SURVIVING THE RULE OF REASON: AN ANTITRUST ANALYSIS OF EMPLOYMENT NONCOMPETES

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When the Federal Trade Commission (FTC) issued a rule banning noncompete agreements as unfair methods of competition, it reinvigorated debates regarding the purpose of federal antitrust law. At its core, federal antitrust law seeks to preserve a competitive economy and promote new entry into the marketplace, primarily to protect consumer interest. Under President Biden's administration, the FTC has increased its efforts to expand the scope of antitrust protection beyond consumer welfare by applying it to other public policy concerns, such as employee mobility. The FTC points to noncompete agreements as detrimental constraints to employees' economic freedoms. In practice, employment noncompetes have escaped the scrutiny of federal antitrust laws as courts have generally treated such agreements as matters governed under state contract law.

This Note contributes to the ongoing discourse regarding the reach of federal antitrust laws and their applicability in regulating noncompete agreements. Foregoing discussions that scrutinize the FTC's rulemaking authority, this Note instead examines the noncompete rule under judicially created antitrust doctrines. Despite the rule's plain language to ban all noncompetes, this Note treats the ban effectively as a per se antitrust violation. This Note argues that the reviewing courts should continue to apply the rule of reason—a three-part inquiry to determine the legality of an activity that may restrict competition—in future antitrust challenges to noncompetes, as vertical restraints between an employer and employee. In conclusion, this Note supplies recommendations for reviewing courts and potential litigants on how to tailor their rule of reason analysis.

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INTRODUCTION

At major inflection points of the American economy, when anticompetitive choke points increase market concentration,[1] raise prices to consumers' detriment, and forestall innovation, the government deploys antitrust laws to discipline the disrupters and restore the market to its competitive baseline. Such discipline raises questions regarding how far-reaching the government's hand must be. At its core, antitrust law seeks

1. *See infra* Part I.C. The Herfindahl-Hirschman Index (HHI) is a common measure of market concentration and is used to determine market competitiveness. *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, DRAFT MERGER GUIDELINES 6 (2023), https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf [https://perma.cc/KEY9-BMTX]. The index measures the size of companies relative to the size of the industry they are in and the amount of competitiveness. *See id.* The U.S. Department of Justice considers a HHI of less than 1,500 to be a competitive market, a HHI between 1,500 and 2,500 to be a "moderately concentrated" market, and an HHI greater than 2,500 to be a "highly concentrated" market. *Id.* at 3.

to preserve a competitive economy[2] and promote new entry into the marketplace to protect the welfare of consumers.[3]

There have been calls to expand the scope of antitrust protection beyond consumer welfare—i.e., the regulation of prices, output, and quality of products and services under conditions most favorable to consumers[4]—to other public policy concerns such as employee mobility.[5] Currently, no effective federal statute or regulation bans noncompete provisions[6] in employment contracts.[7] At the federal level, Senator Christopher Murphy introduced the Mobility and Opportunity for Vulnerable Employees Act,[8] and Senator Angus S. King, Jr. introduced the Leveling Access to Demonstrated Drivers of Employment Results Act,[9] both of which would prohibit the use of noncompete agreements. Senators Murphy and King proposed these bills due to concerns that employers use noncompetes to restrict not only higher-earning executives and top-level employees but also minimum-wage workers, such as those at fast food restaurants.[10] Those bills, however, failed to garner enough support from the 114th Congress and ultimately failed to pass. On July 9, 2021, President Biden signed Executive Order 14,036 which proposed to establish a "whole-of-government" effort to promote competition in the American economy by specifically encouraging stronger enforcement of federal antitrust law.[11]

Although Congress has not enacted a legislative ban on noncompetes, federal agencies have promulgated rules to this effect. On January 5, 2023, the Federal Trade Commission (FTC) proposed a rule for notice and

2. *See* United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

3. *See* Marc Winerman, *The Origins of the FTC: Concentration, Control, and Competition*, 71 ANTITRUST L.J. 1, 3–4 (2003).

4. *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 89–90 (2021).

5. *See* Exec. Order No. 14,036, 86 Fed. Reg. 36987 (Jul. 9, 2021).

6. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912). A noncompete agreement is a contractual clause in an employment agreement or contract that limits an employee's ability to work for the employer's competitors in a certain industry and a certain geographic area for a defined period of time after leaving the employment. *See Covenant Not to Compete*, BLACK'S LAW DICTIONARY (11th ed. 2019). This Note uses the terms "noncompete agreement," "noncompete," and "noncompete covenant" interchangeably.

7. *See* Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 223 (2007).

8. S. 1504, 114th Cong. (2015).

9. H.R. 2873, 114th Cong. (2015).

10. *See* Diego Areas Munhoz, *FTC Noncompete Proposal Breathes New Life into Lawmaker Efforts*, BLOOMBERG L. (Jan. 31, 2023), https://news.bloomberglaw.com/daily-labor-report/ftc-noncompete-proposal-breathes-new-life-into-lawmaker-efforts [https://perma.cc/L8VB-LNZ9].

11. *See supra* note 5.

comment[12] that would ban noncompete agreements[13] and published a final rule on May 7, 2024.[14] The FTC adopted the rule pursuant to § 5 of the Federal Trade Commission Act[15] (FTCA), which permits the FTC to investigate unfair methods of competition and deceptive and unfair business practices.[16] Fundamentally, the rule prohibits employers from imposing noncompetes on workers—including independent contractors, unpaid workers, and sole proprietors.[17] The rule also entails several novel features. The rule applies retroactively, rendering preexisting noncompetes unenforceable and requiring employers to proactively rescind existing noncompetes.[18] The rule also preempts all inconsistent state laws, thereby federalizing noncompete regulation.[19] Further, the ban extends to all contract provisions that create de facto noncompete clauses—i.e., any other contractual clause that may have the "effect" of prohibiting workers from seeking or accepting other employment.[20]

The FTC takes the position that the use of such agreements interferes with the competitive conditions in the labor market.[21] It finds that noncompetes, in their aggregate use, reduce the number of opportunities available to workers by restricting their ability to obtain jobs that are more suitable to their skillsets.[22] Thus, workers who are bound by noncompetes are forced to remain in positions that depreciate their productive capacity.[23] Theoretically, workers in a free market society have the mobility to work wherever they please, but noncompetes constrain this freedom. Such agreements not only

12. *See* Administrative Procedure Act, 5 U.S.C. § 553 (1966). Under the process of notice and comment rulemaking, the FTC gives the public notice that it is considering, adopting, or modifying rules on a particular subject and seeks the public's comment; *see also* CHARLES H. KOCH JR. & RICHARD MURPHY, 1 ADMIN. LAW & PRAC. § 4:32, Westlaw (database updated Mar. 2024). The Commission considers the comments received in developing the final rule. *See id.* § 4:33.

13. *See* Proposed Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

14. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912). The rule has an effective date of September 4, 2024.

15. 15 U.S.C. § 41–58.

16. *See id.* § 45.

17. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38342.

18. *See id.* at 38439–40. The rule, however, would not affect any other provisions negotiated for in exchange for the noncompete, like a severance package. *Id.* at 38366, 38440. There is also a narrow exception to allow noncompetes in "sale-of-business" agreements, but this exception only applies where the individual has at least 25 percent ownership in the business. *Id.* at 38438. The final rule also allows existing noncompetes for senior executives—workers earning more than $151,164 annually who are in a "policy-making position"—to remain in force. *Id.* at 38371–72, 38405.

19. *See id.* at 38452.

20. For example, a nondisclosure agreement (NDA) that has the effect of limiting a worker's mobility may also be subject to the ban. *See id.* at 38361–62.

21. *See id.* at 38365.

22. *See id.* at 38380.

23. *See id.*

dictate the terms of the transaction between an employer and employee but also the terms after the employment relationship has terminated.[24]

Anticompetitive practices in labor markets, particularly pertaining to employment contracts, have escaped condemnation by antitrust enforcement agencies due to a conception that antitrust law is meant to govern markets of conventional trade as opposed to labor relations.[25] The FTC's effort to condemn noncompetes as "unfair methods of competition"[26] is the focus of current debates around the FTC's rulemaking authority.[27] This Note departs from such inquiry and addresses a novel development in utilizing federal antitrust law as a device to "shape[] the distribution of power and opportunity across [the] economy."[28]

Under the rule's plain language, the FTC states not merely an intention to regulate noncompetes nationally but instead to entirely prohibit them.[29] The rule effectively declares a new category of per se violations for vertical restraints—restraints that are imposed at different levels of the distribution system[30]—notwithstanding that the U.S. Supreme Court has held that all vertical restraints are granted the presumption of reasonableness and thereby are subject to the rule of reason.[31]

Since the FTC first proposed the rule, the ban has revived doubts about using the rule of reason in antitrust litigation,[32] especially due to concerns about judicial subjectiveness of its application.[33] The Supreme Court has limited the per se rule to practices that are manifestly anticompetitive, with little procompetitive justifications.[34] Such practices always or almost always tend to restrict competition and decrease output.[35] The Court has consistently

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24. *See* Alan Meese, *Don't Abolish Employee Noncompete Agreements*, 57 WAKE FOREST L. REV. 631, 634 (2022).

25. *See* Gregory Day, *Anticompetitive Employment*, 57 AM. BUS. L.J. 487 (2020).

26. Federal Trade Commission Act of 1914 § 5, 15 U.S.C. § 45.

27. This Note does not purport to analyze the FTC's rulemaking authority under the deference doctrines—meaning the equitable doctrines by which courts determine whether to defer to an agency's rule or statutory interpretation or its rulemaking authority. For sources that specifically discuss the FTC's rulemaking authority, see Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, 75 ADMIN. L. REV. 277 (2023) and Jennifer Cascone Fauver, *A Chair with No Legs?: Legal Constraints on the Competition Rule-Making Authority of Lina Khan's FTC*, 14 WM. & MARY BUS. L. REV. 243 (2023).

28. Memorandum from Lina M. Khan, Chair, Fed. Trade Comm'n, to Commission Staff and Commissioners, Fed. Trade Comm'n (Sept. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf [https://perma.cc/Q4QM-2NNW].

29. *See generally* Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).

30. White Motor Co. v. United States, 372 U.S. 253, 261 (1963).

31. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

32. *See infra* Part II. The rule of reason entails a three-part, burden-shifting inquiry which considers the circumstances surrounding the restraint, including the effects of the restraint in the particular case and any procompetitive benefits. *See* Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

33. *See* BORK, *supra* note 4, at 40.

34. *See* Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977); *infra* Part I.B.

35. *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988); *infra* Part I.B.

expressed their reluctance to apply the per se rule to restraints where the economic impact is not immediately obvious.[36]

Antitrust laws aim not only to ferret out anticompetitive conduct but also to promote activities that bolster competition.[37] To ensure this objective, the Court relies on the rule of reason to distinguish restraints that have legitimate justifications outweighing any anticompetitive effects from restraints that are merely pretextual.[38]

This Note does not purport to question the FTC's regulatory authority. Rather, if antitrust laws are employed to regulate—or prohibit—employment noncompetes, this Note argues that noncompetes, as vertical restraints between an employer and employee, should be subject to the rule of reason's burden-shifting analysis.[39] A per se rule, which the FTC's rule effectively enforces, is inapposite because of the judiciary's insufficient experience and familiarity in dealing with noncompetes as an antitrust matter.[40] Moreover, there is no indication that antitrust laws must value the social costs attributable to noncompetes more heavily than the social gains—primarily, increased investment in employee training and research and development[41] ("R&D") as well as the protective measures for trade secrets[42] and other proprietary information.[43]

This Note proceeds in three parts. Part I of this Note reviews the relevant antitrust statutes—the Sherman Act of 1890[44] and the FTCA[45]—as the main sources of the FTC's enforcement authority and describes the standards of review utilized in antitrust cases, the per se rule and the rule of reason. Further, Part I briefly discusses the theoretical conceptions of how noncompetes may affect competitive labor market conditions. It also provides examples of how federal courts have resolved antitrust cases on postemployment restraints. Part II reviews the debate regarding the proper review standards that courts should apply and the merits of noncompete

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36. *See* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

37. *See Bd. of Trade*, 246 U.S. at 238.

38. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007).

39. *See infra* Part I.B.

40. *Cf.* United States v. Topco Assocs., Inc., 405 U.S. 596, 607, 610 (1972) (holding that the rule of reason was not necessary in an action alleging horizontal, territorial market division, an activity that distinctly minimizes competition).

41. *See* Christopher B. Seaman, *Noncompetes and Other Post Employment Restraints on Competition: Empirical Evidence from Trade Secret Litigation*, 72 HASTINGS L.J. 1183, 1994 (2021).

42. The Uniform Trade Secrets Act (UTSA) defines a trade secret as:

> information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances, to maintain its secrecy.

UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. § 1(4) (1979).

43. *See infra* Part II.B.3.

44. 15 U.S.C. §§ 1–2.

45. 15 U.S.C. §§ 41–58.

usage. Recognizing that challenges against noncompetes, under the federal antitrust laws, will proliferate, Part III proposes recommendations on how litigants and courts should apply the rule of reason. Part III assesses the propriety of the FTC's intention to create a new category of per se prohibitions, which is a stricter standard of review for defendants than the rule of reason.[46]

I. THE LEGAL BACKGROUND FOR POSTEMPLOYMENT NONCOMPETE AGREEMENTS UNDER AN ANTITRUST PERSPECTIVE

Under the common law, courts viewed restrictive employment agreements as ancillary devices to valid contracts.[47] One often cited case, *Mitchel v. Reynolds*,[48] is notable for establishing a judicial approach that balances the utility of restrictive agreements with their unfavorable social harms.[49] In that case, Reynolds agreed to a covenant that he would not seek any work in the baking trade within the town for a period of five years.[50] The covenant stated that, in the event Reynolds violated the terms, Reynolds agreed to pay a bond of fifty pounds.[51] Reynolds, however, refused to pay the bond and, in the legal action against him, argued that the bond was void as the covenant constituted an illegal restraint of trade.[52] In finding that the covenant was a "just and honest contract,"[53] the Court of the Queen's Bench enforced the covenant on the grounds that the agreement was tailored to protect the employer's legitimate business interests.[54] Although the court recognized that restraints on trade were presumptively unreasonable, the court allowed the employer to present arguments to prove the noncompete's validity based on surrounding circumstances.[55]

As scholars have observed, *Mitchel* represented a shift in the English common law from feudal economics to contractual freedom.[56] Such a shift signified the judiciary's increasing awareness of and adaptation to newly developing economic realities.[57] This common-law approach to restraints of trade has long undergirded the language and purpose of federal antitrust law.[58]

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46. *See infra* Part I.D.

47. *See* Harvey J. Goldschmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants under Federal Law*, 73 COLUM. L. REV. 1193, 1194 (1973).

48. (1711) 24 Eng. Rep. 347, 1 P. Wms. 181.

49. *See* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 630 (1960).

50. Mitchel v. Reynolds (1711) 24 Eng. Rep. 347, 1 P. Wms. 181.

51. *See id.*

52. *See id.* at 181.

53. *See id.* at 197.

54. *See id.*

55. *See* Mark A. Glick, Darren Bush & Jonathan Q. Hafen, *The Law and Economics of Post-employment Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357, 365 (2002).

56. *See id.*

57. *See id.*

58. *See* Blake, *supra* note 49, at 628.

This part overviews the foundational objectives of federal antitrust laws. Part I.A explains the purpose of the Sherman Act, delineates the origins of the FTCA, and surveys the Supreme Court's interpretations of the FTCA in antitrust litigation. Part I.B then introduces the two essential review standards that courts have applied in antitrust challenges: per se violations and the rule of reason. This part also discusses the Supreme Court's shifting application of the standards over time. Subsequently, Part I.C puts forth an overview of how noncompetes are defined as an antitrust matter and the competitive conditions of the labor market. Part I.D briefly reviews examples of antitrust challenges—primarily brought under § 1 of the Sherman Act[59]—against restrictive employment agreements and how courts have responded.

A. The Federal Antitrust Laws

American competition policy finds its origins in the distinctly classical application of contract law.[60] The common law of contracts in the restraint of trade recognized that contracts may be voidable when they harm the public by depriving consumers of industries' goods or injuring sellers who were excluded to conduct business in an industry.[61] Competition law evolved to more actively promote economic participation by small businesses and entrepreneurs in pursuit of greater innovation and efficiency and to preserve lower prices and greater choices for consumers.[62] In the late nineteenth century, Congress determined that federal legislation was necessary to target anticompetitive activities that not only harmed small businesses but also injured the public.[63]

1. The Sherman Act of 1890

The Sherman Act of 1890 prohibits "every contract, combination . . . or conspiracy, in restraint of trade"[64] and the monopolization, or the attempt of monopolization, of "any part of . . . trade or commerce."[65] Given the breadth of the statute's language, the Supreme Court has not applied this language literally.[66] Over time, the Supreme Court, through common-law doctrines

59. This Note does not discuss the Clayton Act, as the Clayton Act states that human labor "is not a commodity or article of commerce." Clayton Act, 15 U.S.C. § 17.

60. *See* 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 66–81 (4th ed. 2013).

61. *See* Or. Stream Navigation Co. v. Winsor, 87 U.S. (20 Wall.) 64, 68 (1873).

62. *See* William Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 932–33 (2010).

63. *See* Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948).

64. 15 U.S.C. § 1.

65. 15 U.S.C. § 2. The original targets of the Sherman Act included monopoly power, price-fixing, and market divisions among rivals and certain distribution practices and boycotts. Section 1 of the Sherman Act covers agreements among firms, including both vertical agreements in the supply chain and horizontal agreements among competitors, and § 2 prohibits monopolization as well as attempts and conspiracies to monopolize. *See id.* §§ 1–2.

66. *See* Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006).

and its evolving experience with changing economic conditions, has narrowed the Sherman Act's statutory language—particularly that of § 1—with more concrete meaning.[67]

2. The Federal Trade Commission Act

In 1914, Congress enacted the Federal Trade Commission Act as a part of President Woodrow Wilson's campaign promise to strengthen antitrust legislation and further constrain the anticompetitive effects of big business.[68] The FTCA aimed, in part, to eliminate "unfair methods of competition . . . and unfair or deceptive practices in or affecting commerce,"[69] "which if left untouched would probably create the evils prohibited by the Sherman [] Act."[70] Thus, Congress purported that § 5 of the FTCA fill in the gaps left open by the Sherman Act and the Clayton Act,[71] and that the FTC "prevent unfair competition"[72] according to the current regulatory and economic climate.[73] Notably, Congress chose not to enact an elaborate code of prohibited anticompetitive acts but rather molded the FTCA in similarly broad form as the Sherman Act.[74]

Further, under § 15(b) of the FTCA, the FTC has the sole authority to issue a civil complaint in order to pursue a cease and desist order against methods of competition that are allegedly unfair in interstate commerce.[75] Although the FTC may act to prevent unfair conduct in the public interest, it may not prevent trade practices which are merely offensive to a suitable standard of business morality.[76] Moreover, unlike the Sherman and Clayton Acts, the FTCA does not provide a private right of action to redress private grievances.[77]

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67. *See, e.g.*, United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (prohibiting horizontal price-fixing as per se illegal); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (finding horizontal restrictions on output and bid rigging among competitors as per se illegal); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941) (prohibiting group boycotts under § 1); Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990) (holding that horizontal market allocation is per se illegal).

68. *See* Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 1 (2010).

69. *Id.*

70. Butterick Publ'g Co. v. FTC, 85 F.2d 522, 526 (2d Cir. 1936) (citing FTC v. Raladam Co., 283 U.S. 643 (1931)).

71. 15 U.S.C. §§ 12–27.

72. 63 CONG. REC. S10376–78 (1914).

73. *See* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 27 B.C. L. REV. 227, 230 (1980).

74. *See* 51 CONG. REC. 11114 (1914). Senator James A. Reed of Missouri questioned adopting general language, "unfair competition," due to concern that the Commission would determine what constitutes fair and unfair practices without the guidance of law. *Id.*; *see also* Hovenkamp, *supra* note 68, at 2.

75. 15 U.S.C. § 45(b).

76. *See* Butterick Publ'g Co. v. FTC, 85 F.2d 522, 526 (2d Cir. 1936) (citing Northam Warren Corp. v. FTC, 59 F.2d 196 (2d Cir. 1932)).

77. *See* Moore v. N.Y. Cotton Exchange, 270 U.S. 593 (1926); *see also* Carlson v. Coca-Cola Co., 483 F.2d 279, 280 (9th Cir. 1973); *infra* Part III.

3. The Scope of "Unfair Methods of Competition"

Although the FTC does not have explicit statutory authority to enforce the Sherman Act,[78] the Supreme Court has held that there are many reasons for interpreting the FTCA's "unfair methods of competition"[79] as including violations of the Sherman Act.[80] Thus, the FTCA, in practice, became coterminous with the Sherman Act's provisions. Lower courts have also allowed the FTC to bring Sherman Act claims under § 5 in instances of group boycotts,[81] collusion on terms of sale,[82] and price-fixing.[83] The FTC also has enforcement jurisdiction under the Clayton Act[84] and may bring claims for conduct that violates "the spirit" of either the Sherman or Clayton Act.[85] In effect, the FTC's § 5 authority serves a gap-filling function.[86] However, it remains unclear whether the FTC's jurisdiction encompasses *any* practice that is harmful or potentially harmful to competition, regardless of whether it is false, fraudulent, or morally reprehensible.[87]

In enacting the FTCA, Congress was, in part, reacting to the Supreme Court's decision in *Standard Oil v. United States*.[88] When the FTCA was introduced in Congress, Senator Francis G. Newlands remarked that the phrase "unfair competition" would "have such an elastic character that it will meet every new condition and every new practice that may be invented with a view to gradually bring about monopoly through unfair competition."[89]

The Supreme Court has demonstrated deference to the FTC's determinations of which particular practices constitute "unfair methods of

78. *See* Kovacic & Winerman, *supra* note 62, at 939.

79. 15 U.S.C. § 45(a)(1).

80. *See* FTC v. R. F. Keppel & Bro., Inc., 291 U.S. 304, 310, 425 (1934); *see also* FTC v. Brown Shoe Co., 384 U.S. 316, 320–21 (1966) (finding that "[t]his broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws").

81. *See* Millinery Creators' Guild, Inc. v. FTC, 109 F.2d 175, 176 (2d Cir. 1940), *aff'd*, 312 U.S. 469 (1941).

82. *See* Butterick Publ'g Co. v. FTC, 85 F.2d 522, 526 (2d Cir. 1936).

83. *See, e.g.*, Va. Excelsior Mills, Inc. v. FTC, 256 F.2d 538, 540 (4th Cir. 1958); Standard Container Mfrs. Ass'n v. FTC, 119 F.2d 262, 265 (5th Cir. 1941); Cal. Rice Indus. v. FTC, 102 F.2d 716, 719 (9th Cir. 1939); *cf.* Adolph Coors Co. v. FTC. 497 F.2d 1178, 1184 (10th Cir. 1974) (involving vertical price fixing).

84. 15 U.S.C. §§ 12–27.

85. *See Brown Shoe Co.*, 384 U.S. at 316; *see also* Yamaha Motor Co., Ltd. v. FTC, 657 F.2d 971, 985 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) (suggesting that § 5 reaches mergers under a more aggressive standard than does § 7 of the Clayton Act).

86. *See* Kovacic & Winerman, *supra* note 62, at 943.

87. *See* 51 CONG. REC. 11115 (1914) (debating the propriety of defining "unfair competition" with specificity and whether to leave such definitions to the discretion of the Commission or the courts); *see also* 2 AREEDA & HOVENKAMP, *supra* note 60, at 13–39.

88. 221 U.S. 1 (1911) (implementing a limiting principle, rooted in the common law, to the seemingly broad mandate under § 1 and thereby establishing the rule of reason as the framework for analyzing most trade restraints).

89. 51 CONG. REC. 12024 (1914) (statement of Senator Francis G. Newlands).

competition."[90] The Court expressed that Congress left the development of the term "unfair" to the FTC rather than attempting to define the many and variable unfair practices affecting commerce.[91] In *Federal Trade Commission v. Sperry & Hutchinson Co.*,[92] the Supreme Court held that the FTC may "define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws."[93] In *Federal Trade Commission v. R.F. Keppel & Brother, Inc.*,[94] the Court determined that the task of defining in advance which unfair methods of competition are prohibited under the FTCA was unnecessary, and that even if such an endeavor was possible, "new or different practices must be considered as they arise in the light of the circumstances in which they are employed."[95]

Despite the Supreme Court's remarkably deferential language to the FTC's enforcement power, the Court ensured that the meaning and application of "unfair methods of competition" would be shaped through a "gradual process of judicial inclusion and exclusion."[96] In *Federal Trade Commission v. Motion Picture Advertising Service Co.*,[97] the Court stated that "[t]he point where a method of competition becomes 'unfair' . . . will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question." It is the judiciary that determines whether a particular category of exclusive contracts should be banned in their entirety and whether the FTC has exceeded the limits of its delegated authority.[98] Certainly, the FTC's mandate is also prophylactic in that it may bar "incipient violations" of the other antitrust laws[99] and conduct that is "close to a violation" of those laws.[100] However, the FTC must confine itself to attacking conduct that either has a truly "anticompetitive intent" or that lacks a "legitimate business reason."[101]

90. *See* FTC v. Texaco, Inc., 393 U.S. 223, 226 (1968) ("While the ultimate responsibility for the construction of this statute rests with the courts, we have held on many occasions that the determinations of the Commission, an expert body charged with the practical application of the statute, are entitled to great weight."). The Court in *Texaco* noted that the FTC could condemn unfair methods of competition when a company used its "dominant economic power" over dealers to foreclose competition even when it did not use the "kind of overt coercive acts" condemned in previous cases. *Id.* at 228–29; *see also* Atl. Refin. Co. v. FTC, 381 U.S. 357, 369–70 (1965) ("When conduct does bear the characteristics of recognized antitrust violations it becomes suspect, and the Commission may properly look to cases applying those laws for guidance.").

91. *See Atl. Refin. Co.*, 381 U.S. at 367; *see also* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 241 (1972) ("[T]he sweep and flexibility of this approach were thus made crystal clear.").

92. 405 U.S. 233 (1972).

93. *Id.* at 239.

94. 291 U.S. 304 (1934).

95. *Id.* at 314.

96. *Id.* at 311–12.

97. 344 U.S. 392 (1952).

98. *Id.* at 396.

99. *See* Fashion Originators' Guild v. FTC, 312 U.S. 457, 466 (1941).

100. E. I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 136–37 (2d Cir. 1984).

101. *See id.*

The federal courts of appeals have also exhibited resistance to the FTC's broad interpretations when pursuing challenges to unfair methods of competition.[102] Similar themes arise from the courts' decisions in § 5 cases. Although the judiciary recognized that § 5 allows the FTC to challenge behavior beyond the reach of the other antitrust laws, in each instance, the courts found that the FTC failed to make a compelling case for condemning the conduct in question.[103] As the U.S. Court of Appeals for the Second Circuit stated, the more the FTC veers away from targeting violations of the antitrust laws and seeks to break new ground by enjoining otherwise legitimate practices, the closer the court's scrutiny will be upon review.[104] The Second Circuit rejected the FTC's prima facie standard based solely upon a "restraint of competition," even if the conduct in question is tantamount to an antitrust violation.[105] Such a standard is so vague that it would sanction arbitrary or undue government interference with the reasonable freedom of action that antitrust laws seek to protect.[106]

B. Rule of Reason Versus Per Se Review

In *Board of Trade of City of Chicago v. United States*,[107] Justice Louis D. Brandeis observed, in dicta, that "[e]very agreement concerning trade, every regulation of trade, restrains . . . ."[108] This sentiment has reinforced the proposition that all contracts, in some manner, restrain trade, and that not all restrictive agreements arise from conditions of coercion.[109] In some respects, Justice Brandeis's hostility to the per se rule emanated from his approach to balance the interests of smaller producers and the consumer's interest.[110] Thus, as the Court in *State Oil Co. v. Khan*[111] clarified, the Sherman Act is understood to "outlaw *unreasonable* restraints [of trade]."[112] The conclusion that a restraint or particular conduct is unreasonable, with no less restrictive alternatives available, means that it does not survive antitrust scrutiny.[113]

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102. *See, e.g.*, Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); Off. Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980).

103. *See, e.g.*, *Boise Cascade*, 637 F.2d at 573 (declining to follow the FTC's theory that delivered price systems in the plywood industry constitute a per se § 5 violation, especially absent evidence of an overt agreement to utilize a pricing system to avoid price competition); *Off. Airline Guides*, 630 F.2d at 927 (holding the FTC's order against an airline schedule publisher for unlawful monopolization erroneous as it directly contravened the Supreme Court's previous doctrine and "would permit the FTC to delve into" alternate reasons "for a monopolist's refusal to deal").

104. E. I. du Pont de Nemours & Co. v. FTC, 729 F.2d at 137.

105. *Id.*

106. *See id.*

107. 246 U.S. 231 (1918).

108. *Id.* at 238.

109. *See* Steven Salop, *The Reasonable Competitive Conduct Standard for Antitrust*, PROMARKET (Apr. 6, 2023), https://www.promarket.org/2023/04/06/the-reasonable-competitive-conduct-standard-for-antitrust/ [https://perma.cc/8MUB-4U2P]; *see also* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 690 (1978).

110. *See* BORK, *supra* note 4, at 37.

111. 522 U.S. 3 (1997).

112. *Id.* at 10 (emphasis added).

113. *See* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 83 (2018).

When the restraint is presumed to be anticompetitive—meaning that it always or almost always tends to restrict competition—the courts will apply the per se rule.[114] Thus, plaintiffs may ask the courts to apply the per se rule to their advantage because a plaintiff need not specify a relevant market, prove that the defendant has market power—the power to raise prices above competitive levels or exclude competitors[115]—nor demonstrate actual harmful effects.[116] Furthermore, the defendant has no option to put forth offsetting procompetitive justifications because the conduct alone incurs liability.[117]

The Supreme Court has created a narrow universe of conduct to which per se treatment has applied, including horizontal price-fixing[118] and division of markets,[119] group boycotts,[120] and tying provisions.[121] Such arrangements tend to have a major impact on trade and interbrand competition—that is, competition among different manufacturers or brand owners of the same generic product.[122] The Court has explicitly cautioned that per se treatment is reserved for cases where the courts have sufficient experience to determine that the restraint almost always results in competitive harm, and has discouraged lower courts from expanding per se treatment to new categories.[123]

Conversely, in cases where the restraint is presumptively reasonable—because there are procompetitive effects or efficiency justifications—courts apply a three-part analysis, known as the "rule of reason," to determine whether the conduct violates antitrust law.[124] Under the rule of reason, the plaintiff must establish a prima facie case by showing that a restraint produces actual detrimental effects or by offering indirect evidence that the defendants possess or may acquire market power in a plausible, relevant market.[125] Upon a successful showing, the burden will shift to the defendant to proffer legitimate business objectives[126] or procompetitive justifications

114. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2283 (2018).

115. *See* United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

116. *See* John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 506–07 (2019).

117. *See id.*

118. "Horizontal price-fixing" occurs when multiple firms in a relevant market agree to set prices to consumers at a fixed amount. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 213 (1940).

119. A division of markets by competitors is the practice of allocating territories between competitors at the same level of the market structure. *See* Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49–50 (1990).

120. A "group boycott" is an agreement among multiple firms not to deal with another firm. *See* Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 467–68 (1941).

121. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5–6 (1958).

122. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007); Cont'l T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 54 (1977); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

123. *See GTE Sylvania, Inc.*, 433 U.S. at 52–54, 57.

124. *See* Salop, *supra* note 109, at 2.

125. *See* Hovenkamp, *supra* note 113, at 103–04.

126. *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).

for using the restraint.[127] If the defendant provides sufficient countervailing evidence, the plaintiff will have an opportunity to demonstrate that the same result could have been achieved by a less restrictive alternative without the threat of competitive harm.[128]

The Supreme Court, in *Standard Oil Co. of New Jersey v. United States*,[129] implemented this common-law principle[130] to limit the seemingly broad mandate under the Sherman Act.[131] The Court has also extended the rule of reason in cases brought under § 5 of the FTCA.[132] Determining that Congress intended that, to be unlawful, a "restraint of trade" must result in harm to market competition and consumers through either higher prices,[133] reduced output, or reduced quality, the Court, in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*,[134] sought to balance antitrust protections with free-market principles underlying the freedom of contract.[135] Thus, under antitrust laws, courts generally begin with the presumption that decisions are made independently and competitively, and thereby are reasonable.[136]

With respect to vertical restraints, the Court concluded in *Leegin Creative Leather Prods. v. PSKS, Inc.*[137] that all vertical restraints, which are restrictive agreements undertaken at different levels of production distribution or supply,[138] are presumptively lawful and therefore subject to the rule of reason.[139] The Court reasoned that "the appreciated differences in economic effect between vertical and horizontal agreements" warrant

127. *See* Hovenkamp, *supra* note 113, at 103–04.

128. *See id.*

129. 221 U.S. 1 (1911).

130. *See* Blake, *supra* note 49, at 629–31 (citing Mitchel v. Reynolds (1711) 24 Eng. Rep. 347, 1 P. Wms. 181 as the leading historical account of the common law origins and initial use of covenants not to compete).

131. *See Standard Oil Co.*, 221 U.S. at 50, 53–58.

132. *See, e.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986) (evaluating a policy promulgated by an organization of dentists, which withheld dental x-rays from insurance companies, as unreasonable under the rule of reason, in violation of § 1 of the Sherman Act and thereby § 5 of the FTCA); Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999) (requiring that, under a FTCA § 5 claim of unfair methods of competition, lower courts must engage in a thorough inquiry into the anticompetitive effects where they are not intuitively obvious); FTC v. Actavis, Inc., 570 U.S. 136 (2013) (reviewing a patent holder's decision to settle a patent infringement suit to allegedly maintain a monopoly as not presumptively unreasonable under the rule of reason).

133. However, higher prices alone are not sufficient to raise an antitrust issue. For example, a monopolist with a legitimately obtained monopoly that charges higher prices could be permissible under the Sherman Act. The question is whether there is a requisite underlying harm to competition. *See* Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

134. 540 U.S. 398 (2004).

135. *See id.* at 407–08.

136. *See* Boise Cascade Corp. v. FTC, 637 F.2d 573, 581 (9th Cir. 1980).

137. 551 U.S. 877 (2007) (overruling Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)).

138. *See id.* at 898.

139. *See id.* at 898–99.

different applications of the per se rule.[140] Certain vertical restraints receive "quick look" review, which is a truncated version of the rule of reason analysis.[141] The Supreme Court has retracted its position regarding which types of vertical restraints constitute per se unlawful violations[142] by removing categories such as maximum[143] and minimum resale price maintenance agreements[144] as well as vertical nonprice restraints, such as exclusive dealing and exclusive distributorships.[145]

Courts focus on balancing the anticompetitive effects against the procompetitive benefits of a challenged restraint, and distinguish between restraints with anticompetitive effects that are harmful to the consumer and restraints stimulating competition for the consumer's best interest.[146] Other factors can include specific information about the relevant business and the restraint's nature and economic effect[147] as well as the market power of the entities involved, particularly for § 2 monopoly cases.[148]

The inquiry under the rule of reason, however, is not meant to be mechanical but rather fact intensive, fact inclusive, and flexible, even if the choice of rule is a legal question.[149] Further, the Supreme Court has consistently considered the economic effects of a challenged practice.[150] In *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[151] the Court invoked a market-failure approach to justifying facially anticompetitive restraints.[152]

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140. *Id.* at 888.

141. *See, e.g.*, Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999) (holding that a court should only apply the quick look rule when an observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect on customers and the market).

142. *See* D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003, 1008 (2014) (arguing that some types of vertical restraints have effectively become per se legal).

143. *See* State Oil Co. v. Khan, 522 U.S. 3, 15 (1997) (overruling Albrecht v. Herald Co., 390 U.S. 145 (1968)).

144. *See Leegin*, 551 U.S. at 888.

145. *See* Cont'l T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 52–54, 57 (1977).

146. *See* FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 396 (1953) (reaffirming the use of the rule of reason to specify under what circumstances a method of competition can become "unfair" within the meaning of § 5 of the FTCA, i.e., the "exigencies of a particular situation, trade practices, or the practical requirements of the business in question"); *see also* Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 5 n.7 (2016) ("The Rule of Reason . . . [is] a standard that balances pro- with anticompetitive effects . . . ."). *But see* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1267, 1346 (observing that actual balancing is quite rare).

147. *See* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

148. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 174 (1948).

149. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978); *see also* Hovenkamp, *supra* note 113, at 137.

150. *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 54–56 (1977); *see also* Alan J. Meese, *Economic Theory, Trader Freedom and Consumer Welfare:* State Oil Co. v. Khan *and the Continuing Incoherence of Antitrust Doctrine*, 84 CORNELL L. REV. 763, 768 (1999).

151. 433 U.S. 36 (1977) (applying the rule of reason standard to evaluate the legality of territorial resale restrictions over retailers).

152. *See* Lindsey M. Edwards & Joshua D. Wright, *The Death of Antitrust Safe Harbors: Causes and Consequences*, 23 GEO. MASON L. REV. 1205, 1205 (2016).

The Court recognized that vertical exclusive-territory restraints could alleviate market imperfections such as (1) preventing free riding[153] and hold-up problems;[154] (2) incentivizing promotional efforts, training, and employee assistance; (3) enabling long-term planning, allocating limited resources, and preserving confidentiality; as well as (4) overcoming branding and reputation imbalances.[155] For example, vertical nonprice restraints can promote interbrand competition by allowing manufacturers to achieve efficiencies in the distribution of their products and to make capital and labor investments.[156] As Professor Herbert Hovenkamp argues, a purely vertical agreement does nothing to increase market shares.[157] Although the large market share may already exist, the vertical agreement itself does not add to it.[158] As a result, Professor Hovenkamp suggests that challenges to purely vertical agreements require an additional explanation of how harm to competition comes about as such agreements are presumptively less offensive to competition than horizontal restraints.[159]

In fact, the legislative history of the FTCA similarly demonstrates that its sponsors, though seeking to limit judicial applications of the rule of reason, adopted the FTCA with the intention that interpretations of unfair methods of competition would inevitably rely on the rule of reason.[160] Scholars have commented that, given that § 5's scope encompasses a wider range of conduct than that of the Sherman Act, the rule of reason framework would limit unreasonable and arbitrary antitrust enforcement.[161]

153. *See GTE Sylvania*, 433 U.S. at 55. Free riding results from the presence of externalities which is a common cause of market failure. *See id.*

154. *See* Michael Lipsitz and Evan Starr, *Low-Wage Workers and the Enforceability of Non-compete Agreements*, 68 MGMT. SCI. 143, 145 (2021). Noncompetes may solve "hold-up" problems ex ante because the worker and firm have a mutual interest in sharing important information as it increases the worker's productivity; noncompetes also have ex post benefits because a firm can raise a worker's compensation to protect itself from the threat of leaked information. *See* U.S. DEP'T OF THE TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 7 (2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf [https://perma.cc/YQJ3-AGP7].

155. *See* BORK, *supra* note 4, at 296–300; *see also* McWane, Inc. v. FTC, 783 F.3d 814, 841 (11th Cir. 2015) (noting a list of permissible restraints as those that "reduce cost, increase output or improve product quality, service, or innovation").

156. *See GTE Sylvania*, 433 U.S. at 54–55.

157. *See* Hovenkamp, *supra* note 113, at 156.

158. *See id.*

159. *See id.*

160. *See* 51 Cong. Rec. 12915 (1914). Senator Albert B. Cummins of Iowa stated, "If the rule of reason—and I am not quarrelling with the rule of reason, because it must prevail everywhere—if the rule of reason is used to interpret the phrase 'restraint of trade,' likewise will the rule of reason be used to interpret the phrase 'unfair competition.'" *Id.*; *see also* Averitt, *supra* note 73, at 236–38.

161. *See* Averitt, *supra* note 73, at 236–38.; *see also* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 456 (1986) (declining to hold conduct that merely resembles a prohibited boycott as per se illegal and refusing to extend the per se rule to restraints in the context of business relationships where the economic impact of certain practices is not immediately obvious).

C. Defining Noncompetes as an Antitrust Issue

The prevailing view disfavors enforcing antitrust laws to fix defects in governmental policy[162] or to cure failures of the legislative process.[163] In practice, antitrust enforcement has largely targeted anticompetitive conduct in the product and services markets that harms consumers—or "downstream purchasers"—and competition itself, as opposed to workers' wages and mobility in the labor market.[164] Restraints on workers, however, do not lie beyond the reach of antitrust law, and courts have held that § 1 of the Sherman Act can apply to postemployment restrictive agreements including noncompetes, typically as vertical restraints.[165]

To evaluate how noncompetes may affect the labor market as an antitrust matter, it is essential to define an employer's labor market power—or "monopsony power"[166]—and determine if an employer's use of a postemployment contractual agreement increases that power.[167] Generally, a labor market is a group of jobs, between which workers of similar occupations can switch with relative ease, located within a geographic area usually defined by the commuting distance of workers.[168] In a labor market, employers function as both sellers in the product and service markets and buyers in the labor market because they purchase labor as a supply input.[169] When a small number of employers hire from a pool of workers of a certain skill level within a geographic area in which workers commute, the employers are said to have monopsony power.[170]

Adapting the hypothetical monopolist test—implemented for product market definitions in the merger context—into a hypothetical monopsonist

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162. 1 AREEDA & HOVENKAMP, *supra* note 60, at 7.

163. *See id.*

164. *See* Hovenkamp, *supra* note 113, at 118. *But see* Lauren Alexander & Steven C. Salop, *Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting of Out-of-Market Benefits*, 90 U. CHI. L. REV. 273, 274 (2023) (arguing that restraints on workers, characterized as trading partners in the upstream market, are not outweighed by the downstream benefits to consumers under the ancillary restraints doctrine).

165. *See, e.g.*, Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082 (2d Cir. 1977); Bradford v. N.Y. Times, 501 F.2d 51, 59 (2d Cir. 1974). Contracts or agreements which are imposed from higher levels of the distribution system and restrict supply-input providers constitute vertical restraints, and such restraints neither increase nor decrease competition in the relevant market. *See* Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 69 (1991).

166. Monopsony power is typically understood as a firm's power to reduce the compensation it pays to workers, and there is generally an assumption that a firm with monopsony power will pay less than it would for an equivalent job would in a hypothetical, perfectly competitive market. *See* U.S. DEP'T OF THE TREASURY, THE STATE OF LABOR MARKET COMPETITION 2 (2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf [https://perma.cc/Y5R5-RZGT].

167. *See* Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165, 192–93 (2020).

168. *See* José Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, 66 LABOUR ECON. 1, 1–2 (2020).

169. *See* Posner, *supra* note 167, at 193.

170. *See* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 538 (2018).

test may be an apt analogy.[171] Employers with monopsony power can push wages below their competitive, "market-clearing" level—typically a level at which there is equilibrium between supply and demand.[172] Under the hypothetical monopsonist test, one asks whether a significant wage suppression would be profitable for an employer monopsonizing the market.[173] As in the hypothetical monopolist test, if the decrease in wages would be unprofitable because workers would switch to other employers, then it would not be profitable for the hypothetical monopsonist to implement a "small significant non-transitory increase in price" (SSNIP) or a "small significant non-transitory decrease in wages."[174] When wages are set below competitive levels, workers are less incentivized to supply labor to those underpaying firms.[175] Thus, as the labor supply decreases, so will the volume of output and overall wealth, thereby creating greater economic inefficiencies.[176] Consistent with antitrust policy related to the product and service markets, there is an inherent tension between equity for workers and business efficiency for firms in the labor market.[177]

Scholars have suggested that labor market conditions parallel those of the product market.[178] For example, an exclusive dealing arrangement in a product market is one analogy to a noncompete because such an arrangement would allow a seller with market power to sell only to distributors who agree not to purchase from competing sellers.[179] Exclusive dealing arrangements have the potential to increase market concentration by foreclosing entry of new competitors or by pushing out existing competitors because they are deprived of an essential input.[180] Increase in market concentration, and thereby the foreclosure of new rivals, is a factor that fortifies a firm's market power.[181]

Similarly, postemployment restrictive agreements, such as noncompetes, can resemble exclusive dealing arrangements between a manufacturer and its distributors, especially under monopsonistic conditions.[182] The effects of noncompetes are further discussed in Part II. Furthermore, the U.S. labor market is not a pure monopsony.[183] Although certain geographic areas and industries may be appropriately characterized as monopsonistic, the labor

171. *See* Azar et al., *supra* note 168, at 4–5.
172. *See* Matthew Dimick, *Conflict of Laws?: Tensions between Antitrust and Labor Law*, 90 U. CHI. L. REV. 379, 381 (2023); *see also infra* Part III.A (discussing market definition further).
173. *See id.*
174. *See* U.S. DEP'T OF TREASURY, *supra* note 166, at 9, 49. Under the merger guidelines, the SSNIP is set at a 5 percent increase for consumer prices. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 1, at 6.
175. *See* Naidu et al., *supra* note 170, at 558–60.
176. *See id.* at 559.
177. *See* Dimick, *supra* note 172, at 393.
178. *See* Naidu et al., *supra* note 170, at 558.
179. *See id.* at 596.
180. *See* Hovenkamp, *supra* note 113, at 158.
181. *See* Naidu et al., *supra* note 170, at 538–39.
182. *See* U.S. DEP'T OF TREASURY, *supra* note 166, at 3.
183. *See id.*

market is not so inelastic that workers are "locked-in" to their current jobs and wholly without alternatives in the event of a wage decrease by their current employer.[184] At the same time, employers may actively contribute to frictions[185] in the job market.[186] Noncompetes, for example, potentially reduce the elasticity of labor supply because they exacerbate the search frictions in geographic mobility by making it more difficult for workers to search for a new employer.[187] These theoretical concepts of the labor market are necessary considerations in any potential antitrust challenge against employers' use of noncompetes.

D. The Landscape of Noncompete Enforcement

Under the common law,[188] state courts enforced noncompetes only to the extent that they were reasonable in scope—geographically and temporally—and were necessary to protect a legitimate business interest.[189] Today, state courts generally employ a standard of reasonableness and are willing to enforce noncompetes that protect (1) an investment in employee training, (2) trade secrets and other proprietary business information, and (3) employee goodwill.[190] Some state courts implement the full, burden-shifting analysis to determine whether the agreement is broader than necessary to achieve any legitimate objective.[191] Other courts have foregone the full rule of reason analysis and allow plaintiffs to go straight to the third step when challenging the restrictive agreement.[192]

A few states have banned noncompetes entirely,[193] and other states have enacted restrictions, such as setting a compensation threshold,[194] requiring advance notice,[195] or making them unenforceable against certain types of

184. *See id.* at 4, 15.

185. "Search frictions" are impediments to a match, or agreement, between two parties for a partnership or transaction. *See* Posner, *supra* note 167, at 181; *see also* Naidu et al., *supra* note 170, at 541.

186. *See* Day, *supra* note 25, at 501.

187. *See* U.S. DEP'T OF TREASURY, *supra* note 166, at 6.

188. *See* Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800-1920*, 52 HASTINGS L.J. 441, 455 (2001) (recognizing that English courts were particularly unreceptive to restrictive covenants in the apprenticeship system and that because an artisan could only pursue one trade, the act of restricting this pursuit was met with disfavor).

189. *See, e.g.*, Lucente v. Int'l Bus. Machs. Corp., 310 F.3d 243, 254 (2d Cir. 2002) (enforcing restrictive covenants in the employment context "only to the extent they are reasonable and necessary to protect valid business interests."); *see* Estee Lauder Cos. Inc. v. Batra, 430 F. Supp. 2d 158 (S.D.N.Y. 2006); Synthes, Inc. v. Emerge Med., Inc., 25 F. Supp. 3d 617 (E.D. Pa. 2014); *see also* RESTATEMENT OF EMP. L. § 8.06 (AM. L. INST. 2015).

190. *See* Swift, *supra* note 7, at 231–32.

191. *See id.*

192. *See* Meese, *supra* note 24, at 634.

193. These states include California, Minnesota, North Dakota, Oklahoma, and Washington, D.C. *See* CAL. BUS. & PROF. CODE § 16600 (West 2023); MINN. STAT. ANN. § 181.988 (West 2023); N.D. CENT. CODE ANN. § 9-08-06 (West 2023); OKLA. STAT. tit. 15, § 217 (2023); D.C. CODE ANN. § 32-581.02 (West 2023).

194. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 149, § 24L(b)(iv) (2021).

195. *See id.* § 24L(b)(i).

workers such as low-wage workers.[196] California, which strictly prohibits noncompetes, permits limited exceptions and enforces such agreements arising from a merger or sale of a business.[197] Further, in nonenforcing states like California and North Dakota, about 18 to 19 percent of labor force participants are bound by noncompetition agreements.[198] Evidently, states have adopted different approaches in noncompete enforcement, but state courts have reserved a degree of discretion, in accordance with their equitable power, to permit exceptions to nonenforceability on a case-by-case basis.[199]

Federal courts have exhibited a reluctance to condemn postemployment restrictive agreements as per se illegal under state contract laws and federal antitrust laws.[200] However, there is a lack of precedent relating to labor input markets, given the predominant emphasis on consumer output markets.[201] In the antitrust challenges to postemployment contracts that do exist, courts have used the rule of reason and favored a fact-intensive approach in determining the reasonableness of such contracts and their effects on competition.[202] Courts have assessed antitrust challenges to noncompetes by considering whether "(1) the persons or entities to the agreement intend to harm or restrain competition; (2) an actual injury to competition occurs; and (3) the restraint is unreasonable as determined by balancing the restraint and any justifications or pro-competitive effects of the restraint."[203]

A number of federal antitrust cases against postemployment restrictions have involved horizontal conspiracies, such as no-poach, nonsolicitation, or no-switching agreements.[204] Even in instances where plaintiffs have proven

196. *See, e.g.*, ME. STAT. tit. 26, § 599-A(3) (2023); MD. CODE ANN., LAB. & EMPL. § 3-716 (West 2024) (voiding certain noncompete provisions in employment contracts concerning veterinary and healthcare professionals); VA. CODE ANN. § 40.1-28.7:8 (West 2020); N.H. REV. STAT. ANN. § 275:70-a (2019); 28 R.I. GEN. LAWS § 28-59-3(a)(4) (West 2020); WASH. REV. CODE § 49.62.020 (2024) (prohibiting noncompete enforcement for employees earning less than $100,000).

197. *See* BUS. & PROF. §§ 16600–2.5. In California, courts will allow the enforcement of noncompetes applied to individuals who own above a certain percentage of a business, and "[a]ny member may . . . agree that he or she or it will not carry on a similar business within a specified geographic area." *Id.* § 16602.5.

198. *See* J.J. Prescott, Norman D. Bishara & Evan Starr, *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. ST. L. REV. 369, 461.

199. *See* RESTATEMENT OF EMP. L. § 8.08 (AM. L. INST. 2015).

200. *See* Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 267–68 (7th Cir. 1981).

201. *See* Naidu et al., *supra* note 170, at 540, 540 n.10.

202. *See* Am. Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781 (9th Cir. 1996); Trixler Brokerage Co. v. Ralston Purina Co., 505 F.2d 1045 (9th Cir. 1974) (finding that a noncompete provision was not a restraint of trade where reasonable in scope and duration and where it served a legitimate business purpose). "[T]he standard for determining whether an arrangement violates Section 1 of the Sherman Act is whether it is so inherently anti-competitive in purpose or effect, or both, as to constitute an unreasonable restraint of trade." *Id.* at 1051.

203. *See Am. Ad Mgmt.*, 92 F.3d at 789.

204. *See* Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., 9 F.4th 1102, 1109 (9th Cir. 2021) ("[T]he parties' non-solicitation agreement constitutes a horizontal restraint."); United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013) (holding that a no-poach agreement between two technology companies constituted a service division agreement—analogous to a product division agreement—and thus was a horizontal market allocation agreement). *But see* In re Outpatient Med. Ctr. Emp. Antitrust Litig., 630 F.Supp.3d 968, 988

the existence of a horizontal agreement among competing employers, courts have not immediately applied the per se rule and labeled an agreement a "naked restraint"—which generates profits depending on the firm's exercise of their market power.[205] Rather, they have required further economic analysis of a contractual provision to determine if the restraint is ancillary to procompetitive contracts or has procompetitive justifications such as increasing output, by producing a greater quantity of goods or a new good that would not otherwise exist, or lowering prices to consumers.[206]

Antitrust challenges to noncompetes, including nondisclosure agreements (NDAs) and nonsolicitation agreements, predominantly are brought as vertical restraint claims. For example, in *Aydin Corp. v. Loral Corp.*,[207] the plaintiff brought a § 1 challenge against their former employer alleging that a postemployment noninterference or NDA was an unreasonable restraint on trade.[208] The U.S. Court of Appeals for the Ninth Circuit rejected the plaintiff's invitation to test the agreement under the per se rule because the plaintiff had failed to provide evidence of harm to the competitive process.[209] In that case, evidence of the defendant's actions having a harmful effect on a competitor did not demonstrate an overall reduction in competition of the relevant market.[210]

The Second Circuit has also held in favor of applying the rule of reason in antitrust challenges against restrictive employee agreements.[211] In *Bogan v. Hodgkins*,[212] the Second Circuit held that an intrafirm agreement among franchisees to not recruit or hire each other's subordinate insurance agents was not subject to a per se analysis.[213] The court ultimately concluded that the plaintiffs failed to specify a relevant market in which the agreement could produce an anticompetitive, interfirm effect and emphasized that that "the agreement is far from a typical *per se* illegal restraint" as "no-switching restriction cases typically involve multiple companies."[214]

In *Bradford v. New York Times Co.*,[215] the plaintiff, a high-level executive at the New York Times, entered an agreement providing for retirement benefits on the condition that he did not engage in any business, practice, or

(N.D. Ill. 2022) ("Plaintiffs have plausibly alleged that the non-solicitation agreements are per se unreasonable naked horizontal market allocation agreements."); In re Ry. Indus. Emp. No-Poach Antitrust Litig., 395 F. Supp. 3d 464, 481 (W.D. Pa. 2019) (finding the same).

205. *See* Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 705 (7th Cir. 2023); *see also* Hovenkamp, *supra* note 113, at 99.

206. *See Deslandes*, 81 F.4th at 704–05.

207. 718 F.2d 897 (9th Cir. 1983).

208. *Id.* at 897.

209. *Id.* at 899.

210. *Id.* at 902.

211. *See, e.g.*, Bogan v. Hodgkins, 166 F.3d 509 (2d Cir. 1999); Todd v. Exxon Corp., 275 F.3d 191, 196–98 (2d Cir. 2001); Union Circulation Co. v. FTC, 241 F.2d 652, 655 (2d Cir. 1957).

212. 166 F.3d 509 (2d Cir. 1999).

213. *Id.* at 515.

214. *Id.*

215. 501 F.2d 51 (2d Cir. 1974).

employment with the newspaper's competitors.[216] The plaintiff later took a position at a competing newspaper, and was notified that he had relinquished all rights under the plan.[217] Although the noncompete limited the plaintiff's employment opportunities after his termination, the Second Circuit determined that the employee here received consideration for his promise to render a particular performance, which the court believed to be a significant factor in the reasonableness analysis.[218] Finding no per se violation of either the Sherman Act or the Clayton Act, the Second Circuit applied the rule of reason analysis[219] because the court was dubious that Bradford's employment with a competitor had more than a "de minimis effect," if any, on interstate commerce.[220] Other circuit courts have also refrained from applying the per se rule to restrictive employment agreements.[221] The case law involving postemployment agreements demonstrates that courts generally default to a factual inquiry under the rule of reason.

Implementing antitrust law as a statutory basis for regulating labor markets is a relatively novel strategy, as the main focus is on labor market conditions as opposed to product and service market conditions.[222] Depending on the level of competition of the product market, the impact of a noncompete on the price of the final output may be minimal.[223] Although the U.S. federal antitrust agencies view noncompetes as per se violations of antitrust laws, further discussions about the applicable review standard—the per se rule or the rule of reason—for noncompetes are warranted.

II. THE APPROPRIATE TEST FOR NONCOMPETES

Although courts have consistently treated vertical restraints as warranting the rule of reason, this is not a bright-line rule under Supreme Court precedent. The Court has cautioned against the use of the per se rule because the judiciary may have insufficient experience with the restraint or conduct at issue.[224] Accordingly, as courts acquire greater familiarity, they have the discretion to retract their application of the per se rule or the rule of reason.[225] Thus, in determining the appropriate rule, it is imperative to consider whether the existing case law, literature, and empirical data suggest that noncompetes

216. *Id.*
217. *Id.*
218. *Id.* at 58.
219. *Id.* at 59–60.
220. *Id.* at 58 n.5.
221. *See, e.g.*, Eichorn v. AT&T Corp., 248 F.3d 131, 146–48 (3d Cir. 2001) (considering a no-hire agreement between AT&T and the buyer of a subsidiary, characterizing the no-hire agreement as a covenant not to compete, which the court upheld because of its limited scope despite the agreement's anticompetitive effects); McDonald v. Johnson & Johnson, 722 F.2d 1370, 1378 (8th Cir. 1983) (noting that a noncompete covenant that is "reasonably limited in time and geography" may be necessary to protect parties' legitimate interests).
222. *See* Dimick, *supra* note 172, at 381, 391.
223. *See* Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953, 1040–42 (2020).
224. *See* United States v. Topco Assocs., 405 U.S. 596, 607 (1972).
225. *See supra* Part I.B.

are overwhelmingly beneficial or harmful to competition and beyond the pale of reasonableness.[226]

This part explores the current debate surrounding both the use of noncompetes and the propriety of a per se rule against them. Part II.A surveys the arguments put forth by the FTC and other proponents of a categorical ban as to why a per se rule is most appropriate for noncompetes. Part II.B reviews the arguments in support of the rule of reason, given that employers may rely on noncompetes to protect legitimate business objectives and procompetitive justifications.

A. The Growing Disfavor of the Rule of Reason

Today, an increasing number of scholars have commented that courts and legislators have gradually sought to protect workers' interests in their economic mobility and job security because of the fundamental changes taking place in a technologically driven economy.[227] As some scholars argue, the grounds to rationalize the need for noncompetes has become considerably more difficult.[228] In response, the FTC's rule favors a categorical ban on noncompetes which would effectively amount to a per se prohibition.[229] The rule thereby dispenses with any sort of reasonableness analysis and precludes employers from putting forth procompetitive justifications or other legitimate business objectives.[230] In addition, there would be no further industry-specific or market-specific inquiry into the noncompete's effect on competition, as typically required for vertical restraints.[231]

The rule is the most forceful endeavor to eliminate noncompetes, sweeping even the reach of California laws which impose the strictest regime over noncompete enforceability.[232] Unlike the noncompete laws in most state jurisdictions, the rule also prohibits other types of restrictive employment covenants—such as NDAs and client or customer nonsolicitation agreements—if their scope is so broad that they effectively function as noncompetes.[233]

In justifying the categorical ban over noncompetes, the FTC reasons that public policy leans in favor of employee mobility.[234] In part, the variation in

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226. *See* Hovenkamp, *supra* note 113, at 97.

227. *See* Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 111–12, 168 (2008).

228. *See id.*

229. *See supra* notes 29–31.

230. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38421–34 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).

231. *See id.* at 38358.

232. *See* CAL. BUS. & PROF. Code § 16600 (West 2023).

233. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38362–65.

234. *See* Eleanore R. Godfrey, *Inevitable Disclosure of Trade Secrets: Employee Mobility v. Employer's Rights*, 3 J. HIGH TECH. L. 161, 167 (2004) ("Public policy concerns relat[e] to employee mobility and freedom of employment . . . .").

state laws governing noncompete enforcement[235] has also precipitated the FTC's efforts to put forth a uniform approach to noncompetes.[236] As the Restatement (Third) of Unfair Competition notes, "The interstate character of modern business accentuates the interest in uniformity—an interest advanced by a consistent interpretation of both the common law rules and derivative statutory provisions that define the boundaries of fair competition."[237]

1. Administrative Costs

The "New Brandeis" movement—a school of thought reviving the Progressive Era conception of competition law[238]—has also demonstrated a preference for the per se rule.[239] The rule of reason has received increasing opposition because it imposes both administrative costs and costs on individual economic freedom.[240] With respect to their first concern of administrative costs, scholars have maintained that a bright-line,[241] per se rule provides valuable guidance to employers in planning their business strategies and assures them a measure of predictability regarding the risk of antitrust liability.[242] Thus, a per se rule would eliminate the need for a searching economic analysis, which, as Neo-Brandeisians contend, courts are ill-suited to conduct.[243]

Moreover, the standing requirements for antitrust cases are more rigorous than those for cases brought under Article III.[244] For private party plaintiffs, the evidentiary burden that plaintiffs bear at the pleading stage tends to be dispositive of the case altogether and overly forgiving of defendants.[245] Economist Jesse W. Markham cautions against the use of the rule of reason

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235. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38452–53.

236. *See id.* at 38465 (citing Gillian Lester & Elizabeth Ryan, *Choice of Law and Employee Restrictive Covenants: An American Perspective*, 31 COMP. LAB. & POL'Y J. 389, 396–402 (2010) (finding that the current patchwork of varying state laws is an unworkable standard)).

237. RESTATEMENT (THIRD) OF UNFAIR COMPETITION Foreword (AM. L. INST. 1995).

238. *See* David Dayen, *This Budding Movement Wants to Smash Monopolies*, THE NATION (Apr. 4, 2017), https://www.thenation.com/article/archive/this-budding-movement-wants-to-smash-monopolies/ [https://perma.cc/PE8M-XNW9]; *see also* Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1676 (2020).

239. *See generally* Brian Callaci & Sandeep Vaheesan, *Antitrust Remedies for Fissured Work*, 108 CORNELL L. REV. ONLINE 27, 50–52 (2022).

240. *See* Naidu et al., *supra* note 170, at 574–99.

241. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 104 n.26 (1984).

242. *See* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343 (1982); *see also* Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 22 LOY. CONSUMER L. REV. 15 (2009).

243. *See* United States v. Topco Assocs., 405 U.S. 596, 609 n.10, 622 (1972) (implying that the rule of reason forces courts "to ramble through the wilds of economic theory" and noting that the judiciary is "of limited utility in examining difficult economic problems").

244. *See* Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786, 791 (S.D. Ill. 2018).

245. *See* Khan, *supra* note 238, at 1676; *see also* Herbert Hovenkamp, *Noncompete Agreements and Antitrust's Rule of Reason*, REGUL. REV. (Jan. 16, 2023), https://www.theregreview.org/2023/01/16/hovenkamp-noncompetes-and-rule-of-reason/ [https://perma.cc/A7SE-RD9Q] (arguing that the rule of reason could overburden private party plaintiffs during the pleading stage).

because the rule inherently deters plaintiffs from bringing challenges and reveals an "anti-plaintiff bias."[246] Neo-Brandeisians and others in favor of a per se application emphasize that a finding of "unreasonable" conduct under the rule of reason imposes significant litigation costs to all parties of the litigation.[247] Furthermore, they argue that the rule of reason necessarily burdens plaintiffs with costly and time-consuming discovery costs.[248]

2. Anticompetitive, Economic Costs

In order to make a case for per se application, plaintiffs must demonstrate some tangible, detrimental injury that flowed from anticompetitive effects——with no redeeming qualities—to the competitive process itself, not just a competitor.[249] However, the FTC concededly recognizes that a single noncompete is unlikely to yield anticompetitive harm to the labor market or a product and service market through increased prices or reduced output and quality.[250] In response, the FTC suggests that noncompetes, in their aggregate usage, depreciate competition in the labor market.[251] The FTC contends that increased concentration in the labor market reduces overall worker power by increasing search frictions and decreasing wages.[252]

Recent literature suggests that enforcement of noncompetes also tends to correlate with decreased innovation because of decreased spending on R&D and a lack of knowledge spillovers; knowledge "spills over" between firms when there is employee movement.[253] First, noncompetes restrict employees from leaving their former employers to form a new firm.[254] The FTC surmises that a prohibition on noncompetes would spur new entry and business formation.[255] Without restrictions on their mobility, workers are free to form spin-off companies that would compete with their former employers and thereby increase competition, and new firms would be more

246. Jesse W. Markham, Jr., *Sailing a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 FORDHAM J. CORP. & FIN. L. 591, 627–28 (2012).

247. *See Topco Assocs.*, 405 U.S. at 611–12.

248. *See* Stucke, *supra* note 242, at 19.

249. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 113–15 (1984).

250. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38463 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912). *See, e.g.*, Caremark Homecare, Inc. v. New England Critical Care, Inc., 700 F. Supp. 1033, 1035–36 (D. Minn. 1988) (finding a lack of support to demonstrate anticompetitive effects to interstate commerce).

251. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38358, 38380.

252. *See id.*

253. *See* Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 NYU L. REV. 575, 579 (1999); *see also* Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 376, 413 (2011) (concluding "that increased enforceability [of noncompetes] leads to . . . lower and more salary-based compensation, reduced posttransfer compensation, and reduced capital expenditures per [executive] employee").

254. *See* Seaman, *supra* note 41, at 1196.

255. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38390, 38393, 38398–99, 38407.

inclined to enter markets if they have a guarantee of a potential pool of skilled and experienced labor.[256]

Additionally, businesses seeking to hire talent would have greater access to coveted workers and would eliminate the need for high and inefficient buyout payments for employees bound to noncompetes.[257] Professor Ronald J. Gilson argues that these knowledge spillovers ultimately benefit consumers because new employee transmitted information diffuses throughout an employer's business operation in the form of new and efficient techniques in design, production, and marketing.[258]

Second, the FTC argues that noncompetes may inhibit entrepreneurial ventures and foreclose competitors from access to skilled workers, which would otherwise enhance competition in the product and service markets.[259] An increase in competition among employers may dilute the level of market concentration, which could trickle down into lower consumer prices.[260]

The market concentration level may simultaneously impact workers' wages.[261] One study conducted by economists José Azar, Ioana E. Marinescu, Marshall Steinbaum, and Bledi Taska showed that occupational wages are lower when labor market concentration is higher and that, across industries, a 10 percent increase in labor market concentration is associated with a 1 percent decrease in wages in the "top occupation"—meaning the highest occupational position in an industry.[262] The FTC also assessed empirical data on the relationship of noncompete enforcement over physicians and consumer prices.[263] This data demonstrated a positive correlation between increased noncompete enforceability and increased physician-market concentration levels as well as consumer prices.[264] Additionally, Professors Hiba Hafiz and Marinescu[265] argue that, as the labor market becomes more concentrated, employers have a greater incentive to reduce the number of available employment opportunities and lower wages.[266]

256. *See id.* at 38389, 38423, 38445, 38485.
257. *See id.* at 38408.
258. *See* Gilson, *supra* note 253, at 586.
259. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38388–91.
260. *See id.* at 38389, 38392.
261. *See generally* Azar et al., *supra* note 168.
262. *See id.* at 14.
263. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38398*; see also* Naomi Hausman & Kurt Lavetti, *Physician Practice Organization and Negotiated Prices: Evidence from State Law Changes*, 13 AM. ECON. J. APPLIED ECON. 258, 284 (2021).
264. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38398. However, the cited study did not attribute decreased consumer prices to the pass-through of lower labor costs. *See also* Hausman & Lavetti, *supra* note 263, at 284.
265. *See* Hiba Hafiz & Ioana Marinescu, *Labor Market Regulation and Worker Power*, U. CHI. L. REV. 469, 505 (2023).
266. *See id.*

3. Social Costs

Scholars have also maintained that the facial unreasonableness of noncompetes[267] far outweighs the procompetitive rationale that justifies their use.[268] Neo-Brandeisians and others in support of a per se rule find that the potential restrictions inflicted on workers in their mobility and ability to obtain increased pay through new opportunities are sufficient to trigger antitrust liability without any industry, market, or case-specific analysis.[269] Those who favor a per se rule contend that antitrust laws should be implemented to eliminate the inherent asymmetric power between employers and workers.[270] They find that the power structure not only harms competition among businesses in a highly concentrated labor market but also the employee's free enterprise.[271]

A common explanation is that there is an inherent bargaining failure that occurs due to disproportionate bargaining power and information asymmetry between an employer and an employee.[272] Professor Eric A. Posner posits that when a rational and informed employee seeks to negotiate with the employer better employment terms for themself, they will demand a wage premium to compensate for the expected cost of including a noncompete provision in the contract—the cost being the probability of missing out on a higher wage from another employer.[273] Professor Posner suggests that such a scenario rarely occurs because noncompete provisions are included in take-it-or-leave-it contracts.[274] As Professors Evan Starr, J.J. Prescott, and Norman Bishara find, approximately 12 percent in a sample of 11,505 participants across a broad range of industries[275] negotiated over their noncompetes prior to accepting a job offer.[276] These scholars suggest that noncompetes are typically provisions that are rarely negotiated and are rarely tailored to an employee's own interests.[277]

Another potential effect of this bargaining failure is that workers do not receive sufficient or any consideration for signing a noncompete.[278] Professors Starr, Prescott, and Bishara found that employees who enter into noncompetes after accepting a job offer are relatively less likely to be

267. *See generally* Non-Compete Clause Rule, 89 Fed. Reg. at 38342.
268. *See infra* Parts II.B.2–3.
269. *See* Naidu et al., *supra* note 170, at 574–99.
270. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38371, 38375, 38377; *see also* Dayen, *supra* note 238.
271. *See* Blake, *supra* note 49, at 627, 683.
272. *See id.*
273. *See* Posner, *supra* note 167.
274. *See id.*; *see also* Callaci & Vaheesan, *supra* note 239, at 45.
275. *See* Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the US Labor Force*, 64 J.L. & ECON. 53, 72 tbl.7 (2021). This figure includes individuals who were currently bound by a noncompete at the time of the study and those bound by one in the past. *See id.*
276. *See id.* at 57 tbl.1, 69.
277. *See id.*
278. *See id.*; *see also* Hiba Hafiz, *The Brand Defense*, 43 BERKELEY J. EMP. & LAB. L. 1, 63 (2022).

promised or receive any consideration for their commitment not to compete.[279] As a policy concern, the statistical findings of depressed wages for employees who have late notice about the noncompete is especially problematic for low-wage employees who typically do not have access to the employer's trade secrets or receive additional investment through trainings.[280] As Professor Starr and economist Michael Lipsitz suggest, the use of noncompete agreements and other postemployment restrictive agreements over minimum or low-wage workers demonstrates a lack of a protectable interest: such workers are more fungible across industries, less exposed to proprietary information, and are less likely to be in a position to negotiate with a potential employer.[281]

Although studies have supported the idea that postemployment restraints are frequently used to cover workers in high-skill and high-paying jobs, such restraints may also cover a number of low-wage workers.[282] In the study conducted by Professors Starr, Prescott, and Bishara, their data demonstrated that 13.3 percent of workers who earn less than $40,000 per year reported they were currently bound by a noncompete.[283] For example, in *Butler v. Jimmy John's Franchise, LLC*,[284] the U.S. District Court for the Southern District of Illinois characterized the no-hire agreements among a chain restaurant's franchisees as a restraint that plainly produces an anticompetitive effect on the labor market targeted by those firms.[285] Despite the presumptively anticompetitive effects of the agreements at issue, the court did not reach the determination of which rule to apply.[286] The court went on to state that if the evidence of the franchisee's independence is weak, then the rule of reason would be applicable, given the vertical nature of the agreement.[287]

With respect to low-wage workers, scholars contend that noncompete usage is facially overbroad and unnecessary.[288] Generally, courts have found that employees who work at lower wage rates and in entry-level positions tend not to be exposed to insider and confidential business information.[289]

279. *See* Starr et al., *supra* note 275, at 75–77.
280. *See id.* at 81; *see also* Hafiz & Marinescu, *supra* note 265, at 508.
281. *See* Lipsitz & Starr, *supra* note 154, at 145–46.
282. *See* Seaman, *supra* note 41, at 1221.
283. *See* Starr et al., *supra* note 275, at 63 tbl.5.
284. 331 F. Supp. 3d 786 (2018).
285. *Id.* at 796.
286. *Id.* at 797.
287. *Id.*
288. *See generally* Starr et al., *supra* note 275.
289. *See, e.g.*, Awp, Inc. v. Safe Zone Servs., LLC, No. 19-CV-734, 2022 U.S. Dist. LEXIS 59764, at *24 (W.D. Ky. Mar. 31, 2022) (finding that the former employees did not have access to any proprietary business information or client lists, in that these employees were not responsible for bringing in new clients and business); Scenic Aviation, Inc. v. Blick, No. 02-CV-1201, 2003 U.S. Dist. LEXIS 28009, at *43 (D. Utah Aug. 4, 2003) (finding that the litigation burden may be particularly substantial when noncompetes are directed at lower-level employees); Genex Coop., Inc. v. Contreras, No. 13-cv-3008, 2014 U.S. Dist. LEXIS 141417, at *23 (E.D. Wash. Oct. 3, 2014) (holding a noncompete unenforceable because the employee

In cases where lower-level and low-wage workers bound by noncompetes seek to leave, employers face a heavy burden to show that the employee possessed any significant trade secret or confidential information and that they would suffer irreparable harm should the employee go to a competitor.[290] Thus, whether courts decide to enforce a noncompete may depend on the specific employee's context.

Moreover, NDAs and nonsolicitation clauses are often proffered as less restrictive postemployment restraints than noncompetes which are more likely found to be enforceable by a court.[291] NDAs are sometimes included in noncompetes, prohibiting employees from disclosing information that is contractually designated as confidential.[292]

Nonsolicitation clauses are similar to noncompetes but prohibit an employee from (1) contacting any of the former employer's customers or clients for a specific duration and/or (2) hiring or attempting to hire a former coworker.[293] Nonsolicitation clauses prohibit a former employee from making contact with the former employer's customers, clients, and current employees regardless of any trade secret concerns.[294]

B. Rule of Reason for Noncompetes

The Supreme Court's precedent[295] indicates a presumption in favor of the rule of reason, and any departure from that long-held standard requires a showing of "demonstrable economic effect rather than . . . formalistic line drawing."[296] To show an antitrust injury, plaintiffs must demonstrate not merely harm to a competitor but an adverse market impact.[297] Thus, even where plaintiffs have shown a direct injury resulting from a market-wide anticompetitive effect,[298] courts may still determine that the restraint is reasonable under antitrust laws.[299] Under the rule of reason's second step, courts have typically looked to whether a restraint was reasonable in scope

was an at-will worker who did not have unique or professional skills and that employee could not reasonably be restrained from its exercise).

290. *See* AM Medica Communs. Grp. v. Kilgallen, 261 F. Supp. 2d 258, 259 (S.D.N.Y. 2003).

291. *See* Charles Tait Graves & James A. Diboise, *Do Strict Trade Secret and Non-competition Laws Obstruct Innovation?*, 1 ENTREPRENEURIAL BUS. L.J. 323, 334 (2007).

292. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38362, 38365 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).

293. *See* Graves & Diboise, *supra* note 291, at 334.

294. *See id.*

295. *See* Cont'l T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 49 (1977).

296. *Id*. at 59.

297. *See* Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 268–69 (7th Cir. 1981).

298. *See* Newman, *supra* note 116, at 504–05.

299. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984).

and whether the restraint's harmful effect was necessary to alleviate some inefficiency[300] to the consumer's benefit.[301]

1. The Scope of Noncompete Usage

Although the use of noncompetes poses concerns about impediments to workers' mobility, scholars and courts have offered reasons to exercise caution in applying the per se rule in favor of continued adherence to the rule of reason.[302] First, the effects of a noncompete, in the antitrust context, depend on a variety of threshold factors including, but not limited to, the relevant market, the market concentration, the employer's market share, and the antitrust injury—that is, an injury of the type the antitrust laws were intended to prevent.[303]

Adopted from antitrust merger analysis,[304] the level of market concentration, measured by the Herfindahl-Hirschman Index (HHI), is a useful—albeit imperfect—tool to evaluate the extent to which market shares are concentrated between a small number of firms.[305] Courts have typically relied on concentration levels as an indication of a firm's ability to raise prices above competitive levels and fortify the barriers to entry in a market, as well as to determine if harm to consumers is likely and significant.[306] Many noncompetes, in practice, arise in low-concentration or competitive markets.[307] In one set of findings, Professor Alan J. Meese observes that 20 percent of surveyed workers in the labor force work in highly concentrated markets, those with an HHI of greater than 2,500 points, and 8 percent work in moderately concentrated markets, those with a HHI between 1,500 to 2,500 points.[308] Nearly three-quarters of employees work in unconcentrated labor markets.[309] Professor Meese finds that even if noncompetes were to arise in predominantly concentrated labor markets, this would not justify a presumption of unreasonableness; it is also theoretically plausible that

300. Efficiency is defined akin to "Kaldor-Hicks" efficiency meaning that a change is efficient if those who benefit could compensate those left worse off. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 99–102 (6th ed. 2020).

301. The concept of "consumer welfare" in antitrust policy is based on the idea that a competitive regime provides society with the maximum output that can be achieved at a given time with the resources available. *See* Robert H. Bork, *Resale Price Maintenance and Consumer Welfare*, 77 YALE L.J. 950, 951 (1968).

302. *See, e.g.*, Snap-On Tools Corp. v. FTC, 321 F.2d 825, 837 (7th Cir. 1963) (holding that, under the generally more stringent standards of § 5 of the FTCA, even if the noncompete is unreasonable in its geographic scope, the court was not prepared to find a per se violation).

303. *See* Hovenkamp, *supra* note 113.

304. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 1, at 6.

305. *See* 2B AREEDA & HOVENKAMP, *supra* note 60, at 261; IV *id.* at 244–45. Generally, the agencies and plaintiffs seek to establish the narrowest market definition. *See, e.g.*, Coronavirus Rep. v. Apple, Inc., 85 F.4th 948 (9th Cir. 2023); Double D Spotting Serv. v. Supervalu, Inc., 136 F.3d 554, 560–61 (8th Cir. 1998).

306. *See* Todd v. Exxon Corp., 275 F.3d 191, 208–09 (2d Cir. 2001).

307. *See* Meese, *supra* note 24, at 636.

308. *See id.* at 667–69 (citing Azar et al., *supra* note 168).

309. *See id.* at 669.

noncompetes only arise in concentrated markets, where a threat to an employer's competitive advantage is particularly prevalent.[310]

Economists Elizabeth Weber Handwerker and Matthew Dey similarly analyzed market concentration in more than 133,000 nonrural labor markets.[311] In contrast to the study conducted by economists Azar, Marinescu, Steinbaum, and Taska, which evaluates market concentration by assessing the flow of job postings by industry,[312] Handwerker and Dey use occupation as a proxy for a labor market and evaluate concentration by assessing the stock of employment at each employer and any changes from 2003 to 2018.[313] In their data, Handwerker and Dey conclude that approximately 2.9 percent of private sector employees work in highly concentrated labor markets, compared to 17.3 percent of public sector employees.[314] Further, 10.3 percent of public employees work in moderately concentrated markets in comparison to 2.9 percent of private sector employees.[315] Handwerker and Dey observe that the greater the employment level of an occupation on a nationwide scale is, rather than a sole industry analysis,[316] the less the average level of local employer concentration in that occupation.[317]

Second, in addition to market concentration levels, the terms to which an employee agrees to are also integral to the reasonableness analysis.[318] An employer's use of noncompetes retains a presumption of reasonableness because noncompetes are always limited in duration, geography, and industry.[319] In practice, the most common length of a noncompete is one year, and a majority of noncompetes have a duration of two years or less.[320] Given these qualifications, scholars observe that noncompetes do not necessarily impose overly broad terms on employees.[321] Employees retain the ability to transfer their industry-specific skills to competitors after a certain amount of time and can transfer their non-industry-specific skills to noncompetitors in other local labor markets at any time.[322] Even if an

310. *See id.*

311. Elizabeth Weber Handwerker & Matthew Dey, *Some Facts About Concentrated Labor Markets in the United States*, 63 INDUS. RELS. 132, 132–33, 135 (2023).

312. *See* Azar et al., *supra* note 168.

313. *See* Handwerker & Dey, *supra* note 311, at 135.

314. *Id.* at 140.

315. *Id.*

316. *See* Azar et al., *supra* note 168.

317. *See* Handwerker & Dey, *supra* note 311, at 144.

318. *See* Meese, *supra* note 24, at 668.

319. *See* McDonald v. Johnson & Johnson, 722 F.2d 1370 (8th Cir. 1983); *see also* Jonathan Barnett & Ted Sichelman, *Revisiting Labor Market Mobility in Innovation Markets* (USC L. Sch., Working Paper No. 207, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2758854# [https://perma.cc/VC5Q-N92X].

320. *See* Seaman, *supra* note 41, at 1223.

321. *See id.*

322. *See id.*; *see also* Kevin Rinz, *Labor Market Concentration, Earnings Inequality, and Earnings Mobility* 3 (Ctr. for Admin. Records Rsch. & Applications, U.S. Census Bureau, Working Paper No. 10, 2018), https://www.census.gov/library/working-papers/2018/adrm/carra-wp-2018-10.html [https://perma.cc/R86W-AB9U].

employee is bound to a noncompete, a competing firm can pay the price demanded by the current employer to waive the noncompete.[323]

Moreover, as Professors Jonathan Barnett and Ted Sichelman also explain, the use of noncompetes is more limited than some suggest.[324] This observation has a grounded, theoretical foundation. The relationship between high concentration—thereby high entry barriers—is not linearly correlated with an anticompetitive market.[325] When entry barriers to a specific market are high, the firms in that market have fewer incentives to engage in practices to exclude competitors and potential competitors, given the decreased likelihood of market entry.[326]

In fact, Professors Barnett and Sichelman find that employers that are less likely to adopt noncompetes are found in industries with the following characteristics: "(i) low capital requirements; (ii) short product development times; (iii) rapid product obsolescence; (iv) strong intellectual property protection (including patents, copyrights, and trade secrets); (v) robust complementary assets (such as strong marketing or manufacturing capabilities); [or] (vi) high levels of industry-specific product interoperability."[327] As an example, Professors Barnett and Sichelman point to the biopharmaceutical industry where the use of noncompetes may be prevalent because it yields high capital requirements with lengthy product-development processes, slow product obsolescence, and minimal interoperability.[328] Thus, an employer in a similar industry with the above characteristics places a high value on internalizing the gains from R&D and human capital investments and is likely to pay a relatively high price for noncompetes and other restrictions on departing employees.[329]

2. Efficiency Justifications and Legitimate Business Objectives in Noncompetes

In light of the courts' adherence to the rule of reason,[330] some scholars have identified how noncompetes can produce efficiency justifications beneficial to the product and services markets.[331] Although adhesion contracts[332] generally lie beyond the scope of reasonableness, employees who do receive preemployment notice of noncompetes see a return in benefits.[333] First, employees bound to a noncompete tend to earn higher

323. *See id.*
324. *See* Barnett & Sichelman, *supra* note 223, at 1029.
325. *See* Daniel Crane, *Market Power Without Market Definition*, 90 NOTRE DAME L. REV. 31, 33–34, 50–51 (2014).
326. *See id.*
327. *See* Barnett & Sichelman, *supra* note 319, at 31.
328. *See id.*
329. *See id.* at 32.
330. *See supra* Part II.A.
331. *See* Meese, *supra* note 24, at 700–01, 705.
332. Adhesion contracts are standardized agreements that are proffered on a take-it-or-leave-it basis without any negotiation by one with superior bargaining power. *See* 7 CORBIN ON CONTS. § 29.02 (2002).
333. *See* Meese, *supra* note 24, at 700–02.

wages than similarly situated employees not bound by one.[334] Although opponents of noncompetes emphasize that only 12 percent of employees negotiated their noncompetes, a study which surveyed over 1,000 engineers across a variety of industries showed that, of the 46.8 percent of respondents who were asked to sign a noncompete, over three-quarters (77.14 percent) of those engineers who signed a noncompete did so on or before their first day of employment.[335]

The data collected by Professors Starr, Prescott, and Bishara similarly reveals that those who learned of their noncompetes before accepting their job offers saw nearly 10 percent higher earnings.[336] These individuals were also approximately 8 percent more likely to have proprietary information shared with them by their employers and 7 percent more likely to be satisfied in their jobs compared to employees not bound by a noncompete.[337] Economists Sarah Oh Lam, Thomas M. Lenard, and Scott J. Wallsten further argue that a categorical ban on noncompetes would hinder efficient matching of job openings with workers.[338] They suggest that some workers may prefer wage premiums and other incentives over job mobility with respect to their decision to agree to a noncompete.[339]

Although opponents of noncompete enforcement believe that noncompetes are wholly devoid of any credible benefits, empirical data suggests that a substantial proportion of noncompetes are disclosed in advance and thus reduce information asymmetry between employees and their employers.[340] Thus, those who have prior notice of the noncompete from an employer are statistically more likely to receive better compensation, more training and access to information, and more satisfaction in their employment.[341] Professors Barnett and Sichelman observe that noncompetes, where implemented, provide incentives for employers to invest in the human capital of their employees.[342] This argument is also

334. *See id.*

335. *See* Matt Marx, *The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOCIO. REV. 695, 701–02 (2011).

336. *See* Starr et al., *supra* note 275, at 75.

337. *See id.*

338. *See* Sarah Oh Lam, Thomas Lenard & Scott Wallsten, *Is a Ban on Non-competes Supported by Empirical Evidence?*, 29 FORDHAM J. CORP. & FIN. L. 1, 10 (2023).

339. *Id.*

340. *See* Meese, *supra* note 24, at 673. The general rules of contract law against fraud and misrepresentation increase the cost of pursuing a contract-term discrimination scheme. *See id.* Further, some states require preemployment disclosure of restrictive employment agreements and will not enforce such agreements unless employers provide adequate additional consideration. *See, e.g.*, WASH. REV. CODE ANN. § 49.62.020(1)(a)(i)–(ii) (West 2024) (requiring a pre-acceptance written disclosure of employee noncompete agreements and additional consideration if the noncompete clause is included in the contract after employment has commenced); MASS. GEN. LAWS ch. 149, § 24L(b)(ii) (2021) (same).

341. *See* Starr et al., *supra* note 275, at 77. However, the data does show that employees who learn of their noncompetes after accepting the position are less likely to be promised or receive greater compensation. *See id.*

342. *See* Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082 (2d Cir. 1977); *see also* Barnett and Sichelman, *supra* note 223, at 1029; *see also* Jessica S. Jeffers, *The Impact of*

supported by a study conducted by Professor Starr, who finds that stronger noncompete enforcement regimes are associated with increased employee training, especially in R&D.[343]

Professor Starr's data also demonstrates that increased enforcement of noncompetes yields efficiencies to the product and service markets.[344] An increase in noncompete enforcement is correlated with the establishment of higher quality companies, especially ones that employ a greater number of employees.[345] Not only do noncompetes allow a business to maintain a competitive advantage over its rivals and become profitable, but they also fulfill businesses' need to share information with their employees to enhance product quality by way of increasing worker productivity and firm output.[346] Hence, disclosure of such internal information beyond the company may yield detrimental effects to the business.[347] The concern is that departing employees would be able to take their training and acquired skills to the highest, free-riding bidder.[348] This threat also may disincentivize employers from producing such information and providing specialized trainings and investments in their employees.[349] The existence of noncompetes deters a company's competitors from free riding on their investments into an employee's training and development of valuable skills which are ultimately reflected in the quality of the product or service.[350] As Professor Hovenkamp posits, where there is a realistic probability of profits generated from reduced costs or product improvement, the rule of reason is necessary to consider those business efficiencies of a restraint.[351]

3. Protecting Trade Secrets and Proprietary Information

Businesses may also utilize noncompetes as a device that is narrowly tailored—or the lesser restrictive means—to achieve a legitimate business objective.[352] Employers have long used noncompetes, along with nondisclosure agreements or nonsolicitation agreements, to protect their intellectual property when knowledgeable employees leave to work for

Restricting Labor Mobility on Corporate Investment and Entrepreneurship, 37 REV. FIN. STUD. 1 (2024).

343. Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete*, 72 INDUS. & LAB. RELS. REV. 783, 785, 814 (2019).

344. *See id.*

345. *See id.*

346. *See* Meese, *supra* note 24, at 688.

347. *See id.*

348. *See id.*

349. *See id.*

350. *See* Aydin Corp. v. Loral Corp., 718 F.2d 897, 900 (9th Cir. 1983) (analyzing a noninterference agreement and recognizing an interest in investments in personnel); *see also* Meese, *supra* note 24, at 686.

351. *See* Hovenkamp, *supra* note 113, at 97.

352. *See* Sharon K. Sandeen & Elizabeth A. Rowe, *Debating Employee Non-competes and Trade Secrets*, 33 SANTA CLARA HIGH TECH. L.J. 438 (2016).

competitors and risk taking sensitive information from their former employer along with them.[353]

In this information economy, employers increasingly depend on noncompetes to protect trade secrets—and other proprietary information that may not amount to trade secrets—as assurances to obtain and sustain a competitive advantage.[354] Without the protection of noncompetes, employers may not capture all of the gains resulting from their investments in their employees' human capital and thereby may impede in interfirm innovation as well as intrafirm efficiencies.[355] The very existence of noncompetes with the purpose of securing trade secrets may also deter former employees from misappropriation—when an employee acquires confidential information through improper means, such as theft, bribery, misrepresentation, or a breach of a fiduciary duty or a duty to maintain secrecy.[356]

Courts applying state and federal trade secret laws, however, find that "mere 'knowledge of the intricacies of a [former employer's] business operation' does not constitute a protectable secret that would justify prohibiting the employee from 'utilizing his knowledge and talents in this area.'"[357] The scope of protectable information under trade secret law typically does not include an employee's general skill and knowledge common to a particular trade, or information that is publicly available.[358] Information is a trade secret when it "derives independent economic value from being kept secret . . . [and] the employer has taken reasonable measures to keep it secret."[359] With slight jurisdictional variations, courts have generally deemed information acquired in relation to one's employment as proprietary and protectable under the following circumstances: (1) when the employee obtained confidential information during their employment and subsequently attempted to use it for their own benefit; and/or (2) when the employer has a near permanent relationship with its customers and, but for

353. *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 493 (1974) ("Congress, by its silence over these many years, has seen the wisdom of allowing the States to enforce trade secret protection."); *see also* Estee Lauder Cos. v. Batra, 430 F. Supp. 2d 158, 176–77 (S.D.N.Y. 2006) (granting a preliminary injunction enjoining an employee from working for a competitor of his former employer in the skincare and cosmetics industry where the employee had signed a noncompete because, "even assuming the best of good faith, it is doubtful whether the [employee] could completely divorce his knowledge of the trade secrets from any . . . work he might engage in").

354. *See, e.g.*, Cont'l Grp., Inc. v. Kinsley, 422 F. Supp. 838, 844 (D. Conn. 1976) (upholding a noncompete that protected an employee's knowledge of information regarding a product's stage of production which did not qualify as a trade secret); *see also* Seaman, *supra* note 41, at 1190.

355. *See* Sandeen & Rowe, *supra* note 352.

356. UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. § 1(2)(i) (1979); *see also* RESTATEMENT OF EMP. L. § 8.01 (AM. L. INST. 2015).

357. Int'l Paper Co. v. Suwyn, 966 F. Supp. 246, 256 (S.D.N.Y. 1997) (quoting Reed, Roberts Assocs., Inc. v. Strauman, 353 N.E.2d 590, 594 (N.Y. 1976)).

358. RESTATEMENT (SECOND) OF AGENCY § 396 cmt. b (AM. L. INST. 1958); *see also* RESTATEMENT OF EMP. L. § 8.02(c).

359. RESTATEMENT OF EMP. L. § 8.02 cmt. b. "Economically valuable information" entails information that is commercially valuable, whether it be actual or potential value. *Id.*

the employment, the employee would not have had contact with the customers.[360] For example, client and customer lists may also qualify as trade secrets,[361] but where the names, addresses, and contact persons of a company's customers are readily ascertainable, a customer list is not a trade secret.[362]

Some have pointed to other available methods of protecting trade secrets, such as the federal Defend Trade Secrets Act[363] (DTSA) and the Uniform Trade Secrets Act (UTSA), which nearly all states and the District of Columbia have enacted into their respective state laws.[364] As the FTC notes, the DTSA provides civil remedies for trade secret misappropriation including injunctive relief and damages; thus, the FTC argues that noncompetes are unnecessary and egregious devices that can easily be substituted by the DTSA.[365]

Some legal academics argue that these alternative measures to noncompetes provide insufficient protection on their own.[366] Where enforced, noncompetes have a prophylactic function to stop information theft in its incipiency.[367] Absent a noncompete, an injunction or a post hoc penalty, such as specific performance, cannot undo the damage that has already occurred due to an employee's misappropriation of trade secrets.[368] Furthermore, as Professor Elizabeth A. Rowe observes, courts are generally reluctant to enjoin an employee from working for a competitor for a threatened misappropriation of trade secrets.[369]

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360. *See* Hay Grp., Inc. v. Bassick, No. 02 C 8194, 2005 WL 2420415, at *5 (N.D. Ill. Sept. 29, 2005).

361. *See, e.g.*, Intertek Testing Servs., N.A., Inc. v. Pennisi, 443 F. Supp. 3d 303, 341 (E.D.N.Y. 2020) (determining that a customer list that developed through substantial effort and kept in confidence may be treated as a trade secret and that such an interpretation is aligned with Congress's intent in enacting the Defend Trade Secrets Act).

362. *See, e.g.*, Sysco Food Servs. of E. Wis., LLC v. Ziccarelli, 445 F. Supp. 2d 1039, 1053 (E.D. Wis. 2006) (concluding that where a nonsolicitation agreement protected the confidentiality of customer lists—which mostly involved restaurant patrons and their information was publicly available—the agreement was rendered void).

363. 18 U.S.C. § 1836.

364. *See* Posner, *supra* note 167, at 174; *see also* Alexander & Salop, *supra* note 164. *But see* Graves & Diboise, *supra* note 291 (arguing that overbroad trade secret laws preclude technological innovation from venture-backed start-up companies because such laws often permit employers from raising after-the-fact, unwritten trade secret protection claims).

365. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38424–28 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).

366. *See* Meese, *supra* note 24, at 695; Sandeen & Rowe, *supra* note 352*; cf.* Yifat Aran, *Beyond Covenants Not to Compete: Equilibrium in High-Tech Startup Labor Markets*, 70 STAN. L. REV. 1235, 1273–74 (2018) (arguing that employers should seek methods to disincentivize former employees from appropriating trade secrets against the company in lieu of imposing contractual restraints).

367. *See id.*

368. *See* Seaman, *supra* note 41, at 1195; *see also* RESTATEMENT (SECOND) OF CONTS. § 357 (AM. L. INST. 2016) (noting that when the underlying cause of action is a trade secret misappropriation claim, the remedy sought is an injunction).

369. *See* Sandeen & Rowe, *supra* note 352, at 456.

In UTSA claims for threatened misappropriation of trade secrets, some courts may apply the "inevitable disclosure" doctrine.[370] Under this equitable doctrine—absent an enforceable restrictive employment agreement—a court may grant a trade secret owner injunctive relief upon a showing that (1) a former employee will work for a direct, actual, or potential competitor;[371] (2) the employee's new position is essentially the same as his prior position such that the employee will "inevitably" use the owner's trade secret in the new position; and (3) the trade secret is highly valuable to the second employer.[372]

Not all jurisdictions, however, recognize the inevitable disclosure doctrine due to concerns of judicial overreach and constricting employee mobility absent a contractual agreement.[373] In fact, the language of the DTSA does not adopt the inevitable disclosure doctrine and explicitly prohibits enjoining employees from working for a competitor.[374] As Professors Barnett and Sichelman argue, given the noticeable gaps in the coverage that trade secrets provide for employers' proprietary business information, noncompetes assure employers that they will see a return on their investments in their human capital and incentivize employers to make such investments.[375]

The aforementioned policy arguments and findings of empirical data demonstrate the cautious resistance to a unilateral ban on noncompetes. Without some showing of actual market failures, monopolistic harm to consumers, and foreclosure to competitors and new entrants, those who support a rule of reason find that a per se approach is based on assumption as opposed to market realities.

III. GUIDANCE FOR THE RULE OF REASON IN FUTURE LITIGATION

This Note argues that the FTC's ban on noncompetes de facto creates a new category of per se illegal restraints and recommends that courts subscribe to the burden-shifting test under the rule of reason. Although the FTC's rule does not exclusively rely on federal antitrust laws, it has the potential to spur new antitrust challenges against noncompetes as per se violations of the FTCA and the Sherman Act. In these challenges, plaintiffs—whether they be private parties, the DOJ, or the FTC—would ask the courts to depart from their longstanding adherence to the rule of reason for vertical restraints.[376] Labels such as "categorical bans" and "per se violations" raise concerns about the lack of limiting principles in antitrust

370. *See id.*; *see also* RESTATEMENT OF EMP. L. § 8.05 cmt. b (AM. L. INST. 2015).
371. *See* RESTATEMENT OF EMP. L. § 8.05, Reporters' Notes to cmt. b.
372. 1 ROGER M. MILGRIM & ERIC M. BENSEN, MILGRIM ON TRADE SECRETS § 1.01, Lexis (database updated May 2024).
373. *See* Bos. Sci. Corp. v. Lee, No. 13-13156, 2014 U.S. Dist. LEXIS 66220, at *15–19 (D. Mass. May 14, 2014).
374. 18 U.S.C. § 1836(b)(3)(A)(i)(I).
375. *See* Barnett & Sichelman, *supra* note 223, at 957.
376. *See supra* note 139 and accompanying text.

law.[377] Such divergence from the standard rule would not only conflict with the Supreme Court's precedent[378] but also relegate the body of antitrust law to a fail-safe, protective measure for matters peripheral to traditional antitrust concerns. In practice, the rule of reason's burden-shifting analysis equips the courts with default rules in the face of competition policies that transcend prevailing interpretations of antitrust law.[379]

Despite the FTC's contention that no market-specific analysis is necessary,[380] the FTC's challenge against noncompetes must show that they are truly anticompetitive to the competitive process itself, not just to a competitor or an individual employee.[381] Anticompetitive activity in the labor market,[382] however, departs from the consumer welfare standard that courts have consistently abided by,[383] in that there must be a finding that such conduct does or will lead to some deviation from the market's competitive baseline at consumers' expense.[384] Given that a noncompete's effect on consumer prices or output may be difficult to ascertain statistically,[385] the FTC must persuade the courts that it has a sound, empirical basis for challenging noncompetes as per se antitrust violations by their effects on wages, employee mobility, and employee power.[386] The agency faces a high burden in asking courts to not only reject the rule of reason's application for vertical restraints[387] but also expand the objective of antitrust law.[388]

Furthermore, this Note stands amid the background question regarding the FTC's rulemaking authority under § 6(g) of the FTCA.[389] The legal community continues to debate the question of whether courts will defer to the FTC's expertise in antitrust enforcement and give the noncompete rule the effect and force of law.[390] If the Supreme Court were to take on such a case, the question regarding the FTC's rulemaking authority is a very different question than the one posed in this Note—that is, if the Court decides that the FTC has rulemaking authority over unfair methods of competition, whether noncompetes require a per se or rule of reason review.

Challenges from business groups against the FTC's rulemaking are already underway, and at least one federal court has granted a preliminary injunction which stayed the noncompete rule.[391] However, making a conjecture on how

377. *See* Kovacic & Winerman, *supra* note 62, at 942, 947.
378. *See supra* notes 139–40 and accompanying text.
379. *See id.*; *see also* Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 268 (7th Cir. 1981).
380. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38358 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).
381. *See generally* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).
382. *See generally supra* Part II.B.
383. *See* Dimick, *supra* note 172, at 393.
384. *See supra* Part I.C.
385. *See supra* note 250 and accompanying text.
386. *See* Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 265, 268–69 (7th Cir. 1981).
387. *See id.*
388. *See supra* Parts I.A–B.
389. 15 U.S.C. § 46(g).
390. *See supra* note 27 and accompanying text.
391. *See* Ryan, LLC v. Federal Trade Commission, No. 3:24-cv-986, 2024 U.S. Dist. LEXIS 117418 (N.D. Tex. July 4, 2024) (holding that the plaintiffs are likely to succeed on

the Supreme Court may ultimately decide this issue, should it hear such a case, is premature. If the Supreme Court should rule that the FTC lacks the delegated authority to issue a rule which categorically bans noncompetes, the FTC has, nonetheless, laid down the groundwork to pursue enforcement actions against employers using noncompetes under the Sherman Act and the FTCA.[392]

This Note does not call into question the FTC's regulatory authority pursuant to antitrust law. Rather, it disagrees with the FTC's use of a categorical ban to effectively declare a new category of per se antitrust violations. Going forward, employers, potential litigants, and the courts must consider in their challenges against the rule, whether judicial review over noncompetes warrants a per se rule or the rule of reason. In light of credible findings in favor of and against the use of noncompetes,[393] this part argues that the rule of reason provides courts with the flexibility to assess noncompetes on a case-by-case basis, given that their effects on the relevant market varies depending on the conditions in which they are imposed. This part puts forth guidance for how courts should evaluate each stage of the burden-shifting analysis in the FTC's noncompete challenges brought under the rule and in private-party actions.

Part III.A provides criteria for how plaintiffs—both private plaintiffs and the agencies—may tailor their market definitions and demonstrate an antitrust injury under step one of the rule of reason. Part III.B proposes considerations for courts to discern legitimate justifications from pretextual ones under step two. Part III.C assesses the availability of less restrictive alternatives. Finally, Part III.D suggests that courts' balancing of arguments hinges on whether it will follow the consumer welfare standard.

A. Market Definition Criteria

Properly defining the relevant market is crucial to an antitrust claim.[394] Within the context of postemployment restrictive agreements, private plaintiffs who bring a Sherman Act claim must allege an injury in fact

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the merits of their case, including on the argument that the FTC lacks the authority to promulgate the final rule). *But see* ATS Tree Services, LLC v. FTC, No. 24-cv-1743, 2024 WL 3511630, at *8–9 (E.D. Pa. July 23, 2024) (denying plaintiff's motion for a preliminary injunction against the FTC because the plaintiff failed to establish irreparable harm as a result of complying with the noncompete rule and finding that monetary loss and business expenses alone are insufficient justifications for injunctive relief). Further, the U.S. District Court for the Eastern District of Pennsylvania determined that the rule of reason was not applicable in its review of the rule's legality but concluded that, even under the rule of reason, (1) the FTC had the designated rulemaking authority under the FTCA to classify noncompetes as unfair methods of competition, and (2) noncompetes are inherently "exploitative and coercive" when employers unilaterally impose them without meaningful negotiation or compensation. *Id.* at *16–17.

392. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).

393. *See supra* Parts II.B–C.

394. *See supra* notes 166–76 and accompanying text; *see also* HOVENKAMP, *supra* note 300, at 108–18.

flowing from the defendant's conduct, which must also produce a wider injury to a competitive market.[395] For the FTC's challenge, under either the Sherman Act or the FTCA, its burden under step one of the rule of reason is slightly different, as it may use the incipiency doctrine to demonstrate that an anticompetitive effect is likely to occur in the market.[396] Although the FTC is charged with a prophylactic mandate, it must show a plausible[397] reduction in, or harm to, competition flowing from the defendant's actions.[398]

For both the FTC and private plaintiffs, if the market description is vague, plaintiffs would likely struggle to successfully overcome the burden under step one.[399] If an employer's use of noncompetes is going to have some discernible impact on market competition, that market must be narrowly defined and must be highly concentrated.[400] As such, scholars describe the task of defining the market as a critical feature of antitrust litigation.[401]

Here, the FTC argues that noncompetes produce anticompetitive harm in the labor market which also has residual effects in the product and service market.[402] The logic of the FTC's contention rests on the idea that employee-transmitted information circulates freely among businesses and thus contributes to greater innovation and business efficiencies, which ultimately benefits consumers in the output market.[403] However, the relevant market cannot be defined as the labor market as a whole, but rather the market for a specific type of labor.[404] First, under the hypothetical monopsonist test, one asks whether a small but significant wage suppression would be profitable for an employer monopsonizing the market.[405] If the decrease in wages would be profitable for the monopsonist, then the market definition is correctly defined. On the other hand, if the suppression would be unprofitable because workers would switch to other employers, then the proposed market must be narrowed by geography, industry, employers,

395. *See supra* Part I.B.

396. *See supra* note 100 and accompanying text.

397. *See generally* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

398. Professors Roger D. Blair and Jeffrey L. Harrison suggest that when utilizing the incipiency doctrine, as a threshold matter, there must be a logical connection between the challenged activity and a decrease in the welfare of consumers. *See* Roger D. Blair and Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 VAND. L. REV. 1539, 1542–43 (1989). If there is a connection, the authors would ask whether the damage to the plaintiff is a necessary consequence of the activity. *Id.* at 1543. If so, the plaintiff should be viewed as having suffered an antitrust injury. *Id.*

399. *See, e.g.*, Lektro-Vend Corp v. Vendo Co., 660 F.2d 255, 267 (7th Cir. 1981).

400. *See supra* Part II.B.

401. *See* HOVENKAMP, *supra* note 300, at 108–18.

402. *See supra* note 250 and accompanying text.

403. *See supra* notes 259–60 and accompanying text.

404. *See* Hanger v. Berkley Grp., Inc., No. 13-cv-113, 2015 U.S. Dist. LEXIS 68751, at *28–29 (W.D. Va. May 28, 2015) (dismissing a complaint for failure to allege a plausible market). "The *Eichorn* court held that the proper market definition 'includes all those technology companies and network services providers who actively compete for employees with the skills and training possessed by plaintiffs.'" *Id.* (quoting Eichorn v. AT&T Corp., 248 F.3d 131, 147–48 (3d Cir. 2001)).

405. *See supra* note 174 and accompanying text.

workers, or a combination of all four categories.[406] Further, under the hypothetical monopsonist test, workers may incur costs due to search frictions and information asymmetries.[407] If the direct and indirect costs of searching for a new job are high, workers may be hesitant to leave their current employer and become "locked-in," thus strengthening the monopsonist-employer's market power.[408] Furthermore, in antitrust practice, the SSNIP is typically set at 5 percent.[409] But if the SSNIP model is adapted to the labor market context, it is unclear whether a 5 percent decrease in wages would tend to produce a lower-level elasticity of labor supply.[410] These are uncertainties that must be considered in evaluating the competitive conditions of the relevant labor market. The FTC's rule, however, does not address this issue.[411]

Second, the market's concentration level is also essential for defining the relevant market. As economists Azar, Marinescu, Steinbaum, and Taska note, some considerations for this analysis include, but may not be limited to, the geographic boundaries of the relevant market, the specific industry sector, the volume of job vacancies, the overall changes in wages that are not attributable to shocks to labor demand, and the number of firms within a specific labor market where workers may easily transfer their skills from one employer to another.[412] The rule of reason may also require plaintiffs to demonstrate that an employer had significant market power or monopsony, which would enable them to unilaterally control wages through the use of noncompetes.[413] Although market power and market concentration are not express elements of an antitrust offense,[414] they serve as indirect measures of proving likely anticompetitive effects in the relevant market.[415]

A final consideration for the market definition, as the FTC also contends, entails how noncompetes may potentially affect competition in the product and service market.[416] As described previously in this Note,[417] courts have ordinarily evaluated the anticompetitive effects of a restraint or conduct by looking at evidence of a likely or an actual increase in consumer prices or a decrease in quality and output.[418] For example, the study conducted by Professors Hausman and Lavetti, which measured the effects of noncompete

406. *See id.*
407. *See supra* notes 185–86 and accompanying text.
408. *See* U.S. DEP'T OF TREASURY, *supra* note 166, at 28, 59.
409. *See* U.S. DEP'T. OF JUSTICE & FED. TRADE COMM'N, *supra* note 1, at 8.
410. *See supra* note 174 and accompanying text.
411. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38380 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912) (discussing the degree of noncompete enforceability and its correlation on employees' earnings).
412. *See generally* Azar et al., *supra* note 168.
413. *See supra* Parts I.B–C.
414. *See* Hovenkamp, *supra* note 113, at 102–03.
415. *See supra* Part I.C.
416. *See* Non-Compete Clause Rule, 89 Fed. Reg. at 38433.
417. *See supra* Part II.C.
418. *See id.*; *see also* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 775 (1999) (determining that the gains to consumer information and thereby competition outweighed the association's anticompetitive activities).

enforceability in physician markets, did not put forth direct evidence that decreased noncompete enforceability causes decreased consumer prices or costs to patients.[419] Despite the assumption that prohibiting noncompetes reduces market concentration and thereby impedes an employer's ability to decrease wages,[420] it is also theoretically possible that prohibiting noncompetes may lead to reduced employee compensation because there would be no need for consideration in exchange for the employee's noncompete agreement.[421] However, in order to support these assumptions, there would need to be evidence that the cost of wages constitutes a nontrivial share of the cost of the final product and that wage changes—like input costs—pass through to consumer prices.[422] Further, litigants and courts should reference market concentration in this analysis after having considered the likelihood that firms are less inclined to enforce exclusive provisions when such measures have a low probability of successfully excluding their competitors and potential rivals or when such measures are unnecessary because structural entry barriers, alone, can obstruct new entry.[423]

In response to the argument that noncompetes decrease innovation because they function as barriers to knowledge sharing and knowledge spillovers among firms,[424] this Note posits that nothing in antitrust regulation prevents firms from engaging in R&D joint ventures or competitor collaborations[425]—"a set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity"[426]—so long as firms share in the risks and rewards.[427] Furthermore, antitrust laws do not prohibit joint ventures as long as they are not conspiracies or agreements to fix prices or output, they do not facilitate bid rigging, they do not share or divide markets, and they are not de facto mergers because such joint ventures do not completely extinguish competition between competitors.[428]

419. *See supra* note 264 and accompanying text; *see also* Hausman & Lavetti, *supra* note 263, at 278 (noting that the price difference between users and nonusers of noncompetes in higher versus lower noncompete enforcement states is not statistically significant).

420. *See* Michael Lipsitz & Mark Tremblay, *Noncompete Agreements and the Welfare of Consumers*, 16 AM. ECON. J.: MICROECONOMICS (forthcoming 2024) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3975864 [https://perma.cc/2HZ2-3TBK].

421. *See supra* Part II.A.2.

422. *See supra* Part II.B.1.

423. *See* Crane, *supra* note 325, at 52–53.

424. *See* Garmaise, *supra* note 253.

425. *See* Gilson, *supra* note 253, at 585.

426. *See* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 2 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf [https://perma.cc/L9TJ-FSNM].

427. *See* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 356–57 (1982).

428. *See* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, *supra* note 426.

B. Legitimate or Pretextual?

Although the per se rule reduces administrative costs,[429] it may correspondingly increase error costs by prohibiting conduct that may be procompetitive under certain circumstances.[430] As the Supreme Court determined in *GTE Sylvania, Inc.* and subsequently affirmed in *Leegin Creative Leather Products, Inc.*, the reduction in administrative costs is insufficient for a court to grant a per se application, let alone create a new category of per se violations.[431] Furthermore, antitrust analysis devoid of economic learning and the experience of the market—i.e., the labor market—contravenes the Supreme Court's case law.[432] In *National Collegiate Athletic Association v. Board of Regents*,[433] the Court noted that, even in the absence of a detailed market analysis, naked restraints on price and output require a showing of some competitive justification, thereby deeming the rule of reason's second step as a prerequisite to a holistic antitrust review.[434]

Upon a successful, prima facie showing of anticompetitive harm, courts will grant employers the opportunity to put forth any legitimate business objective or procompetitive justification for the use of a noncompete.[435] At this stage of the rule of reason analysis, a court will be tasked with discerning legitimate defenses from ones that are plainly pretextual.[436] Thus, a reviewing court should only enforce the agreement as reasonable where the terms do not appear abusively broad in relation to the individual employee and their position with the former employer.[437] Noncompetes can be presumed reasonable where the employer has limited their use to only employees who possess trade secrets, client lists, client goodwill, and other proprietary business information.[438] Additionally, the terms of the agreement should be limited in scope, geography, duration, and the types of employment.[439] However, the geographic scope of a noncompete has become less practical especially for multinational companies whose businesses are wide reaching in a variety of industry sectors and research interests.[440]

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429. *See supra* notes 241–42 and accompanying text.
430. *See Arizona*, 457 U.S. at 344.
431. *See id.* at 895.
432. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 110 (1984).
433. 468 U.S. 85 (1984).
434. *See id.* at 110.
435. *See supra* Part I.B.
436. *See supra* note 38 and accompanying text.
437. *See* Starr et al., *supra* note 275.
438. *See supra* Part II.B.3.
439. *See* Barnett & Sichelman, *supra* note 223, at 1030–31.
440. *See* Graves & Diboise, *supra* note 291, at 332; *see, e.g.*, Hay Grp., Inc. v. Bassick, No. 02 C 8194, 2005 WL 2420415, at *7 (N.D. Ill. Sept. 29, 2005) (refusing to enforce a noncompete for its overbreadth because the employer's business had a global presence). *But see* Int'l Bus. Machs. Corp. v. Johnson, 629 F. Supp. 2d 321, 323 (S.D.N.Y. 2009) (denying a preliminary injunction to the employer, despite finding that absent an injunction, the employee's disclosure of information would undoubtedly harm the employer's business).

With respect to an employer's potential trade secret defense, courts will need to assess the sufficiency and legitimacy of the employer's justification. Courts should scrutinize whether the employer has put forth evidence that (1) a trade secret and other protectable information exist, (2) the employee had access to said information, (3) the noncompete's enforcement was necessary to achieve its end, and (4) whether an employer's proprietary interest can be balanced against public policy in favor of advancing employee mobility and other public interests.[441] An employee's possession of trade secrets may have been a result of the employer's investment into that individual's employment by providing specialized training, increased wages or salary and other benefits, and granting access to otherwise confidential business information.[442] Thus, factual findings of bespoke training and adequate monetary consideration can weigh in the employer's favor.[443]

Whereas trade secrets constitute a legitimate protectable interest of an employer,[444] information that may be known within an industry but nonetheless unique and of significant value to the employer may not reach the level of a trade secret.[445] Thus, such information may not warrant the protection of trade secret laws.[446] Nonetheless, given the employer's interest in safeguarding proprietary information, noncompetes provide additional protection from potential employee misappropriation.[447]

The FTC, however, contends that employers can use noncompetes as pretext to preserve or promote their competitive positions in the product and service market by depriving competitors of access to reasonably priced labor inputs.[448] Whether an employer has implemented a noncompete as an anticompetitive strategy to exclude their rivals will depend on a factual inquiry based on direct and circumstantial evidence. Such a showing may necessitate evidence that an employer's strategy raised their rivals' costs and that the employer had the intent to do so.[449]

Further, with respect to noncompetes that cover low-wage and lower-skill employees, many have maintained that such restrictions are presumptively unreasonable and are improperly imposed to exercise economic control over certain classes of employees.[450] Although applying the rule of reason is less favorable for workers that are unaware of a noncompete's existence until after their employment began or for workers who are uncertain that a noncompete is enforceable,[451] restraints on these groups of workers should

441. *See* 1 MILGRIM & BENSEN, *supra* note 372, § 15.01.
442. *See id.*
443. *See, e.g.*, Estee Lauder Cos. Inc. v. Batra, 430 F. Supp. 2d 158 (2006).
444. *See* Sandeen & Rowe, *supra* note 352, at 456.
445. *See supra* Part II.B.3.
446. *See id.*
447. *See* Meese, *supra* note 150.
448. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38359, 38399 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).
449. *See* Seaman, *supra* note 41.
450. *See* Starr et al., *supra* note 275.
451. *See supra* Part II.B.2.

be reviewed on a case-by-case basis.[452] A case-specific analysis under the rule of reason still permits courts to apply a truncated version of the rule of reason, such as the quick look rule.[453] Under the quick look rule, plaintiffs may only need to show a form of market injury because the conduct, although not per se illegal, appears so likely to have anticompetitive effects that it is unnecessary for a court to go through the full rule of reason analysis.[454] This determination—whether to use the rule of reason or the quick look rule—is still a legal question reserved for the courts.[455]

C. Less Restrictive Alternatives: Nondisclosure and Nonsolicitation Agreements

In a full, three-part rule of reason analysis, plaintiffs may put forth less restrictive alternatives to noncompetes, should the defendants raise a legitimate business objective or a procompetitive justification.[456] With respect to nonsolicitation agreements, although they may permit employees to work at a competing firm, such agreements raise their own set of antitrust concerns with detrimental repercussions to consumers. For example, if customers are unaware that their choices have been limited by the former employer, the former employer may be able to charge higher prices by creating and exploiting this information asymmetry.[457] If customers prefer working with the former employee but are barred from contacting them, nonsolicitation agreements can inhibit them from seeking out products and services at lower prices and better quality. Conduct that is unresponsive to consumer preference suggests unreasonableness.

NDAs also protect the improper leaking of an employer's trade secrets and other confidential information.[458] However, NDAs are provisions often intertwined with noncompetes; whether the nondisclosure can be severed from the noncompete is an equitable determination that varies across jurisdictions. NDAs may also have the effect of a noncompete because a new employer may be disinclined to hire an employee without access to their knowledge of the former employer's business. Such agreements, under the rule's language, would also come within the ban and would not be a viable alternative.[459]

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452. *See* Hovenkamp, *supra* note 113, at 110.
453. *See supra* note 141 and accompanying text.
454. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).
455. *See supra* note 149 and accompanying text.
456. *See supra* Part I.B.
457. *See, e.g.*, Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 700 (1978) (finding the Society's rule overbroad and anticompetitive because it prevented the dissemination of competitive price information to consumers).
458. *See supra* Part II.B.3.
459. *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38361–62 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).

D. The Rule of Reason's Fourth Step: A Balancing Act

Once the plaintiff has satisfactorily shown less restrictive alternatives, courts will ultimately come to a conclusion by balancing the plaintiff's arguments and the defendant's arguments.[460] Under a strict consumer welfare standard,[461] if plaintiffs wish to prove actual harm—such as likely harm to competition—there must be proof that the noncompete produces changes in price, quality, and output that deviate from the competitive baseline and that these changes are to the consumer's detriment.[462] Here, a plaintiff's survival under the rule of reason may depend on whether the courts expand the consumer welfare standard—which has undergirded the body of antitrust law[463]—to take into account other concerns about social costs and fairness generally.[464]

In future antitrust litigation, the rule of reason analysis may need to adapt to address the concerns raised by the FTC, such as reduced wages, unbalanced employee bargaining power, and economic well-being.[465] In light of the potential moral effects, courts, when balancing party arguments, should also consider the conditions under which the agreement was made. To the extent the noncompete was entered after careful deliberation and negotiation, rather than an overbroad contract of adhesion, there should be a stronger presumption of validity, provided that the employer had legitimate justifications. On the other hand, the inclusion of known, unenforceable terms in the agreement should weigh heavily against the employer, as this could constitute evidence of bad faith and pretextual intent.

Although some scholars find the lack of precision attendant with the rule of reason analysis as the downfall to antitrust law,[466] the text of the antitrust statutes illustrates that the laws are meant to be flexible in accordance with changing economic conditions and narrowed through greater experience with the conduct at issue.[467] The rule of reason permits this flexibility through reasoned, veritable analysis over categorical line drawing.[468]

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460. *See* Cont'l T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 49 (1977) ("Under [the rule of reason], the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.").

461. *See supra* Part I.B.

462. *See id.*

463. *See, e.g.*, AMG Capital Mgmt. v. FTC, 141 S. Ct. 1341 (2021) (interpreting the FTCA as largely a mandate for the FTC's consumer protection program).

464. *See generally* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175 (2021); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001).

465. *See supra* Part II.B.

466. *See* Markham, *supra* note 246, at 622–23.

467. *See supra* Part I.A.

468. *See supra* Part I.A.

CONCLUSION

Perhaps there is a turning of the tide in the evolution of federal antitrust law. Courts may decide that the time to expand the consumer welfare standard to include moral concerns has come. A shift in what courts determine to be the "objective" of antitrust law will have profound, multifaceted effects. Not only will employers undertake significant changes and incur substantial costs to preserve their proprietary information and protect their business efficiencies from competitors, but such new measures will, at least initially, invite greater scrutiny from the federal antitrust agencies in regulating the internal affairs of businesses. The FTC's novel actions in prohibiting noncompetes should be met with a thorough analysis on a case-by-case basis. Though the rule of reason may impose heavy burdens on litigants, it is the appropriate standard by which courts should conduct their review over noncompetes as antitrust restraints.