban such contracts by imposing fines or treble damages on the proponents of such agreements.[33] Indeed, William Howard Taft asserted as much in United States v. Addyston Pipe & Steel Co.[34] There Taft opined that the Sherman Act bans those agreements that courts would not have enforced at common law, so long as the "trade . . . restrained was interstate."[35] Naked restraints, he said, were automatically unenforceable, while courts enforced ancillary agreements if reasonable.[36] Moreover, Taft identified two attributes that would render such agreements unreasonable: (1) the agreements are general instead of partial; or (2) even if partial, the agreements are broader than necessary to achieve their objectives.[37] Taft identified five categories of ancillary restraints, including employee noncompete agreements.[38] He discussed and quoted with approval an English decision that enforced such an agreement, on the grounds that such agreements would encourage employers to train and share information with employees.[39]

Both before and after *Addyston Pipe*, however, the Supreme Court confirmed that the restraints Taft described as ancillary exceeded the reach of the Act, even if they were unreasonable and thus unenforceable at common law.[40] In United States v. E.C. Knight

31. *See id.* at 1043–44.

32. *Id.* at 958 (reporting that California, Oklahoma, and North Dakota decline to enforce such agreements).

33. *See* 15 U.S.C. §§ 1, 15(a).

34. 85 F. 271, 279 (6th Cir. 1898) ("Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal . . . but were simply void, and were not enforced by the courts. The effect of the [A]ct of 1890 is to render such contracts unlawful in an affirmative or positive sense . . . ." (citations omitted)).

35. *Id.* at 278–79; *id.* at 281–83 (describing standards governing the common law's enforcement of ancillary restraints).

36. *Id.* at 280–83.

37. *Id.* at 282–83.

38. *Id.* at 281.

39. *Id.* (quoting Mallan v. May (1843) 152 Eng. Rep. 967 (Ex.)).

40. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 327–29 (1897).

Co.,[41] the Court had already held that the Act did not reach agreements that only burdened interstate commerce "indirectly."[42] Shortly thereafter, the Court opined that a covenant ancillary to the sale of a business "might not be included within the letter or spirit of the statute in question."[43] The Court reaffirmed the importance of the direct/indirect distinction in three 1898 decisions[44] and again in *Addyston Pipe* itself.[45] More importantly, the Court opined that, say, a covenant ancillary to the sale of a business fell into the "indirect restraints" category.[46] As a result, the assessment of such agreements reverted to state courts, either applying contract law or, perhaps, their own antitrust laws.[47]

41. 156 U.S. 1 (1895).

42. *Id.* at 16–17 (concluding that the Sherman Act was framed "in light of" the Court's dual federalism jurisprudence); *see also* Apex Hosiery Co. v. Leader, 310 U.S. 469, 494–95 (1940) ("[T]he phrase 'restraint of trade' . . . was made the means of defining the activities prohibited. The addition of the words 'or commerce among the several States' . . . was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes . . . ." (citation omitted)); Alan J. Meese, *Antitrust Regulation and the Federal-State Balance: Restoring the Original Design*, 70 AM. U. L. REV. 75, 114–15 (2020) [hereinafter Meese, *Federal-State Balance*] (contending that the statutory term "in restraint of . . . commerce among the several States" drew from the Court's Commerce Clause jurisprudence of dual federalism that preempted state regulations that directly burdened interstate commerce); Alan J. Meese, *Justice Scalia and Sherman Act Textualism*, 92 NOTRE DAME L. REV. 2013, 2016 (2017).

43. *See Trans-Missouri Freight Ass'n*, 166 U.S. at 329.

44. *See* Anderson v. United States, 171 U.S. 604, 615–16 (1898); Hopkins v. United States, 171 U.S. 578, 587 (1898); United States v. Joint Traffic Ass'n, 171 U.S. 505, 568–69 (1898); *see also* Meese, *Federal-State Balance*, *supra* note 42, at 123–35 (recounting Court's repeated application of the direct/indirect standard during this period).

45. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 228–29 (1899). The word "ancillary" does not appear in the Supreme Court's opinion affirming Taft's *Addyston Pipe* decision. Moreover, the Court reversed that portion of Taft's judgment enjoining horizontal price fixing that produced only intrastate harm and thus only impacted interstate commerce indirectly. *Id.* at 247–48.

46. *See Joint Traffic*, 171 U.S. at 567–68 (concluding that the Sherman Act does not reach indirect restraints such as covenants ancillary to the sale of a business); *see also* Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co. v. Bay, 200 U.S. 179, 184–85 (1906) (holding that covenant ancillary to the sale of a ship exceeded the reach of the Sherman Act because the impact on interstate commerce was "incidental").

47. For instance, the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws employs the term "ancillary" nineteen times. U.S., ATT'Y GEN.'S NAT'L COMM. TO STUDY THE ANTITRUST L., REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 27, 29, 77, 84, 86–88, 156, 174, 231, 238–39, 311 (1955). No such reference mentions covenants ancillary to the sale of a business, covenants ancillary to an

Of course, the Supreme Court would eventually reject the "direct/indirect" distinction, holding instead that the Sherman Act reached any restraint that produced a "substantial [economic] effect upon interstate commerce . . . ."[48] The exact import of this standard was not initially clear; one could read the standard as requiring a showing that the harmful effects themselves impose substantial effects on interstate commerce."[49] However, subsequent decisions held that entirely harmless and indirect effects could count as substantial and thus justify application of the Act, even where the harm itself was confined to a single state.[50]

In 1960, the leading scholarly assessment of employee noncompete agreements reported that, despite "thousands of cases" assessing such agreements, "the Sherman Act is apparently never called into play against this traditional type of contract in restraint of trade . . . ."[51] Thirteen years later, an antitrust scholar would refer to such agreements as the "neglected stepchild" of federal antitrust law, decrying the fact that such agreements had been the exclusive concern of state contract law.[52] The author contended that the Sherman Act was a "comprehensive charter of economic liberty,

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employment relationship, covenants ancillary to the formation of a partnership, covenants ancillary to the retirement of a partner, or covenants ancillary to the sale of a chattel—the five types of ancillary restraints that Taft invoked in *Addyston Pipe*. *See id.* at 281–82.

48. *See* Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 229–34 (1948); *see also* Meese, *Federal-State Balance*, *supra* note 42, at 92–95 (describing adoption of substantial effects test in *Mandeville Island Farms*).

49. *See* Meese, *Federal-State Balance*, *supra* note 42, at 93 & n.73 ("Some language in *Mandeville Island Farms* suggested that only harmful effects counted as 'substantial' for purposes of the newly minted substantial effects test." (quoting *Mandeville Island Farms*, 334 U.S. at 234 ("[T]he vital question becomes whether the effect is sufficiently substantial and adverse to Congress'[s] paramount policy . . . to constitute a forbidden consequence."))).

50. *See, e.g.*, Burke v. Ford, 389 U.S. 320, 321–22 (1967) (per curiam) (holding that the Sherman Act applied to intrastate conspiracy between liquor wholesalers); United States v. Employing Plasterers' Ass'n, 347 U.S. 186, 188 (1954) (finding that agreement restricting entry into the Chicago plastering trade substantially affected interstate commerce because plasterers purchased some supplies from other states).

51. *See* Blake, *supra* note 20, at 628 & n.8 ("[T]he Antitrust Division has in all likelihood never turned its attention to such agreements, and no treble-damage actions have been discovered among the reported thousands of cases."). *But see* Mytinger & Casselberry, Inc., 57 F.T.C. 717, 742–43 (1960) (disapproving noncompete agreements imposed on travelling salespeople also subject to exclusive dealing agreements).

52. Goldschmid, *supra* note 5, at 1206 ("The Antitrust Division apparently has not initiated suits in this area because of a belief that restrictive covenants present issues of essentially local concern.").

aimed at preserving free and unfettered competition . . . ."[53] To justify enhanced federal scrutiny of such agreements, this scholar and others invoked post-1948 decisions that expanded the scope of the Sherman Act to reach purely local restraints.[54] Another scholar elaborated on these arguments, also contending that federal courts applying the Sherman Act should adopt a more interventionist posture toward such agreements than state courts had when applying their own contract law.[55] Only in the 1970s and early 1980s did federal courts begin applying the Sherman Act to traditional ancillary restraints, including employee noncompete agreements.[56]

Courts now assess such agreements under the fact-intensive Rule of Reason applied to nearly all restraints that survive per se condemnation.[57] Under this approach, parties challenging an agreement must begin by establishing a *prima facie* case that the agreement produces competitive harm.[58] Only then must proponents of the restraint adduce evidence that the agreement produces benefits, after which the challenger may contend that the restraint is broader than necessary to achieve these objectives.[59] Nearly all Rule of Reason cases fail because those who challenge the agreement

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53. *Id.* at 1204 ("Simply stated, state courts are not dealing effectively with the problems at hand. Local judges steeped in the intricacies of contract and real estate law, impressed with the respectability of those seeking to enforce restrictive covenants, and imbued with a sense that freedom of contract is a basic value should almost invariably be upheld, have paid scant attention to the spirit of the antitrust laws or to original common-law notions of restraint of trade. . . . But, taken cumulatively, there is untold harm being done. Still at issue is whether the Sherman Act, 'designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition,' can be used to reform the field." (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958))).

54. *See id.* at 1206 & nn. 82–83 (invoking *Burke* and *Employing Plasterers' Ass'n*).

55. *See* Charles A. Sullivan, *Revisiting the "Neglected Stepchild": Antitrust Treatment of Postemployment Restraints of Trade*, 1977 U. ILL. L.F. 621, 647, 667 n.200 (1977).

56. *See* Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 264–69 (7th Cir. 1981); Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082 (2d Cir. 1977) ("[W]e need not pass upon the general applicability of the federal antitrust laws to postemployment restraints. Although such issues have not often been raised in the federal courts, employee agreements not to compete are proper subjects for scrutiny under section 1 of the Sherman Act."); Bradford v. New York Times Co., 501 F.2d 51, 59–60 (2d Cir. 1974).

57. *See, e.g.*, *Lektro-Vend*, 660 F.2d at 265–68. Lower courts and the enforcement agencies subject a very small fraction of agreements that survive per se condemnation to the so-called "[Q]uick [L]ook." *See* Polygram Holding, Inc. v. FTC, 416 F.3d 29, 35 (D.C. Cir. 2005) (articulating and applying this approach).

58. *See, e.g.*, Realcomp II, Ltd. v. FTC, 635 F.3d 815, 827–28 (6th Cir. 2011).

59. *Id.*

cannot make such a showing.[60] So far as this author is aware, no federal court has condemned an employee noncompete agreement as contrary to Section 1 of the Sherman Act in the past several decades. Thus, state contract law, generated by a regime of competitive federalism, sometimes articulates a more intrusive standard for assessing such agreements than Sherman Act case law.[61]

II. THE CASE FOR ABOLISHING EMPLOYEE NONCOMPETE AGREEMENTS

Numerous scholars, lawyers, and advocates at nonprofit think tanks have expressed various levels of hostility toward employee noncompete agreements.[62] Some advocate wholesale abolition, while others seek a more intrusive assessment of such agreements.[63] Despite differences about the "bottom line," however, both Abolitionists and those merely hostile to such agreements embrace similar economic assumptions. One recent and comprehensive case for abolishing such agreements took the form of a Petition for

60. *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON 827, 827–29, 837 (2009) (finding that plaintiffs fail to establish a *prima facie* case in 97 percent of rule of reason cases).

61. *See generally* Meese, *Federal-State Balance*, *supra* note 42, at 90–92 (describing how regime of competitive federalism once generated antitrust rules applicable to local conduct); Alan J. Meese, *Regulation of Franchisor Opportunism and Production of the Institutional Framework: Federal Monopoly or Competition Between the States*?, 23 HARV. J.L. & PUB. POL'Y 61, 62–63 (1999) [hereinafter Meese, *Franchisor Opportunism*].

62. *See, e.g.*, MARK LEMLEY & ORLY LOBEL, DAY ONE PROJECT, SUPPORTING TALENT MOBILITY AND ENHANCING HUMAN CAPITAL: BANNING NONCOMPETE AGREEMENTS TO CREATE COMPETITIVE JOB MARKETS 2 (2021) (calling on national government to "[b]ar[] noncompete agreements through legislation or executive order"); Alan Hyde, *Should Noncompetes Be Enforced?: New Empirical Evidence Reveals the Economic Harm of Non-Compete Covenants*, REGULATION, Winter 2010–2011, at 7 ("[T]he nation would be better served by never enforcing noncompetes."); Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165, 167 (2020) (advocating more intrusive scrutiny of such agreements); Kenneth G. Dau-Schmidt et al., *The American Experience with Employee Noncompete Clauses: Constraints on Employees Flourish and Do Real Damage in the Land of Economic Liberty*, 42 COMPAR. LAB. L. & POL'Y J. (forthcoming 2022) (manuscript at 101–04), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3870403. Professors Lobel and Hyde are signatories of the Petition for Rulemaking. *See* Petition, *supra* note 7, at 59, 65.

63. *Compare* LEMLEY & LOBEL, *supra* note 62, at 2 (advocating complete abolition), *with* Posner, *supra* note 62, at 167 (contending that such agreements should be presumptively illegal under the Sherman Act, "allowing employers to rebut the presumption if they can prove that the noncompetes they use will benefit rather than harm their workers").

Rulemaking filed with the FTC.[64] The Petition boasted forty-six individual signatories, including leading academics and thought leaders at public interest organizations, and nineteen signatures from organizations, including the AFL-CIO and three other unions.[65] The Petition asks the Commission to issue a rule banning all employee noncompete agreements, including those that would survive scrutiny under the Sherman Act and state law, as "unfair methods of competition" and thus violative of Section 5 of the FTC Act.[66] The Petition also contends that such agreements are inherently suspect and therefore presumptively violate Section 1 of the Sherman Act.[67] Other scholars and advocates have also endorsed banning or severely curtailing such agreements, often invoking the same or similar arguments to those made in the Petition.[68]

Filed in March 2019, the Petition languished.[69] However, elections have consequences. On July 9, 2021, President Biden issued an executive order designed to bolster competition throughout the American economy.[70] Among other things, the order encouraged the FTC "to curtail the use of unfair noncompete clauses . . . ."[71] He also nominated Professor Lina Khan, a leader of the neo-Brandeisian school of antitrust thought and a strong proponent of robust economic regulation, to chair the Commission.[72] Before her nomination, Chair Khan had expressed concern that antitrust law paid insufficient heed

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64. Petition, *supra* note 7, at 1–5.

65. The other three unions are the Service Employees International Union, United Food and Communications Workers, and UNITE HERE. *Id.* at 56, 58.

66. *Id.* at 4–5. *See* 15 U.S.C. § 45(a)(1) (banning "unfair methods of competition in or affecting commerce").

67. Petition, *supra* note 7, at 4–5. *See infra* notes 119–21 and accompanying text (describing this contention in greater detail).

68. *See, e.g.*, LEMLEY & LOBEL, *supra* note 62, at 2 (advocating a ban on noncompetes and suggesting in the alternative a ban on noncompetes entered by low-wage employees); Posner, *supra* note 62, at 194 (contending that such agreements should be presumptively illegal under the Sherman Act); Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,992 (July 9, 2021) (encouraging the FTC to consider "curtail[ing] the unfair use of non-compete clauses").

69. *See* Amanda Jaret & Sandeep Vaheesan, *Non-Compete Clauses Are Suffocating American Workers*, TIME (Dec. 19, 2019, 3:40 PM), https://time.com/5753078/non-compete-clauses-american-workers/ (indicating that "[t]he current chairman of the Republican-majority FTC, Joseph Simons, has expressed interest in the issue but taken no concrete steps toward initiating a rulemaking").

70. Exec. Order No. 14,036, 86 Fed. Reg. at 36,987.

71. *Id.* at 36,992.

72. *See* Cecilia Kang, *Biden Nominates Lina Khan, a Vocal Critic of Big Tech, to the F.T.C.*, N.Y. TIMES (Mar. 22, 2021), https://www.nytimes.com/2021/03/22/business/lina-khan-ftc.html.

to the impact of trade restraints on the welfare of employees.[73] On August 5, 2021, less than two months after the Senate confirmed Chair Khan, the Commission sought public comments on the Petition.[74] The Commission's response to this Petition will serve as an early test of the Biden administration's professed commitment to abolishing practices that supposedly express employers' growing power in labor markets.[75] The response will also test the administration's professed embrace of science and evidence as foundations of enlightened public policy.[76]

The proposal to declare all such agreements to be methods of unfair competition, regardless of actual market effect, rests upon several interlocking economic assumptions—some empirical and some theoretical—about the origins and impacts of such agreements. This Article treats the Petition as a thorough exemplar of the case for abolishing employee noncompete agreements. This Part summarizes the Petition's main theoretical and empirical arguments for a rule abolishing such agreements, noting when appropriate where those who did not sign the Petition have embraced similar contentions.

First, the Petition asserts that employee noncompete agreements are usually involuntary.[77] The Petition claims that certain structural attributes of American labor markets confer superior bargaining power on employers—power that employers use to impose such agreements against employees' will.[78] The Petition invokes three such structural attributes.[79] For instance, the Petition contends that most local labor markets are highly concentrated as defined by the Department of Justice and FTC Horizontal Merger Guidelines, such that there is insufficient competition between employers for employees' labor.[80] Moreover, the Petition asserts that

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73. *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 791 (2017) (contending that doctrine governing alleged predatory pricing should reflect "full range of interests that antitrust laws were enacted to safeguard—" including "lower income and wages for employees").

74. *See* FTC Request for Public Comment, *supra* note 12.

75. *See* Exec. Order No. 14,036, 86 Fed. Reg. at 36,987–88.

76. *See* Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking, 2021 DAILY COMP. PRES. DOC. 96 (Jan. 27, 2021) ("It is the policy of my Administration to make evidence-based decisions guided by the best available science and data. Scientific and technological information, data, and evidence are central to the development and iterative improvement of sound policies[.]").

77. *See* Petition, *supra* note 7, at 13–18.

78. *Id.* at 13–25.

79. *Id.* at 22 (summarizing these three attributes).

80. *Id.* at 13 ("To compound the weak position of workers, the employer side of most local labor markets is highly concentrated."); *id.* at 17 ("On the employer side, most local labor markets are highly concentrated, as defined by the [2010] Department of Justice and Federal Trade Commission's Horizontal Merger

most workers have few, if any, sources of unearned household income and thus must sell their labor to employers to subsist.[81] Finally, very few individuals belong to unions that would provide countervailing bargaining power to offset the putative, overbearing power of employers.[82] Taken together, these three factors supposedly confer vastly superior bargaining power on employers—power employers purportedly use to coercively impose noncompete agreements.[83]

Second, the Petition identifies other purported defects in the bargaining process that prevent meaningful negotiation over such provisions, even when employers and employees occupy relatively equal bargaining positions.[84] Like the supposed ubiquity of employer power, these defects all constitute departures from what one might call perfect competition in labor markets.[85] In particular, the Petition asserts that prospective employees focus their scarce bargaining effort, attention, and power on more central features of the bargain, such as wages, hours, and benefits.[86] These aspects of the bargain loom far larger than low-probability events such as post-employment restraints on a former employee's autonomy. Recent developments in behavioral economics, the Petition contends, suggest that potential employees will unduly discount the relevance of such agreements because they only apply in the unlikely event that an employee

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Guidelines."); U.S. DEP'T OF JUST. & FTC, HORIZONTAL MERGER GUIDELINES, 18–19 (2010) [hereinafter HORIZONTAL MERGER GUIDELINES] (defining "highly concentrated" markets as those with a Herfindahl-Hirschman Index above 2,500).

81. *See* Petition, *supra* note 7, at 2 ("Workers, who often depend on wages to subsist, are usually at a significant disadvantage in their relationship with employers."); *id.* at 13 ("Tens of millions of Americans generally have nothing to sell but their labor and skills and so must work to subsist.").

82. *Id.* at 16–17 (reporting that fewer than 7 percent of private sector workers are unionized).

83. *Id.* at 18 ("Against this background of weak employees and strong employers, workers are unlikely to be able to avoid non-compete clauses. Due to their economic situation and the structure of labor markets in the United States, most workers have little leverage in the hiring context. Consequently, they typically must accept the terms of employment presented to them by employers. . . . Under these circumstances, most workers must acquiesce to an employer's insistence on a non-compete clause.").

84. *See, e.g.*, *id.* at 21 ("To the degree workers can and do bargain with employers[,] . . . they are unlikely to focus on the existence of a non-compete clause[,] [e]ven when they have some power at the hiring stage.").

85. *Id.* at 23–24 ("The conditions of contractual formation are very different from the textbook theory of contract in which bargaining and negotiation are preconditions of reaching agreement."). The Petition does not identify the "textbook theory of contract" to which it refers.

86. *Id.* at 18–19.

departs.[87] Finally, the Petition points out that some employers further distort this process by deferring disclosure of such provisions until *after* employees have accepted the offer of employment and a given package of wages and benefits.[88] This tactic forces employees to consider such provisions when they have minimal bargaining power. In such cases, it seems that employers can obtain agreement to such provisions without compensating employees for this unanticipated restriction on their autonomy because employees are unable to demand higher wages in return for "agreeing" to such restrictions.[89]

Taken together, the Petition says, these various attributes of labor markets render all noncompete agreements "contracts of adhesion" and not the results of "free bargaining" between the parties.[90] The Petition also argues that employers "have broad power to impose these restrictive agreements on workers."[91] Another leading scholar contends that "workers and employers rarely bargain over noncompetes," with the result that such agreements are generally not exemplars of voluntary cooperation.[92]

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87. *Id.* at 18 ("Given these biases, any competition among employers for workers likely focuses on the most salient dimensions of employment, such as wages and benefits, and not on less salient terms such as non-compete clauses."); *see also* Dau-Schmidt et al., *supra* note 62 (manuscript at 103) ("[F]ew of these noncompetes are the result of bargained for exchange . . . .").

88. *See* Petition, *supra* note 7, at 22–23 ("Some employers further tilt the power imbalance in their favor by delaying presentation of the non-compete clause to workers. They withhold the non-compete until after a worker has accepted an offer of employment[.]"); *see also* Posner, *supra* note 62, at 185 ("Workers often do not learn about noncompetes until after they start their job . . . ."); Dau-Schmidt et al., *supra* note 62 (manuscript at 103) (contending that "many" such agreements are imposed "after the job has been accepted and without additional compensation").

89. *See* Posner, *supra* note 62, at 184 (explaining how, absent a "bargaining failure," prospective employees will theoretically demand higher wages in return for anticipated restraints on post-employment autonomy).

90. *See* Petition, *supra* note 7, at 13 ("Non-compete clauses function as contracts of adhesion instead of products of free bargaining between employees and employers. In general, the employee-employer relationship is defined by inequality."); *id.* at 21 (defining "contracts of adhesion" "as documents that are drafted as standard forms by one party and presented to the other party on a take it-or-leave it basis").

91. *See id.* at 23 ("Because non-compete clauses function as contracts of adhesion in an environment characterized by power disparities and behavioral biases, employers have broad power to impose these restrictive agreements on workers."); *id.* at 22 ("Due to power dynamics in labor markets and behavioral biases among workers, market competition is unlikely to discipline employers' use of non-compete requirements.").

92. Posner, *supra* note 62, at 185.

The Petition does not acknowledge any model of contract formation that *would* explain how parties reach voluntary agreements that create such enforceable, post-employment restraints. Almost by default then (and perhaps inadvertently), the Petition portrays the formation of such agreements as always the result of some defect(s) in the bargaining process and thus never truly voluntary. Others hostile to such agreements also decline to identify any method of voluntary formation.[93] Given this premise, it is perhaps no surprise that the Petition concludes that such agreements are generally harmful and rarely, if ever, produce cognizable benefits.[94] After all, if employees have no say in whether such agreements bind them, there is no reason to presume that the agreement maximizes the parties' joint welfare.[95]

Third, the Petition asserts that such agreements impose significant harm on individual employees and reduce overall wages.[96] An employee bound by such an agreement who receives a lucrative offer from the employer's rival must either reject the offer or face the prospect of a breach of contract action and resulting damages and/or an injunction.[97] By locking employees into their current firm, the Petition contends, such agreements severely limit an employee's personal autonomy and ultimately prevent employees from receiving the highest wages the market will pay for their services at that moment in time.[98] To be sure, such employees would be entirely free to accept a position not precluded by the noncompete agreement, e.g., with a firm in a different industry or geographic region not covered by the agreement. But it stands to reason that, in many cases, a close rival of the employer in the same geographic area will be the "highest bidder" for the employee's services, especially if one includes the cost that the employee must incur to move to a new home when calculating the net wage offered by a distant potential employer. The harm flowing from such agreements, the Petition continues, is compounded by the proclivity of some employers to threaten to enforce such

93. *But see id.* at 184–185 (discussing and rejecting theoretical possibility that employers pay higher wages to compensate employees for "the expected 'hardship' cost of the noncompete—the probability of being deprived of a higher wage from another employer").

94. *See* Petition, *supra* note 7, at 54.

95. This is an implication of Coase's insight that transaction costs can prevent bargaining between parties that would otherwise eliminate market failure resulting from inefficient externalities. Here, such externalities could take the form of harm to employees and perhaps consumers if employees cannot sell their labor to the highest bidder. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

96. Petition, *supra* note 7, at 26.

97. *Id.* at 27.

98. Posner, *supra* note 62, at 190 ("Noncompetes . . . harm workers by depriving them of possible future offers.").

agreements even if they are unenforceable in the relevant jurisdiction.[99]

The Petition also contends that employee noncompete agreements can reduce competition in the product market by preventing employees from selling their labor to new entrants or other rivals or starting firms that compete with former employers.[100] Put another way, such agreements can raise the costs of an incumbent firm's rivals, including rivals that do not yet exist, by depriving them of access to important inputs—namely, the talent of the employee.[101] Smaller firms, the Petition says, are more likely to fall victim to such agreements, thereby fortifying the market power of larger incumbent firms.[102] Under this account, an employee noncompete agreement can be analogous to an exclusive dealing or tying agreement, whereby a manufacturer or franchisor deprives rivals of important inputs or raises the prices of such inputs. This forces rivals to raise their own prices and allows the perpetrator of the agreement, who presumably has access to cheaper inputs, to price above its (lower) costs.[103]

Fourth, the Petition asserts that such agreements rarely, if ever, create benefits relevant to the assessment of such contracts under Section 1 of the Sherman Act or Section 5 of the FTC Act.[104] The Petition describes whatever benefits that may exist as "intangible."[105] The Petition recognizes that such agreements can create the equivalent of a property right, thereby allowing employers to capture a larger share of their investments in producing information (such as

99. *See* Petition, *supra* note 7, at 53 ("The mere existence of non-compete contracts, even when legally not binding, still inflicts real harms on workers."); *id.* at 28–29 (explaining that employment contracts often include employee noncompete agreements that are unenforceable within the relevant jurisdiction); *see also* LEMLEY & LOBEL, *supra* note 62, at 3 n.20 (invoking findings of one study concluding that noncompete agreements reduce average wages to justify banning such agreements); Posner, *supra* note 62, at 187–88 (invoking findings of multiple studies to justify more hostile treatment of noncompete agreements).

100. *See* Petition, *supra* note 7, at 37 ("[N]on-compete clauses can protect dominant incumbents against competition in product and labor markets. Incumbents can use non-compete clauses to tie up scarce labor and thereby deprive current and would-be rivals of essential workers.").

101. *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 230 (1986).

102. Petition, *supra* note 7, at 37 ("[N]on-competes can favor large incumbents over small rivals.").

103. *Id.*

104. *Id.* at 3 ("[N]on-competes do not have a credible justification.").

105. *Id.* at 39 ("The case for non-compete clauses presumes a need for employers to protect their investment in intangibles through a quasi-property right. These intangibles include trade secrets, customer lists, and employee training.").

trade secrets) and enhancing employees' human capital.[106] The Petition also apparently recognizes that employers who bid away such employees are sometimes free riding on such investments.[107] However, the Petition asserts that free riding is generally a good thing and enhances society's welfare because it results in a "broad dissemination of information and knowledge."[108] Indeed, the Petition asserts that the argument for enforcement of employee noncompete agreements presupposes that such "broad dissemination" is "generally bad for society."[109] The Petition even attributes the prosperity of California's Silicon Valley, in part, to the state's refusal to enforce such agreements.[110]

Put in terms familiar to antitrust lawyers, the Petition effectively contends that the prevention of free riding and resulting investments in employee training and the production of information do not count as cognizable benefits or "redeeming virtues" that courts or agencies should consider when assessing such restraints, either case-by-case or as a group, under Section 1 or Section 5.[111]

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106. *Id.*

107. *Id.* at 50 ("What is disparaged as free riding is *often* beneficial sharing of information and knowledge among workers and across firms. While firms have a motive to defend against perceived free riding by competitors, their private incentive to protect intangibles *can* conflict with the public interest in allowing the free dissemination and sharing of information and knowledge." (emphases added)). The negative implication of the emphasized qualifications seems to be that the prevention of free riding does not always "conflict with the public interest." *Id.*

108. *Id.* at 41 ("What is disparaged as free riding often is the broad dissemination of knowledge that contributes to economic growth and innovation."); *see also* Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 845–47 (2015) (articulating claim that unfettered mobility of labor will facilitate innovation and economic growth, without regard to any resulting free riding).

109. Petition, *supra* note 7, at 3–4.

110. Petition, *supra* note 7, at 41–42; *see also* ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 67–70 (2013) (articulating this contention). *But see* Barnett & Sichelman, *supra* note 30, at 963–66 (articulating multifaceted critique of this contention).

111. *See, e.g.*, Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 693–95 (1978) (rejecting defendants' contention that propensity of restraint to enhance quality of engineering services constituted cognizable benefit); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54–55, 58 (1977) (treating propensity of restraint to overcome free riding and encourage promotion as a redeeming virtue precluding per se condemnation); N. Pac. Ry. Co. v. United States (*NPR*), 356 U.S. 1, 5 (1958) (restraints that restrict rivalry and cannot produce "redeeming virtues" are unlawful per se); Polygram Holding, Inc. v. FTC, 416 F.3d 29, 37–38 (D.C. Cir. 2005) (assessing whether purported benefit was cognizable under Section 1 and Section 5); Law v. NCAA, 134 F.3d 1010, 1021–24 (10th Cir. 1998) (rejecting defendants' contention that certain purported

Fifth, the Petition asserts that, to the extent such agreements produce benefits, there are less restrictive means of achieving such objectives.[112] The Petition invokes three such alternatives.[113] For instance, firms can enter nondisclosure agreements that prevent former employees from revealing sensitive information to new employers.[114] Moreover, firms can adopt more generous salaries and benefits, retaining such individuals without relying upon noncompete agreements.[115] Finally, the parties can enter long-term employment contracts, allowing firms to recoup investments in training without restricting employees' post-employment freedom of action.[116] Unlike noncompete agreements, which the Petition characterizes as "one-sided obligations," under such long-term agreements, "both the employer and the employee make a binding commitment in an employment contract."[117] Indeed, the FTC's solicitation of public comments, inspired by the Petition, implied that it has already decided that employee noncompete agreements are "one-sided contract terms."[118]

Taken together, these considerations purportedly justify banning all such agreements as unfair methods of competition within the meaning of Section 5 of the FTC Act. The Petition also contends that all employee noncompete agreements are "inherently suspect" under the Sherman Act and thus governed by Section 1's "Quick Look."[119] While nominally less drastic than outright condemnation under Section 5, a declaration that a restraint is "inherently suspect"

benefits were cognizable and thus relevant to assessment of challenged restraint under the Rule of Reason).

112. Petition, *supra* note 7, at 49.

113. *Id.*

114. *See id.* at 47 ("Employers can also condition employment on employees' signing non-disclosure agreements. . . . [which] are less restrictive than non-competes.").

115. *Id.* ("Employers can retain workers, and ensure their commitment and loyalty, through higher wages and salaries, more generous benefits, and fair treatment."); *see also* Hyde, *supra* note 62, at 10 ("[E]mployers who are unprotected by any legal means of frustrating employee mobility have a simple solution to the problem: they could pay the employee not to leave.").

116. Petition, *supra* note 7, at 48; *see also* Sullivan, *supra* note 55, at 639–40 (suggesting such an alternative).

117. Petition, *supra* note 7, at 48.

118. *See* FTC Request for Public Comment, *supra* note 12 (referring to "non-compete clauses that prevent workers from seeking employment with other firms, and other one-sided contract terms that may exacerbate or lock in power disparities").

119. Petition, *supra* note 7, at 4 (arguing that such agreements "should be presumptively illegal under the Sherman Act"); *id.* at 4 & n.6 (arguing that such agreements are "inherently suspect owing to [their] likely tendency to suppress competition" (quoting Polygram Holding, Inc., 136 F.T.C. 310, 344 (2003), *petition denied*, 416 F.3d 29 (D.C. Cir. 2005))).

constitutes *de facto* condemnation in the real world, given that defendants never rebut the Quick Look's presumption that such restraints produce net harm.[120] Indeed, if the Petition is correct that there is always a less restrictive means of achieving any benefits produced by such agreements, efforts to overcome a presumption against them will invariably fail. After all, challengers could always rebut any proof that such restraints produce benefits by invoking the availability of such alternatives.[121] If so, designation of such restraints as "inherently suspect" would be the functional equivalent of per se condemnation, albeit at the greater administrative expense of case-by-case adjudication, which predictably results in condemnation.

Abolitionists and others hostile to noncompetes have instanced certain real-world agreements that supposedly exemplify such contracts and illustrate the case against them.[122] For instance, franchisees of the sandwich franchisor Jimmy John's once obtained such agreements from their employees, precluding them from working at shops selling similar sandwiches (but not all fast-food restaurants) within three miles of any Jimmy John's location for two years after departing from the franchisee.[123] Abolitionists and others have uniformly criticized this agreement, and Jimmy John's relented after the public outcry and threats from state attorneys general.[124] Abolitionists have invoked other examples of such agreements that, like the Jimmy John's agreement, bind low-income workers.[125]

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120. *See* Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 GEO. L.J. 835, 870–71 (2016).

121. *See* Polygram Holding, Inc., 136 F.T.C. 310, 349 (2003), *petition denied,* 416 F.3d 29 (D.C. Cir. 2005) ("The plaintiff may also show that the proffered procompetitive effects could be achieved through means less restrictive of competition.").

122. *See infra* notes 203–07 and accompanying text.

123. *See* Petition, *supra* note 7, at 7–8 (invoking this as a representative example of noncompete agreements); *see also* Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law and Contract Governance*, 106 MINN. L. REV. 877, 913 (2021) (treating Jimmy John's agreement as exemplar of agreement adopted—"for illegitimate reasons"); Posner, *supra* note 62, at 165 (beginning article by invoking the Jimmy John's example); Dau-Schmidt et al., *supra* note 62 (manuscript at 5) (quoting and invoking this agreement as an exemplar). A search of the HeinOnline law review database reveals over four dozen articles that invoke this contract in connection with an assessment of noncompete agreements.

124. *See* Press Release, Lisa Madigan, Illinois Attorney General, Madigan Sues Jimmy John's for Imposing Unlawful Non-Compete Agreements on Sandwich Makers and Delivery Drivers (June 8, 2016), https://www.illinoisattorneygeneral.gov/pressroom/2016_06/20160608.html.

125. *See infra* notes 203–06 and accompanying text.

III. EMPLOYEE NONCOMPETE AGREEMENTS ARE NONSTANDARD CONTRACTS

Nobel Laureate Oliver Williamson posited a distinction between "classical market contracting" and "nonstandard contracts."[126] Applying this taxonomy to a relationship between a manufacturer and a dealer, for instance, classical agreements simply mediate the passage of title from seller to buyer, without any post-transaction restriction on either.[127] Such agreements presumably include terms such as price, quantity, and date of delivery.[128] A typical example might be a shoe manufacturer's sale of shoes to independent stores.[129]

Nonstandard contracts, on the other hand, both mediate passage of title and, in addition, include terms that limit the post-transaction autonomy of one or both parties.[130] Such agreements generally arise in a setting of relational contracting, where one or both parties make investments specific to the relationship, and performance unfolds

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126. *See* Oliver E. Williamson, *Assessing Contract*, 1 J.L. ECON. & ORG. 177, 185 (1985) (describing "classical market contracting" as "the discrete contracting ideal"); *id.* at 188 (explaining the "[c]lassical market exchange—whereby [a] product is sold at a uniform price to all comers without restriction . . . .").

127. *See* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 68 (1985) (describing classical "discrete transaction paradigm" whereby transactions are "sharp in by clear agreement; sharp out by clear performance"); *id.* at 69 & n.1 (stating that such transactions correspond to the "'ideal' market transaction in economics" whereby "the participants trade a standardized contract such that each unit of the contract is a perfect substitute for any other unit. . . . The organized market itself or some other institution deliberately creates a homogenous good that can be traded anonymously by the participants or their agents." (quoting Lester G. Telser & Harlow N. Higinbotham, *Organized Future Markets: Costs and Benefits*, 85 J. POL. ECON. 969, 997 (1977))).

128. Oliver E. Williamson, *The Economics of Governance: Framework and Implications*, 140 J. INSTITUTIONAL & THEORETICAL ECON. 195, 202 (1984) ("Neoclassical transactions take place within markets where 'faceless buyers and sellers . . . meet . . . for an instant to exchange standardized goods at equilibrium prices . . . .'" (quoting Yoram Ben-Porath, *The F-Connection: Families, Friends, and Firms and the Organization of Exchange*, 6 POPULATION & DEV. REV. 1, 4 (1980))).

129. *E.g.*, *In re* Brown Shoe Co., 62 F.T.C. 679, 703–20 (1963) (evaluating distribution arrangement whereby manufacturer sold shoes to most retailers with no post-sale restraint), *aff'd*, 384 U.S. 316 (1966).

130. *See* Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233, 250 (1979) (describing "nonstandardized transactions" whereby the "nature of these transactions makes primary reliance on market governance hazardous"); Oliver E. Williamson, *Credible Commitments*: *Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519, 528–29 (1983) [hereinafter Williamson, *Credible Commitments*] (describing "nonstandard [and] unfamiliar contracting practices" as methods of minimizing "hazards" of particular transactions).

over time under uncertainty.[131] Such investments, in turn, can place one or both parties at risk of opportunism by the other, making classical market contracting "hazardous."[132] The typical nonstandard agreement accompanied the sale of a manufactured good to a retailer.[133] A manufacturer might sell dealers products on the contractual condition that they confine their selling efforts to a particular geographic area (an exclusive territory) and/or decline to purchase products from other manufacturers (exclusive dealing).[134]

The classical/nonstandard dichotomy can also apply to the purchase and sale of labor. A "classical" labor contract would entail an exchange of wages for a certain amount and quality of work under the "direction" of the employer.[135] Once the work is complete and the wage paid, the "transaction" is complete, and the contract that supported it places no ongoing constraint on either party.[136] By contrast, a nonstandard labor agreement could also include, say, a restriction on the employee's commercial autonomy during the term of employment.[137] Such an agreement could also include a restriction on the autonomy of a (former) employee after he or she departs, that

131. *See* Williamson, *supra* note 126, at 182 (describing scenario in which "full productive values are realized only in the context of an ongoing relation between the original parties to a transaction. . . . Parties who are engaged in a trade that is supported by nontrivial investments in transaction-specific assets are effectively operating in a bilateral trading relation with one another"); *id.* at 185–86 (articulating schema of contracting whereby presence of relationship-specific investments induces parties to adopt "protective safeguards" in the form of nonstandard contracts and other practices).

132. *Id.* at 184–85 (discussing how combination of bounded rationality and asset specificity can induce opportunism); *id.* at 185 (explaining how "unassisted market governance poses hazards" in such settings).

133. *See, e.g.*, *id.* at 187 (observing that "[n]onstandard forms of contracting—customer and territorial restrictions, tie-ins, block booking, franchise restrictions, resale price maintenance, exclusive dealing, and the like—are of special interest" to practitioners of industrial organization).

134. *See id.* at 203 (treating exclusive territories as exemplar of nonstandard contracting subject to transaction cost analysis).

135. *See* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 396 (1937) (describing how entrepreneurs "organi[ze]" certain "transactions within the firm"); *id.* at 391 (describing employment relationship as an employee's agreement to accept direction from the employer in return for compensation); *id.* ("The contract is one whereby the factor, for a certain remuneration . . . agrees to obey the directions of an entrepreneur *within certain limits*.") (emphasis in original).

136. *Cf.* Williamson, *supra* note 126, at 185 (describing "classical market contracting").

137. By analogy, the Revised Uniform Partnership Act implies such a restriction on the activities of partners by default. *See* UNIF. P'SHIP ACT § 409(b)(3) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2013) (articulating duty "to refrain from competing with the partnership in the conduct of the partnership's business before the dissolution of the partnership").

is, after the main transaction between the parties—money for labor—has ended.[138] These agreements have their impact when individuals are no longer employed by the firm. This agreement between once and future independent entities is "nonstandard" because it does more than simply mediate the terms of the employment transaction between the parties.[139] Moreover, like nonstandard distribution agreements, employee noncompete agreements constrain one party to the agreement, the employee, after the main transaction.

IV. NONSTANDARD CONTRACTS AND THE INHOSPITALITY TRADITION

The recognition that employee noncompete agreements are nonstandard contracts provides some historical perspective and allows for a well-informed assessment of the case for abolition. Such agreements are not the first nonstandard contracts to endure scrutiny by the nation's expert enforcement agencies. The misguided approach these agencies and courts took to various other nonstandard agreements serves as a cautionary tale.

A. The Inhospitality Tradition Treated Nonstandard Contracts as Anticompetitive Restraints That Produced No Cognizable Benefits

During antitrust's "inhospitality era,"[140] scholars, agencies, and courts repeatedly expressed hostility to nonstandard agreements, including those between manufacturers and dealers, even when such agreements reduced consumer prices and/or apparently enhanced interbrand rivalry.[141] The FTC itself sometimes led the way in condemning such agreements, and the Supreme Court adopted the Commission's approach.[142] Scholars, enforcers, and, by derivation,

138. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898) (describing examples of such provisions).

139. *See supra* notes 130–34 and accompanying text (describing and defining nonstandard agreements).

140. *See* Williamson, *Credible Commitments*, *supra* note 130, at 535 (describing origins of antitrust's inhospitality tradition).

141. *See, e.g.*, United States v. Topco Assocs., 405 U.S. 596, 611–12 (1972) (declaring apparently ancillary agreements between independent grocery stores unlawful per se despite district court's determination that such agreements enhanced interbrand rivalry); Albrecht v. Herald Co., 390 U.S. 145, 153–54 (1968) (declaring maximum resale price maintenance unlawful per se despite reduction in consumer prices), *overruled by* State Oil Co. v. Khan, 522 U.S. 3 (1997).

142. *See, e.g.*, *In re* Brown Shoe Co., 62 F.T.C. 679, 715–17 (1963) (condemning quasi-exclusive dealing agreements binding 1 percent of nation's shoe retailers), *aff'd*, 384 U.S. 316 (1966); *In re* Sandura Co., 61 F.T.C. 756, 809–14 (1962) (condemning exclusive territories obtained by small manufacturer), *rev'd*, 339 F.2d 847 (6th Cir. 1964); *In re* Snap-On Tools Corp., 59 F.T.C. 1035, 1046–49 (1961) (condemning exclusive territories obtained by tool manufacturer in competitive market), *rev'd*, 321 F.2d 825 (7th Cir. 1963). Although federal courts of appeal reversed two of these decisions, the Supreme Court endorsed the

jurists, drew upon the branch of economic science known as industrial organization, which was simply applied price theory.[143] These actors emphasized that such agreements restricted competition and the autonomy of trading partners.[144] They also claimed that such agreements almost never produced cognizable efficiencies, i.e., redeeming virtues, even if they predictably increased the output of advertising and promotion, for instance.[145] According to the Department of Justice, efficiencies arising after transfer of title were not "comparable" to those (technological) efficiencies that arose within firms.[146] Others claimed that what some called free riding was simply a form of aggressive competition that forced full-service dealers to engage in price competition with no-frills dealers.[147] While such competition could cause full-service dealers to reduce promotional efforts, this reduction was purportedly a manifestation of a well-functioning market that properly registered consumer preferences.[148] Indeed, some price theorists were outright hostile to

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Commission's approach shortly thereafter. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967) (banning vertical exclusive territories as unlawful per se), *overruled by* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

143. *See* Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 115; *see also id.* at 115 n.196 (collecting several authorities from this period to this effect).

144. *See* FTC v. Brown Shoe Co., 384 U.S. 316, 321 (1966) (opining that challenged exclusive dealing agreement "conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market"); *Snap-On Tools*, 59 F.T.C. at 1047 (condemning vertically imposed exclusive territories because "'[p]laying off' one dealer against another" in respondent's products "is the essence of competition"); *id.* at 1047–48 (holding that such restraints "have the same destructive effects on competition as the horizontal allocations of territory condemned in [*Addyston Pipe*] and are no less unlawful" (citation omitted)); Williamson, *Credible Commitments*, *supra* note 130, at 535 (explaining that, within the inhospitality tradition: "[l]egitimate market transactions will be mediated entirely by price; restrictive contractual relations signal anticompetitive intent"); *see also* Meese, *supra* note 143, at 115–23 (describing price theory's hostile interpretation of nonstandard agreements and resulting preference for atomistic competition).

145. *Cf.* Williamson, *supra* note 130, at 535 ("The inhospitality tradition is supported by the widespread view that economic organization is technologically determined. Economies of scale and technological nonseparabilities explain the organization of economic activity within firms. All other activity is appropriately organized by market exchanges.").

146. *See, e.g.*, Brief for the United States at 50, *Schwinn*, 388 U.S. 365 (No. 25).

147. *See, e.g.*, Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per Se *Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1492–93 (1983) (articulating this contention).

148. *Id.* at 1493; *see also* Brief for Petitioners at 56–57, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (No. 76-15), 1976 WL 181221, at *56–57 (same);

advertising and promotion, contending that such efforts induced unjustified product differentiation, reduced interbrand competition, and thus enhanced manufacturers' market power.[149] This position followed naturally from price theory's assumption that economic efficiencies were technological in origin (e.g., economies of scale) and thus naturally arose within the boundaries of the firm, before the sale of the manufacturer's product to a dealer or consumer.[150]

Courts, scholars, and enforcers sometimes grudgingly recognized that some nonstandard contracts could produce ostensible efficiencies.[151] But these advocates also asserted that parties could achieve any efficiencies via less restrictive alternatives, including sometimes relying on an unconstrained atomistic market.[152] For instance, some argued that if consumers value advertising and promotion, a "market will develop to supply them and a separate price

Brief for the United States at 24, White Motor Co. v. United States, 372 U.S. 253 (1963) (No. 54) ("[T]he proportion of time, money and effort to be devoted to inter-brand rather than intra-brand competition, and to each of the inducements offered by sellers to buyers, is to be determined by the free decisions of individual sellers, not by agreements between a manufacturer and its purchasers[.]"); LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 414 (1977) ("If sizable numbers of customers use the display facilities of the high-priced dealer to shop and then buy from the low-priced dealer, the high-priced dealer will respond by cutting its display services and its prices. This is what should happen.").

149. *See* Brief of the Small Business Legal Defense Committee as Amicus Curiae in Support of Respondent at 23–24, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) (No. 82-914), 1983 U.S. S. Ct. Briefs LEXIS 381, at *23–24 (arguing that suppliers employ resale price maintenance to further differentiate their products, augmenting their market power); Reply Brief for the United States at 16, *Schwinn*, 388 U.S. 365 (No. 25) (contending that product differentiation from additional dealer sales effort could raise barriers to entry, *reducing* interbrand competition); William S. Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath*, 81 HARV. L. REV. 1419, 1427 (1968).

150. *See* Williamson, *Credible Commitments*, *supra* note 130, at 535; *see also* Brief for the United States, *supra* note 146, at 50 (asserting that contractually obtained exclusive territories could not produce "comparable economies" to those arising within firms that integrated forward into distribution).

151. *See* Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 698–99 (1962) (recognizing that manufacturer "facing ample competition at his level [i.e., significant interbrand competition]" may use exclusive territories "to induce or compel his selected dealers to develop their respective local market more intensively"). Turner suggested that more intensive market development would reduce prices. *Id.* at 699. However, the eventual argument that vertical exclusive territories overcome a market failure and thus increase promotion implied that prices would *rise* after such promotion increased consumer demand for the manufacturer's product. *See* Meese, *supra* note 143, at 149–52.

152. *See* Turner, *supra* note 151, at 699.

will be charged."[153] As a result, contractual restrictions on dealers nominally designed to induce such promotion were deemed unnecessarily restrictive of rivalry and thus supposedly injured consumers and unduly restricted dealer autonomy.[154] Moreover, the FTC, joined by the Department of Justice, advised the Supreme Court that, if purchasing exclusively from one supplier produced efficiencies, dealers would be "eager" unilaterally to confine their purchases to individual manufacturers, with the result that there was no "need [for] restrictions on [dealers'] freedom of choice in order to achieve efficiency . . . ."[155] Finally, before he led the Antitrust Division, Donald Turner contended that manufacturers could achieve the legitimate objectives of vertical exclusive territories by "assigning each dealer a territory of primary responsibility which he agrees to use his best efforts to develop," while still allowing dealers to sell wherever they pleased.[156] Jurists, agencies, and other scholars also endorsed such provisions as alternatives that would produce the same

153. Comanor, *supra* note 149, at 1433; *see also* JOEL B. DIRLAM & ALFRED E. KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY 185 (1954) ("[I]t is difficult to see why many of the mutual benefits and socially beneficent consequences of exclusive dealing require coercion [i.e., contractual requirement] for their achievement."); SULLIVAN, *supra* note 148, at 414; Derek C. Bok, *The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act*, 1961 SUP. CT. REV. 267, 307 ("[I]f a strong and legitimate business need for exclusive selling actually does exist, it is strange that dealers will not follow this policy without being compelled to do so by contract, for the advantages that result should benefit them as well as the [manufacturer].").

154. *See* Comanor, *supra* note 149, at 1433.

155. Brief for the Federal Trade Commission at 30, FTC v. Brown Shoe Co., 384 U.S. 316 (1966) (No. 118), 1966 WL 100464, at 30. *See id.* at 29–30 ("[E]ven if it were supposed that complete line concentration was the most efficient approach, one would expect that retailers would be eager to achieve the attendant economies and would not have to be held to the line by contractual agreement. As the Commission concluded, '[w]hile line concentration itself may or may not be economically justifiable, there is no economic justification for making the adherence to this doctrine the subject of agreement between buyer and seller and enforcing the agreement to the latter's advantage.' Independent shoe dealers do not need restrictions on their freedom of choice in order to achieve efficiency[.]" (citation omitted)).

156. Turner, *supra* note 151, at 699; Mark J. Niefer, *Donald F. Turner at the Antitrust Division: A Reconsideration of Merger Policy in the 1960s*, ANTITRUST, Summer 2015, at 53 (noting President Johnson nominated and appointed Turner to serve as Assistant Attorney General for Antitrust at the U.S. Department of Justice). The Commission itself endorsed the same alternative when condemning exclusive territories. *See In re* Snap-On Tools Corp., 59 F.T.C. 1035, 1048–49 (1961) ("There is nothing to prevent Snap-On from assigning areas of primary responsibility to its dealers and insisting that they provide adequate sales coverage and service within these territories."), *rev'd*, 321 F.2d 825 (7th Cir. 1963).

benefits as exclusive territories.[157] Others asserted that manufacturers could negotiate directly with dealers over which promotional services dealers should provide, thereby obviating the need for any contractual mechanisms to assure adequate promotion.[158]

B. The Inhospitality Account Maintained that Firms Used Market Power to Impose Nonstandard Contracts on Trading Partners

The inhospitality era's account of nonstandard contracts also implied a related account of contract formation. Scholars claimed that manufacturers employed economic power to impose nonstandard agreements against the will of dealers and others.[159] These experts

157. *See* Earl E. Pollock, *Alternative Distribution Methods After* Schwinn, 63 NW. U. L. REV. 595, 604 & n.44 (1968) (collecting numerous consent judgments approving primary responsibility clauses in place of exclusive territories); *see also* White Motor Co. v. United States, 372 U.S. 253, 271 (1963) (Brennan, J., concurring) (invoking "assignment of areas of primary responsibility" as possible less restrictive means of achieving same benefits as nonprice vertical restraints); United States v. Topco Assocs., 1973–1 Trade Cas. ¶ 74,485 at *2 (N.D. Ill. 1973) (approving such clauses in place of horizontal ancillary exclusive territories), *aff'd*, 414 U.S. 801 (1973); Brief for Petitioners, *supra* note 148, at 49–50; Brief for the United States at 20–21, United States v. Sealy, Inc., 388 U.S. 350 (1967) (No. 9), 1966 WL 100610, at *20–21 (contending that such clauses are less restrictive means of achieving the objective of ancillary horizontal exclusive territories); Brief for the United States, *supra* note 148, at 24–25 (quoting Turner, *supra* note 151, at 699); Martin B. Louis, *Vertical Distributional Restraints Under* Schwinn *and* Sylvania*: An Argument for the Continuing Use of a Partial Per Se Approach*, 75 MICH. L. REV. 275, 305 (1976); Robert Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 25 (1978) ("'[P]rimary responsibility' clauses should satisfy the suppliers' interests adequately."); Turner, *supra* note 151, at 699; Robert G. Parker, Note, *Restrictive Distribution Arrangements After the* Schwinn *Case*, 53 CORNELL L. REV. 514, 525 (1968).

158. *See, e.g.*, Brief for the United States, *supra* note 148, at 26 (explaining that manufacturers can contractually "regulate the location and appearance of showrooms, the maintenance of adequate repair and service facilities, the employment of courteous, skilled and trained sales personnel, the compliance with local laws and regulations, the maintenance of good credit ratings or the assumption of primary responsibility for sales coverage for specified areas and classes of customers"); SULLIVAN, *supra* note 148, at 416 ("The manufacturer can expressly require every dealer to provide whatever display, service or other facility, or whatever commitment to local promotional activity the manufacturer regards as needed."); Pitofsky, *supra* note 147, at 1493 ("If a manufacturer really wants additional advertising, the common commercial practice is to contract separately for it.").

159. *See, e.g.*, DIRLAM & KAHN, *supra* note 153, at 185 (characterizing exclusive dealing requirements as resulting from "coercion"); J.R. Gould & B.S. Yamey, *Professor Bork on Vertical Price Fixing*, 76 YALE L.J. 722, 727 (1967) ("In short, a programme of r.p.m. in practice does not involve the voluntary agreement

had no alternative explanation for the origins of such agreements. For instance, in their monograph on antitrust policy, economists Carl Kaysen and Donald Turner offered such an account of tying contracts.[160] They pointed out that buyers prefer flexibility regarding whether to purchase the seller's version of the tied product.[161] As a result, they said, sellers must employ some market power, no matter how slight, to impose such restrictions on purchasers.[162] Kaysen and Turner acknowledged that some tying contracts arose in competitive markets.[163] Still, they dismissed such agreements as "random small transactions of no consequence."[164] Those familiar with the work of Thomas Kuhn on the progress of science and scientific discovery will recognize this dismissal as a tacit concession that such agreements were "anomalies" within the then-extant scientific paradigm.[165] Such anomalies sometimes induce scientists to rethink the conceptual apparatus they employ to interpret natural phenomena.[166] However, Kaysen and Turner "stuck to their guns." Tying agreements were not the only nonstandard agreements that arose in competitive markets.[167]

Antitrust doctrine reflected identical economic assumptions regarding the process of forming nonstandard contracts. For instance, the Court condemned tying agreements as unlawful per se.[168] While the Court purported to require a showing of economic power over the tying product as a condition of such summary condemnation, it found such power in any departure from perfect

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of all parties affected, but does involve the 'supervision' and overriding by the manufacturer of the 'normal business judgment' of others."); *see also* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943) (treating monopoly and uniform adoption of terms by all sellers in the market as equivalent indications of bargaining power, and claiming that, therefore, uniform adoption of a contractual provision in a competitive market rendered a dealer's agreement involuntary); Jerrold G. Van Cise, *Franchising—From Power to Partnership*, 15 ANTITRUST BULL. 443, 443 (1970) (characterizing franchisors as "medieval feudal lord[s] holding the power of economic life and death over enfranchised serfs").

160. CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 157 (1959).

161. *See id.*

162. *Id.*

163. *See id.*

164. *Id.* at 159.

165. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 52–65 (4th ed. 2012) (titling Chapter VI "Anomaly and the Emergence of Scientific Discoveries").

166. *Id.*

167. *See supra* note 142 and accompanying text (collecting decisions condemning nonstandard distribution restraints that arose in competitive markets).

168. *See NPR*, 356 U.S. at 5–8.

competition, including product differentiation nominally conferred by copyrights.[169] Lower courts invoked such logic to hold that trademarks conferred sufficient power.[170] The Court even opined that the mere existence of a tie itself gave rise to a presumption that the seller used power to impose it.[171] Some lower courts allowed defendants to "justify" such agreements.[172] However, even if a defendant established that a tie produced significant benefits, a plaintiff would still prevail if it could establish that there was a less restrictive means of achieving the same objective.[173] This "less restrictive alternative" test rested on the assumption that any benefits necessarily coexisted with anticompetitive harm—namely, the use of power to "force" such agreements on the purchaser.[174]

Similar assumptions informed other aspects of antitrust doctrine during this period. For instance, the traditional equitable doctrine of *in pari delicto* precluded parties from challenging agreements into which they had entered.[175] During the inhospitality era, the Court declined to employ this doctrine to bar suits by dealers challenging exclusive dealing agreements, exclusive territories, minimum resale price maintenance, and tying contracts.[176] The Court reasoned that

169. *See* United States v. Loew's, Inc., 371 U.S. 38, 48 (1962).

170. Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 48 (5th Cir. 1976) (finding that franchisor possessed economic power because of its attractive trademark and ability to charge above-market prices for tied product); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 49 (9th Cir. 1971) (holding that attractive trademark conferred economic power sufficient to establish per se violation), *abrogated by* Rick-Mik. Enters. v. Equilon Enters., 532 F.3d 963 (9th Cir. 2008).

171. *See NPR,* 356 U.S. at 7–8 ("The very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints."); *see also Loew's*, 371 U.S. at 45 & n.4 (concluding that no market definition was necessary to determine whether defendants possessed sufficient economic power because tying products were copyrighted).

172. *See Carpa*, 536 F.2d at 46–47.

173. *See Siegel*, 448 F.2d at 51.

174. *See* Alan J. Meese, *The Market Power Model of Contract Formation: How Outmoded Economic Theory Still Distorts Antitrust Doctrine*, 88 NOTRE DAME L. REV. 1291, 1308 (2013) [hereinafter Meese, *Market Power and Contract Formation*]; *cf.* Alan J. Meese, *Tying Meets the New Institutional Economics: Farewell to the Chimera of Forcing*, 146 U. PA. L. REV. 1, 85 (1997) [hereinafter Meese, *Tying Meets the New Institutional Economics*] (explaining that, where less restrictive alternatives are less effective, there is no reason to presume that tie is the result of anticompetitive forcing).

175. *See* Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 137–40 (1968), *overruled on other grounds by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984).

176. *See, e.g.*, *id.* (entertaining challenge to such agreements); *id.* at 139 (finding that franchisees' "participation" in these agreements "was not voluntary" because they had to accept onerous terms in order to obtain franchise

dealers' participation in such agreements was the result of franchisors' unequal bargaining power and thus involuntary.[177] This was so, the Court said, even though the dealers actively sought some of the provisions.[178] Nor did the Court identify any relevant market where the defendants supposedly possessed power. The Court embraced similar economic logic when evaluating claims that challenged vertical restraints were consignments and not concerted action, holding that any consignment was in fact a "coercive device" that restricted the autonomy of dealers.[179] In short, neither courts nor economists recognized any voluntary means of obtaining agreement to nonstandard contracts.

V. THERE IS NO EVIDENCE THAT EMPLOYEE NONCOMPETE AGREEMENTS ARE GENERALLY THE RESULT OF UNEQUAL BARGAINING POWER OR SOME OTHER DEFECT IN THE BARGAINING PROCESS

In a well-functioning market, prospective employees will demand additional compensation in return for entering a noncompete agreement, given that such a contract will restrict employees' ability "to access more lucrative outside employment options during the term of the" agreement.[180] These wage demands will induce employers to internalize the prospective costs that the provision imposes on such

opportunities); *id.* at 143 (White, J., concurring) ("[D]efendant's superior bargaining power led to plaintiff's participation in the unlawful arrangement."); *id.* (concluding that the "illegal arrangement . . . was thrust on [petitioners]").

177. *Id.* at 139 (majority opinion); *see also* Albrecht v. Herald Co., 390 U.S. 145, 150 & n.6 (1968) (finding Section 1 agreement between manufacturer and dealer from moment that latter "unwillingly complied" with the price ceiling imposed by the manufacturer), *overruled by* State Oil Co. v. Khan, 522 U.S. 3 (1997); William B. Bohling, *Franchise Terminations Under the Sherman Act: Populism and Relational Power*, 53 TEX. L. REV. 1180, 1184 (1975) (describing doctrine condemning such practices as "reflecting a judicial intolerance to the coercive use of superior bargaining power").

178. *See Perma Life*, 392 U.S. at 139 (noting that franchisees "eagerly [sought] more franchises and more profits," but holding that "their participation was not voluntary in any meaningful sense" because "they did not actively seek each and every clause of the agreement").

179. *See* Simpson v. Union Oil Co. of California, 377 U.S. 13, 16–17 (1964) (describing consignment agreement setting minimum resale prices as "coercive device" that "depriv[ed] independent dealers of the exercise of free judgment whether to become consignees at all, or remain consignees, and, in any event, to sell at competitive prices"); *id.* at 21 ("[D]ealers are coercively laced into an arrangement under which their supplier is able to impose noncompetitive prices . . . [that] otherwise might be competitive.").

180. Barnett & Sichelman, *supra* note 30, at 1036; *see also* Richard A. Epstein, *The Application of Antitrust Law to Labor Markets—Then and Now*, 15 N.Y.U. J.L. & LIBERTY 327, 338 (2022).

employees.[181] As a result, employers would only adopt such provisions if the benefits, e.g., higher productivity resulting from enhanced training, exceeded the employee's anticipated costs, reflected in higher wages.[182] The employer's payment of premium wages that induce such an agreement thereby shares with employees the gains that such contracts make possible.[183]

However, as explained above, Abolitionists contend that employment markets do not function properly.[184] Instead, they contend that employers generally use superior bargaining power or informational advantages to foist employee noncompete agreements upon unwilling employees.[185] By implication, then, there is no reason to presume that such agreements produce benefits that exceed the harm imposed on purchasers. Instead, according to Abolitionists, all or nearly all such agreements do more harm than good and are thus suboptimal.[186]

This account of the formation of such agreements echoes claims during the inhospitality era that manufacturers employed economic power to impose nonstandard agreements on dealers.[187] Unlike inhospitality era scholars, however, Abolitionists have offered empirical evidence to support their claim of widespread coercion. In particular, Abolitionists invoke a recent study, finding that most American labor markets are highly concentrated as defined by the Department of Justice and FTC Horizontal Merger Guidelines.[188] As

181. *See generally* Coase, *supra* note 95, at 6–8 (explaining that a party's willingness to pay counterparty to alter its activity will cause the latter to internalize the cost of its actions in a setting with low transaction costs). Of course, the employee's own assessment of cost would also incorporate any benefits of such enhanced productivity, which the employee could capture in the form of higher wages earned from current and/or future employers. If this effect is large enough, it would seem that the employee need not receive an immediate wage premium to enter such an agreement. *Id.*

182. *See* Barnett & Sichelman, *supra* note 30, at 1037–38. It should be noted that the private "benefits" of such agreements may take the form of supracompetitive profits resulting from the use of such agreements to "rais[e] rivals' costs." *See* Krattenmaker & Salop, *supra* note 101, at 239–40. In these circumstances, employers will share a portion of such profits via higher wages. *See infra* notes 343–45 and accompanying text.

183. *See* Evan P. Starr et al., *Noncompete Agreements in the US Labor Force*, 64 J.L. & ECON. 53, 75 (2021) ("[N]oncompete agreements are associated with positive differentials in wages and training.").

184. *See supra* notes 77–94 and accompanying text.

185. *See supra* notes 77–91 and accompanying text.

186. *See supra* notes 94–125 and accompanying text.

187. Alan J. Meese, *Market Failure and Non-Standard Contracting: How the Ghost of Perfect Competition Still Haunts Antitrust*, 1 J. COMPETITION L. & ECON. 21, 55–56 (2005).

188. *See* Petition, *supra* note 7, at 17.

a result, they say, millions of American workers sell their labor in concentrated markets.[189]

Even if most American employees labored in concentrated markets, and even if all employee noncompete agreements arose in such markets, this would not justify even a rebuttable presumption that these agreements are the result of economic coercion. For, as explained later in this Article, even firms with monopoly or monopsony power sometimes induce employees or customers to agree to particular contractual provisions voluntarily.[190] Indeed, absent price regulation, monopolists and monopsonists possess the same incentives as smaller firms to adopt practices, including contractual terms, that confer benefits on one party that exceed the costs imposed on the other.[191] Such firms will instead use their market power to set profit-maximizing prices or wages.[192]

In any event, review of the research cited by Abolitionists reveals that most employees work in unconcentrated markets. Research cited by the Petition does conclude that most labor markets are highly concentrated.[193] However, both the paper cited by the Petition and a more recent version reveal that those labor markets that are highly concentrated (HHI above 2500) or even moderately concentrated (HHI between 1500 and 2500) are small on average and employ only a modest fraction of American workers.[194]

In particular, the authors describe the results of their investigation as follows:

> [W]e find that 20 percent of workers work in highly concentrated labor markets . . . and a further 8 percent work in

189. *Id.* ("Because of this concentration among employers, millions of American workers have only one or a few employment options.").

190. *See infra* notes 298–99 and accompanying text.

191. *See* Meese, *Market Power and Contract Formation*, *supra* note 174, at 1353–57. For instance, absent price regulation and information asymmetries, a profit-maximizing monopolist will voluntarily assume the risk of loss whenever its cost of avoiding the loss is lower than the loss itself and lower than the consumer's cost of avoiding the loss. *See id.* at 1353. Under these conditions, contractual terms and the resulting allocation of risk will be unrelated to the relative bargaining power of the parties. *See id.*

192. *Id.*

193. *See* Petition, *supra* note 7, at 17 (citing José A. Azar et al., *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24395, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3133344.

194. José A. Azar et al., *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data* 14–15 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24395, 2019), [hereinafter Anzar et al., Working Paper] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3133344; José A. Azar et al., *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data*, LABOUR ECON., October 2020, at 101,886.

> moderately concentrated markets. Concentration is lower in large commuting zones, which explains why weighting by employment lowers the prevalence of high concentration.[195]

While the study concludes that millions of Americans sell their labor in highly concentrated or moderately concentrated markets, it also concludes that most do not.[196] Instead, nearly three-quarters of employees work in labor markets that are unconcentrated, that is, have an HHI below 1500.[197] It appears that most American employees sell their labor in markets that would be considered competitive in other contexts.[198]

These data do not establish that a significant proportion of employee noncompete agreements arise in competitive markets. It is theoretically possible that noncompete agreements only arise in concentrated labor markets, perhaps implying that employers use bargaining power to impose them. However, any rule premised upon such an assumption must find some empirical support in the administrative record. The Petition itself offers no such evidence.

Indeed, a study by an organizational signatory of the Petition finds that 49.4 percent of responding firms enter into such agreements with some employees and that "between 27.8% and 46.5% of private-sector workers are subject to noncompetes."[199] Assuming the actual percentage subject to noncompetes is 37 percent (the

195. José Azar et al., Working Paper, at 2.

196. *Id.*

197. *See id.*; JOSH BIVENS ET AL., ECON. POL'Y INST., IT'S NOT JUST MONOPOLY AND MONOPSONY: HOW MARKET POWER HAS AFFECTED AMERICAN WAGES 8 (2018) (characterizing prior version of the paper cited in the previous footnote as finding that "highly and moderately concentrated labor markets account for only 23 percent of total employment, with 17 percent of employment in 'high' and 6 percent in 'moderately concentrated' labor markets"); *id.* at 2 (concluding that rural Americans are far more likely to face concentrated labor markets).

198. One scholar contends that Professors Azar, Marinescu, Steinbaum, and Taska define labor markets too narrowly and thus overstate the number of concentrated markets. *See* Richard A. Epstein, *Antitrust Overreach in Labor Markets: A Response to Eric Posner*, 15 N.Y.U. J.L. & LIBERTY, 407, 424–26 (2022).

199. ALEXANDER J.S. COLVIN & HEIDI SHIERHOLZ, ECON. POL'Y INST., NONCOMPETE AGREEMENTS: UBIQUITOUS, HARMFUL TO WAGES AND TO COMPETITION, AND PART OF A GROWING TREND OF EMPLOYERS REQUIRING WORKERS TO SIGN AWAY THEIR RIGHTS 10 (2019). Another study finds that 38 percent of employees have been subject to such agreements sometime in their career, but only 18 percent were subject to such agreements at the time of the survey. Starr et al., *supra* note 183, at 60. The former report surveyed business establishments, while the latter surveyed employees. COLVIN & SHIERHOLZ, *supra*, at 4; Starr et al., *supra* note 183, at 55–58. The authors of the former report speculate that some employees may not know that they are subject to such agreements and that such agreements are becoming more prevalent. *See* COLVIN & SHIERHOLZ, *supra*, at 2–3.

midpoint between 28 and 46) at a minimum, almost one-quarter of such agreements arise in unconcentrated markets.[200]

Abolitionists and others hostile to noncompete agreements often highlight as paradigm cases agreements apparently arising in competitive markets. For instance, several highlight the Jimmy John's agreement discussed above.[201] The Petition offers no evidence that Jimmy John's franchisees possess market power in all or most of the labor markets where they operate. At least some such markets are highly competitive, with franchisees facing significant labor market competition from numerous other fast-food franchisees and other potential employers.[202]

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200. This lower bound calculation assumes that every employee working in a highly or moderately concentrated labor market—28 percent of the workforce—is subject to a noncompete agreement. Even adopting this unrealistic assumption, the remaining workers subject to such agreements would constitute nine percent of the workforce (37 percent minus 28 percent) and thus 24.3 percent (9 percent divided by 37 percent) of the employees subject to such agreements. If, however, we assume that half the employees working in concentrated labor markets are subject to noncompete agreements, 62 percent (23 percent divided by 37 percent) of such employees work in unconcentrated labor markets. *See* COLVIN & SHIERHOLZ, *supra* note 199, at 10.

201. *See supra* notes 123–24 and accompanying text (describing invocation of this agreement by Abolitionists and others).

202. This author's hometown of Williamsburg, Virginia, in James City County, Virginia, provides one example where Jimmy John's operates in a highly competitive labor market. James City County has a population of about 80,000 individuals and one Jimmy John's, which recently closed. *James City County, Virginia*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/jamescitycountyvirginia/PST045221 (last visited Aug. 2, 2022). Within a four-mile drive of this Jimmy John's, there are the following fast-food restaurants: McDonalds, Burger King, Chick-fil-A, Taco Bell, Subway, Mooyah's, Five Guys, Jersey Mike's, Chipotle, Moe's, Cook Out, Qdoba, Dunkin', and Arby's. This list does not include various "sit down" restaurants, both national and local, and other businesses competing for the labor of potential employees. No franchisee possesses power in this labor market. *See NPR*, 356 U.S. at 6–7 (explaining that one of a dozen grocery stores in a small town lacks the power to coercively impose a tying contract). To be sure, Williamsburg is partly a "tourist town." But one would also find similar levels of competition in, say, neighboring Newport News, Virginia. Moreover, there are certainly other regions of the country where the market for fast-food labor is even more competitive, e.g., cities such as Houston with numerous national franchise outlets, *viz.*, McDonalds, Burger King, Taco Bell, and Wendy's, competing with regional chains such as Whataburger and Taco Cabana. There are fifty-seven Whataburger locations in Houston, twenty-five Taco Cabanas, and twenty-five Jimmy John's. *See All Whataburger Locations in Houston, Texas*, WHATABURGER, https://locations.whataburger.com/tx/houston.html (last visited June 26, 2022); *Find a TC Location*, TACO CABANA, https://www.tacocabana.com/find-a-tc-location/ (last visited June 26, 2022); *Jimmy John's Locations in Houston, Texas*,

Jimmy John's is not the only proponent of such noncompete agreements operating in a competitive labor market.[203] The Petition also invokes agreements obtained by one payday lender with thirty-three locations throughout Illinois.[204] The agreement prevented some former employees from working at "any payday advance services; check-cashing services; pawn or title pawn services; secured or unsecured credit lending services; secured or unsecured installment lending services; or essentially any other consumer lending service or money transmission service."[205] Assuming that the relevant market

JIMMY JOHN'S, https://locations.jimmyjohns.com/tx/houston/ (last visit June 26, 2022).

203. For instance, one Seattle firm that owns and operates eight coffee shops has entered into such agreements with its employees. *See* Paul Constant, *Noncompetes and No-Poach Agreements Have Destroyed Opportunities for Tens of Millions of American Workers. Here's How One State Attorney General Fought Back*, INSIDER (May 22, 2021, 10:19 AM), https://www.businessinsider.com/how-noncompete-agreements-hurt-minimum-wage-workers-2021-5. There are, of course, numerous other coffee chains in Seattle as well as various nonchain stores. *See, e.g.*, Mindy Halleck, *25-Best Coffee Shops, Seattle, Washington*, GPSMYCITY, https://www.gpsmycity.com/directory/25-best-coffee-shops-1041.html (last visited June 26, 2022). Moreover, the Attorneys General of Illinois and New York recently challenged employee noncompete agreements obtained by WeWork, which once had eight locations in Chicago. *See* Press Release, Lisa Madigan, Illinois Attorney General, Attorney General Madigan Reaches Settlement with National Payday Lender for Imposing Unlawful Non-Compete Agreements (Jan. 7, 2019) [hereinafter Press Release, Madigan Reaches Settlement with National Payday Lender], https://illinoisattorneygeneral.gov/pressroom/2019_01/20190107b.html (describing settlement with WeWork); Press Release, Lisa Madigan, Illinois Attorney General, Attorney General Madigan Reaches Settlement with WeWork to End Use of Overly Broad Non-Competes (Sept. 18, 2018), https://illinoisattorneygeneral.gov/pressroom/2018_09/20180918.html (describing settlement with WeWork); Press Release, Barbara D. Underwood, New York Attorney General, A.G. Underwood Announces Settlement with WeWork to End Use of Overly Broad Non-Competes that Restricted Workers' Ability to Take New Jobs (Sept. 18, 2018), https://ag.ny.gov/press-release/2018/ag-underwood-announces-settlement-wework-end-use-overly-broad-non-competes. The agreements governed, inter alia, custodians, baristas, cleaners, executive assistants, and mail associates. *Id.* The announcements of the challenges did not assert that WeWork possessed bargaining power in any Chicago labor market, nor does it seem remotely likely that the firm possessed such power.

204. Petition, *supra* note 7, at 8; Press Release, Madigan Reaches Settlement with National Payday Lender, *supra* note 203 (mentioning the thirty-three locations throughout Illinois).

205. Press Release, Madigan Reaches Settlement with National Payday Lender, *supra* note 203 (describing settlement with Check Into Cash of Illinois).

includes the various services the agreement invokes (if not more),[206] the market would include far more than just payday lenders. Indeed, the Petition invokes the conclusion of the Illinois Attorney General that numerous employers could fall within this definition, including "retail stores or auto dealerships that extend credit on an incidental basis or entities like Western Union or the U.S. postal service that transmit money."[207] No single payday lender could possess power in such a state-wide labor market.

This evidence may seem anecdotal. However, one doubts that Abolitionists and others would highlight these exemplars if they were unrepresentative. In any event, other evidence casts additional doubt on the claim that all or nearly all such agreements arise in concentrated markets. In particular, scholars have estimated that 80 percent of chief executive officers ("CEOs") at Standard & Poor's ("S&P") 1500 firms have entered such agreements.[208] Presumably, the market for such labor is national in scope. Moreover, the continued and well-documented growth in CEO salaries undermines any claim that such employees are the victims of unequal bargaining power.[209] Most employees work in unconcentrated labor markets. Because employee noncompete agreements sometimes arise in such competitive labor markets, those who claim that employers generally employ bargaining power to impose them presumably bear the

206. *Cf.* FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 435 n.18 (1990) ("[T]he fact of agreement defines the market." (citation omitted)).

207. Petition, *supra* note 7, at 8 (quoting Press Release, Madigan Reaches Settlement with National Payday Lender, *supra* note 203). If anything, the Petition understates the breadth of firms governed by the restraint. *See* Press Release, Madigan Reaches Settlement with National Payday Lender, *supra* note 203 ("Check Into Cash's unlawful non-compete agreement restricted employees from working for any other business that provides consumer lending services or products for one year after they left the company. These services and products include any payday advance services; check-cashing services; pawn or title pawn services; secured or unsecured credit lending services; secured or unsecured installment lending services; or essentially any other consumer lending service or money transmission service. Madigan's October 2017 lawsuit against Check Into Cash alleged that a wide variety of businesses could fall within this broad definition, including retail stores or auto dealerships that extend credit on an incidental basis or entities like Western Union or the U.S. postal service that transmit money.").

208. *See* Norman D. Bishara et al., *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Contracts*, 68 VAND. L. REV. 1, 3 (2015) (finding that 80 percent of the CEOs of a random sample of 500 such firms were subject to noncompete agreements).

209. A study published by one signatory of the Petition concluded that CEO pay has risen more than thirteen-fold since 1978. *See* LAWRENCE MISHEL & JORI KANDRA, ECON. POL'Y INST., CEO PAY HAS SKYROCKETED 1,322% SINCE 1978: CEOS WERE PAID 351 TIMES AS MUCH AS A TYPICAL WORKER IN 2010 2 (2021).

burden of establishing that these examples are the exception and not the norm.[210]

Abolitionists invoke two other purported sources of employer power in labor markets. First, many (maybe most) Americans have few assets and thus have no choice but to supply their labor to employers if they wish to subsist.[211] As a result, it is said, employees must accept whatever terms employers offer, including noncompete agreements.[212] Second, very few Americans belong to unions, and thus most cannot rely upon collective bargaining to counteract employer bargaining power.[213]

Neither of these attributes suggests that all or most noncompete agreements that arise in otherwise competitive markets will produce more harm than benefits and thus depart from results expected in a well-functioning market.[214] No doubt some Americans work "paycheck to paycheck" and would have no household income, aside from public assistance, without working for wages. However, such workers are far less likely than the more affluent to enter such agreements.[215] In any event, we may stipulate that those who must work to subsist feel like they have no choice but to accept a noncompete agreement and/or whatever wages an employer offers. But this does not mean that the market's equilibrium with respect to wages or other terms will be suboptimal. If the preferences of subsistence employees determined wages, for instance, we would

210. Theoretically, all firms in a competitive labor market could adopt identical noncompete provisions, such that those wishing to work in that industry must assent to such restriction. Scholars once saw the market-wide adoption of contractual terms as reflecting "strong bargaining power" that disadvantaged purchasers. *See* Kessler, *supra* note 159, at 632. However, the uniform adoption of a practice by numerous competing firms is equally consistent with a conclusion that the practice is the efficient result of a well-functioning market. For instance, the fact that consumer product warranties include exclusions for commercial use suggests that consumers are not willing to pay for enhanced protection, unrelated to any bargaining power. *See* George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1331–33 (1981) (describing economic rationale of exclusions for commercial use found in such warranties); *id.* at 1313 ("[D]isclaimers and exclusions can be said to be demanded by consumers because of the relative cheapness of consumer allocative investments . . . ."). In any event, the Petition cites no competitive market, and this author knows of none, where all employers have adopted such terms.

211. *See* Petition, *supra* note 7, at 2.

212. *Id.* at 18.

213. *Id.* at 22.

214. *See supra* notes 180–83 and accompanying text (explaining that parties will only adopt noncompetes in a well-functioning market if such contracts generate benefits that exceed the costs such agreements impose on employees).

215. *See* Barnett & Sichelman, *supra* note 30, at 1039–40 ("37 percent of employees earning over $100,000 a year are subject to noncompetes [while] this is only true of 14 percent of employees earning up to $40,000.").

expect all employees to earn the lowest wage allowed by law. However, data contradict this prediction. The proportion of employees that earn the minimum wage has fallen steadily, from 13.4 percent in 1979 to 1.5 percent in 2020.[216] At the same time, a far more significant portion of the workforce than 1.5 percent lacks any significant assets or nonlabor source of income.[217] Why do labor markets with substantial proportions of subsistence employees nonetheless produce wages well above the level predicted by the Abolitionist account?

The short answer is that individuals who are not subsistence employees often work in these same markets. Indeed, most low-wage employees occupy households in the three highest income quintiles, and one-third of households that include a low-income employee earn over $75,000 per year, nearly quintuple the minimum wage for one earner.[218] Households that include such low-income workers necessarily have sources of income significantly larger than the income of such workers, thereby raising the prospect that these low-income workers need not accept whatever terms that an employer might offer. Put another way, potential employees from such households presumably constitute the "marginal" employees in the labor market they inhabit and are thus more willing to exit in response to unfavorable terms of employment. The presence of these employees in the relevant market increases the elasticity of labor supply, protecting other participants whose supply is inelastic.[219] Unless employers engage in contract term discrimination, the preferences of these "marginal" employees, and not those of

216. *Characteristics of Minimum Wage Workers, 2020*, U.S. BUREAU LAB. STAT. (Feb. 2021), https://www.bls.gov/opub/reports/minimum-wage/2020/home.htm ("The percentage of hourly paid workers earning the prevailing federal minimum wage or less declined from 1.9 percent in 2019 to 1.5 percent in 2020. This remains well below the percentage of 13.4 recorded in 1979, when data were first collected on a regular basis."). Of course, some states impose minimum wages higher than the federal minimum. However, this is not a new development.

217. Petition, *supra* note 7, 14–15.

218. *See* Johnathan Meer, *Who Benefits from a Minimum Wage?*, ECONOFACT (Nov. 27, 2018), https://econofact.org/who-benefits-from-a-higher-minimum-wage. A single minimum wage employee with a forty-hour workweek earns $15,080 annually. *What Are the Annual Earnings for a Full-Time Minimum Wage Worker?: Minimum Wage Basic Calculations and its Impact on Poverty*, CTR. FOR POVERTY & INEQ. RSCH., U.C. DAVIS (Jan. 12, 2018), https://poverty.ucdavis.edu/faq/what-are-annual-earnings-full-time-minimum-wage-worker.

219. *See* Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 638–39 (1979) (demonstrating that search and comparison of prices by some consumers can ensure competitive prices for all); *id.* at 659–61 (describing similar result for contract terms).

subsistence employees, will determine the equilibrium terms in the labor market.[220] Moreover, background rules of contract law increase the cost of pursuing a term discrimination strategy.[221] Employers that engage in such discrimination will be unable to claim that the resulting agreements are "standard" and thus will not be able to enforce them absent an individualized showing that the employee subjectively assented to the clause.[222]

What, though, about unions? Certainly, such labor cartels and the resulting exercise of monopoly power can offset the power of monopsonistic firms.[223] However, the data recounted above suggest that there is usually no such power to offset in the first place.[224] Thus, in most employment relationships, the introduction of collective bargaining over conditions of employment will produce the straightforward consequences of a cartel, namely, labor supply that is lower and wages that are higher than would prevail in a competitive market.[225] Nor is there any reason to expect that a union would exercise such power to influence the content of noncompete agreements instead of wages.[226]

Of course, the presence of substantial competition in the relevant labor market does not guarantee that each aspect of resulting bargains will be optimal. For instance, imperfect information, however caused, could allow employers to obtain putative agreement to such provisions even if they reduce the parties' joint welfare. Imagine, for instance, if an employer included such clauses in form contracts that employees do not read. Imagine further that such an agreement would nonetheless be binding and enforceable under state

220. *See id.* at 662–63 (explaining how price discrimination can prevent searching consumers from protecting nonsearchers from noncompetitive prices and how contract term discrimination can allow firms to impose inefficient terms on unsophisticated consumers); Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J.L. & ECON. 461, 485 (1974).

221. *See* R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 27–28 (1988) (explaining how the state can reduce transaction costs and enhance the allocation of resources "by altering the requirements for making a legally binding contract").

222. *See, e.g.*, RESTATEMENT (SECOND) OF CONTS. § 211(1) (AM. L. INST. 1981) (explaining that absent subjective assent, a court will enforce an agreement as "standard" if the party to be bound understood that "like writings are regularly used to embody terms of agreements of the same type"); *id.* cmt. b ("Customers . . . trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated.").

223. *See* JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 132–34 (1952) (describing how unions' monopoly power over labor services can offset employers' monopsonistic power).

224. *See* Petition, *supra* note 7, at 22.

225. *See* GEORGE J. STIGLER, THE THEORY OF PRICE 268–69 (3d ed. 1966).

226. *See* Petition, *supra* note 7, at 18–21.

law and not contrary to the Sherman Act.[227] In these circumstances, the presence of such clauses would not alter employees' willingness to supply their labor at the offered wage, with the result that employers would not internalize the cost that such agreements impose upon employees.[228] Employers could thus obtain (nominal but enforceable) agreement to such one-sided provisions. The resulting equilibrium would reflect too many such agreements and/or agreements with unduly onerous terms.

Certainly, some employee noncompete agreements arise in markets beset by information shortcomings. Moreover, such shortcomings are not always exogenous to parties' behavior. Some employers do not reveal noncompete agreements until after the employee accepts the employment offer.[229]

However, preexisting aspects of the institutional framework may obviate the formation of harmful agreements.[230] For instance, some states require preemployment disclosure of such agreements.[231] These states decline to enforce noncompete agreements that are imposed after employees accept employment, unless the employer provides adequate additional consideration.[232] Moreover, general rules governing the enforcement of form contracts render unenforceable unknown terms outside the reasonable expectations of the employee.[233]

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227. *See* RESTATEMENT (FIRST) OF CONTS. § 70 (AM. L. INST. 1932) (enforcing terms regardless of subjective awareness or whether proponent has reason to believe that counterparty would object).

228. *See* Posner, *supra* note 62, at 190 ("It is possible that noncompetes suppress wages because workers who sign [noncompetes] do not demand a wage premium—because of ignorance . . . .").

229. *See* Evan Starr et al., *supra* note 183, at 69 (finding that 30 percent of employees learned of noncompete clauses after accepting employment offers).

230. *Cf.* COASE, *supra* note 221, at 27 28 (explaining how background rules making it more difficult to enter certain contracts may eliminate market failures). Indeed, competition between states to produce such institutional frameworks may hasten the creation of efficient background rules. *See* Meese, *Franchisor Opportunism*, *supra* note 61, at 80 81. Ironically, the abolition of all noncompete agreements would prevent competitive federalism from generating efficient background rules that discourage the enforcement of inefficient agreements. *See id.* at 86–87.

231. *See, e.g.*, WASH. REV. CODE § 49.62.020(1)(a)(i) (2019) (requiring preacceptance written disclosure of employee noncompete agreements); MASS. GEN. LAWS ch. 149, § 24L(b) (2021) (same).

232. *See, e.g.*, WASH. REV. CODE § 49.62.020(1)(a)(ii) (2019) (requiring additional consideration if employer adopts noncompete clause "after the commencement of employment"); MASS. GEN. LAWS ch. 149, § 24L(b)(ii) (2021) (same).

233. *See* RESTATEMENT (SECOND) OF CONTS. § 211(3) (AM. L. INST. 1979) (declining to enforce unknown standard terms where proponent has "reason to believe that the party manifesting such assent would not do so if he knew that

In any event, the presence of some market failures does not justify banning all employee noncompete agreements. Most employers disclose such agreements before the employee accepts the employment offer, reducing information asymmetry.[234] Banning all such agreements because a fraction is suboptimal could unnecessarily destroy wealth, making many employers and employees worse off.

VI. DEVELOPMENTS IN ECONOMIC SCIENCE AND EMPIRICAL EVIDENCE UNDERMINE ABOLITIONIST CLAIMS THAT SUCH AGREEMENTS NEVER PRODUCE COGNIZABLE BENEFITS

Abolitionists do not rely solely on the invocation of a flawed bargaining process. They also assert that, whatever the process, "non-competes do not have a credible justification."[235] This claim echoes analogous critiques of, say, exclusive territories during the inhospitality era.[236] Because such agreements supposedly produced no cognizable benefits but restrained rivalry, the natural inference was that manufacturers imposed them against dealers' wills and that such contracts reflected a harmful exercise of market power.[237]

By analogy, employee noncompete agreements reduce employee autonomy and limit competition for employee labor. If such agreements produce no cognizable benefits, the natural implication is that they enhance employers' profits on some nonefficiency basis.[238] Indeed, if such agreements really cannot produce cognizable benefits, the Sherman Act should condemn them as unlawful per se because they have a "pernicious effect on competition and lack . . . redeeming virtue[s] . . . ."[239] There would thus be no reason to invoke Section 5

the writing contained the particular term . . . ."). Abolitionists emphasize that employers sometimes threaten to enforce unenforceable provisions, thereby deterring employees from accepting outside offers. *See* Petition, *supra* note 7, at 28–29. Perhaps the Commission could ban such conduct as an unfair trade practice, thereby bolstering state law determinations that particular agreements are unenforceable. Another scholar recommends that states require robust disclosure regarding whether and when such agreements are enforceable. *See* Rachel Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision*, 50 SETON HALL L. REV. 1223, 1254–55 (2020); *see also* N. Brock Enger, *Offers You Can't Refuse: Post-Hire Noncompete Agreement Insertions and Procedural Unconscionability Doctrine*, 2020 WIS. L. REV. 769, 771 (contending that an employer's failure to disclose such an agreement until after the employee has accepted the employment offer should establish procedural unconscionability and militate against enforcement).

234. *See* Starr et al., *supra* note 183, at 69.
235. Petition, *supra* note 7, at 3.
236. *See* Meese, *supra* note 143, at 125–31.
237. *See id.* at 128–31.
238. *See id.* at 122–23.
239. *See NPR*, 356 U.S. at 5.

of the FTC Act or the "inherently suspect" category of restraints recognized by Section 1 jurisprudence. Moreover, the bargaining process would be beside the point. After all, cartel agreements are entirely voluntary, yet courts condemn such agreements as unlawful per se because they cannot produce cognizable benefits.[240]

As explained below, both developments in economic science and empirical evidence strongly suggest that a significant proportion of noncompete agreements in fact produce cognizable benefits.[241] In particular, many employee noncompete agreements apparently overcome a market failure that would otherwise occur by ensuring that employers can capture the benefits of investing in the general human capital of their employees.[242] Such investments increase employee productivity and thus boost interbrand competition.[243] Courts have repeatedly and properly treated analogous effects as cognizable benefits for the purpose of assessing agreements under Section 1 of the Sherman Act and Section 5 of the FTC Act.[244] In both contexts, the prospect that restraints may produce such benefits obviates summary condemnation in favor of assessment under the fact-intensive Rule of Reason.

A. The Presence of Employee Noncompete Agreements in Competitive Markets Suggests That Some Such Contracts Produce Significant Benefits

As Justice Brandeis once explained, proper assessment of a practice may turn on the market positions of the parties.[245] Abolitionists have not adduced any evidence that all or most noncompete agreements arise in concentrated labor markets. Some agreements that they have invoked, like the Jimmy John's agreement, apparently arise in competitive markets.[246] Moreover, employers disclose most such agreements before the employee accepts employment.[247] Like tying agreements that arose in competitive

240. *See* John Shepard Wiley, Jr., *Reciprocal Altruism as a Felony: Antitrust and the Prisoner's Dilemma*, 86 MICH. L. REV. 1906, 1918–20 (1988) (explaining how participation in a cartel is generally voluntary).

241. *See* discussion *infra* Sections VI.B, VI.C., and VI.D.

242. *See* Barnett & Sichelman, *supra* note 30, at 969 71.

243. *See* Starr et al., *supra* note 183, at 54.

244. *See*, *e.g.*, Leegin Creative Leather Prods., Inc., v. PSKS, Inc., 551 U.S. 877, 885–92 (2007).

245. FTC v. Gratz, 253 U.S. 421, 438 (1920) (Brandeis, J., dissenting) ("[A] method of competition fair among equals may be very unfair if applied where there is inequality of resources."), *overruled by* FTC v. Brown Shoe Co., 384 U.S. 316 (1966).

246. *See* Posner, *supra* note 62, at 165.

247. *See* Starr et al., *supra* note 183, at 69. Abolitionists have adduced no evidence that employers only disclose such agreements in concentrated markets.

markets and thus challenged price theory's account of the formation of such agreements, noncompete agreements that are disclosed in advance and arise in competitive markets challenge the Abolitionist account.[248] Those employee noncompete agreements that *do* arise in competitive markets are less likely to produce the sort of harm that Abolitionists attribute to them because potential employees can avoid such agreements by accepting employment from other firms.

If employee noncompete agreements cannot produce competitive harm, the parties who have invested resources into negotiating and enforcing them presumably believed they would create some benefits.[249] Moreover, if such agreements sought by employers without power in the labor market can create benefits, then agreements entered into by firms *with* market power can create such benefits as well. Even monopolists can enter into efficient contracts that replicate those that would arise in a competitive market.[250] As shown in Subparts B, C, and D below, theory and evidence confirm the inference that employee noncompete agreements often produce significant net benefits that cannot be achieved in some other way.[251] Contrary claims by Abolitionists echo the inhospitality era's discredited critiques of other nonstandard contracts.

B. Developments in Economic Science Suggest That Many Such Agreements Produce Significant Cognizable Benefits

The Abolitionist claim that such agreements produce no cognizable benefits would have made perfect sense in, say, 1962, when nearly all economists and others believed that nonstandard agreements were unambiguously anticompetitive.[252] For instance, scholars and expert enforcement agencies contended that atomistic competition between firms would produce the right amount and type of advertising, promotion, and other dealer efforts.[253] In the alternative, they contended that parties could achieve any such

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It thus seems safe to assume that employee noncompete agreements that arise in competitive markets are often disclosed in advance.

248. *See* Meese, *supra* note 143, at 127, 137.

249. *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 21–23 (1979) (finding that adoption of practice by small performing rights societies militated against per se condemnation); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 221 (D.C. Cir. 1986) ("If it is clear that [defendants] by eliminating competition among themselves are not attempting to restrict industry output, then their agreement must be designed to make the conduct of their business more effective.").

250. *See, e.g.*, Meese, *Market Power and Contract Formation*, *supra* note 174, at 1353 54.

251. *See* discussion *infra* Sections VI.B, VI.C, and VI.D.

252. *See* Williamson, *Credible Commitments*, *supra* note 130, at 535.

253. *See supra* notes 142–50 and accompanying text.

benefits via the less restrictive means of areas of primary responsibility.[254]

However, Section 1's Rule of Reason compels courts and agencies to adjust doctrine in light of changed economic understandings about the impacts of particular restraints.[255] Moreover, the Commission's status as an expert enforcement agency requires it to apply such expertise when assessing the probable impact of restraints alleged to be unfair methods of competition.[256] Even if a solid line of precedent declared employee noncompete agreements unlawful per se, the Commission would be free to reassess such treatment, subject, of course, to judicial review. In fact, precedent cuts entirely the other way, declining to condemn such agreements outright.[257]

The scientific revolution known as TCE rejected neoclassical price theory's assessment of nonstandard contracts and offered an alternative account of the origin and impact of such agreements.[258] In particular, Professor Oliver Williamson and other practitioners of TCE concluded that such agreements could counteract market failures that would otherwise result from relying on atomistic markets to conduct economic activity.[259]

The distribution of a manufactured product provided the paradigmatic economic problem addressed by TCE. Assume that a manufacturer declines to distribute its own products but instead relies upon market transactions—sales to independent dealers—to do so. The success of such a strategy would depend largely upon the

254. *See* Turner, *supra* note 151, at 699.

255. *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988) ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890."); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 55 (1911) (describing with approval evolution of common law and statutory regulation of trade restraints in light of "more accurate economic conceptions and the changes in conditions of society"); *see also* California Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999) (opining that category of restraint could become inherently suspect under Section 1 and Section 5 "if rule-of-reason analyses in case after case reach identical conclusions").

256. *See, e.g.*, Polygram Holdings, Inc., 136 F.T.C. 310, 353–58, 355 n.52 (2003) (reviewing modern economic theory and nineteen empirical studies to inform assessment of whether restraint was "inherently suspect" and thus presumptively a method of unfair competition under Section 5 of the FTC Act).

257. *See supra* notes 57–60 and accompanying text.

258. *See* Meese, *supra* note 187, at 22.

259. *See* Oliver E. Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV. 953, 991–92 (1979); *see also* Brief for Motor Vehicle Manufacturers Ass'n as Amicus Curiae at 7–8, Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (No. 76-15) (arguing "a growing body of modern economic thinking about vertical relationships" counsels reconsideration of antitrust's hostility to nonstandard contracts). It should be noted that Donald Turner coauthored this brief.

extent and quality of the dealer's promotional efforts. Unlike manufacturers, independent dealers potentially possess local knowledge about optimal promotional strategies.[260] Still, after purchasing the manufacturer's product, dealers may lack adequate incentives to generate and utilize such knowledge. After all, a dealer that convinces consumers to purchase the product has no guarantee that the consumer will purchase *from it* instead of purchasing from other dealers. Indeed, dealers that decline to make promotional investments will enjoy lower costs and thus a competitive advantage compared to firms that do. Rational dealers considering whether to make such investments will predictably decline to do so, knowing that they may not capture the benefits, i.e., increased sales of the manufacturer's product.[261]

In short, a manufacturer's reliance on market transactions—independent dealers—to distribute its product entails a cost, namely, the expectation that dealers will underinvest in promotion and advertising, reducing demand for the product below what it might otherwise be. Exclusive territories can reduce or eliminate this cost by ensuring that dealers capture the benefits of such investments. Armed with this assurance, dealers can employ their local knowledge and pursue optimal promotional strategies.[262] The result is an improved allocation of resources in the form of investments in promotion and advertising that otherwise would not occur and increased consumer welfare.[263]

To be sure, such agreements reduce rivalry between dealers and thus, when enforced against a given dealer, seemingly reduce that individual dealer's expected profits. Framed in this way, exclusive territories seem quite literally "anticompetitive" and "harmful to

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260. *See* Alan J. Meese, *Property Rights and Intrabrand Restraints*, 89 CORNELL L. REV. 553, 559–60 (2004); *see also* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 815, 818 n.139 (1965); Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86, 97 (1960).

261. *See* Meese, *supra* note 260, at 590–98. A fully integrated firm would capture the benefits of such investments, as consumers would necessarily purchase the firm's products from company-owned dealers. *See id.* at 590. However, manufacturers presumably abjure complete integration because they wish to harness the superior effort by independent dealers, who, unlike employees of fully integrated manufacturers, will fully internalize the increased revenues resulting from promotional efforts. *See id.* at 596.

262. *See* Williamson, *supra* note 259, at 958 & n.26.

263. *See Sylvania*, 433 U.S. at 56 n.25 (rejecting the claim that "a large part of the promotional efforts resulting from vertical restrictions will not convey socially desirable information"); Robert H. Bork, *Resale Price Maintenance and Consumer Welfare*, 77 YALE L.J. 950, 955–56 (1968) (explaining why advertising and promotion induced by minimum resale price maintenance constitute socially valuable output).

dealers." Moreover, viewed at this moment in time, it is difficult to see why a dealer would have entered into this agreement voluntarily, even if the agreement produces social benefits. However, many such agreements arose in competitive markets, thereby calling into question assertions that such agreements were coercive and injured consumers or dealers.[264]

As Professor Williamson explained, proper assessment of exclusive territories and other nonstandard agreements requires courts and agencies to consider them "*in their entirety*" instead of simply considering the isolated term that restricts one party's autonomy at a particular moment in time.[265] Such holistic consideration, he said, often reveals that the restrained party has received compensation that induced initial acceptance of a wealth-creating, yet restrictive, term.[266] Parties who want to retain such compensation but ignore the restriction are "trying to have their cake . . . and eat it too . . . ."[267] Indeed, Professor Williamson concluded that courts and enforcement agencies should adopt a "[p]resumption that [v]ertical [m]arket [r]estrictions [n]ormally [e]nhance [e]fficiency."[268]

TCE's account of such agreements also undermined the assumption that nonstandard contracts necessarily result from

264. *See, e.g.*, *Sylvania*, 433 U.S. at 38 (reporting that manufacturer possessed a "1% to 2%" market share when it obtained dealer agreement to location clauses).

265. WILLIAMSON, *supra* note 127, at 35 (emphasis in original).

266. *Id.* at 371.

267. *See id.* at 35. Speaking about antitrust treatment of distribution restraints, Professor Williamson opined as follows:

> It is easy to conclude, upon examining a contract at a point in time, that one of the parties to the exchange is disadvantaged by the restraint—in the sense that the restrained party would behave differently if the restraint were removed. Thus, franchisees would frequently exercise the option to buy supplies (product; replacement parts) from unauthorized suppliers if permitted. That supposedly demonstrates that manufacturer insistence that purchases be made only from authorized suppliers is one-sided and anticompetitive. Such a myopic conception fails to recognize that the terms under which the original franchise was struck reflect the associated restraints. It is understandably attractive to have your cake (low price) and eat it too (no restrictions). But both the theory and the practice of contract preclude that.

Id. at 371.

268. Williamson, *supra* note 259, at 958; *id.* at 960 ("The principal reason for maintaining an efficiency presumption is that this presumption accords with reality. . . . [A]nticompetitive effects can appear only if rather special structural conditions exist."). *See also* WILLIAMSON, *supra* note 127, at 28 ("[TCE] maintains the rebuttable presumption that nonstandard forms of contracting have efficiency purposes.").

defects in the bargaining process, such as unequal bargaining power or imperfect information. Instead, TCE offered an alternative explanation for the existence of such agreements, explaining how they could arise in competitive markets.[269] In his pathbreaking work, Professor Williamson explained how manufacturers, for instance, can obtain voluntary agreement to contractual safeguards that protect firms from opportunistic behavior by dealers and others.[270] In particular, firms can offer two contractual options at different prices: (1) sale of the product at a high price, with no contractual safeguard (an example of classical market contracting); and (2) sale of the product with such a post-sale contractual safeguard (say, an exclusive territory) at a lower price.[271] At first glance, such a price differential, particularly the "threat" to charge a higher price if the dealer does not agree to the (nonstandard) safeguard, appears to reflect the firm's exercise of market power. Market power, after all, is the ability to profitably price above cost, and costs appear to be unrelated to the contractual alternative offered.[272] However, a necessary implication of TCE is that costs include more than the technological cost of production but also include transaction costs. The higher price offered for sale without any safeguard would reflect the additional cost the manufacturer would incur by relying upon the market—transacting—to distribute the firm's product. Thus, the price differential Williamson described would reflect the different costs that the seller would incur under each possible agreement.[273] The resulting agreement by the dealer to observe a safeguard would be no more "involuntary" or "coercive" than a warranty that a consumer

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269. *Cf.* R.H. Coase, *The Nature of the Firm: Meaning*, 4 J.L. ECON. & ORG. 19, 26–27 (1988) ("I was looking for an explanation for the existence of the firm which did not depend on monopoly. I found it, of course, in transaction costs.").

270. WILLIAMSON, *supra* note 127, at 32–35; *see also* Meese, *Market Power and Contract Formation*, *supra* note 174, at 1345–53. Other scholars referred to certain nonstandard agreements as voluntary, without explaining how parties induced each other to enter them. *See* Benjamin Klein, *Transaction Cost Determinants of "Unfair" Contractual Arrangements*, 70 AM. ECON. REV. 356, 356 (1980) ("This paper considers some transaction costs that might explain the voluntary adoption of contractual provisions . . . that have been under legal attack.").

271. *See* WILLIAMSON, *supra* note 127, at 32–35.

272. *See* A.P. Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power*, 1 REV. ECON. STUD. 157, 157–58, 168–69 (1934) (defining market power in this manner).

273. *See* WILLIAMSON, *supra* note 127, at 32–35. For instance, under the alternative with no safeguard, the manufacturer would anticipate suboptimal promotion by dealers, reduced demand for the manufacturer's product, and lower profits. The price under this alternative would thus exceed the price of a sale with a safeguard by an amount equal to the reduced profit.

might select from several options that reflected the actual cost of each.[274]

Professor Williamson did not address employee noncompete agreements. However, such agreements share some attributes of the nonstandard agreements he *did* address. For instance, such agreements accompany an ongoing relationship between trading partners (employer and employee), a relationship that entails investments by the parties that will (potentially) produce significant value within the context of their cooperation.[275] Investments by the employer in training employees will only redound to the employer's benefit over time and only if the employee remains with the employer. Such investments will also be susceptible to free riding by third parties. Like opportunistic dealers who free ride on promotional investments by other dealers, rival employers may free ride on the initial employer's investments. It would thus seem that employee noncompete agreements are strong candidates for the application of Professor Williamson's presumption that nonstandard agreements serve economizing purposes.[276]

Long before Professor Williamson articulated his presumption, William Howard Taft, quoting a previous English decision, articulated an economic rationale for treating employee noncompete agreements as "ancillary restraints" and thus presumptively enforceable:

> Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice pro tanto of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. . . . And such is the class of cases of much more frequent occurrence, and to which this present case belongs, of a tradesman, manufacturer, or professional man taking [an employee] or clerk into his service, with a

274. *See* Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1072 (1977) (explaining that a profit-maximizing monopolist will offer cost-justified warranty terms if consumers are willing to pay for them); *id.* at 1071–76 (explaining that monopolist manufacturers will not employ power to alter content of warranties they offer consumers).

275. *Cf.* Coase, *supra* note 135, at 396 (referring to "transactions" within firms).

276. *See* Williamson, *supra* note 259, at 958–60. To be sure, Professor Williamson articulated his presumption with respect to vertical restraints. *Id.* at 958. Employee noncompete agreements can be characterized as horizontal in nature. *See, e.g.*, Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 189 (7th Cir. 1985) (opining that ancillary restraints, including employee noncompete agreements, are horizontal). At any rate, as I have explained elsewhere, TCE considerations establish that nonstandard horizontal agreements are equally capable of producing cognizable benefits. Meese, *supra* note 120, at 878–79.

> contract that he will not carry on the same trade or profession within certain limits. . . . In such a case the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the [employer] *will not withhold from the [employee] instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business*.[277]

Taft, of course, was unfamiliar with Williamson's work. However, numerous scholars who *are* familiar with the TCE framework have echoed Taft's conclusion.[278] These scholars draw on the distinction between two forms of human capital: general and specific.[279] The former consists of skills and knowledge that are useful at any firm in the relevant industry, including a firm an

277. United States v. Addyston Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898) (emphasis added) (quoting Mallan v. May (1843) 152 Eng. Rep. 967 (Ex.)). See also *Addyston Pipe*, 85 F. at 281 ("[I]t was of importance that business men and professional men should have every motive to employ the ablest assistants, and to instruct them thoroughly"). Numerous other courts have articulated a similar rationale for enforcing such agreements. *See, e.g.*, *Polk Bros.*, 776 F.2d at 188–89; Hitchcock v. Coker (1837) 112 Eng. Rep. 167 (KB) 175 (describing "receiving instruction in a particular trade" as the valid consideration that supported enforcement of the agreement).

278. For the formal articulation of this account, *see* Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 95–100 (1981); *see also* Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUD. 683, 685 (1980). Other scholars previously articulated a similar account, albeit without distinguishing between general and specific human capital. *See, e.g.*, Blake, *supra* note 20, at 652 ("The cost of training represents an investment by the employer in the employee—one which he hopes to recapture, with appropriate return, from the enhanced productivity of the employee's future services. However, the employer cannot be sure that the employee will stay on so that the investment will be rewarded . . . . Thus, the employer may feel justified in seeking to make it more difficult for the employee to leave—particularly to go into competitive employment—by any effective device at hand. A covenant against postemployment competition may have the desired effect. Furthermore, a plausible public-policy argument is available: Unless some enforceable commitment or effective deterrent is possible, employers will not be justified in making the optimum outlay on employee-training programs[.]"); *see also* Barnett & Sichelman, *supra* note 30, at 969–71 (articulating this account); Starr et al., *supra* note 183, at 54 (summarizing additional literature contending that: "[e]nforceable noncompetes solve this holdup problem by prohibiting departures to competitors, which encourages employers to make these fragile but important productivity-enhancing investments."). *But see* Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L.J. 49, 49–51 (2001) (recognizing possible application of TCE framework to such contracts but questioning conclusions reached by scholars who have applied this approach).

279. Rubin & Shedd, *supra* note 278, at 95–96.

employee might establish, while the latter consists of skills that are most useful at the particular firm.[280] Firms can generally capture the benefits of investments in specific human capital because such benefits are by hypothesis most useful in connection with the employer's own production. Therefore, other firms will not be willing or able to outbid the original employer for the services of the employee who has received such training.[281] However, so long as they operate in atomistic markets, firms will not be assured of capturing the benefits of investments in general human capital.[282] As a result, other firms will rationally bid for the services of these employees, hoping to acquire their talents. Presumably, firms contemplating investments in general human capital will understand their rivals' incentives and the resulting insecurity of investments in general human capital.

Given these assumptions, scholars contend that employee noncompete agreements can safeguard employers' investments in general human capital from opportunistic behavior by preventing rivals *who have not made such investments* from luring away trained employees with the promise of higher salaries.[283] It should be noted that such opportunistic employers may be able to pay a salary premium to attract such employees precisely because they have not invested in employee human capital. Absent some safeguard against such opportunistic free riding, a market failure will ensue, as reliance on market-driven training will result in suboptimal investments.[284]

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280. *See id.*

281. *See id.* at 95–96.

282. *Id.* at 96.

283. *See* Barnett & Sichelman, *supra* note 30, at 969–71.

284. The Petition characterizes the contention that employee noncompete agreements can encourage investments in employee training as resting on "neoclassical economic theory." Petition, *supra* note 7, at 40. However, like other transaction cost interpretations of nonstandard contracts, this interpretation depends upon several *departures* from neoclassical price theory. For instance, this account assumes that parties may behave opportunistically by attempting to exploit investments made by others. *Cf.* Samuel Bowles & Herbert Gintis, *The Revenge of Homo Economicus: Contested Exchange and the Revival of Political Economy*, J. ECON. PERSPS., Winter 1993, at 83, 84 (contending price theory rested upon the assumption that market participants behaved as "Victorian gentlem[en]" and did not behave opportunistically). *See generally* Williamson, *supra* note 259, at 957–58 (describing important role of opportunism in TCE reasoning). The account also assumes that property rights are imperfectly specified, such that firms must take private measures to create the equivalent of such rights and assure themselves of the ability to capture the benefits of investment in training. *Cf.* Meese, *supra* note 187, at 79–80 (explaining that the perfect competition model depends upon preexisting fixed and well-specified property rights).

Like Taft and previous English decisions,[285] several state courts have opined that the propensity of a restraint to encourage such investments in employee training is a legitimate interest that can support enforcement of an employee noncompete agreement.[286]

285. *See* Mallan v. May (1843) 152 Eng. Rep. 967, 972 (Ex.) (stating that enforcement of such agreements will induce an employer to "instruct[]" employees "in the secrets of his trade," and "communicate[] . . . his own skill and experience" to employees); Hitchcock v. Coker (1837) 112 Eng. Rep. 167 (KB) 175 (treating "receiving instruction in a particular trade" as valid consideration supporting enforcement of employee noncompete agreement).

286. *See, e.g.*, Cmty. Hosp. Grp., Inc. v. More, 869 A.2d 884, 897 (N.J. 2005) (treating "protecting investment in the training of a physician" as a "legitimate interest[]" of the employer that could support enforcement of employee noncompete agreement); *id.* ("[T]he evidence established that JFK made a substantial investment in Dr. More by giving him the opportunity to accumulate knowledge and hone his skills as a neurosurgeon."); Weber v. Tillman, 913 P.2d 84, 91 (Kan. 1996) (describing "special training" as a "legitimate business interest" that can support enforcement); Orkin Exterminating Co. v. Mills, 127 S.E.2d 796, 797–98 (Ga. 1962) (enforcing noncompetition covenant when the employee "was given courses of training which could be used against the employer"); *id.* ("The employee was trained for the kind of work carried on throughout the area covered by the restriction, and under the contract he was subject to be sent to all parts of that area."); Morgan's Home Equip. Corp. v. Martucci, 136 A.2d 838, 846 (Pa. 1957) ("An employee *may receive specialized training and skills*, and learn the carefully guarded methods of doing business which are the trade secrets of a particular enterprise. To prevent an employee *from utilizing such training* and information in competition with his former employer, for the patronage of the public at large, restrictive covenants are entered into. They are enforced by the courts as reasonably necessary for the protection of the employer." (emphases added)); *see also* Victaulic Co. v. Tieman, 499 F.3d 227, 235 (3d Cir. 2007) (reading *Martucci* as treating protection of investments in "specialized training and skills" as legitimate business interest that will support a properly tailored employee noncompete agreement); Curtis 1000, Inc. v. Suess, 24 F.3d 941, 947–48 (7th Cir. 1994) (holding that Delaware but not Illinois would treat investments in employee's "human capital" as a "legitimate interest" supportive of a noncompete agreement); Nationwide Mut. Ins. Co. v. Cornutt, 907 F.2d 1085, 1087–88 (11th Cir. 1990) (summarizing Alabama law that "[a] protectable interest can also arise from the employer's investment in its employee, in terms of time, resources and responsibility"); Arthur Murray Dance Studios of Cleveland, Inc. v. Witter, 105 N.E.2d 685, 709–11 (Ohio Ct. C.P. Cuyahoga Cnty. 1952); Lester, *supra* note 278, at 57–59 (citing additional cases but contending that such decisions reflect minority position). Some states have also expressly recognized this interest by statute. *See, e.g.*, COLO. REV. STAT. § 8-2-113(2)(c) (2022) (permitting agreement allowing employer to recover the costs of training employees so long as "training is distinct from normal, on-the-job training"); FLA. STAT. § 542.335(b) (2022) (stating that "legitimate business interest" includes "[e]xtraordinary or specialized training"). One widely cited scholarly intervention claimed that courts never recognize the employer's interest in recapturing training investments as a rationale for enforcement. *See* Blake, *supra* note 20, at 652. The cases cited earlier in this

Other scholars identified a different market failure that noncompete agreements can solve. Firms often must produce information to enhance product quality (such as a secret recipe) or facilitate distribution (such as a customer list).[287] Disclosure of such information beyond the firm is detrimental, and the prospect of disclosure will attenuate the incentives to produce such information. While trade secret law and nondisclosure agreements may protect such information, noncompete agreements can bolster this protection.[288] Courts have repeatedly recognized that protection of such secrets is a legitimate interest that can justify enforcement of employee noncompete agreements.[289]

Williamson's presumption would predict that most such agreements serve anti-opportunism purposes, encourage investments in human capital and information, overcome market failures, and thus enhance worker productivity and firm output. To be sure, employers can also behave opportunistically, enforcing agreements solely for the purpose of depressing wages and/or insulating themselves from competition.[290] However, the existence of other bodies of law, such as contract law and antitrust law, which already police and condemn unreasonable agreements, would bolster that presumption as applied to agreements that remain unscathed by these other regimes.[291]

Recall that Abolitionists contend that free riding usually entails the beneficial sharing of information and skills that enhance society's

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footnote refute this blanket statement. Moreover, TCE bolsters the views of those courts that have recognized this impact as a cognizable benefit. In any event, state law generated when assessing the enforcement of private agreements does not limit the range of cognizable benefits the FTC may recognize when assessing whether such contracts are "unfair methods of competition" or violate the Sherman Act. Finally, states that refuse to recognize training as a legitimate interest have not yet fully internalized the teachings of TCE.

287. *See* Kitch, *supra* note 278, at 701–02.

288. *See id.* at 684–85.

289. *See, e.g.*, Proudfoot Consulting Co. v. Gordon, 576 F.3d 1223, 1233–36 (11th Cir. 2009) (Florida law).

290. *See* Rubin & Shedd, *supra* note 278, at 99 (recognizing potential employer opportunism in this context).

291. *See* Blake, *supra* note 20, at 643–46 (describing jurisprudence declining to enforce agreements that are broader than necessary and/or impose undue hardship on employees). Indeed, this body of law presumably induces some employers to draft narrower agreements than they might otherwise. The infamous Jimmy John's agreement, for instance, only precluded former employees from working for rivals who derived 10 percent or more of their revenues from "submarine, hero-type, deli-style, pita and/or wrapped or rolled sandwiches." Dau-Schmidt et al., *supra* note 62 (manuscript at 105) (quoting the Jimmy John's Non-Competition Covenant). Thus, the agreement left departing employees entirely free to work for any number of fast-food franchisees, let alone other possible employers.

welfare.[292] However, this reasoning seemingly disregards the origin of at least some such knowledge and abilities—namely, investments by employers. As explained above, employee noncompete agreements can protect and thus encourage such investments, overcoming a market failure.[293]

For over four decades now, courts and agencies have recognized that the propensity of a restraint to overcome a market failure that unbridled rivalry would otherwise produce constitutes a cognizable benefit under the Sherman Act and FTC Act, at least when the market failure stems from imperfect property rights and thus suboptimal incentives that distort parties' economic choices.[294] Most notably, the Supreme Court has repeatedly held that the propensity of a restraint to deter free riding and encourage promotion constitutes a redeeming virtue, in part because such promotion can enhance interbrand competition.[295] This conclusion, of course, saves such restraints from per se condemnation under the Sherman Act. These conclusions are also relevant to whether such restraints are necessarily "unfair methods of competition" within the meaning of Section 5 of the FTC Act.[296] Moreover, this realization entitles

292. *See* Petition, supra note 7, at 44.

293. *See supra* notes 283–89 and accompanying text.

294. *See* Meese, *supra* note 143, at 141–44 (describing case law concluding that the propensity of a restraint to overcome such market failures constitutes a redeeming virtue); Newman, *supra* note 6, at 509–11 (contending that the propensity of a restraint to overcome a market failure properly constitutes a redeeming virtue under current law); *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc, 551 U.S. 877, 889–92 (2007) (finding that the propensity of minimum resale price maintenance to combat free riding and encourage dealer promotion of a manufacturer's products constituted a redeeming virtue that obviated per se condemnation); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 689–90 (1978) (opining that employee noncompete agreements were properly subject to assessment under *Standard Oil*'s Rule of Reason); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54–55 (1977) (finding that the propensity of exclusive territories to overcome free riding that would occur in a "purely competitive situation" constituted a redeeming virtue that prevented per se condemnation of such restraints).

295. *See, e.g.*, *Leegin*, 551 U.S. at 889–92 (holding that vertical restraints can reduce free riding, enhance interbrand competition, and thus produce redeeming virtues); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 724–28 (1988) (same); *Sylvania*, 433 U.S. at 54–57 (same); NCAA v. Bd. of Regents of the Univ. of Oklahoma, 468 U.S. 85, 101–03 (1984) (embracing similar logic for some horizontal restraints (citing *Sylvania*, 433 U.S. at 51–57)); Polk Bros., Inc. v. Forest City Enters., Inc., 776 F. 2d 185, 188–89 (7th Cir. 1985) (same).

296. *See* California Dental Ass'n v. FTC, 526 U.S. 756, 762, n. 3 (1999) (stating that Section 5 of the FTC Act "overlaps" the scope of Section 1 of the Sherman Act); Realcomp II, Ltd. v. FTC, 635 F.3d 815, 824 (6th Cir. 2011) ("[W]e rely upon Sherman Act jurisprudence in determining whether the challenged policies violated Section 5 of the FTC Act." (citing *California Dental*, 526 U.S. at 762 n.3)).

proponents of noncompete agreements to rebut any prima facie case under the Rule of Reason by offering evidence that they induced employers to provide more training.[297] Employee noncompete agreements that encourage employee training and/or the production of information also overcome market failures, enhance the quality of the employer's product, and foster interbrand competition.

TCE's account of noncompete agreements also undermines any claim that such agreements are necessarily the result of some defect in the bargaining process. Just as manufacturers can employ cost-based price differentials to induce dealers to enter nonstandard contracts, so too can employers adopt a similar tactic to induce employees voluntarily to accept such terms.[298] That is, employers could offer prospective employees two options: (1) employment at will, at a lower wage with no safeguard; and (2) employment subject to a contractual safeguard, namely, a noncompete agreement, at a higher wage. The gap between the wages offered will reflect the fact that, with no safeguard (the low-wage option), employers will make few, if any, investments in general human capital and thus forgo the opportunity to enhance the firm's own output. Such a differential would not reflect an exercise of employer bargaining power, even if the employer possesses monopsony power, but would instead constitute a cost-based wage differential.[299] Employers would use any monopsony power to depress the wage terms that accompany both contractual options without altering the magnitude of the differential.

This model of contract formation generates a prediction about the relationship between such agreements, on the one hand, and wages, on the other. That is, other things being equal, one would expect employees who knowingly enter such agreements to receive higher wages than those employees who are not so subject. Empirical evidence discussed below apparently confirms this prediction.[300]

The analysis in this Subpart vindicates and bolsters the decision by federal antitrust courts to assess employee noncompete agreements under a fact-intensive Rule of Reason, leaving states free to impose their own regulations, subject to the constraints of

297. *See, e.g.*, Realcomp II, Ltd. v. FTC, 635 F.3d 815, 827–28 (6th Cir. 2011); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 265–68 (7th Cir. 1981).

298. *See, e.g.*, Rubin & Shedd, *supra* note 278, at 100.

299. Two scholars articulated a similar account of how employers induce voluntary acceptance of such agreements. *Id.* ("[B]oth parties must prospectively expect to benefit from the agreement, independently of their respective bargaining power. If an employer places a restrictive clause in an employment contract, he will reduce the supply of potential employees and thus pay a higher wage to those persons who nonetheless choose to work for him. Employers will not put clauses in contracts unless the gain to the employer from including the clause is greater than the cost in higher wages which the contract will entail.").

300. *See infra* notes 368–69 and accompanying text (discussing this evidence).

competitive federalism.[301] Indeed, such an analysis and data discussed below may also induce some states to relax their own approaches to employee noncompete agreements, at least with respect to those agreements about which employees are not aware.[302]

To be sure, the Supreme Court has opined that conduct need not violate Section 1 of the Sherman Act to constitute "unfair competition."[303] Instead, contracts can also be "unfair methods of competition" if the Commission determines them to be "against public policy for other reasons."[304]

The Petition does not discuss the possibility that employee noncompete agreements are voluntary. Nor does it explain what public policy voluntary noncompete agreements might violate. Voluntary employee noncompete agreements are not, as a class, "unfair methods of competition."

C. The Less Restrictive Alternatives Adduced by Abolitionists Are Less Effective and/or More Costly to Administer than Employee Noncompete Agreements

Even if forced to concede that employee noncompete agreements often produce significant benefits, at least some Abolitionists nonetheless persist in their view that such restraints should be condemned without exception. In particular, Abolitionists contend that employers can always achieve any benefits that noncompete agreements might produce in ways that are less harmful to employees and society.[305] As a result, they say, banning all such agreements enhances competition and individual autonomy without depriving society of any benefits.[306] If Abolitionists are correct on this score, identification of such agreements as "inherently suspect" will always result in condemnation by a court or agency because attempts to justify such restraints will necessarily fail.[307]

Abolitionists' invocation of purported "less restrictive alternatives" echoes inhospitality era critiques of nonstandard agreements.[308] However, practitioners of TCE have demonstrated

301. *See* Epstein, *supra* note 180, at 336 (explaining how hostility to noncompete agreements "ignore[es] the efficiency justifications that would matter under a rule of reason approach").

302. *Cf.* Techworks, LLC v. Wille, 770 N.W.2d 727, 732 (Wis. Ct. App. 2009) ("[T]he employer has the burden to prove that a noncompete agreement is reasonable . . . .").

303. *See Indian Federation of Dentists*, 476 U.S. at 454 (citing FTC v. Sperry Hutchinson Co., 405 U.S. 233, 244 (1972)).

304. *Id.*

305. *See* Petition, *supra* note 7, at 46–48.

306. *See id.* at 4.

307. *Id.* at 4 & n.6.

308. Leading scholars and the Supreme Court invoked the supposed availability of less restrictive alternatives to support per se condemnation of tying

that less restrictive alternatives proffered in various contexts are less effective, more costly to administer, or both.[309] Consider the claim, described earlier, that "territor[ies] of primary responsibility" were less restrictive means of achieving the same benefits as vertically obtained exclusive territories.[310] This contention made perfect sense if one assumed away information costs, bargaining costs, monitoring costs, and adjudication costs.[311] In a cost-free world, manufacturers could freely assess the costs and payoffs of various local promotional strategies, costlessly determining the optimal promotional strategy for each dealer. The manufacturer could then costlessly communicate individualized strategies to each dealer and then costlessly monitor dealers' compliance. The manufacturer could then terminate noncompliant dealers, costlessly defending against any resulting litigation.[312]

Such costs exist in the real world, however, with the result that such clauses are poor substitutes for an exclusive territory. In particular, exclusive territories allow manufacturers to delegate the determination and execution of promotional strategies to individual dealers who have superior access to local knowledge.[313] Each such dealer will capture the costs and benefits of its promotional investments and thus make optimal promotional decisions.[314] In short, contractually conferred exclusive territories create the equivalent of a property right, buttressing the decentralized system of distribution the manufacturer has chosen.[315] Similar shortcomings beset other less restrictive means that parties have advanced.[316]

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contracts. *See* Meese, *Tying Meets the New Institutional Economics*, *supra* note 174, at 71–72, 85–86 (describing this case law and commentary).

309. *Id.* at 74.

310. *See* Turner, *supra* note 151, at 699.

311. At the same time, the implicit concession that *some* contractual constraints on dealer conduct were necessary in this context rested on a belief that dealers would behave opportunistically by refusing to engage in sufficient promotion. *See id.* at 698–99.

312. *See supra* note 157 and accompanying text (describing presumed operation of primary responsibility clauses).

313. *See* Meese, *supra* note 260, at 559–60.

314. *Id.* at 602–05; *see also* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 YALE L.J. 373, 467–69 (1966) (explaining how "areas of primary responsibility" do not adequately serve the procompetitive interest furthered by exclusive territories and are more expensive to administer).

315. *See* Bork, *supra* note 263, at 956 (describing "vertical market division" as "closely analogous to the social recognition of property rights as a means of inducing economic activities"); Meese, *supra* note 260, at 602–04.

316. *See, e.g.*, Bork, *supra* note 314, at 466–67 (describing shortcomings of less restrictive "profit pass-over system[s]"); Victor P. Goldberg, *The Law and Economics of Vertical Restrictions: A Relational Perspective*, 58 TEX. L. REV. 91, 110–11 (1979) (arguing that less restrictive alternatives to vertical distribution

As Abolitionists themselves suggest, employee noncompete agreements can create a "quasi property right," thereby incentivizing investments in training and the production of information.[317] Like primary responsibility clauses, the alternatives proposed by Abolitionists are inferior means of achieving the objectives of such contractual property rights. Initially, it should be emphasized that current law already includes an assessment of some less restrictive alternatives.[318] That is, state courts assessing such agreements under contract law condemn employee noncompete agreements that are broader than necessary in time, space, or definition of the industry to achieve the employer's legitimate objectives.[319] Abolitionists would nonetheless ban restraints that survive such significant scrutiny.

It is also important to consider the implications of how such agreements arise in the first place. Some arise in unconcentrated labor markets, and employers usually disclose such agreements in advance.[320] Others result from intensive bargaining between sophisticated parties.[321] Presumably, parties operating in competitive markets and/or engaging in such bargaining would adopt alternatives if they produced greater net benefits. The decision to adopt noncompete agreements instead suggests that the proposed alternatives are more costly, less effective, or both.[322] Consideration

restraints are less effective); Benjamin Klein & Lester F. Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.L. & ECON. 345, 353–54 (1985); Alan J. Meese, *Antitrust Balancing in a (Near) Coasean World: The Case of Franchise Tying Contracts*, 95 MICH. L. REV. 111, 149–51 (1996) (detailing how less restrictive means of achieving same benefits as franchise tying contracts are less effective and more costly); Alan J. Meese, *Price Theory and Vertical Restraints: A Misunderstood Relation*, 45 UCLA L. REV. 143, 191–92 (1977) [hereinafter Meese, *Vertical Restraints*] (explaining that less restrictive alternative of contracting separately for dealer services rests on the unrealistic assumption that bargaining, information, and monitoring costs are zero); *see also* WILLIAMSON, *supra* note 127, at 187 ("[I]t is less costly to police simple systems than it is to police more complicated ones.").

317. *See* Petition, *supra* note 7, at 39.

318. *See* Blake, *supra* note 20, at 674–75.

319. *Id.*

320. *See* Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete*, 72 ILR REV. 783, 788 (2019).

321. *See* Barnett & Sichelman, *supra* note 30, at 1038–39 ("[I]n the case of top-level executives, the full negotiation assumption almost always holds true as these agreements are typically entered into with the advice of highly sophisticated counsel specialized in executive compensation matters."); Bishara et al., *supra* note 208, at 3, 28 (estimating that 80 percent of the CEOs of firms in the S&P 1500 were subject to noncompete agreements).

322. *See* Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 221 (D.C. Cir. 1986) (explaining that adoption of nonstandard agreement in a

of the three alternatives Abolitionists have proposed confirms this inference.

Consider first the proposed alternative of confidentiality agreements that prevent former employees from revealing trade secrets.[323] Even if such agreements completely prevent the release of trade secrets, they do nothing to protect the fruits of the employer's investments in the production of general human capital or capital investments complementary to highly trained employees.[324] Departing employees would thus remain entirely free to take newly obtained skills to the highest, free-riding bidder. A rational employer would anticipate such defection and decline to make such investments.

Even as respects trade secrets, confidentiality agreements would fall short compared to employee noncompete agreements. Arguments to the contrary reflect the sort of price-theoretic assumptions that informed the inhospitality tradition, including the assumption of costless monitoring.[325] Like primary responsibility clauses, nondisclosure agreements would require the original employer continually to expend resources monitoring ex-employees, wherever employed, to determine whether they have disclosed such information.[326] If a breach occurs, the former employer will have to

competitive market reflects party's effort "to make the conduct of their business more effective").

323. *See* Petition, *supra* note 7, at 50.

324. *See* Jessica S. Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship* 22–23 (Jan. 3, 2018) (unpublished manuscript), (*available at* https://www.aeaweb.org/conference/2018/preliminary/paper/sRa8K2DN) (discussing research concluding that enforcement of such agreements can induce such capital investment).

325. *See* Meese, *supra* note 187, at 54–55; Meese, *Vertical Restraints*, *supra* note 316, at 191–92.

326. Two scholars not friendly to employee noncompete agreements have asserted that trade secret law does not suffice to prevent former employees from sharing such secrets with a new employer. *See* Blake, *supra* note 20, at 669–70 ("An injunction not to disclose can seldom undo or effectively prevent the doing of real damage. Even in the best of good faith, a former technical or 'creative' employee working for a competitor, or in business for himself in the same or a related field, can hardly prevent his knowledge of his former employer's confidential methods or data from showing up in his work. And utmost good faith cannot always be expected. Thus, from the employer's point of view a more effective preventative is badly needed. . . . *The most effective protective device is an enforceable postemployment covenant not to compete*." (emphasis added)); Posner, *supra* note 62, at 180 ("[I]t may be difficult to identify a theft [of trade secrets] because the employee may simply rely on her knowledge of those trade secrets while improving the production processes of the new employer. . . . *The noncompete thus helps employers fill a gap in the enforceability of trade secret law*." (emphasis added)); *see also* Lester, *supra* note 278, at 53 ("Trade secret law

sue a former employee who may deny wrongdoing. Such lawsuits are not costless, and courts are imperfect arbiters of conflicting testimony that may reflect good-faith disagreements about the source of particular knowledge. Finally, even a successful suit may leave the former employer empty-handed because the ex-employee may be judgment proof, while equitable relief may arrive *after* the former employee has disclosed such information to others.[327] Courts of equity cannot erase memories.

Abolitionists also claim that employers can increase employee compensation to prevent post-training defection to rivals.[328] This alternative fares no better, ignoring as it does revised scientific understanding of nonstandard agreements. For one thing, both theory and evidence cited below suggest that, in many cases, employers are already paying significant premia to induce agreement to noncompete provisions.[329]

The admonition to pay unrestrained employees a premium to fend off post-investment bids by free-riding rivals falls flat. By definition, such opportunistic bidders have not incurred the cost of training and/or the production of information that has enhanced the employee's general productivity. Because such rivals have not incurred such costs, they will be able profitably to outbid the employer who *did* incur such costs.[330] Assuming there is no noncompete agreement and the employee is equally productive at both firms, the employer who made such investments will either lose the bidding contest or prevail by making a bid that, when combined with the sunk cost of training and/or production of information, is greater than the employee's marginal contribution to the firm. While unprofitable ex post as an accounting matter, such a bid would be rational short-run behavior because the original employer's cost of training and/or producing information is sunk.[331] Even so, the rational original

. . . does not completely allay employer concerns. . . . Restrictive covenants, then, fill a gap where other legal and extra-legal mechanisms fall short.").

327. *See* Blake, *supra* note 20, at 669 ("An injunction not to disclose can seldom undo or effectively prevent . . . the real damage.").

328. *See* Petition, *supra* note 7, at 50.

329. *See infra* notes 343–51 and accompanying text. If they are not, the proper remedy would be to require additional pre-contractual disclosure as a condition of enforcement.

330. One Abolitionist scholar apparently ignored the role of sunk costs when he claimed that "[t]he old employer is at no systematic disadvantage in these negotiations." *See* Hyde, *supra* note 62, at 10.

331. The original employer is analogous to the firm that makes substantial investments in identifying an undervalued takeover target. Once the firm makes a tender offer for shares of the target, firms that have not made such investments but place equal value on the target can free ride on such search and profitably outbid the original bidder. While the original bidder may still prevail by raising its bid, the resulting price, when combined with the sunk costs of searching for

employer could only hope to match, and not exceed, the outside bid. Unless one assumes that any "tie" always goes to the original employer, this counterbidding alternative will be less effective at retaining employees than a noncompete agreement.

To this point in the analysis, reliance on counterbidding by the original employer has no efficiency consequences and merely alters the distribution of rewards of economic activity between the original employer and (now) former employee, in favor of the latter. However, Williamson's admonition to examine a contract "in the entirety" counsels that we consider the passage of time beyond simply the bidding contest.[332] While rational in the short run, counterbidding by the original employer will produce negative profits. Employers who anticipate that noncompete agreements will be unenforceable will rightly believe they can only retain employees by making such unprofitable counterbids. Such employers will therefore decline to make (sunk) investments in enhancing general human capital in the first place. Banning noncompete agreements and relegating employers to the less restrictive alternative of counterbidding against free-riding rivals will thus predictably reduce investment in employee training to the detriment of employees, employers, and the rest of society. Worker productivity and GDP will suffer accordingly.

Finally, the alternative of entering into long-term binding agreements also falls short.[333] Here again, developments in economic science in the form of TCE, along with real-world data, undermine this claim. As explained earlier, it appears that many such agreements arise in competitive markets in which parties have rejected this alternative.[334] It is not difficult to see why. Recall that nonstandard contracts arise in the context of relational contracting, in which performance by both parties unfolds over time in conditions of uncertainty, thereby requiring adjustments to changed conditions.[335] Within this context, employee training is not a single discrete event, the exact quantity and nature of which the parties can

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the undervalued company, will exceed the bidder's gains from the transaction. *See* Frank H. Easterbrook & Daniel R. Fischel, *Auctions and Sunk Costs in Tender Offers*, 35 STAN. L. REV. 1, 4–5 (1982). Knowing that a search will likely lead to such an unprofitable yet "winning" bid, the putative bidder will refrain from searching (and bidding) in the first place. *See id.* In the same way, an employer who knows that it will only be able to retain an employee it has trained by tendering an unprofitable but rational bid will decline to invest in such training in the first place.

332. *See* WILLIAMSON, *supra* note 127, at 35 (emphasis omitted).

333. *See* Petition, *supra* note 7, at 46, 48.

334. *See* Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 221 (D.C. Cir. 1986) (explaining that adoption of nonstandard agreement in a competitive market reflects parties' effort to "make conduct of their business more effective").

335. *See* Williamson, *supra* note 126, at 181–82.

predict ex ante.[336] Instead, training will likely take several forms, both formal and informal, including unquantifiable "learning by doing." Indeed, literature cited by Abolitionists concludes that firms often engage employees in multiple training events over time.[337] Moreover, firms will presumably adjust training in response to industry changes, new product offerings, evolving understandings of employee capabilities, and opportunity costs of such training, which will fluctuate along with the demand for the firm's product and thus productivity of employees.[338] In such settings, characterized by bounded rationality, it is not realistic to expect firms years in advance to "determine an employment term that is just long enough to recoup their investment in the intangibles."[339] As a result, noncompete provisions will often be the least imperfect method of protecting employer investments in training and/or the production and sharing of information.

D. Some Evidence in Recent Economic Literature Confirms the Predictions of TCE that Many Such Agreements Produce Significant Benefits

We need not rely solely upon the inference to be drawn from the apparent presence of numerous employee noncompete agreements in unconcentrated markets, combined with TCE's theoretical account. Abolitionists themselves cite academic research suggesting that a nontrivial portion of such agreements produce important

336. *See* Starr, *supra* note 320, at 796 tbl.4, 797 (describing positive correlation between state-level enforceability of noncompete agreements and number of discrete training events).

337. *Id.* at 797–98.

338. *See* Petition, *supra* note 7, at 42–43; *see also* Barnett & Sichelman, *supra* note 30, at 987–88 (opining that reliance on a long-term employment contract "may be unattractive to both employers and employees because it locks each party into a potentially unwanted long-term commitment that is difficult to mitigate even through the most carefully crafted provisions for early separation under certain circumstances"); Rubin & Shedd, *supra* note 278, at 98 ("It may, however, be difficult or impossible to draft a contract with sufficient specificity to include only the training that the employer desires to protect. The employer may not know in advance for exactly what sort of work a particular employee is best suited, and thus may not be able to specify contractually which information is to be protected. Moreover, the details of trade secrets often cannot be written down; the secret may consist of a series of actions involving a particular process.").

339. Petition, *supra* note 7, at 48. Invocation of this alternative rests on the price-theoretic assumption that firms have perfect information about the optimal training investments for each employee. Abolitionists have thus embraced the sort of textbook model of market processes that they purport to reject. *See id.* at 23–24 (describing Abolitionists' rejection of textbook model of contract formation).

efficiencies.[340] For instance, the Petition invokes (for other propositions) an econometric study that concludes that three-fifths of sampled employees learned of their noncompete agreement binding them *before* accepting employment.[341] Others hostile to such agreements have invoked the same study, again for other propositions.[342] Perhaps more importantly, this study finds a positive and statistically significant correlation between an employee's knowing agreement to a noncompete agreement, on the one hand, and the amount of training received, on the other.[343] The same study also finds that employees who knowingly enter such agreements receive greater access to information, higher wages, and greater job satisfaction than those not bound by such agreements.[344] In particular, this study finds that employees who learn of noncompete agreements before they accept a job offer earn wages that are nearly 10 percent higher than employees not subject to any such agreement, other things being equal.[345]

A previous article by one coauthor of this study reached some similar conclusions.[346] The article studied the relationship between individual states' propensity to enforce noncompete agreements and the amount and type of training that employees in that state

340. *See, e.g.*, Starr et al., *supra* note 183, at 69.

341. *Id.* ("61 percent of individuals with a noncompete first learn [of it] before accepting their job offers, while approximately 30 percent first learn . . . only after they have already accepted . . . ."). The Petition cited a previous, unpublished version of this article. *See* Petition, *supra* note 7, at 6 n.8, 34 & n.150. A different study concludes that almost 70 percent of a much smaller and narrower sample (electrical and electronics engineers) did *not* receive notice of such agreements until after they accepted the offer of employment. *See* Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry . . . and Exit?*, 12 INNOVATION POL'Y & ECON. 39, 49 (2012).

342. *See, e.g.*, LEMLEY & LOBEL, *supra* note 62, at 3 n.7 (citing draft version of Starr et al., *supra* note 183); Posner, *supra* note 62, at 166 n.5 (citing previous, unpublished version of same study); Dau-Schmidt et al., *supra* note 62 (manuscript at 102 n.5) (citing a draft version of Starr et al., *supra* note 183).

343. Starr et al., *supra* note 183, at 57 tbl.1; *id.* at 75 ("With regard to those who learn of their noncompete before they accept their job offers, our most saturated model indicates that these employees have 9.7 percent (e^{093}) higher earnings, are 4.3 percentage points more likely to have information shared with them (a 7.8 percent increase relative to the sample average), are 5.5 percentage points more likely to have received training in the last year (an 11 percent increase), and are 4.5 percentage points more likely to be satisfied in their jobs (a 6.6 percent increase) *relative to employees without a noncompete*." (emphasis added)).

344. *Id.* at 57 tbl.1 ("Noncompetes are associated with more training, greater access to information, and higher wages and job satisfaction when the noncompete is presented along with the job offer[.]").

345. *Id.* at 75.

346. *See* Starr, *supra* note 320, at 796 tbl.4, 797–98.

receive.[347] The article found that, controlling for other factors that could impact levels of training, employees in states with an average level of enforcement of noncompete agreements receive almost 15 percent more training than employees in states with the lowest level of enforcement.[348] The same paper also found a positive correlation between such enforceability and the number of "training events" that employees experienced, that such training was "likely to be more costly" than "simple on-the-job training taught by a co-worker," and that employers paid for such additional training.[349]

Another study cited by the Petition found that physicians who entered into such agreements earned higher salaries than physicians who did not, other things being equal.[350] The same study also found a positive correlation between the strength of state enforcement of such provisions and wages.[351]

Yet another study concludes that robust enforcement of noncompete agreements apparently reduces the number of new spin-off firms within industries but that those firms that are created are of higher quality and endure longer than those in states with less

347. *Id.* at 795–98.

348. *Id.* at 795–97.

349. *Id.* at 797–98; *id.* at 798 ("Taken together, the results provided here suggest a strong positive relationship between noncompete enforceability and the firm's willingness to invest in multiple training events that tend to be off-site or outsider taught and that are primarily meant to upgrade skills and teach new skills.").

350. Petition, *supra* note 7, at 34 & n.149; Kurt Lavetti et al., *Buying Loyalty: Theory and Evidence from Physicians* 33–34 (Oct. 26, 2012) (unpublished manuscript) (*available at* https://www.sole-jole.org/assets/docs/13228.pdf) [hereinafter Lavetti et al., *Buying Loyalty*]. The published version of this paper is: Kurt Lavetti et al., *The Impact of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J. HUM. RES. 1025 (2020) [hereinafter Lavetti et al., *Impact of Restricting Mobility*].

351. The unpublished version of the study, helpfully cited by the Petition, offers the following observation:

> The theory of compensating wage differentials suggests that earnings levels should be higher for workers with NCAs, who accept restrictions on their occupational choice sets. Of course, firms are only willing to pay a wage differential if they benefit sufficiently from the use of NCAs. Overcoming investment holdups by assigning property rights with NCAs, leading to higher productivity, creates rents than can be shared between workers and firms.

Lavetti et al., *Buying Loyalty*, *supra* note 350, at 26–27; *see also id.* at 27 ("[H]ourly earnings of workers with NCAs in their contracts are about 14% higher, conditional on observed worker and firm characteristics and unobserved market effects."). The published version reports that "the present value of the future wage differential associated with NCAs is between $149,000–$274,000 when the rate of time preference varies between 10 percent and 2 percent." Lavetti et al., *Impact of Restricting Mobility*, *supra* note 350, at 1060.

robust enforcement.[352] Finally, a yet unpublished study finds a positive and statistically significant relationship between state enforcement of noncompete agreements and firm-level capital investments.[353] The author surmises that enhanced enforceability encourages firms to invest in physical capital that is complementary to employees who are trained to use such equipment.[354] Such additional investments presumably enhance the productivity of workers and thus enhance the nation's overall output.[355]

In sum, the academic literature discussed above confirms the predictions of TCE that noncompete agreements often overcome a market failure and encourage investments in worker training.[356] Such investments improve the quality of products that employers offer, enhancing interbrand competition and producing unambiguous social benefits.[357] Moreover, these benefits are cognizable under the Sherman Act and the FTC Act.[358] These data also contradict any claim—made by the Petition and apparently echoed by the Commission itself—that employee noncompete agreements are generally one-sided contracts of adhesion.[359] Instead, these data are consistent with TCE's prediction that employers can induce employees to enter such agreements voluntarily by offering higher wages that compensate employees for post-employment restrictions

352. *See* Evan Starr et al., *Screening Spinouts?: How Noncompete Enforceability Affects the Creation, Growth and Survival of New Firms*, 64 MGMT. SCI. 552, 553 (2018).

353. *See* Jeffers, *supra* note 324, at 23 ("These results point to an important trade-off of labor mobility, between encouraging the entrance of new firms on the one hand and investment at existing firms on the other hand.").

354. *Id.* at 3–4 ("In particular, if human capital is hard to replace and its relationship with physical capital is complementary—for example, expensive computers are worth acquiring if the firm can retain talented programmers—then tighter restrictions on labor mobility will increase the rate of capital investment. Consistent with this hypothesis, I find that in firms that are more highly dependent on human capital, the net capital investment rate rises.").

355. *See* Alan J. Meese, *Section 2 Enforcement and the Great Recession: Why Less (Enforcement) Might Mean More (GDP)*, 80 FORDHAM L. REV. 1633, 1677–78 (2012) (explaining that refusal to ban wealth-creating practices will facilitate optimal allocation of scarce resources, increase potential output, and encourage economic growth).

356. See *supra* notes 343–49 and accompanying text.

357. *See* Starr et al., *supra* note 183, at 54; *cf.* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889–92 (2007) (holding that vertical intrabrand restraints can reduce free riding, enhance interbrand competition, and thus produce redeeming virtues).

358. *See supra* notes 294–97 and accompanying text.

359. *See* Petition, supra note 7, at 23; FTC Request for Public Comment, *supra* note 12 (referring to "non-compete clauses that prevent workers from seeking employment with other firms, and other one-sided contract terms that may exacerbate or lock in power disparities").

on their autonomy, thereby sharing with them a portion of the productivity gains associated with enhanced training.[360]

These data also refute the claim, made by Abolitionists and others, that all employee noncompete agreements are "inherently suspect" and thus presumptively violate the Sherman Act.[361] According to a leading decision the Petition invokes, a class of agreement is "inherently suspect" if it bears a "close family resemblance [to] another practice that already stands convicted in the court of consumer welfare."[362] Invoking this standard, Eric Posner, for instance, contends that courts should presume all such agreements unlawful because "[t]he empirical literature suggests that noncompetes typically cause anticompetitive harm—in the form of lower wages for workers."[363] Professor Posner cites a study that finds an association between average enforcement of noncompete agreements and a 4 percent reduction in average wages.[364] Some

360. This is not to say that negotiating across a proverbial bargaining table always or usually precedes the adoption of such beneficial agreements that increase employee wages. *Cf.* Posner, *supra* note 62, at 185 (concluding that such agreements do not compensate employees for constraints on their autonomy because "the empirical literature on noncompetes shows that workers and employers rarely bargain over noncompetes"). Markets often produce wealth-creating results for transacting parties without such individualized (and costly) bargaining. For instance, knowledgeable bargaining by a subset of employees can produce efficient terms and thus protect employees who do not engage in such bargaining, so long as firms employ standard agreements that treat all parties who are similarly situated the same. *See supra* notes 219–24 and accompanying text (explaining this result). Moreover, firms that adopt wealth-creating practices will to that extent thrive at the expense of rivals who do not, even if they cannot explain why such agreements enhance their success. *See, e.g.*, Armen A. Alchian, *Uncertainty, Evolution and Economic Theory*, 58 J. POL. ECON. 211, 211, 212–13 (1950); *id.* at 216 ("If explanation of past results rather than prediction is the task, the economist can diagnose the particular attributes which were critical in facilitating survival, even though individual participants were not aware of them."). Finally, it may well be that some such agreements are offered on a "take it or leave it" basis. However, such standardization is also one attribute of a well-functioning competitive market.

361. *See* Petition, *supra* note 7, at 4 & n.6. Indeed, one scholar advanced this contention during the waning years of the inhospitality era. *See* Sullivan, *supra* note 55, at 650 n.126 (contending that the "existence of [such] a contract" should establish a *prima facie* case of illegality, thereby shifting the burden to the defendant); *id.* at 642 (invoking *United States v. Arnold, Schwinn & Co.* as persuasive precedent, 388 U.S. 365 (1967), *overruled by* Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)).

362. Polygram Holding, Inc. v. FTC, 416 F.3d 29, 37 (D.C. Cir. 2005); *see* Petition, *supra* note 7, at 4 n.6 (invoking the FTC decision affirmed in *Polygram*); Posner, *supra* note 62, at 194 n.27 (also invoking *Polygram*); *see also* 1-800 Contacts, Inc. v. FTC, 1 F.4th 102, 115 (2d Cir. 2021) (quoting *Polygram*).

363. Posner, *supra* note 62, at 194.

364. *Id.* at 187; *see* Starr, *supra* note 320, at 785.

Abolitionists invoke the same empirical finding to justify banning such agreements, in part because of their supposed negative effect on income distribution.[365]

This argument overstates the empirical results reported by the single study invoked. The study does not purport to identify the impact of a "typical" noncompete clause. Instead, the study reports that, on average, wages are 4 percent lower in states with normal levels of enforcement.[366] But the author also qualifies these findings. In particular, the article explains that the main driver of this result is a reduction in the wages of employees in states that allow enforcement of noncompete agreements imposed after employees have accepted the offer of employment without any requirement of additional consideration.[367]

As explained earlier, the same author has also found that 61 percent of employee noncompete agreements are disclosed *before* employees accept employment.[368] Moreover, when employers *do* disclose such agreements, employees bound by them earn significantly *higher* wages than similarly situated employees not bound by such agreements.[369] Taken together and viewed in their entirety, these data suggest two distinct results. First, the average impact of employee noncompete agreements is to reduce wages, and this result is driven by a subset of *atypical* employee noncompete agreements, i.e., those not initially disclosed to employees. Second, where employee noncompete agreements are disclosed, and the *typical* agreement *is* disclosed, employees receive higher wages than they would have received had they not entered into such agreements. These higher wages presumably reflect the parties' expectations—confirmed by the data—that such agreements will induce additional training and/or the production of information.[370]

These results do not justify a finding that employee noncompete agreements have a "close family resemblance" to agreements deemed unlawful per se.[371] Instead, it appears that a substantial proportion produce significant benefits, partially captured by employees via

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365. *See* LEMLEY & LOBEL, *supra* note 62, at 3 ("Noncompetes decrease wages." (citing Starr, *supra* note 320, at 785)); Petition, *supra* note 7, at 33 (citing an unpublished draft of Starr, *supra* note 320).

366. Starr, *supra* note 320, at 785.

367. *Id.* at 806–07.

368. Starr et al., *supra* note 183, at 69.

369. *Id.* at 75.

370. *Id.* (summarizing findings that "those who learn of their noncompete before they accept their job offers . . . are 5.5 percentage points more likely to have received training in the last year (an 11 percent increase)"). *See also* Starr, *supra* note 320, at 797–98 (finding positive correlation between robust enforcement of employee noncompete agreements and quantity of employee training).

371. Polygram Holding, Inc. v. FTC, 416 F.3d 29, 37 (D.C. Cir. 2005).

higher wages. Presumptively banning *all* noncompete agreements because of their supposed effect on average wages will throw the proverbial baby out with the bathwater and thus unnecessarily destroy wealth.

To be sure, regulatory regimes must sometimes rely on clear rules that ban (or allow) particular conduct, and such rules will be overinclusive or underinclusive.[372] As then-Judge Breyer once explained, the cost of assessing the exact impact of each type of conduct would be prohibitive.[373] The benefits of additional investigation do not always warrant the costs. However, if the anticipated impact on wages should drive the treatment of employee noncompete agreements, the cost of discriminating between contracts likely to reduce such wages and those likely to increase them is extremely low. Agencies and courts need simply ask whether the employer disclosed the agreement before acceptance. If the answer is "yes," any presumption that such an agreement will reduce wages must evaporate. If anything, the presumption should shift in favor of a conclusion that the agreement will produce net benefits.[374]

Finally, these data undermine Abolitionists' account of the harm that these agreements supposedly produce. Recall that Abolitionists and others contend that employee noncompete agreements prevent former employees from selling their services to the highest bidder, thereby reducing their wages below what a free market would produce.[375] This account treats hypothesized bids and resulting imagined (higher) wages as a baseline against which to measure the supposed impact of enforceable employee noncompete agreements.[376]

As is often the case with nonstandard agreements, focusing on the impact of a restraint at a particular moment in time can produce misleading results.[377] Instead, TCE teaches that we must examine

372. Competing examples include the per se rule against horizontal price fixing (overinclusive) and the per se legality under Section 2 of the Sherman Act of above-cost pricing (underinclusive). Both such bright line rules depend in part upon the belief that the cost of more refined assessment exceeds the benefits.

373. *See* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.) ("[W]hile technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the economists' (sometimes conflicting) views. . . . Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.").

374. *See* 1-800 Contacts, Inc. v. FTC, 1 F.4th 102, 115–17 (2d Cir. 2021) (rejecting "inherently suspect" label because defendants articulated "cognizable procompetitive justifications").

375. *See* Posner, *supra* note 62, at 190.

376. *Id.*

377. *See* Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 189 (7th Cir. 1985) ("A legal rule that enforces covenants not to compete, even after an employee has launched his own firm, makes it easier for people to cooperate

the contract "in its entirety."[378] Such examination reveals that the prospect of the outside bidding that noncompete agreements may prevent is not exogenous to the enforceability of noncompete agreements.[379] The prospect of such bidding turns upon the amount and type of training that the original employer provides before such bids. Absent a noncompete agreement, the employer may not supply any training or may only supply training specific to the firm. The wage that the employee can command in the marketplace may then be *lower* than what the employee is earning at the firm.

In short, the harm that Abolitionists and others attribute to employee noncompete agreements—deterrence of outside bids and depression of wages—depends upon a nonrestraint baseline of high bids and resulting wages that may be entirely imaginary and unlikely to occur absent enforcement of noncompete agreements. Such agreements are frequently necessary to induce the very investments that enhance employees' general human capital and give rise to outside bidding in the first place. In these circumstances, banning such agreements will deter such training, eliminate the prospect of outside bidding, and thus not increase wages. Like inhospitality opponents of exclusive territories, Abolitionists and others want employees to "have their cake and eat it too," that is, atomistic competition for labor, unconstrained by a noncompete agreement, and robust bidding by other employers. However, this fortunate result is often not a sustainable equilibrium because the prospect of atomistic rivalry in the labor market would deter the very training that gives rise to robust outside bidding. Antitrust presumptions must rest on "actual market realities" and not on wishful thinking about the impact of banning certain restraints.[380] There is simply no basis for any presumption that employee noncompete agreements usually or typically suppress wages compared to what employees could earn in a nonrestraint world. Any claim that such agreements generally reduce wages compared to a state of affairs without such contracts presumes the existence of employee productivity and bids that would not exist but for the agreements.

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productively in the first place. Knowing that he is not cutting his own throat by doing so, the employer will train the employee, giving him skills, knowledge and trade secrets that make the firm more productive. *Once that employment ends, there is nothing left but restraint—but the aftermath is the wrong focus*." (emphasis added)).

378. WILLIAMSON, *supra* note 127, at 35 (emphasis omitted).

379. *But cf.* Lobel, *supra* note 108, at 845–48 (apparently assuming that firms will create human capital regardless of ability to capture benefits of doing so).

380. Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 466–67 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.").

VII. THE UNLIKELY PROSPECT THAT EMPLOYERS WILL USE SUCH AGREEMENTS TO PROTECT OR GAIN MARKET POWER IN THE PRODUCT MARKET DOES NOT SUPPORT ABOLITION

Abolitionists also contend that employers can use employee noncompete agreements to protect or obtain power in the product market by depriving rivals of access to labor inputs or entrepreneurial talent, raising rivals' costs and thus allowing the employer to price above its own costs.[381] Such a strategy is theoretically possible. Under the right conditions, employers could pay employees a wage premium to prevent them from accepting outside bids or starting competing firms. Such exclusionary rights agreements could be entirely voluntary, like a cartel agreement or exclusive dealing contract.[382] If the enforcement agencies learn that a firm has adopted such a strategy, they should pursue the perpetrators under the Sherman Act or the FTC Act.

However, several necessary conditions must exist before such a strategy can succeed.[383] Both the relevant product market and the relevant input market (here, the labor market) must be susceptible to such a strategy.[384] The challenged agreement must result in sufficient foreclosure of the relevant input market to impact the input's market price.[385] The input must constitute a nontrivial share of the cost of the final product.[386] Moreover, there must be barriers to entry in the relevant input and product markets.[387] Finally, the

381. *See* Petition, *supra* note 7, at 38.

382. *See* Meese, *Market Power and Contract Formation*, *supra* note 174, at 1369 ("While such agreements may appear to be the result of market power, close analysis suggests that they are instead the result of purely voluntary integration, to wit, a process of contract formation whereby the proponent of the agreement offers the input supplier a discount if it agrees to the exclusive arrangement, thereby sharing expected market power with the supplier. Thus, such agreements are no more 'coercive' than a garden-variety cartel agreement, whereby rivals voluntarily decide to reduce output . . . .").

383. *See generally* Krattenmaker & Salop, *supra* note 101, at 236–38, 250–51 (articulating conditions necessary to achieve "Real Foreclosure" that raises rivals' costs sufficiently to confer market power on the proponent of the agreement); Williamson, *supra* note 259, at 960 ("[A]nticompetitive effects [of nonstandard contracts] can appear only if rather special structural conditions exist."). *See also* Alan J. Meese, *Raising Rivals' Costs: Can the Agencies Do More Good than Harm?*, 12 GEO. MASON L. REV. 241, 269–70 (2003). Of course, in some circumstances, the exclusionary agreement can itself constitute a barrier to entry by depriving potential entrants of reasonably priced inputs, thus placing them at a disadvantage vis-à-vis incumbent firms.

384. *See* Meese, *supra* note 174, at 269.

385. *See id.*

386. *Id.*

387. *Id.*

victims of the scheme must lack effective counterstrategies that would thwart an otherwise plausible plan.[388]

Even the scholars who first articulated the raising rivals' costs paradigm have opined that most industries are not susceptible to such a strategy, i.e., that such a strategy can only be successful in a minority subset of American markets.[389] In addition, the industries that *are* susceptible to such a strategy via the labor market, as opposed to contracts governing other input markets, would presumably constitute a subset of this subset. After all, some successful raising rivals' costs strategies will entail increasing the costs of inputs other than labor.

The Petition offers no evidence that a substantial portion of employee noncompete agreements raise rivals' costs and thus help their proponents obtain market power. For instance, the Petition offers no evidence that such agreements are more prevalent in industries characterized by concentrated labor markets. Indeed, one source the Petition cites concludes that such agreements are more frequent in product markets that are *not* concentrated.[390] Other things being equal, this datum suggests that entry into markets where parties employ such restraints is relatively easy because incumbent firms are profitably operating at relatively small shares of the market, with the result that the minimum viable scale—an important determinant of entry—is comparatively low.[391] This lack of data, coupled with the dearth of adjudicated cases imposing liability based upon such a theory, counsels against treating the risk of raising rivals' costs schemes as a factor militating in favor of abolishing employee noncompete agreements.

VIII. BANNING SUCH AGREEMENTS WILL PREDICTABLY RAISE THE COSTS OF SOME SMALL RIVALS, ENRICHING LARGER FIRMS

The theory of raising rivals' costs is not irrelevant to the assessment of employee noncompete agreements. As explained earlier, overly aggressive applications of antitrust laws during the inhospitality era sometimes banned practices that allowed smaller

388. *See* Krattenmaker & Salop, *supra* note 101, at 271–72 (discussing conditions under which counterstrategies by targeted firms can undermine raising rivals' costs scheme).

389. *See id.* at 267 ("Certainly, in most industries, exclusionary rights contracts cannot be profitably employed for anticompetitive ends.").

390. Petition, *supra* note 7, at 2–3; *see* Starr et al., *supra* note 183, at 61 (finding that such agreements are "a bit more frequent . . . in areas with greater product market competition").

391. *See, e.g.*, HORIZONTAL MERGER GUIDELINES, *supra* note 80, at 29 (explaining that the likelihood of entry depends in part on "the cost per unit the entrant would likely incur, which may depend upon the scale at which the entrant would operate").

firms to achieve efficiencies already available to larger rivals.[392] These regulatory interventions "raised rivals' costs" every bit as much as some private agreements did.[393]

United States v. Topco[394] was a quintessential example. Topco was a joint venture of regional grocery chains formed to develop, purchase, and distribute private-label products to venture members.[395] The United States conceded that the venture was lawful but challenged ancillary agreements that assigned each member an exclusive territory where only it could promote and sell Topco products.[396] The District Court assessed the restraint under the fact-intensive Rule of Reason and concluded that the agreement produced little, if any, anticompetitive harm.[397] The court also concluded that the restraints fostered interbrand competition between Topco's members and large, fully integrated chains that produced and promoted their own private-label products.[398] The government conceded that Section 1 of the Sherman Act did not reach the integrated chains' private-label programs.[399] In particular, the court found that the enforcement of such territories was necessary to induce members to promote and advertise the various private-label products distributed by the venture.[400]

The Supreme Court reversed, condemning the restraints as unlawful per se.[401] The district court's findings that such agreements encouraged promotion and thus enhanced interbrand rivalry were beside the point, the Court said.[402] Simply put, such impacts could not justify the resulting contractual restrictions on the autonomy of members to sell private-label products wherever they wished.[403]

392. *See supra* notes 6, 140–50 and accompanying text.

393. *See generally* Steven C. Salop & David T. Scheffman, *Cost-Raising Strategies*, 36 J. INDUS. ECON. 19, 21–22 (1987) (observing that some firms can injure competition by inducing captured agency to adopt regulations that impose disproportionate costs on rivals); Steven C. Salop et al., *A Bidding Analysis of Special Interest Regulation: Raising Rivals' Costs in a Rent Seeking Society* 1–2 (FTC Bureau of Econ., Working Paper No. 114, 1984).

394. 319 F.Supp. 1031, 1040 (N.D. Ill. 1970), *rev'd*, 405 U.S. 596 (1972).

395. *Id.* at 1032.

396. *Id.* at 1038–40.

397. *Id.* at 1041–43.

398. *Id.* at 1042–43.

399. *See id.* at 1040 (noting government's concession that "if Topco . . . were a single, large national chain, none of its practices would be objectionable under the antitrust laws"); *see also* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 776 (1984) (holding that conduct within a single firm is unilateral and thus beyond the scope of Section 1).

400. *Topco*, 319 F. Supp. at 1042–43.

401. United States v. Topco Assocs., 405 U.S. 596, 610–612 (1972).

402. *Id.* at 610–11.

403. *See id.*

The decision thus left the large, integrated chains entirely free to continue promoting and selling their own private-label products while hampering regional chains' efforts to replicate the same institutional framework by contract.[404] In his concurring opinion, Justice Blackmun expressly recognized that, because of the Court's decision, "[t]he bigs therefore should find it easier to get bigger," a result that "seems at odds with the public interest."[405] Two years later, the Court approved a consent decree that relegated Topco's members to reliance upon areas of primary responsibility.[406]

In the same way, an outright ban on noncompete agreements would sometimes raise the costs of small businesses that rely upon such agreements to protect trade secrets and/or recoup their investments in training employees. To be sure, any such ban would apply to small and large firms alike. However, smaller firms will often adopt production processes that utilize more labor per unit of output and are thus "labor-intensive" as compared to the production processes employed by larger rivals.[407] Relegating all firms to more costly methods of enhancing a given employee's productivity will sometimes impose a disproportionate impact upon those small firms that utilize labor-intensive production processes. This result would thereby advantage larger, capital-intensive firms and reduce interbrand competition.[408] Indeed, one of the original scholarly interventions that helped inspire the raising rivals' costs literature examined the impact of an across-the-board wage increase on competitive conditions in the coal industry.[409] The author, Professor Williamson, concluded that such an increase disadvantaged small, labor-intensive firms vis-à-vis the capital-intensive firms that orchestrated the increase.[410]

404. *Cf.* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347–50 (1967) (explaining that the institution of property can internalize externalities that would otherwise exist).

405. *Topco*, 405 U.S. at 612–13 (Blackmun, J., concurring).

406. *See* United States v. Topco Assocs., 1973–1 Trade Cas. ¶ 74,485 at *2, 4 (N.D. Ill. 1973), *aff'd.*, 414 U.S. 801 (1973).

407. *See* Oliver E. Williamson, *Wage Rates as a Barrier to Entry: The Pennington Case in Perspective*, 82 Q.J. ECON. 85, 97 (1968) (describing dichotomy in the coal industry between smaller, labor-intensive firms and larger, capital-intensive firms).

408. *See* Krattenmaker & Salop, *supra* note 101, at 238 (explaining that exclusionary rights agreement that results in uniform price increase for inputs will disadvantage rivals if the proponent of the agreement "uses the input less intensively").

409. *See* Williamson, *supra* note 407, at 101–08; *see also* Krattenmaker & Salop, *supra* note 101, at 230 n.73 (including Professor Williamson's article among those on cost-raising strategies that inspired recognition of raising rivals' costs paradigm).

410. Williamson, *supra* note 407, at 108–09.

This account of the impact of employee noncompete agreements could help explain organized labor's support for banning such agreements.[411] Cartelization of the labor supply by unions and resulting supracompetitive wages naturally induces firms to adopt production processes that are less labor-intensive than those adopted by nonunion firms facing competitive labor markets. Imposing regulations that reduce the productivity of labor will thus disproportionately disadvantage nonunion, labor-intensive firms, increasing the profits of unionized firms and wages of those who work there.[412] For similar reasons, of course, unions often support increases in minimum wages, even though their members generally earn wages well above the legal minimum.[413] Policymakers truly concerned with small firms and their employees will think twice about banning agreements that help such firms improve their employees' productivity.

411. *See supra* note 65 and accompanying text (listing four unions that have urged the FTC to abolish such agreements).

412. *See* Alan J. Meese, *Competition Policy and the Great Depression: Lessons Learned and a New Way Forward*, 23 CORNELL J.L. & PUB. POL'Y 255, 294–96 (2013) (describing how minimum wage laws, maximum hour laws, and bans on "yellow dog" contracts disproportionately raised the costs of small, labor-intensive, nonunion firms).

413. *See* Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 1001 (1984) (contending that unions support minimum wages because they "ha[ve] the effect of raising the price of substitute nonunion labor").