

# The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision

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## I. INTRODUCTION

There is likely no area of employment law more ancient than the law of post-employment competition. The so-called “rule of reason” that undergirds contemporary noncompete doctrine dates to the early 1700s,<sup>1</sup> and

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<sup>1</sup> See *Mitchell v. Reynolds*, 24 Eng. Rep. 347 (Q.B. 1711). The first recorded instances of the use of employee noncompetition agreements date to the fifteenth and sixteenth century, at which time they were considered per se void as against public policy. See Harlan M. Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 631–32 (1960) (summarizing early history of noncompete law); Mark A. Glick et al., *The Law and Economics of Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357, 360–68 (2002) (same). By contrast the rule of employment at will—the enduring, if controversial, presumption of the parties’ right

until recently it has been relatively stagnant.<sup>2</sup> At the dawn of the millennium, the law of noncompetes appeared largely as it did in the 18<sup>th</sup> century: almost every state, with the notable exception of California,<sup>3</sup> permitted validly formed noncompetes, provided they were tied to a protectible business interest of the employer and reasonable in scope.<sup>4</sup>

But times are changing. In the last decade, there has been a surge in public initiatives targeting employers' use and enforcement of restraints against employee competition—what I refer to as the “new enforcement regime.” These have come at all levels of government and in a variety of

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to freely terminate their relationship that undergirds all of American employment law—came into being a full century and a half later. See Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 125–29 (1976) (providing an historical context and critical perspective on the rise of employment at will doctrine).

<sup>2</sup> By way of comparison, the near two centuries that have elapsed since the formal articulation of the at-will rule have witnessed a series of pendulum swings in which the courts and legislatures have alternately deferred to and dialed back on employers' right to terminate workers at their discretion. This phenomenon is often described as a movement between contract and status, the former embracing freedom of contract principles and deferring to the private “choices” of the parties with respect to the terms of employment, and the latter deeming employment a state-sanctioned status relationship subject to publicly imposed limits and protections. For a discussion of these concepts, see Rachel S. Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447, 468–69 (2009); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 124–25 (1976).

<sup>3</sup> See CAL. BUS. & PROF. CODE §§ 16600–16602.5 (West, Westlaw through Ch. 1 of 2020 Reg. Sess.). For historical background on California's peculiar law, which dates to the late 1800s, see Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 614–19 (1999). Two other states have near identical statutory bans dating to the same period: North Dakota and Oklahoma. N.D. CENT. CODE ANN. § 9-08-06 (West, Westlaw through legislation effective Jan. 1, 2020); OKLA. STAT. ANN. tit. 15, § 217 (West, Westlaw through First Regular Session of the 57th Legislature (2019)). North Dakota has consistently banned the use of noncompetes, but has received little to no scholarly attention, likely owing to the modest size of its economy. By contrast, for decades courts in Oklahoma construed that state's statute as permitting restraints deemed reasonable at common law despite its plain language. See *Tatum v. Colonial Life & Accident Insurance Co. of America*, 465 P.2d 448 (Okla. 1970). Recently, a combination of statutory amendments and judicial decisions effectively restored the original meaning of the statute, making Oklahoma the third state to ban noncompetes and the first to do since the emergence of the new enforcement regime. See OKLA. STAT. ANN. tit. 15, § 219A (West, Westlaw through First Regular Session of the 57th Legislature (2019)); see generally Teresa L. Green, *The Shifting Landscape of Restrictive Covenants in Oklahoma*, 40 OKLA. CITY U. L. REV. 449 (2015); *infra* Part II.B.2.

<sup>4</sup> See, e.g., WI. STAT. ANN. § 103.465 (2020); TEX. BUS. & COM. CODE § 15.50 (2020); *Reliable Fire Equip. Co. v. Arredondo*, 965 N.E.2d 393, 396–97 (Ill. 2011) (holding that a noncompete is reasonable only if it (1) is no greater than is required for a legitimate business interest; (2) does not impose undue hardship on the employee; and (3) is not injurious to the public); *Boulanger v. Dunkin' Donuts Inc.*, 815 N.E.2d 572, 576–77 (Mass. 2004) (holding that a noncompete is enforceable “only if it is necessary to protect a legitimate business interest, reasonably limited in time and space, and consonant with the public interest”); see generally RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981); *infra* Part II.A.

forms, including new legislation, regulatory initiatives, targeted litigation, and enforcement programs.<sup>5</sup> With some exceptions, their aim is to restrict employers' already limited ability to prevent post-employment competition,<sup>6</sup> a move consistent with a growing body of academic literature asserting that such restraints against competition are harmful to employees and the economy.<sup>7</sup>

It is therefore a fitting moment to reexamine the law and scholarship of employee competition. It is also a fitting time to reconsider the work of one particular scholar whose contributions to the employment law field are abundant and diverse.<sup>8</sup> Professor Charles Sullivan, over the course of a prolific forty-year career, periodically waded into the "vast sea" of

<sup>5</sup> See *infra* Part II.

<sup>6</sup> For instance, a number of states have passed legislation categorically prohibiting the use of noncompetes against workers earning below a threshold income. See, e.g., 820 ILL. COMP. STAT. ANN. ch. 90/10 (West, Westlaw through P.A. 101-629); ME. REV. STAT. ANN. 26 § 599-A (West, Westlaw through Chapter 560 of the 2019 Second Regular Session of the 129th Legislature); MD. CODE ANN., LAB. & EMPL. § 3-716 (West, Westlaw through all legislation from the 2019 Regular Session of the General Assembly); N.H. REV. STAT. ANN. § 275:70-a (West, Westlaw through Chapter 4 of the 2020 Reg. Sess.). These and additional limitations will be discussed *infra* Part II.

<sup>7</sup> A fair amount of legal scholarship, including Sullivan's, has argued for more limited enforcement of noncompetes based on the risk of employer overreach leading to inefficient and/or unfair results between the individual employer and employee. See, e.g., Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163 (2001) [hereinafter *Bargaining for Loyalty*]; Blake, *supra* note 1; Cynthia Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 PENN. L. REV. 2 (2006); Katherine V.W. Stone, *Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721 (2002); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001); Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO STATE L.J. 1127 (2009) [hereinafter *Puzzling Persistence*]. A second research stream in legal scholarship has focused on the economic benefits of employee mobility and the adverse effects of human capital controls on the overall economy. See, e.g., ALAN HYDE, *WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET* (2003); ORLY LOBEL, *TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING* (2013); Gilson, *supra* note 3, at 577–80. As will be discussed, a robust body of research in the fields of economics and business now provides empirical support for these critiques. See *infra* Part II.

<sup>8</sup> Professor Sullivan is known perhaps principally for his extensive work in antidiscrimination law. For recent examples, see, e.g., Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012); Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613 (2011); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191 (2009). However, Professor Sullivan has written on diverse topics ranging from artificial intelligence, see Charles A. Sullivan, *Employing AI*, 63 VILL. L. REV. 395 (2018), to asterisk footnotes, see Charles A. Sullivan, *The Under-Theorized Asterisk Footnote*, 93 GEO. L. J. 1093 (2005).

employee-competition law.<sup>9</sup> Of particular note are two Articles—one penned in the late 1970s,<sup>10</sup> the other, over thirty years later<sup>11</sup>—that are not only relevant to the current conversation, but eerily prescient.<sup>12</sup> In them, he articulates two risks of the unfettered use of noncompetes: the likelihood that employers will impose illegally broad restraints on unassuming employees;<sup>13</sup> and the possibility that even modestly drafted noncompetes, taken in the aggregate, will adversely affect economic competition.<sup>14</sup> Both suppositions have since been borne out by emerging empirical data that is playing an important role in noncompete reform efforts.<sup>15</sup>

This Article offers a 2020 perspective on a decade of on-the-ground reform efforts and ground-breaking empirical research. The new enforcement regime appears to be heeding the calls of an emerging literature that is toppling fundamental assumptions about the use of noncompetes and the effectiveness of court-imposed limits on their enforcement. My claim, however, is that it does not go far enough in deterring employer overreach in drafting and requesting noncompetes. While the new regime will likely succeed in reigning in particular employer abuses—by imposing, for instance, what I will refer to as “vulnerable worker bans”—more aggressive reforms are needed to protect the mobility of all employees and to realize the economic benefits of a so-called “high velocity” labor market.<sup>16</sup>

This Article proceeds as follows: Part II surveys the historical and emerging law of employee noncompetition. It describes a budding enforcement regime with the potential to upend basic enforcement rules and status quo employer practices. Part III considers both the impetus and justification for these policy developments, connecting Professor Sullivan’s

<sup>9</sup> See *Arthur Murray Dance Studios of Clev. v. Witter*, 105 N.E.2d 685, 687 (Ohio 1952) (describing the common law of noncompete enforcement as “a sea—vast and vacillating, overlapping and bewildering” out of which “[o]ne can fish . . . any kind of strange support for anything”).

<sup>10</sup> Charles A. Sullivan, *Revisiting the “Neglected Stepchild”: Antitrust Treatment of Postemployment Restraints of Trade*, 1977 U. ILL. L.F. 621 (1977) [hereinafter *Neglected Stepchild*].

<sup>11</sup> *The Puzzling Persistence*, *supra* note 7.

<sup>12</sup> Nor are these Sullivan’s sole contributions to this field. Also relevant are his works on “garden leave,” or pay-to-sit-out clauses, and employee loyalty. See Charles A. Sullivan, *Tending the Garden: Restricting Competition via “Garden Leave”*, 37 BERKELEY J. EMP. & LAB. L. 293 (2016) [hereinafter *Tending the Garden*]; Charles A. Sullivan, *Mastering the Faithless Servant: Reconciling Employment Law, Contract Law, and Fiduciary Duty*, 2011 WIS. L. REV. 777 (2011). For purposes of this paper, I limit my discussion to the other two.

<sup>13</sup> *Puzzling Persistence*, *supra* note 7, at 1150–51.

<sup>14</sup> *Neglected Stepchild*, *supra* note 10, at 637.

<sup>15</sup> See *infra* Part III.

<sup>16</sup> ALAN HYDE, *WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET* (2003).

past work to a wave of empirical scholarship that seemingly validates long-held fears about the adverse economic effects of noncompete agreements and the law's inability to police opportunistic employer behavior. Part IV speculates on what the new enforcement regime means for employee mobility. It argues that in order for the new enforcement regime to meaningfully alter current practices, state legislation must go further in three ways. New laws must (1) ensure that workers receive initial notice of and maintain ongoing access to information about their rights; (2) categorically void agreements that reflect employer overreach, and (3) create pathways for employees to challenge and remedy unlawful noncompete practices at all stages of employment.

## II. NONCOMPETITION LAW, THEN AND NOW

The regulation of employee mobility is a delicate matter. On one hand, the law must protect employers' investments in both information and human capital in order to incentivize research and development.<sup>17</sup> At the same time, the law cannot allow employers to stymie fair competition or to impede the free mobility of labor.<sup>18</sup> At the cross-section of these competing policies is the question of the contractual enforceability of noncompete agreements that limit employees' prospects for future employment. This section examines noncompete law historically and from the vantage point of today, describing a viral reform movement that, over the last five years, has sought to ban noncompetes in particular populations and limit their use in the labor market overall. This movement is giving way to a new enforcement regime far less hospitable to noncompetes among states that have long condoned their use.

### A. *The Predictably Unpredictable Common Law*

Compared to other restrictive covenants, noncompetes are of particular concern because they impose outright limits on employees' ability to engage in competitive work.<sup>19</sup> They have the potential to profoundly impede

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<sup>17</sup> See generally Blake, *supra* note 1, at 627 ("From the point of view of the employer, postemployment restraints are regarded as perhaps the only effective method of preventing unscrupulous competitors or employees from appropriating valuable trade information and customer relationships for their own benefit."). Professor Harlan Blake's seminal article, although written sixty years ago, still serves as an eloquent and insightful exposition of the competing policies underlying noncompete law, and I rely on it throughout this section and the Article.

<sup>18</sup> See *id.* ("[Postemployment] restraints also diminish competition by intimidating potential competitors and by slowing down the dissemination of ideas, processes, and methods. They unfairly weaken the individual employee's bargaining position vis-à-vis his employer and, from the social point of view, clog the market's channeling of manpower to employments in which its productivity is greatest.").

<sup>19</sup> Other contractual instruments like non-solicitation and non-disclosure agreements, by

individual workers' access to economic opportunity, effectively indenturing them to a particular employer. Thus, noncompetes pose an especially high risk of economic harm to the individual employees who sign them, as well as the broader harms to society that flow from any private agreement in restraint of trade.

The law has historically attempted to contain both risks by imposing a two-part "rule of reason."<sup>20</sup> In every state that permits noncompetes, employers must first justify their use of the instrument by demonstrating an interest at stake beyond the mere desire to avoid ordinary competition or retain the individual employee.<sup>21</sup> The way that interest is defined varies somewhat across states, but generally the law requires that the employee have access either to trade secrets, confidential information, or customer

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contrast, impose much narrower restraints on employees. The former prohibit employees from contacting co-workers or past clients; the latter from disclosing or relying on proprietary information. The fact that contractual vehicles for protecting employer interests exist short of an outright restraint on employee competition casts further doubt on the justifications for allowing noncompetes given their harsh effects on employees. New legislation in Massachusetts recognizes this point, making the potential effectiveness of less onerous restraints a consideration in determining the reasonableness of a noncompete. *See* MASS. GEN. LAWS ANN. ch. 149 § 24L(b)(iii) (West 2020) ("A noncompetition agreement may be presumed necessary where the legitimate business interest cannot be adequately protected through an alternative restrictive covenant, including but not limited to a non-solicitation agreement or a non-disclosure or confidentiality agreement."). For the most part, however, states have categorized all restrictive covenants imposed on employees as subject to the basic rule of reason developed in the noncompete context. *See, e.g.,* W.R. Grace & Co., Dearborn Div. v. Mouyal, 422 S.E.2d 529, 531 (Ga. 1999) ("[A nonsolicitation agreement] contained in an employment contract is considered to be in partial restraint of trade and will be upheld if the restraint imposed is not unreasonable . . ."); Aon Consulting, Inc. v. Midlands Fin. Benefits, Inc., 748 N.W.2d 626, 653 (Neb. 2008) (determining the enforceability of a nonsolicitation agreement by considering whether the restriction is "(1) reasonable in the sense that it is not injurious to the public, (2) not greater than is reasonably necessary to protect the employer in some legitimate interest, and (3) not unduly harsh and oppressive on the employee."); Cambridge Eng'g, Inc. v. Mercury Partners 90 BI, Inc., 879 N.E.2d 512, 528 (Ill. App. Ct. 2007) ("A nonsolicitation clause is only valid if reasonably related to the employer's interest in protecting customer relations that its employees developed while working for the employer.") (internal quotations omitted).

<sup>20</sup> I have described the applicable legal framework in more detail elsewhere, as have others. *See generally* *Bargaining for Loyalty*, *supra* note 7, at 1173–80 (2001); Estlund, *supra* note 7, at 393–95; Glick, *supra* note 1, at 370–73. For purposes of this Article, therefore, I offer a brief summary, relying on these and other sources.

<sup>21</sup> *See, e.g.,* Davis v. Albany Area Primary Health Care, Inc., 503 S.E.2d 909, 912 (Ga. Ct. App. 1998) (declaring that "avoidance of competition is not a legitimate business interest" in finding geographically broad physician noncompete unenforceable); Hasty v. Rent-A-Driver, Inc., 671 S.W.2d 471, 473 (Tenn. 1984) ("[A]ny competition by a former employee may well injure the business of the employer. An employer, however, cannot by contract restrain ordinary competition."); Weber v. Tillman, 913 P.2d 84, 89 (Kan. 1996) ("[I]t is well settled that only a legitimate business interest may be protected by a noncompetition covenant. If the sole purpose is to avoid ordinary competition, it is unreasonable and unenforceable.").

relationships.<sup>22</sup> Once the employer meets this threshold showing, it must additionally demonstrate that the scope of the restraint is reasonable in relation to those interests and not unduly harmful to the employee.<sup>23</sup>

This body of common law has long had a statutory overlay. Over the course of the twentieth century about half the states enacted some form of noncompete legislation. For the most part, however, those statutes did not substantially change the underlying law. Some targeted specific professions, such as physicians or radio broadcasters.<sup>24</sup> Others made particular tweaks, such as expanding or more precisely delineating the circumstances under which an employer could meet the threshold requirement of an underlying interest.<sup>25</sup> Yet, for the most part, these statutes reaffirmed the two-part rule of reason. Some codified it outright.<sup>26</sup> Others took a seemingly more comprehensive or idiosyncratic approach, only to later be interpreted by court decisions reasserting the relevance of the historical rule.<sup>27</sup> In the end,

<sup>22</sup> See Arnov-Richman, *Bargaining for Loyalty*, *supra* note 7, at 1176.

<sup>23</sup> See Arnov-Richman, *Bargaining for Loyalty*, *supra* note 7, at 1178; Glick, *supra* note 1, at 371–73. Some articulations of the rule also reference potential harm to the public, *see generally* Restatement (Second) of Contracts § 188 (1981) (declaring noncompete unenforceable where “the promisee’s need is outweighed by the hardship to the promisor and the likely injury to the public”), but as discussed, *infra*, courts generally omit any direct application of that portion of the rule. *See infra* Part III.A.

<sup>24</sup> See, e.g., CONN. GEN. STAT. ANN. § 20-14p (West 2020); 820 ILL. COMP. STAT. 17/10 (2018); MASS. GEN. LAWS ch. 149, § 186 (2018); N.Y. LAB. LAW § 202-k (McKinney 2018); 5 R.I. GEN. LAWS ANN. § 5-37-33 (West 2020); TEX. BUS. & COM. CODE ANN. § 15.50 (West 2020); UTAH CODE ANN. § 34-51-201 (West 2020).

<sup>25</sup> See, e.g., FLA. STAT. ANN. § 542.335(1)(b)(5) (2020) (recognizing “extraordinary or specialized training” as a basis for enforcing a noncompete); ALA. CODE § 8-1-191 (2020) (recognizing “[s]pecialized and unique training involving substantial business expenditure” as a protectable business interest justifying enforcement of restrictive covenants); *cf.* C.R.S.A. §8-2-113(2)(c) (2019) (sanctioning the use of training repayment contracts with employees who depart within two years of employment).

<sup>26</sup> See, e.g., IDAHO CODE § 44-2701 (2018); MICH. COMP. LAWS § 445.774a (2018); WIS. STAT. § 103.465 (2018).

<sup>27</sup> As an extreme example, in the 1980s, courts in Oklahoma ruled that the state’s century-old noncompete statute, which on its face declared all restraints of trade void, applied only to agreements deemed unreasonable at common law. *See infra*, Part II.B.2; *see also* Technicolor Inc. v. Traeger, 551 P. 2d 163, 170 (Haw. 1976) (finding that Hawaii statute seemingly limiting lawful employee noncompetes to the protection of trade secrets “was not meant to be exclusive” permitting a court to analyze “all restrictive covenants. . . not listed as ‘per se violations’ and determine their validity” under the rule of reason). A more subtle example is Colorado. That state’s statute, confines enforceable restraints of trade to situations involving trade secrets or “managerial and executive” employees. C.R.S.A. §8-2-113 (2019). Yet some cases read the statutory exceptions in ways that arguably expand the bases for a noncompete to be more in accordance with traditional common law. For instance, while the Colorado statute does not create an exception for agreements protecting customer goodwill, courts have read the trade secret provision to permit noncompetes that effectively serve that purpose. *See, e.g.,* Great Am. Opportunities, Inc. v. Kent, 352 F. Supp. 3d 1126, 1134–35(D. Co. 2018) (finding question of fact existed as to whether employer’s customer lists and

noncompete law remained at the tail end of the millennium what it had always been—a common law body of doctrine largely consistent across those jurisdictions that are willing to enforce them.<sup>28</sup>

That is not to say that application of the law has been clear or consistent.<sup>29</sup> Courts apply the rule of reason case-by-case, usually in the context of a preliminary injunction hearing. The legal inquiry is highly fact-specific, and the sentiments of judges toward the instruments varies. Much ink has been spilt attempting to rank jurisdictions in terms of their support for or aversion to enforcement,<sup>30</sup> and the inability to predict outcomes is a constant refrain.<sup>31</sup> Adding to the uncertainty, during the mid-twentieth century, courts in some states began to reform overbroad agreements that would otherwise fail the rule of reason.<sup>32</sup> The evolution of this practice has deepened the variation between jurisdictions,<sup>33</sup> contributing to strategic

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account information constituted trade secrets justifying enforcement of otherwise invalid noncompetition and nonsolicitation clauses against sales representative who solicited business from former clients). In addition, while the statute refers exclusively to “trade secrets,” decisions sometimes refer to the legitimacy of restraints protecting “confidential information.” See, e.g., *Haggard v. Spine*, No. 09-cv-00721-CMA-KMT, 2009 WL 1655030, at \*5–6 (D. Colo. June 12, 2009); see generally *Bargaining for Loyalty*, *supra* note 7, at 1182–89 (exploring the distinction between trade secret and confidential information). The upshot is that Colorado law is considerably more tolerant of noncompetes than one might suppose from reading its statute.

<sup>28</sup> See Maureen B. Callahan, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 709 (1985) (asserting as of the mid-1980s that the rule of reason “has survived virtually unchanged to the present day”).

<sup>29</sup> For nearly seventy-five years, scholars and courts alike have pointed to the Ohio Supreme Court’s vivid description of the jurisprudence: “[It is] a sea—vast and vacillating, overlapping and bewildering” out of which “[o]ne can fish . . . any kind of strange support for anything.” *Arthur Murray Dance Studios of Cleveland v. Witter*, 105 N.E.2d 685, 687 (Ohio 1952).

<sup>30</sup> See, e.g., Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751 (2011); Evan Starr, *Consider This: Firm-Sponsored Training and the Enforceability of Covenants Not to Compete*, 72 INDUS. & LAB. REV. 783 (2019). For a discussion and assessment of the various indexes of state laws, see generally J.J. Prescott, Norman D. Bishara & Evan Starr, *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. STATE L. REV. 369, 458–59 (2016).

<sup>31</sup> See *Bargaining for Loyalty*, *supra* note 7, at 1243 (describing noncompetes as “placeholders guaranteeing the employer a judicially crafted remedy”); Orly Lobel, *Enforceability TBD: From Status to Contract in Intellectual Property Law*, 96 B.U. L. REV. 869 (2016) [hereinafter *Enforceability TBD*] (discussing the costs of uncertainty in noncompete enforcement to the intellectual property regime).

<sup>32</sup> See, e.g., *Metropolitan Ice Co. v. Ducas*, 196 N.E. 856, 858 (Mass. 1935); *Solari Industries, Inc. v. Malady*, 264 A.2d 53 (NJ 1970); *Fullerton Lumber Co. v. Torborg*, 70 N.W.2d 585, 592 (Wisc. 1955).

<sup>33</sup> This practice appears to have begun with courts merely “blue penciling” – or striking out—discrete clause, but has evolved into a practice of fully rewriting the overbroad restraint. See, e.g., *Fullerton*, 70 N.W.2d 585 at 552 (“[W]e do not see why the basic reason for



behavior on the part of employers and their counsel.<sup>34</sup> These differences, however, are a matter of application rather than a reflection of the law itself. In those jurisdictions that enforce them, the governing principles and doctrinal rules were, until recently, largely the same, and the question of the legality of noncompetes was considered settled law.

### B. Reform Gone Viral

This laconic landscape recently has given way to a viral reform movement that is fast displacing the status quo. Since 2015, there have been dozens of state legislative initiatives, at least three bills introduced in Congress, and a host of regulatory and enforcement efforts at both the state and federal levels targeting employee noncompetes and other agreements that limit mobility. This section provides an overview of some of these developments, focusing on three types of reform efforts: what I refer to as “vulnerable worker bans” that prohibit noncompetes with low-wage, low-skilled workers; “California-style bans” that seek to void all forms of employee noncompetes; and “middle way” statutes that impose select procedural requirements and substantive limitations on how, where, and under what conditions noncompetes may be imposed and enforced.

#### 1. Protecting the Vulnerable

The most successful reform initiative thus far has been a wide-spread effort to ban the predatory use of noncompetes with vulnerable workers—

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[enforcing] a contract after removing terms which are literally divisible should not also exist in the case of indivisible promise”); *see generally* 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, 245–51 (2007) (describing the different jurisdictional approaches to unreasonable non-compete agreements, including “voiding the agreement, using the ‘Blue Pencil’ doctrine to eliminate an unreasonable term, and using the ‘Blue Pencil’ doctrine to eliminate an unreasonable term and replace it with a reasonable term.”). In a handful of states, legislation subsequently overruled or clarified the practice of judicial modification, adding another dimension to the differences between states on this critical point. *See, e.g.*, WIS. STAT. ANN. § 103.465 (2020). I will return to the need for further legislation limiting judicial modification, *infra* Part IV.

<sup>34</sup> *See e.g.*, *Manuel v. Convergys Corp.*, 430 F.3d 1132 (11th Cir. 2005) (applying Georgia law and voiding noncompete despite its Ohio choice-of-law provision in declaratory judgment suit where employee had never worked in Ohio and had relocated to Georgia for position with new employer at time of filing); Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381, 1385–86 (2008) (describing how companies seek to leverage the pro-noncompete stance of particular jurisdictions through choice-of-law agreements); Viva Moffat, *Making Non-Competes Unenforceable* 54 ARIZ. L. REV. 939, 943 (2012) (arguing for uniform non-enforcement rule to avoid conflict of laws and other “state-to-state problems” resulting from jurisdictional differences in noncompete enforcement).

those who are either low-wage, low-skilled or both. An employer's need for a noncompete in such cases is questionable; such workers are unlikely to have access to the type of information or customer relationships that would provide a competitive advantage post-employment.<sup>35</sup> Vulnerable workers are also less likely than their better-paid, higher-skilled counterparts to comprehend the legal significance of a noncompete or object to its imposition as a condition of employment. The use of noncompetes in such situations raises suspicions of unfair dealing.

Over a dozen states have entertained statutory bans on the imposition of noncompetes on vulnerable workers—defined by reference to a particular economic indicator or to other employment laws.<sup>36</sup> These “vulnerable worker bans,” as I refer to them, have come both in the form of stand-alone legislation or in conjunction with other proposed reforms. At least seven such initiatives have passed and approximately half a dozen are pending or were recently considered.<sup>37</sup> Similar moves have been made at the federal level. In 2015, Senator Chris Murphy of Connecticut introduced the Mobility and Opportunity for Vulnerable Employees (“MOVE”) Act, which would have banned noncompetes with employees earning below the federal

<sup>35</sup> Indeed, many such agreements would likely be held unenforceable under the rule of reason were they to be pursued in court. As will be discussed, a core contribution of Professor Sullivan's work, and one impetus behind efforts to ban noncompetes in vulnerable populations, is the recognition that such agreements constrain those who sign them irrespective of their legality, an issue that may never be litigated. *See Puzzling Persistence*, *supra* note 711, at 1137–39 (explaining why an employee would more likely comply with an overbroad noncompete than risk being sued); *Neglected Stepchild*, *supra* note 10, at 622–23 (describing litigated noncompete cases as the “proverbial iceberg's tip”); *infra* Part III.B.

<sup>36</sup> Many of these efforts use the federal or state minimum wage as a reference. *See, e.g.*, ILL. COMP. STAT. ch. 820 § 90/5 (West 2019); N.H. REV. STAT. ANN. § 275:70-a (2020). Some track the employee's exempt or non-exempt status under the Fair Labor Standards Act or its state law equivalent. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 149, § 24L(c)(i) (West 2020). Others set out threshold income levels. *See, e.g.*, ME. REV. STAT. ANN. 26 § 599-A (2019) (400% of the federal poverty level); MD. CODE ANN., LAB. & EMPL. § 3-716 (West 2020) (\$15/hour and \$31,200 annually); OR. REV. STAT. ANN. § 653.295(1)(d) (West 2016) (U.S. Census Bureau's median family income for family of four); 28 R.I. GEN. LAWS § 28-59-2(7) (2020) (250% of the federal poverty level for individuals); WASH. REV. CODE. ANN. § 49.62.020(1)(b) (West 2020) (salary of \$100,000 per year, to be adjusted annually).

<sup>37</sup> Legislation has passed and/or gone into effect in Illinois, 820 ILL. COMP. STAT. 90/10 (2018), Maine, ME. REV. STAT. ANN. tit. 26 § 599-A (2020), Maryland, MD. CODE ANN., LAB. & EMPL. § 3-716 (West 2020), Massachusetts, MASS. GEN. LAWS ANN. ch. 149, § 24L (West 2020), New Hampshire, N.H. REV. STAT. ANN. § 275:70-a (2020), Rhode Island, 28 R.I. GEN. LAWS § 28-59-3 (2020), and Washington, WASH. REV. CODE. ANN. § 49.62.020 (West 2020). Bills are pending or were recently considered in Connecticut, H.B. 6913, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019), Hawaii, H.B. 1059, 30th Leg., Reg. Sess. (Haw. 2019), Indiana, S.B. 348, 121st Gen. Assemb., Reg. Sess. (Ind. 2019), New Jersey, S.B. 2872, 218th Leg., Ann. Sess. (N.J. 2018), New York, Assemb. B. 2504, 142nd Leg. Sess., Reg. Sess. (N.Y. 2019), Pennsylvania, H.B. 563, 2019 Leg., 203rd Gen. Assemb. (Pa. 2019), and Virginia, S.B. 1387, 2019 Reg. Sess. (Va. 2018).

or applicable state minimum wage.<sup>38</sup> More recently, Senator Marco Rubio introduced the Freedom to Compete Act, which would amend the Fair Labor Standards Act to preclude the use of noncompetes with non-exempt employees subject to minimum wage and overtime requirements.<sup>39</sup>

In addition to these legislative efforts, a number of regulatory programs seeking to protect the mobility of vulnerable employees are also underway. In early 2018, the Washington State Attorney General's Office spearheaded a worker protection initiative that aims to eradicate the use of "no poach" clauses in franchise contracts. "No poach" clauses differ from noncompetes in that they are found in contracts between business entities, but their effect is similar: The corporate franchisor requires each individual franchisee, as a condition of operating, not to employ workers previously employed by another franchisee, resulting in a de facto bar against employee movement between corporate locations.<sup>40</sup> These franchise employees frequently work low-skill service jobs such as food preparation, cash register operation, clean up, and related service and retail tasks for minimum or near-minimum wage.<sup>41</sup>

<sup>38</sup> The "MOVE" Act, S. 1504, 114th Cong. (2015). See generally Lydia DePillis, *Can the Senate Stop Low-Wage Employers from Tying up Workers with Non-competes?*, WASH. POST (June 2, 2015, 3:16 PM), <https://www.washingtonpost.com/news/wonk/wp/2015/06/02/can-the-senate-stop-low-wage-employers-from-tying-up-their-workers-with-non-compete-s/>.

<sup>39</sup> Freedom to Compete Act, S. 124, 116th Cong. (2019). See generally Clifford R. Atlas, Erik J. Winton & Colin A. Thakkar, *U.S. Senator Reignites Federal Non-Compete Reform Efforts with Bill Aimed at Protecting Low-Wage Employees*, NAT'L L. R. (Feb. 18, 2019), <https://www.natlawreview.com/article/us-senator-reignites-federal-non-compete-reform-efforts-bill-aimed-protecting-low>. This bill is currently in the Committee on Small Business and Entrepreneurship. CONGRESS.GOV, <https://www.congress.gov/bills/116/congress/senate/bills/124/all-info> (last visited Jan. 29, 2020). Also pending is a more recent bill sponsored by Senator Murphy and Senator Young that would ban all employee noncompetes, limiting such restraints to situations involving the sale or dissolution of business entities. See Workforce Mobility Act of 2019, S. 2614, 116th Cong. (2019); Amanda Jaret & Sandeep Vaheesan, *Non-Compete Clauses Are Suffocating American Workers*, TIME (Dec. 19, 2019), <https://time.com/5753078/non-compete-clauses-american-workers/>; *infra* Part II.B.2.

<sup>40</sup> For instance, prior to settling with the AG's Office, Jimmy John's standard franchise contract provided that "Franchisee shall not. . .[e]mploy or seek to employ any person who is at that time employed by Franchisor or by any Affiliate of Franchisor, or by any other franchisee of Franchisor, or otherwise directly or indirectly induce or seek to induce such person to leave his or her employment thereat." Compl. for Civil Penalties, Injunction, and Other Relief at 4, *State of Wash. v. Jersey Mike Franchise Sys. et. al.*, No. 1802025822-7 (Wash. King Cty. Super. Ct. Oct. 15, 2018).

<sup>41</sup> Indeed, the Washington AG's efforts gained popular attention when the media reported on the use of no poach clauses by the Jimmy John's sandwich franchise which eliminated any intra-franchise opportunities for the low-wage workers who assemble its sandwiches. See Neil Irwin, *When the Guy Making Your Sandwich Has a Noncompete Clause*, N. Y. TIMES: UPSHOT (Oct. 14, 2014), <https://www.nytimes.com/2014/10/15/upshot/when-the-guy-making-your-sandwich-has-a-noncompete-clause.html>; Ben Rooney, *Jimmy*

The Washington State Attorney General's office, operating under its antitrust authority and in conjunction with other states' offices, has investigated and reached settlements with over one hundred and fifty national corporate chains—primarily in the fast food industry, but also with an expanding array of service and retail operators, including gyms, hotels, home cleaners, shippers, and tax preparers.<sup>42</sup> The negotiated consent agreements provide that the corporate franchisor will cease requiring “no poach” clauses in its franchise contracts and refrain from enforcing them in any existing contract. In at least one instance, the Office initiated litigation against a franchisor that initially declined to settle,<sup>43</sup> and several class-action suits have been brought on behalf of employees adversely affected by the clauses.<sup>44</sup>

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*John's Under Fire for Worker Contracts*, CNN: MONEY (Oct. 22, 2014, 12:00 PM), <https://money.cnn.com/2014/10/22/news/jimmy-johns-non-compete/index.html>. No-poach agreements, however, are not limited to franchise contracts nor do they only affect low wage workers. In the late 2000s the Department of Justice filed suit and ultimately achieved settlement with several iconic Silicon Valley technology companies, including Google, Apple, Adobe, and Intuit, that had informally agreed not to hire each others' employees. *See* Press Release, U.S. Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), <https://www.ustice.gov/opa/pr/justice-department-requires-six-high-tech-compani> es-stop-entering-anticompetitive-employee. More recently, then-California Attorney General Kamala Harris filed suit against eBay for entering into “handshake” agreement with Intuit not to hire or recruit each other's employees. *See* Press Release, Kamala D. Harris, Cal. Att'y Gen., Attorney General Kamala D. Harris Files Lawsuit against eBay for Anticompetitive Hiring Agreement (Nov. 16, 2012), <https://www.oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-files-lawsuit-against-ebay-anticompetitive>. Such “gentleman's agreements” among key industry players are especially notorious given California's robust stance against agreements in restraints of trade. *See generally* Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix The Talent Market*, 59 SANTA CLARA L. REV. 663, 668–70 (2020) [hereinafter *Gentlemen Prefer Bonds*] (discussing the Google litigation and settlement and the DOJ's investigation of other “horizontal” collusions limiting worker mobility).

<sup>42</sup> *See* Press Release, Bob Ferguson, Wash. Att'y Gen., AAG to Testify to Congress as AG Ferguson's Anti-No-Poach Initiative Reaches 155 Corporate Chains (Oct. 28, 2019), <https://www.atg.wa.gov/news/news-releases/aag-testify-congress-ag-ferguson-s-anti-no-poach-initiative-reaches-155-corporate>; *see generally* *Gentleman Prefer Bonds*, *supra* note 40 (discussing these and related efforts).

<sup>43</sup> Attorney General Ferguson filed suit against Jersey Mike's for violation of antitrust provisions in Washington's Consumer Protection Act after the company refused to remove no-poach clauses from their existing franchise contracts. *See* Press Release, Bob Ferguson, Wash. Att'y Gen., AG Ferguson Announces Major Milestones in Initiative to Eliminate No-Poach Clauses Nationwide, Files Lawsuit Against Jersey Mikes (Oct. 15, 2018), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-major-milestones-initiative-eliminate-no-poach-clauses>. The suit subsequently settled.

<sup>44</sup> *See, e.g.*, Class Action Complaint at 2, *Turner v. McDonald's USA*, No. 1:19-cv-05524 (N.D. Ill. Aug. 15, 2019); Class Action Complaint at 1, *Griffith v. H&R Block, Inc.*, No. 4:19-cv-00470-ODS (N.D. Ill. Nov. 13, 2018); Plaintiff's Antitrust Class Action Complaint at 1, *Rice v. Arby's Franchisor, LLC*, No. 1:19-cv-00131-NRN (D. Colo. Jan. 15, 2019); Class Action Complaint at 1, *Fuentes v. Jiffy Lube Int'l, Inc.*, No. 18-5174 (E.D. Pa.

Similar work has been underway, albeit with less national attention, to address the direct use of noncompetes with employees. The New York and Illinois Attorneys General's Offices, for instance, have been investigating the use of unreasonable noncompetes, broadly defined, based on employee complaints. Like the Washington Attorney General's Office, they have proceeded primarily through their investigative power, achieving settlements with several large employers<sup>45</sup> and in some cases, initiating litigation.<sup>46</sup> The New York initiative includes a direct information campaign targeting individual employees. The Office has disseminated an easy-to-understand question and answer sheet explaining workers' rights and options before and after signing a noncompete and urging workers to report abusive agreements.<sup>47</sup>

In sum, there is a developing consensus in favor of outright bans against employers' use of noncompetes with certain vulnerable populations. The movement is playing out primarily at the state level through the efforts of legislatures and chief law enforcement offices, although there is interest at the federal level as well.<sup>48</sup> These efforts, while limited in scope, have been

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Nov. 29, 2018); Class Action Complaint at 1, *Houston v. Papa Johns Int'l, Inc.*, No. 3:18-cv-825-JHM (W.D. Ky. Dec. 14, 2018); *see generally Gentlemen Prefer Bonds*, *supra* note 41 (discussing such litigation).

<sup>45</sup> *See* New York State, Office of the Attorney General, *Non-Compete Agreements in New York State: Frequently Asked Questions* (Sept. 2018), <https://ag.ny.gov/sites/default/files/non-competes.pdf>; *see also* Aruna Viswanatha, *Sandwich Chain Jimmy John's to Drop Noncompete Clauses from Hiring Packets*, THE WALL STREET J. (June 21, 2016, 9:00 PM), <https://www.wsj.com/articles/sandwich-chain-jimmy-johns-to-drop-noncompete-clauses-from-hiring-packets-1466557202>; Elliot Brown, *WeWork Reaches Settlement on Noncompete Pacts*, THE WALL STREET J. (Sept. 18, 2018, 4:53 PM), <https://www.wsj.com/articles/wework-reaches-settlement-on-noncompete-pacts-1537304008>.

<sup>46</sup> *See, e.g.,* *People of Ill. v. Check Into Cash of Ill., LLC*, No. 2017-CH-14224 (Cook County Cir. Ct. filed Oct. 25, 2017); *People of Ill. v. Jimmy John's Enters., LLC*, No. 2016-CH-07746 (Cook County Cir. Ct. filed June 8, 2016); *see generally* State of Illinois, Office of the Attorney General, *Overuse of Non-Competition Agreements: Understanding How They Are Used, Who They Harm, and What State Attorneys General Can Do to Protect the Public Interest* (June 13, 2018), [https://lwp.law.harvard.edu/files/lwp/files/webpage\\_materials\\_papers\\_madigan\\_flanagan\\_june\\_13\\_2018.pdf](https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_madigan_flanagan_june_13_2018.pdf).

<sup>47</sup> *See* New York State, *supra* note 45. More recently the Washington AG's Office expanded its Worker Protection Initiative to similarly consider abusive noncompete practicing, filing litigation and ultimately achieving a settlement with a coffee shop requiring such agreements of its barristas. *See* Press Release, Bob Ferguson, Wash. Att'y Gen., Attorney General Bob Ferguson Stops King County Coffee Shop's Practice Requiring Baristas To Sign Unfair Non-Compete Agreements (Oct. 29, 2019) <https://www.atg.wa.gov/news/news-releases/attorney-general-bob-ferguson-stops-king-county-coffee-shop-s-practice-requiring>.

<sup>48</sup> For instance, Congress received testimony from the Washington Attorney General's Office regarding its anti-no poach and expanded non-compete initiative at a hearing on Labor Market Competition held late last year. *See* U.S. House of Representatives, Hearing: Antitrust and Economic Opportunity: Competition in Labor Markets available at

successful in prohibiting some of the most abusive uses of noncompetes.

## 2. Chasing California

In contrast to these narrowly targeted efforts, a handful of reformers have set their sights higher. At the federal level, Senator Chris Murphy last year introduced legislation seeking a federal California-style ban on noncompetes.<sup>49</sup> Similarly, the Federal Trade Commission is considering a petition, supported by various scholars and interest groups, calling on the agency to use its rulemaking authority to declare employee noncompetes an unfair method of competition.<sup>50</sup>

At the state level, in 2015, Hawaii adopted a California-style ban solely for the technology sector.<sup>51</sup> A hat tip to the Golden State, the law's explicit goal was to stimulate and protect Hawaii's high-tech industry, eliminating barriers to hiring and staunching brain drain.<sup>52</sup> Three state legislatures are considering or recently considered bills proposing California-style bans on all employee noncompetes throughout the state. Vermont last year introduced a bill voiding restraints on employee competition in language almost identical to California's law.<sup>53</sup> Illinois legislators proposed amending that state's recently enacted vulnerable worker ban to void all noncompetes irrespective of the worker's income status.<sup>54</sup> Pennsylvania legislators proposed a bill declaring noncompetes "illegal, unenforceable and void as a matter of law."<sup>55</sup>

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<https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventId=110152>.

<sup>49</sup> See Workforce Mobility Act, *supra* note 39. Murphy's bill ups the ante on Senator Rubio's Freedom to Compete Act that would create a federal vulnerable worker ban. See *supra* note 39 and accompanying text. It was introduced with bi-partisan support.

<sup>50</sup> The Author of this article is a signatory to the petition. See Open Markets Institute et al., *Petition for Rulemaking to Prohibit Worker Non-Compete Clauses* (Mar. 15, 2019), <https://openmarketsinstitute.org/wp-content/uploads/2019/03/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf>; Josh Eidelson, Labor Groups Petition U.S. FTC to Ban Non-Compete Clauses, BLOOMBERG (Mar. 20, 2019, 1:22 PM), <https://www.bloomberg.com/news/articles/2019-03-20/labor-groups-petition-u-s-ftc-to-prohibit-non-compete-clauses>. The agency held a hearing earlier this year to consider the state of the law and the economic research on noncompetes and has sought public comment. *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, FTC (Jan. 9, 2020) <https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues>.

<sup>51</sup> HAW. REV. STAT. ANN. § 480-4(d) (West 2015).

<sup>52</sup> See *Enforceability TBD*, *supra* note 31, at 887–88 (2016) (discussing the Hawaii statute's legislative history).

<sup>53</sup> H.B. 1, 2019-2020 Leg., Gen. Assemb. (Vt. 2019).

<sup>54</sup> H.B. 2565, 2019 Leg., 101st Gen. Assemb. (Ill. 2019).

<sup>55</sup> H.B. 171, 203rd Gen. Assemb., 2019 Sess. (Pa. 2019).

Meanwhile, in Oklahoma, a series of legislative and judicial developments have resulted in that state becoming the third jurisdiction in the United States to ban noncompetes outright. Since the turn of the century, Oklahoma's labor code included language similar to the noncompete bans in California and North Dakota.<sup>56</sup> Beginning in the 1970s, however, in a series of cases primarily involving non-solicitation agreements, the state supreme court ruled that the Oklahoma statute applied only to complete prohibitions on an individual practicing his or her profession.<sup>57</sup> These holdings suggested that noncompetes satisfying the common law rule of reason could survive the statutory prohibition.<sup>58</sup> That interpretation was foreclosed recently when the Oklahoma legislature passed amendments in 2001<sup>59</sup> and 2013<sup>60</sup> to expressly permit nonsolicitation agreements, while declaring all other forms of restraint "void and unenforceable."<sup>61</sup> The effect of these changes is to overrule the prior caselaw permitting reasonable noncompetes, and the consensus is that Oklahoma is now a nonenforcement state.<sup>62</sup>

The developments in Oklahoma are clearly idiosyncratic, a seeming

<sup>56</sup> Prior to recent amendments, it provided: "Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind [other than in the context of a sale of business or dissolution of a partnership] is to that extent void." OKLA. STAT. tit. 15, §217 (2018). For an historical account of the Oklahoma statute and its relationship to California and North Dakota law, see generally Jeb Boatman, Note, *Contract Law: As Clear as Mud: The Demise of the Covenant Not to Compete in Oklahoma*, 55 OKLA. L. REV. 491 (2002); Teresa L. Green, Note, *The Shifting Landscape of Restrictive Covenants in Oklahoma*, 40 OKLA. CITY U. L. REV. 449, 459–65 (2015).

<sup>57</sup> See, e.g., *Crown Paint Co. v. Bankston*, 640 P.2d 948 (Okla. 1981); *Bd. of Regents of Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n*, 561 P.2d 499 (Okla. 1977); *Tatum v. Colonial Life & Accident Ins. Co.*, 465 P.2d 448 (Okla. 1970). See generally Boatman, *supra* note 56, at 498–99 (describing this interpretive history); Green, *supra* note 3, at 459–61 (same).

<sup>58</sup> See *Board of Regents, etc. v. Nat. Collegiate Ath. Ass'n*, 561 P.2d 499, 508 (Okla. 1977) (concluding that the "[v]alidity of a] restraint of trade must be determined by its reasonableness in view of the particular circumstance. An agreement in illegal restraint of trade is void, but an agreement in reasonable restraint of trade is valid.")

<sup>59</sup> OKLA. STAT. tit. 15., §§ 217, 219A (2001) (permitting agreements that prohibit a former employee from "directly solicit[ing] the sale of goods, services or a combination of goods and services from the established customers of the former employer.").

<sup>60</sup> OKLA. STAT. tit. 15., § 219B (2013) (permitting agreements that prohibit a former employee "from soliciting . . . the employees or independent contractors of that person or business to become employees or independent contractors of another person or business").

<sup>61</sup> OKLA. STAT. tit. 15., § 219A(B) (2001).

<sup>62</sup> See *Howard v. Nitro-Lift Techs.*, 273 P.3d 20, 28 (Okla. 2011) (determining that "[t]he plain, clear, unmistakable, unambiguous, and unequivocal language of [the 2001 amendments] prohibits employers from binding employees to agreements which bar their ability to find gainful employment in the same business or industry as that of the employer" with the "only exception" being nonsolicitation agreements), vacated on other grounds 133 S.Ct. 500 (2012); see generally Green, *supra* note 3, at 462–63.

rectification of a suspect interpretation of the state's original statute.<sup>63</sup> Yet the timing is telling, occurring at the onset of the new enforcement regime. It is unclear whether any of the pending bills proposing California-style bans have hopes of succeeding.<sup>64</sup> Prospects at the federal level seem bleak with the nation entering an election year and Congress having failed to act on less dramatic legislation in the past. At a minimum these initiatives have symbolic value, attesting to how far interest in noncompete reform has reached. As a practical matter, they may play an anchoring role in debates on the subject, funneling support toward more incremental legislation like the "middle way" initiatives discussed next.

### 3. Seeking Middle Ground

Beyond these two extremes, a handful of states have adopted or are considering adopting what I refer to as "middle way" legislation. There is no one model for these laws, but they can be collectively described as multipart statutes that aim to restrict the use of noncompetes primarily through one or more of the following mechanisms: (1) limiting their substantive terms, (2) establishing procedural protections for workers asked to sign them, and (3) imposing penalties or other consequences on employers who violate the law.

With respect to substantive limits, a consistent feature of middle way legislation is that it incorporates or exists alongside the type of vulnerable worker ban described previously.<sup>65</sup> But this is just a starting point. Middle way legislation goes on to set limits on the substantive terms of noncompetes sought from workers who satisfy the state's income threshold. These interventions are idiosyncratic and cover different types of terms. Some seek to define the outer bounds of the noncompete's scope. For instance,

<sup>63</sup> See Boatman, *supra* note 56, at 501 ("While [the recent statutory] amendments initially may seem radical, a close inspection . . . reveals that the amendments simply bring Oklahoma statutes in line with established case law.").

<sup>64</sup> While data supports the conclusion that greater employee mobility improves economic conditions in certain important respects, *see infra* Part III, noncompetes offer benefits to the individual employers who rely on them to protect their assets and retain talent. From this perspective, noncompetes pose a classic collective action problem that a ban is well suited to address. See Orly Lobel, *Non-Competes, Human Capital Policy & Regional Competition*, J. CORP. L. (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3473186](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3473186). As Professor Orly Lobel explains, however, not all firms stand to benefit from so drastic a regime change and some may rationally prefer retaining the status quo or at least a moderate enforcement climate. *Id.* at 12 (cautioning that "a one size fits all approach may not be appropriate" in all regions and industries). Indeed, proposed California-style bans have been met with staunch resistance from the business community. See Aimee Keane, *Non-Compete Clauses Prompt an American Backlash*, FIN. TIMES (Aug. 4, 2016), <https://www.ft.com/content/3196e048-4e6a-11e6-88c5-db83e98a590a>.

<sup>65</sup> See, e.g., ME. REV. STAT. ANN. tit. 26, § 599 (2019); *supra* Part II.B.1.



Massachusetts' new law and Connecticut's law on physician agreements cap the duration of noncompetes at twelve months.<sup>66</sup> Oregon's and Washington's laws allow the employer a maximum of eighteen months,<sup>67</sup> while a bill considered in New Hampshire would limit the employer to six months.<sup>68</sup> Other interventions seek to regulate the terms of the exchange. Some state legislation requires, for instance, that employees who sign a noncompete after beginning employment<sup>69</sup> receive identifiable consideration in addition to continued employment.<sup>70</sup> Others mandate that the employer compensate the employee when and if the restraint goes into effect, requiring so-called "garden leave" or its equivalent.<sup>71</sup>

<sup>66</sup> MASS. GEN. LAWS ANN. ch. 149, § 24L(b)(iv) (West 2020); CONN. GEN. STAT. ANN. § 20-14p (West 2019).

<sup>67</sup> OR. REV. STAT. ANN. § 653.295 (West 2016); WASH. REV. CODE ANN. § 49.62.020 (West 2020);

<sup>68</sup> H. B. 346, 2019 Leg., 166th Sess. (N.H. 2019).

<sup>69</sup> I refer to these types of contractualized adjustments of employment terms during the course of an existing employment relationship as "midterm" modifications. See Rachel Arnov-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427, 428 (2016). Such adjustments are problematic as a matter of contract law and from a fairness perspective because they are generally extracted on explicit or implicit threat of termination. See *id.*; Jordan Leibman & Richard Nathan, *The Enforceability of Post-Employment Noncompetition Agreements Formed After At-Will Employment Has Commenced: The "Afterthought" Agreement*, 60 S. CAL. L. REV. 1465 (1987); Tracy L. Staidl, *The Enforceability of Noncompetition Agreements when Employment Is At-Will: Reformulating the Analysis*, 2 EMP. RTS. & EMP. POL'Y J. 95,118 (1998).

<sup>70</sup> See, e.g., MASS. GEN. LAWS ANN. ch. 149, § 24L(b)(ii) (West 2020) (requiring "fair and reasonable consideration independent from the continuation of employment"); WASH. REV. CODE ANN. § 49.44.020(1)(a)(ii) (West 2020) (requiring "independent consideration"); see also OR. REV. STAT. ANN. § 653.295 (West 2016) (requiring such an agreement to be "entered into upon a bona fide advancement" in the employee's position).

<sup>71</sup> See MASS. GEN. LAWS ANN. ch. 149, § 24L(b)(vii) (West 2020) (requiring garden leave at fifty percent of the employee's salary or "other mutually-agreed upon consideration"); *id.* (permitting enforcement of a noncompete following a termination due to layoff only in the event that the employer continues to pay the employee's salary); S. B. 635, 2018 Leg., 218th Sess. (N.J. 2018) (requiring garden leave at full salary); H. B. 346, 2019 Leg., 166th Sess. (N.H. 2019) (requiring fifty percent of the employee's salary). "Garden leave" is a concept inherited from the U.K. that requires an employer to pay the employee for any post-work period in which the employee is prohibited from competing. See generally Greg T. Lembrich, Note, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291 (2002) (discussing history and current state of the doctrine in England). It has appeal as a possible solution to the problem of forced unemployment resulting from overly broad restraints. Yet it has received relatively little attention from scholars, Professor Sullivan being one of the few exceptions. *Tending the Garden*, *supra* note 12, at 322–23 (predicting increased adoption of garden leave provisions in high-level employment contracts with mixed results for employees); see also Estlund, *supra* note 7 at 425 (suggesting that garden leave might be made a condition of enforceability which would force the employer to bear the cost of employee's "forced idleness"); Lembrich, *supra* note 71, at 2321–23 (suggesting that garden leave offers employers greater predictability of enforcement while better balancing the competing

Still other substantive interventions are aimed at limiting or encouraging particular terms without directly mandating them. In Oregon, for instance, an employer who provides garden leave may enforce a noncompete without regard to the state's minimum income threshold.<sup>72</sup> In Massachusetts a restriction limited to the "specific types of services" provided by the employee in the geographic area where those services were provided is "presumptively reasonable."<sup>73</sup> In Washington, a duration exceeding eighteen months is "presume[d] . . . unreasonable and unenforceable."<sup>74</sup> Such provisions encourage employers to draft within preferred limits in order to obtain what are essentially evidentiary advantages.

With respect to procedural protections, a common feature of middle way statutes is the requirement of advance notice of the noncompete combined with an opportunity to review. Oregon requires at least two weeks;<sup>75</sup> Massachusetts requires ten days.<sup>76</sup> A bill recently considered in New Jersey would have required thirty business days in advance of signing as well as notice of the employer's intent to enforce the noncompete within ten days of the employee's separation.<sup>77</sup> Massachusetts's law and legislation proposed in several neighboring states require the employee to be informed of the right to consult counsel.<sup>78</sup> At least one state proposal would have imposed a "poster" requirement of the type commonly mandated by federal employment protection legislation.<sup>79</sup>

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interests of restrained workers). Empirical research examining possible changes to wages and mobility of noncompete signers post-adoption would be of great value.

<sup>72</sup> OR. REV. STAT. ANN. § 653.295(6) (West 2016) (declaring a noncompete enforceable "without regard" to the statute's vulnerable worker ban if the employer provides at least fifty percent of the employee's salary or fifty percent of the median income for a family of four for the duration of the restriction); *cf.* H. B. 6913, 2019 Leg., (Conn. 2019) (permitting an employer that provides at least one year of full pay to a restrained employee to exceed the bill's twelve month duration cap by up to two years ).

<sup>73</sup> MASS. GEN. LAWS ANN. ch. 149, § 24L(b)(iii) (West 2020).

<sup>74</sup> WASH. REV. CODE ANN. § 49.62.020(2) (West 2020). Florida has had statutory minimum and maximum duration presumptions since the 1990s, well before the current legislative trend. *See* FLA. STAT. ANN. § 542.335(1)(d)(1) ("[A] court shall presume reasonable in time any restraint 6 months or less in duration and shall presume unreasonable in time any restraint more than 2 years in duration.").

<sup>75</sup> OR. REV. STAT. ANN. § 653.295(1)(a)(A) (West 2016).

<sup>76</sup> MASS GEN. LAWS ANN ch. 149 § 24L(b)(ii) (West 2020).

<sup>77</sup> S.B. 635, 218th Leg., Ann. Sess. (N.J. 2018). Such a provision has the effect of a statute of limitations, allowing the employee to act freely and without fear of litigation following the proscribed time period.

<sup>78</sup> MASS GEN. LAWS ANN. ch. 149 § 24L(b)(iii); S.B. 635, 218th Leg., Ann. Sess. (N.J. 2018); H.B. 6913, Gen. Assemb., Jan. Sess. (Conn. 2019); H.B. 346, 166th Leg. Sess., 2019 Session (N.H. 2019).

<sup>79</sup> The New Jersey bill would have required employers to post a copy of either the law

A final, albeit less common, feature of some middle way legislation and proposed laws is that they establish penalties or other consequences aimed at deterring and redressing employer violations. Maine's law grants the state department of labor enforcement responsibility and imposes a civil fine of at least \$5,000 on any employer who violates the law.<sup>80</sup> Washington's law goes further, creating a private right of action for victims of unlawful noncompete practices. Signers can recover actual damages sustained as a result of a violation of the law or liquidated damages, plus costs and attorneys' fees.<sup>81</sup>

The "middle way" legislation described here, along with future state initiatives, will likely prove a critical component of the new enforcement regime. In the absence of federal action or the will to impose outright bans, these laws will be the primary pathway for reform. Their ability to fundamentally alter employers' use of noncompetes and the rules of enforcement will depend on the particular measures adopted, a question I turn to in Part IV. At a minimum, they impose important, if discrete, new limits on employer noncompete practices and, in some cases, additional protections for employees.

### III. JUSTIFYING THE NEW REGIME

The previous section provided an overview of the new enforcement regime. This section seeks to explain it. It would be rash, of course, to attribute the new enforcement regime to any particular cause or development. It arises, however, in tandem with growing empirical research questioning long-held assumptions about the use of noncompetes and their effects on both workers and the economy. There are at least two implications from this work. First, there is now good reason to believe that noncompetes adversely affect wages and economic growth.<sup>82</sup> Second, there is growing evidence that employers overreach in their use of noncompetes, either by requiring them in situations where they are unenforceable or by drafting stronger restraints than the law allows.<sup>83</sup> Such research validates the speculations of some legal scholars, among them Professor Sullivan, who

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itself or an agency-approved summary in a prominent workplace location. S.B. 635, 218th Leg., Ann. Sess. (N.J. 2018); *see also* The "MOVE" Act, S. 1504, 114th Cong. (2015) (imposing a similar requirement).

<sup>80</sup> ME. REV. STAT. ANN. tit. 26 § 599-A6 (2019).

<sup>81</sup> WASH. REV. CODE ANN. § 49.62.080 (West 2019); *see also* S.B. 635, 218th Leg., Ann. Sess. (N.J. 2018) (protecting an employee who challenges the validity of a noncompete against employer reprisals). In Washington, these remedies are available to the employee even if the court partially enforces the agreement. § 49.62.080(3). This strikes a critical balance that I will take up further in Part IV, *infra*.

<sup>82</sup> *See infra* Part III.A.

<sup>83</sup> *See infra* Part III.B.

have asserted that current doctrinal limits on noncompetes do not go far enough in addressing their pernicious collective effects or policing opportunistic employer behavior.<sup>84</sup> This section examines the emerging data through the lens of Professor Sullivan's past work and demonstrates how his writings lay a theoretical groundwork for recent empirical research that is, in turn, fueling the new enforcement regime.

#### A. *The Collective Effects of Individual Agreements*

The law and economics of noncompetes are subtle and complex. On one hand, noncompetes are private agreements to which the parties assent, presumably because they deem the agreement to be in their interests. Freedom of contract principles dictate that they be enforced as written.<sup>85</sup> On the other hand, noncompetes are restraints of trade that reduce opportunities for those in the field and the public's access to their goods and services.<sup>86</sup> Open competition and principles of free trade dictate that they be limited to ensure a robust economy.

In the battle between these competing first principles, freedom of contract has long been the victor. The traditional law and economics view held that the removal of any one individual from the field of competition was

<sup>84</sup> *Puzzling Persistence*, *supra* note 7, at 1151 (arguing that current judicial doctrine fails to adequately discourage overbroad restraints); *Neglected Stepchild*, *supra* note 10, at 622–23 (describing collective effects of noncompetes including depressed wages and employee “lock in”); *See also Bargaining for Loyalty*, *supra* note 7, at 1189 (suggesting that employers impermissibly use noncompetes to restrain workers rather than protect their legitimate interests); Rachel S. Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 976–84 (2006) (arguing that employers’ opportunistic contracting practices constrain workers’ ability to evaluate or bargain over noncompetes) [hereinafter “*The Dilution of Employee Bargaining Power*”]; Estlund, *supra* note 7, at 424–25 (arguing for a “strict scrutiny” approach to noncompetes and other “conditionally waivable” employee rights); *cf.* *Gentlemen Prefer Bonds*, *supra* note 41, at 667–68 (describing the various ways that California employers seek to subvert the law and constrain worker mobility despite the state’s interdiction against noncompetes).

<sup>85</sup> *See Outsource Int’l, Inc. v. Barton*, 192 F.3d 662, 672 (7th Cir. 1999) (Posner, J., dissenting) (arguing that noncompetes should be enforced absent grounds for ordinary contract defenses); Callahan, *supra* note 28, at 725–27 (same); *cf.* Stewart E. Sterk, *Restraints on the Alienation of Human Capital*, 79 VA. L. REV. 383, 383 (1993) (asserting that rules limiting noncompete enforcement undermine individual freedom to alienate one’s human capital).

<sup>86</sup> *See Blake*, *supra* note 1, at 687 (“One situation in which social cost might be different from private cost exists when the restraint is being used, either by the employer alone or in a bilateral arrangement with his employees, to monopolize the business in a specific community.”); Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts* (Sept. 2019), <https://ssrn.com/abstract=3453433> 21–23 (offering a taxonomy of the adverse effects of noncompetes on labor and product markets).

unlikely to do economic damage to any industry.<sup>87</sup> Presumably, the rule of reason could do the job of discerning between those restraints that merely limited opportunity for the individual signer and those that had broader anti-competitive effects.<sup>88</sup> As applied, however, the rule of reason focuses almost exclusively on the competing interests of the individual litigants. Many formulations of the basic rule of reason require consideration of the agreement's potential impact on the public interest.<sup>89</sup> Yet few courts actually engage in that inquiry,<sup>90</sup> nor is it clear how such a factual determination would be made.<sup>91</sup> In a subset of cases where the noncompete involves a health care provider or other individual whose services are necessary to the public welfare, courts will sometimes consider whether other providers are available in the former employer's geographic area in an effort to protect consumer choice.<sup>92</sup> Outside that situation, however, courts mostly treat their evaluation of the harm to the individual worker as a proxy for the noncompete's fairness to the public.<sup>93</sup>

<sup>87</sup> See, e.g., *Outsource Int'l, Inc.*, 192 F.3d at 670 (Posner, J., dissenting) ("It would be unlikely for the vitality of competition to depend on the ability of a former employee to compete with his former employer."); Sterk, *supra* note 85, at 407 ("The anticompetitive effect of enforcing restrictive covenants. . . will probably be insignificant. Indeed, only the employer and the

employee are likely to see any effects."); see generally LOBEL, *supra* note 7 (describing the "orthodox" view of noncompetes held by early law and economic thinkers).

<sup>88</sup> See *Outsource Int'l, Inc.*, 192 F.3d at 670 (Posner, J., dissenting) (suggesting that anti-competitive effects from individual noncompetes are "[s]o unlikely that it would make little sense to place a cloud of suspicion over such covenants, rather than considering competitive effects on a case by case basis").

<sup>89</sup> See, e.g., *Barbagallo v. Marcum LLP*, 820 F. Supp. 2d 429, 450 (E.D.N.Y. 2011); *Reliable Fire Equip. Co. v. Arredondo*, 965 N.E.2d 393, 396 (Ill. 2011); *Dawson v. Temps Plus, Inc.*, 987 S.W.2d 722, 727 (Ark. 1999); RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981) (declaring a noncompete unreasonable in restraint of trade where "the promisee's need is outweighed by . . . the likely injury to the public").

<sup>90</sup> See *Bargaining for Loyalty*, *supra* note 7, at 1173–74 (critiquing courts for paying lip-service to the public interest without actually applying this prong of the test); Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L. J. 49, 56 (2001) ("The bite of the reasonableness analysis rests principally in the [factors] pertaining to the scope of the restrictions: a restraint deemed reasonable in scope typically will not be invalidated due to public interest or hardship alone.").

<sup>91</sup> Professor Sullivan lays out a series of factors that should come into play in assessing a noncompete's public effects, including the degree of labor market concentration and the specialized or essential nature of the employee's work. See *Neglected Stepchild*, *supra* note 10, at 647–50. However, it may be beyond the capacity of courts to make such assessments in the context of individual cases. I return briefly to this concern in my proscriptive *infra*, which focuses primarily on employer overreach rather than antitrust concerns.

<sup>92</sup> See, e.g., *Marsh USA, Inc. v. Cook*, 354 S.W.3d 764, 768 (Tex. 2011); *Carter-Shields v. Alton Health Inst.*, 739 N.E.2d 569, 577 (Ill. App. Ct. 2000).

<sup>93</sup> See Milton Handler & Daniel E. Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. REV. 669, 739 (1982) ("[C]ase-by-case judicial treatment

Professor Sullivan was an early critic of this approach. In the late 1970s he published *Revisiting the “Neglected Stepchild”: Antitrust Treatment of Postemployment Restraints of Trade*, in which he argued that the existing common law gave insignificant attention to the economic implications of noncompetes.<sup>94</sup> He pointed out that, under antitrust law, neither the agreement of the parties nor the legitimate interests of the employer could justify a restraint deemed unreasonable.<sup>95</sup> As a consequence, he argued that otherwise “reasonable” noncompetes could violate Section 1 of the Sherman Act and that state-level noncompete doctrine might be in conflict with federal antitrust law.<sup>96</sup> To remedy this problem, he asserted, “courts should look to the general use of [noncompetes] in the industry to determine whether the collective effect of such practices is to lock-in classes of key employees so as to create a general barrier to competition.”<sup>97</sup>

Underlying Sullivan’s analysis were two factual assumptions: first, that the incidence of noncompetes was far wider than could be surmised from reported caselaw;<sup>98</sup> and second, that as a consequence, noncompetes were likely to have collective effects beyond what a court would likely discern when looking solely at the relative positions of the litigants in any one case.<sup>99</sup> Writing in 1977, Professor Sullivan acknowledged the dearth of empirical data available to support those assumptions and speculated that the collective effects of noncompetes might well be immeasurable.<sup>100</sup>

Today we know that Professor Sullivan’s premises were correct and his fears well founded. First, noncompetes and other instruments that restrict employee mobility are more widely used than once supposed. Industry-level data suggests that they are quite routine in certain professions—notably among physicians and engineers—and that they are a bread-and-butter-

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of the public injury factor has not extended beyond a concern for the prevention of monopoly or serious anticompetitive impact. Public injury has been treated generically—that is, as the rationale for antimonopoly prohibitions and not as a separate negative factual requirement.”).

<sup>94</sup> *Neglected Stepchild*, *supra* note 10, at 622.

<sup>95</sup> *Neglected Stepchild*, *supra* note 10, at 642.

<sup>96</sup> *Neglected Stepchild*, *supra* note 10, at 623, 627.

<sup>97</sup> *Neglected Stepchild*, *supra* note 10, at 647–48.

<sup>98</sup> *Neglected Stepchild*, *supra* note 10, at 622–23 (suggesting that the reported decisions on noncompetes “constituted the proverbial iceberg’s tip”).

<sup>99</sup> *See Neglected Stepchild*, *supra* note 10, at 623.

<sup>100</sup> *Neglected Stepchild*, *supra* note 10, at 622–23 (characterizing suppositions about the incidence of noncompetes as the product of an “armchair survey”). This is not a criticism of Professor Sullivan’s work, but rather the norm in legal scholarship, particularly in the noncompete literature prior to the boom in empirical scholarship discussed *infra*. *See* Prescott, Bishara & Starr, *supra* note 30, at 372 (describing the wealth of “provocative, but ultimately limited” studies “fueled by unsupported assumptions and by high-profile anecdotal evidence of purportedly abusive practices involving noncompetes”).

feature of CEO contracts.<sup>101</sup> But beyond these highly skilled, highly compensated job sectors, noncompetes appear with frequency in ordinary employment relationships. In 2014, researchers administered the first nationwide representative survey of labor force participants asking about their experience with noncompetes.<sup>102</sup> The results of the 2014 Noncompete Project revealed that nearly one in five participants was bound by a noncompete at the time of response,<sup>103</sup> and nearly forty percent had signed one at some point in their career.<sup>104</sup> Presently, an estimated twenty-eight million workers are subject to a noncompete.<sup>105</sup> Moreover, while the majority of workers in the study who had signed noncompetes held a college degree, twelve percent of those without a degree had signed one as well.<sup>106</sup> Thus, the mere incidence of noncompetes suggests reason for concern.

Second, there is increased evidence that noncompetes in the aggregate adversely affect regional economies and labor markets. Twenty years after Professor Sullivan's contribution, Professor Ronald Gilson wrote a highly influential article, arguing that California's aberrational approach to noncompetes—its strict rule that all employee noncompetes are void and unenforceable—explained, at least in part, the phenomenal growth and economic success of Silicon Valley as compared to Massachusetts' less robust Route 128 high-tech corridor.<sup>107</sup> Gilson theorized that the unenforceability of noncompetes in California resulted in greater “knowledge spillovers”—the transmission of information from company to company through mobile employees—enabling and sustaining more successful regional development.<sup>108</sup>

<sup>101</sup> According to researchers, forty-three percent of engineers, fifty percent of physicians, and between fifty and eighty percent of Chief Executive Officers sign noncompetes. See Norman Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497 (2016) (summarizing studies). There is also firm-level data demonstrating that over fifty percent of companies use noncompetes according to their human resources personnel. *Id.* at 520. That research, however, does not reveal how widely each company uses the agreements. *Id.* (discussing the limited value of such undifferentiated data).

<sup>102</sup> See Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force* (U. of Michigan Law & Econ. Research Paper No. 18-013, 2019), <https://ssrn.com/abstract=2625714>.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 2.

<sup>106</sup> *Id.* at 2–3. That is not to say that noncompetes are always unlawful or unjustified with non-degree holding employees, only that it belies past assumptions that they were used sparingly with key employees.

<sup>107</sup> See Gilson, *supra* note 3, at 577–80.

<sup>108</sup> Gilson, *supra* note 3, at 578. For a more thorough account of the concept of spillovers and its treatment in early economic literature, see Alan Hyde, *Intellectual Property Justifications for Restricting Employee Mobility: A Critical Appraisal in Light of the Economic Evidence*, in RESEARCH HANDBOOK ON THE LAW AND ECONOMICS OF LABOR AND

Gilson's Article stoked new interest in noncompete enforcement and the regulation of human capital.<sup>109</sup> Its legacy includes both a richer legal literature<sup>110</sup> and a body of empirical work testing the broader economic effects of noncompete enforcement.<sup>111</sup> Much of the latter research supports the positive connection between labor mobility and regional growth that underlies Gilson's argument: by studying various indicators—including firm entry, industry spinouts, and venture capital impact, among others—and comparing them across jurisdictions, researchers have concluded that noncompete enforcement reduces firm-level competition, entrepreneurship, and growth.<sup>112</sup>

That research has also revealed the pernicious effects of noncompete covenants on labor markets. Sullivan's motivation in appealing to antitrust law was not to enhance economic development but to protect workers. In his 1977 article he sketched a troubling picture of non-compete signers indentured to their employers or forced to take career detours, resulting in lower wages and limited opportunity.<sup>113</sup> In fact, almost all of the post-Gilson empirical work focusing on labor market effects confirm this view. Not surprisingly, noncompete enforcement is associated with longer job tenure and reduced mobility.<sup>114</sup> Yet it is also associated with lower wages, belying

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EMPLOYMENT LAW 357, 361–62 (Michael L. Wachter & Cynthia L. Estlund eds., 2012).

<sup>109</sup> See Lobel, *supra* note 64 (crediting Gilson with creating the field of human capital law).

<sup>110</sup> Of particular note is the work of Professor Orly Lobel, whose scholarship expands on Gilson's to examine, among other things, the role of other forms of "human capital controls" and their intersection with intellectual property law, economic theory, and the business and management literature. See, e.g., LOBEL, *supra* note 7, at 51; Lobel, *supra* note 64; *Gentlemen Prefer Bonds*, *supra* note 41; Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789 (2015).

<sup>111</sup> See generally Bishara & Starr, *supra* note 101, at 523–34 (providing an overview of the literature); Prescott, Bishara & Starr, *supra* note 30, 381–89 (same).

<sup>112</sup> This research is methodologically diverse and has been exhaustively catalogued by others. For examples, see, e.g., Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425, 427 (2011); Evan Starr, Natarajan Balasubramanian & Mariko Sakakibara, *Screening Spinouts? How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms*, 64 MGMT. SCI. 552, 552–53 (2018); Toby E. Stuart & Olav Sorenson, *Liquidity Events and the Geographic Distribution of Entrepreneurial Activity*, 48 ADMIN. SCI. Q. 175, 194 (2003). For a comprehensive literature review, including an account of the limitations of existing data, see generally Bishara & Starr, *supra* note 101, at 523–34; Posner, *supra* note 86, at 18–19; Prescott, Bishara & Starr, *supra* note 30, at 381–89.

<sup>113</sup> See *Neglected Stepchild*, *supra* note 10, at 623.

<sup>114</sup> See, e.g., Natarajan Balasubramanian, et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, J. HUM. RESOURCES (forthcoming) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2905782](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2905782) (finding 8% fewer job opportunities and lower cumulative earnings among technology workers in noncompete enforcing jurisdictions versus non-enforcement jurisdictions); Matt Marx,



classical economic theory that predicts that signers will receive a wage premium for accepting a post-employment restraint.<sup>115</sup> Studies put the wage differential at anywhere from two to eight percent, depending on the market studied, with estimates of between fourteen and twenty-one percent for those who actually sign.<sup>116</sup> There is evidence that negative wage and mobility effects are felt not just by rank-and-file workers, but also by high-level, highly skilled employees who have significant bargaining power.<sup>117</sup>

In sum, Sullivan's views have become mainstream. State attorneys general and private litigants are leveraging the very theory he espoused—employer liability under Section 1 of the Sherman Act—in challenging franchise anti-poach agreements and the noncompete practices of employers with significant market power.<sup>118</sup> Meanwhile, both regulators and scholars are giving serious consideration to the idea that antitrust law should have something more to say about labor market concentration.<sup>119</sup> That does not

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Deborah Strumsky & Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55(6) MGMT. SCI. 875, 876 (2009) (finding reduced mobility among patent holding-employees in Michigan following that state's reversal of policy in favor of noncompete enforcement); Starr, Prescott & Bishara, *supra* note 102 (finding 11% increase in job tenure for noncompete signers); cf. Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695, 702–03 (2011) (finding more than 87% of job moves by engineers subject to a noncompete were industry exits).

<sup>115</sup> See Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 99–101 (1981) (proceeding from this assumption).

<sup>116</sup> See, e.g., Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 376 (2011) (finding 8.2% reduction in executive compensation growth following stricter non-compete enforcement); Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of NonCompete Agreements* (Sept. 2019), <https://ssrn.com/abstract=3452240> (finding 2-3% wage increase among low-wage workers after passage of Oregon vulnerable worker ban); Starr, *supra* note 30 (finding 4% wage difference between enforcing and non-enforcing states); see generally Posner, *supra* note 86 (summarizing findings).

<sup>117</sup> See, e.g., Balasubramanian, et al., *supra* note 114 (technologists); Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 376 (2011) (corporate executives); Marx, *supra* note 114 (engineers); but see Kurt Lavetti, et al. *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians* (2018), [http://kurtlavetti.com/UIPNC\\_vf.pdf](http://kurtlavetti.com/UIPNC_vf.pdf) (finding physicians who sign noncompetes earn more and have greater returns than those who do not); see generally Bishara & Starr, *supra* note 101, at 518–20, 526–31 (summarizing these findings and others).

<sup>118</sup> See *supra* Part II.B.1.

<sup>119</sup> See Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1023-33 (2019) (applying “well-established economic doctrine and traditional antitrust rules” to “mergers that facilitate anticompetitive wage and salary suppression”); Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 537, 547 (2018) (arguing for regulatory consideration of labor market effects in approving corporate mergers); Federal Trade Commission Announces Hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century 4

mean that antitrust law is or need be the primary vehicle for curtailing the economic harms associated with widespread noncompete use; clearly state-level legislation will have a large role to play in the new enforcement regime.<sup>120</sup> The point, rather, is that the alarm Sullivan sounded forty-odd years ago on the macro-effects of noncompetes has been not only justified, it is at last being heeded.

### B. *Employer Overreach and Employee Ignorance*

The previous section asserted that the collective effects of noncompetes on wages and growth are insufficiently captured by the common law rule of reason and its statutory overlay. The argument is agnostic, however, as to employer compliance with that body of law and to the legitimacy of any one contract. Even noncompetes that strike a reasonable balance between employer and employee might, if sufficiently pervasive in a particular industry, result in externalities justifying further regulation. But are noncompetes generally reasonable? That is to say, does the rule of reason adequately police individual fairness, even if it gives short shrift to broader market concerns?

Many legal scholars, myself included, have long been skeptical of employer noncompete practices, particularly in the era of standard form contracts and corporatized human resource departments.<sup>121</sup> This fear is

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[https://www.ftc.gov/system/files/attachments/hearings-competition-consumer-protection-21st-century/hearings-announcement\\_0\\_0.pdf](https://www.ftc.gov/system/files/attachments/hearings-competition-consumer-protection-21st-century/hearings-announcement_0_0.pdf) (setting hearing on the “evidence and analysis of monopsony power. . . in labor markets”); U.S. Dept. of Justice, Public Workshop On Competition In Labor Markets (Sept. 23, 2019) <https://www.justice.gov/atr/public-workshop-competition-labor-markets> (holding public workshop on “the role of antitrust [in] labor markets and promoting robust competition for the American worker”); Fed. Trade Comm., Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues (Jan. 9, 2020) at <https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues> (holding public workshop “to examine whether there is a sufficient legal basis and empirical economic support to promulgate a Commission Rule that would restrict the use of non-compete clauses in employer-employee employment contracts”). Federal interest in the subject began in 2016 during the Obama administration but waned thereafter. See Treasury Report, Non-Compete Contracts: Economic Effects and Policy Implications at <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>; White House 2016 Report Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses at [https://obamawhitehouse.archives.gov/sites/default/files/non-competes\\_report\\_final2.pdf](https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf). It is now being picked up at the agency level.

<sup>120</sup> See *supra* Part II.B.

<sup>121</sup> See e.g., Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 639 (2007) (describing use of “boilerplate [noncompete] documents, unilaterally drafted by the employer and presented as a condition of employment, often subsequent to the start of work”) [hereinafter *Rise of Delayed Term*]; *The Dilution of Employee Bargaining Power*, *supra* note 84, at 978

compounded by the reality that the enforceability of most noncompetes is unlikely to be litigated.<sup>122</sup> Thirty years after his antitrust contribution, Sullivan expanded on these concerns. In a 2009 article focusing on the prevalence of “unenforceable contract terms” in employment relationships, he argued that the current law is ineffective in policing overbroad noncompete terms and fails to adequately deter employer overreach.<sup>123</sup> He argued that owing to information deficits and risk aversion, employees are unlikely to question or challenge an employer’s demand for a noncompete.<sup>124</sup> During the course of employment, these employees may avoid seeking out other jobs or reject alternate employment because they either assume the noncompete they signed is binding or are unwilling to take the risk of being sued.<sup>125</sup> At the same time, employers face little to no legal consequence for using overbroad agreements. The majority of courts modify unreasonable terms, effectively redrafting the agreement to comply with the law. This incentivizes continued overreaching.<sup>126</sup>

Whether employers seek more than the law allows is, ultimately, an empirical question, one that research has begun to address. In turning to that data, it is useful to distinguish between three forms of overreach, which I characterize as follows: first, and most blatantly, an employer might act in direct contravention of a statutory prohibition, by requesting what I refer to simply as “illegal” noncompetes. Thus, an employer might insist on a noncompete, despite operating in a nonenforcement jurisdiction, or request

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(describing how employers exact noncompetes through “cubewrap contracting practices” that make the agreement appear to be “simple routine paperwork”); Estlund, *supra* note 7, at 423 (noting that some employers use noncompetes “as near-boilerplate . . . for a wide variety of positions, with little regard to the particulars of the position or to whether employees are privy to protectible information”); *Puzzling Persistence*, *supra* note 7, at 1129 (concluding that, while some employers issue unenforceable noncompete covenants by mistake, it is “certain that invalid [noncompete covenants] continue to be used by those who are well aware that they are unenforceable as written”); cf. *Gentlemen Prefer Bonds*, *supra* note 41, at 667–68 (describing how California employers intentionally undermine the state’s nonenforcement policy through no poach agreements and other practices).

<sup>122</sup> Professor Blake raised this concern eighty years ago. See Blake, *supra* note 1, at 682 (“For every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations.”); see also *The Dilution of Employee Bargaining Power*, *supra* note 84, at 975–76; *Rise of Delayed Term*, *supra* note 121, at 641; Estlund, *supra* note 7, at 421; *Puzzling Persistence*, *supra* note 7, at 1134; *Neglected Stepchild*, *supra* note 10, at 647–48.

<sup>123</sup> *Puzzling Persistence*, *supra* note 7, at 1131–32 (identifying “disconnect” between law’s purported goal of deterring overreach and “the actions of the courts on the ground” that are willing to partially enforce overbroad agreements).

<sup>124</sup> *Puzzling Persistence*, *supra* note 7, at 1134–36 (“[T]he obvious reason why one party would seek a [noncompete covenant] clause it knew to be unenforceable is that it believed the other party to be unaware of the fact and likely to remain unaware of it.”).

<sup>125</sup> *Puzzling Persistence*, *supra* note 7, at 1149.

<sup>126</sup> *Puzzling Persistence*, *supra* note 7, at 1147.

one from an employee in a profession where restraints are categorically void.<sup>127</sup> Second, even where noncompetes are statutorily permitted, the employer might demand one absent any claim to a protectible interest. For instance, certain employers might request noncompetes as a matter of course from employees at all levels of its organization, including those who could not plausibly have access to propriety information or relationships. Borrowing loosely from the antitrust discourse, I refer to these agreements as “naked” noncompetes because they serve purely to give the employer a competitive edge by preventing employee defection.<sup>128</sup> Finally, an employer might overreach in the terms of the agreement itself, what I refer to as “overbroad” noncompetes. In such a case, the noncompete is justified by the employee’s access to protectible assets, but the agreement is overly broad in scope, restricting the employee from working in too wide a market, for too long a period of time, or in too wide a region.

Recent data support the conclusion that employers in fact engage in at least some of these forms of overreach. We know, for instance, that employers use illegal noncompetes in violation of state statutes. The 2014 Noncompete Project found that noncompetes appear with equal frequency across jurisdictions, despite differences in states’ approaches to enforceability.<sup>129</sup> That is, researchers found no statistical difference in the number of respondents bound by a noncompete in nonenforcing states (California and North Dakota) compared to those that allow them.<sup>130</sup> Since employers are presumably aware of the legal regime in which they are operating, this data raises the concerning possibility that employers in nonenforcement jurisdictions are capitalizing on employee ignorance to skirt state law prohibitions.<sup>131</sup>

<sup>127</sup> See, e.g., AZ. REV. STAT. § 23-494 (voiding noncompetes with broadcast employees); DEL. CODE ANN. § 6-2707 (voiding noncompetes among physicians); HAW. REV. STAT. ANN. § 480-4(d) (West 2015) (voiding noncompetes with technology workers); R.I. GEN. LAWS ANN. § 5-37-33. .

<sup>128</sup> “Naked” restraints of trade are contracts wherein “the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster.” *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282–83 (6th Cir 1898), *aff’d*, 175 U.S. 211 (1899). They are generally void *per se* or subject to only a truncated inquiry. See generally AREEDA & HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 1904 (distinguishing between “naked” and “ancillary” restraints of trade and the relevant test for lawfulness).

<sup>129</sup> Prescott, Bishara & Starr, *supra* note 30, at 370 (finding that the incidence of noncompetition agreements in particular states bears little relationship to the jurisdiction’s enforcement rate).

<sup>130</sup> In fact, the incidence of noncompetes in non-enforcing states was slightly higher than their incidence in those jurisdictions deemed most hospitable to enforcement. Prescott, Bishara & Starr, *supra* note 30, at 461.

<sup>131</sup> To be sure, some of these agreements may be the product of mistake. In the age of

The same research gives reason to conclude that employers are also overreaching within enforcing jurisdictions, demanding naked noncompetes from employees who do not pose a competitive risk. As discussed previously, the 2014 Noncompete Project revealed that a surprising number of employees without college degrees have signed noncompetes.<sup>132</sup> While the probability of signing a noncompete increased with income level, between twelve and twenty-one percent of workers with annual income of \$60,000 and below were likely to have signed as well.<sup>133</sup> Moreover, various sources—including the previously-described investigative work of State Attorney General offices, isolated industry-specific studies, and a wealth of court decisions and anecdotal sources—reveal the use of noncompetes across a range of occupations including sandwich maker, hair stylist, gardener, daycare worker, and security guard.<sup>134</sup>

As of yet, we have only caselaw evidence of the third form of overreach—overbroad agreements whose terms exceed the bounds of the employer’s protectible interest. What we know empirically about illegal and naked agreements derives from surveys of labor market participants, which provide valuable data on the incidence of noncompetes but nothing about their content. The corpus of cases in which courts modify overbroad agreements attests the existence of this form of overreach, but research examining the agreements themselves is needed to verify and understand the scope of the problem.

Regardless of the type of overreach at issue, data about employee mobility and noncompete perception support the assumption that such agreements adversely affect employee behavior. Comparing the mobility patterns of noncompete signers across jurisdictions with different legal

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standard form agreements, less sophisticated employers may simply apply an agreement used elsewhere in its organization or one obtained commercially without regard to its enforceability in the relevant jurisdiction or without vetting its suitability to the particular employees asked to sign. See *Puzzling Persistence*, *supra* note 7, at 1151 (recognizing the possibility that unenforceable noncompetes are sometimes the result of honest error). I refer to these noncompetes as “legacy” agreements because the documents themselves are inherited from other contexts. Mistake alone, however, likely accounts for only a small subset of noncompetes found in non-enforcement jurisdictions. *Id.*

<sup>132</sup> See Starr, Prescott & Bishara *supra* note 102, at 17; *supra* Part III.A.

<sup>133</sup> Starr, Prescott & Bishara, *supra* note 102, at 42, fig.4.

<sup>134</sup> See generally STATE OF ILLINOIS, OFFICE OF THE ATTORNEY GENERAL, OVERUSE OF NON-COMPETITION AGREEMENTS 3 (June 13, 2018), [https://lwp.law.harvard.edu/files/lwp/files/webpage\\_materials\\_papers\\_madigan\\_flanagan\\_june\\_13\\_2018.pdf](https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_madigan_flanagan_june_13_2018.pdf); Steven Greenhouse, *Non-compete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES (June 8, 2014), <https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html>. To be sure, employee skill and pay levels are not perfectly correlated with access to proprietary information or relationships, and it is possible that employers have a legally cognizable interest with respect to some employees in such positions.

regimes, the 2014 Noncompete Project found that signers in non-enforcing jurisdictions had the same increased job tenure and lower defection rates as signers in enforcing jurisdictions.<sup>135</sup> Forty percent of signers across jurisdictions cited their noncompete as a reason for declining an offer of employment irrespective of the law in their jurisdiction.<sup>136</sup> In addition, fear of being sued, beliefs about enforceability, and reminders from their employers were more predictive of whether an employee would decline a competitor's offer than the applicable state law.<sup>137</sup> Thus the project authors conclude that "many employees may decide to decline employment offers they would have otherwise taken simply because they incorrectly believe their noncompete is enforceable."<sup>138</sup> In short, the *in terrorem* effects of noncompete agreements are not hypothetical. Employers are well-positioned not only to overreach in requesting noncompetes, but to reap advantages from those terms over the life of the employment relationship, regardless of their enforceability.<sup>139</sup>

Finally, there is increasing evidence that employers not only overreach in the various ways described, but they also manipulate the bargaining process. In two earlier works, I argued that the contractual view of

<sup>135</sup> See Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts* 16 (Mich. L. & Econ., Research Paper No. 16-032, 2019), <http://dx.doi.org/10.2139/ssrn.2858637> [hereinafter *The Behavioral Effects of (Unenforceable) Contracts*]

<sup>136</sup> *Id.* at 24.

<sup>137</sup> *Id.* at 25.

<sup>138</sup> *Id.* at 27. In a related information experiment, the authors of the 2014 noncompete project discovered that subjects greatly over-estimated the enforceability of noncompetes, including in states where they are completely unenforceable. See J.J. Prescott & Evan Starr, *Subjective Beliefs About the Enforceability of Noncompetes*, (Powerpoint Presented June 2019) (on file with Author). These results are unsurprising in light of prior studies demonstrating that employees misunderstand employer termination rights. See, e.g., Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 139 (1997) (finding that 74% of survey respondents incorrectly believed that employers could not fire an at-will employee for purely cost-saving reasons); Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-At-Will in Light of Findings That Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307, 335 (2002) (finding 50% incorrect response rate in similar study). See Prescott & Starr, *supra* note 138. Yet employee misperceptions about employer termination rights and the enforceability of noncompetes appear to run in opposite directions: employees underestimate the employer's ability to terminate employment at will while overestimating the employer's ability to enforce a noncompete. For this and other reasons, further study of employee perception is warranted.

<sup>139</sup> Indeed, the research reveals a further cause for concern: employers in non-enforcing jurisdictions in some cases affirmatively "remind" exiting employees of their noncompetes, a move that may well be calculated to induce compliance with what the employer knows is an unenforceable agreement. *The Behavioral Effects of (Unenforceable) Contracts*, *supra* note 135, at 4

noncompetes as a “bargained-for” term of the employment relationship is inapplicable in part because employers are likely to delay requesting a noncompete until after a new employee begins working.<sup>140</sup> The significance of this type of “cubewrap” contracting, as I have referred to it, is that it undercuts any ability for the employee to reject the noncompete, renegotiate its terms, or decline the job should the employer prove intransigent and the noncompete too objectionable.<sup>141</sup> Indeed, the 2014 Noncompete Project revealed that thirty to forty percent of workers are asked to sign noncompetes *after* they have accepted work, often when they are already on the job.<sup>142</sup> In other words, even the exceptional employee—the one who knows the law and has the wherewithal to challenge the employer—is constrained in any attempt to bargain over the necessity of a noncompete or the breadth of its terms.

#### IV. THE FUTURE OF EMPLOYEE NONCOMPETITION LAW

The previous section argued that new empirical research supports the claims of legal theorists and justifies, if not compels, serious reform. The next question is whether the new regime will meet the mark: will new legislation, along with continued regulatory investigation and enforcement, do the job of reducing the incidence of noncompetes and their collective effects on markets? Can these efforts successfully police employer behavior, disincentivizing and remedying employer overreach and manipulative practices? It is, of course, too soon to answer such questions—the new regime is only just unfolding. Neither is so broad an assessment possible within the scope of this Article. Yet to the extent that legislatures or other regulators are considering options for reform, it is appropriate to offer preliminary thoughts on the direction of the movement thus far and the course it ought to follow.

A few disclaimers are in order. First, I will focus on the role of state legislation targeting the problem of employer overreach. This does not reflect a preference for keeping the issue of noncompete enforceability

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<sup>140</sup> See *Rise of Delayed Term*, *supra* note 121, at 637; *The Dilution of Employee Bargaining Power*, *supra* note 84, at 963.

<sup>141</sup> See *Rise of Delayed Term*, *supra* note 121, at 653–54 (citing the legion of practical impediments to an employee negotiating or rejecting a noncompete agreement after accepting a job offer); *The Dilution of Employee Bargaining Power*, *supra* note 84, at 966–67 (“[C]ubewrap noncompetes succeed in further diluting an employee’s already tenuous grip on any form of bargaining power. They strip away the worker’s ability, both at the outset and during the course of employment, to refuse to deal.”).

<sup>142</sup> Starr, Prescott & Bishara, *supra* note 102, at 46, Table 2; see also Marx, *supra* note 114 at 706 (finding that 47% of sampled engineers signed their noncompete on or after the first day of work).

within the ambit of state regulation; indeed, there may be reasons to prefer a federal approach.<sup>143</sup> As previously noted, however, the likelihood of federal action appears dim, whereas states have already begun to enact laws and continue to entertain new bills.<sup>144</sup> Second, in considering state legislation, I will focus on what I consider the critical features of effective “middle way” statutes. This is where I see both the potential for movement as well as the need for guidance.<sup>145</sup> Finally, I will direct my comments to the particular problem of employer overreach and resulting *in terrorem* effects. That is not to discount the possibility that even reasonably drafted, appropriately targeted, and fairly obtained noncompetes could, if sufficiently pervasive, have aggregate market effects justifying further regulation. Rather, I leave that determination, and the job of striking a suitable balance, to economists and others with such expertise.

Turning to the task at hand, I believe that states seeking to quash opportunistic noncompetes of all kinds, and not merely those imposed on vulnerable populations, must make at least three specific reforms. They must (1) adopt robust disclosure requirements that go beyond mere notice; (2) eliminate courts’ ability to modify overbroad agreements; and (3) create a full-fledged private right of action that grants employees expedited access to the courts or reviewing agencies. I will discuss each of these briefly.

To begin, reducing *in terrorem* effects requires reeducation. It is both common sense and, increasingly, an empirical fact that employees do not understand their rights or their employers’ when it comes to noncompete enforcement.<sup>146</sup> State legislation that requires advance disclosure of the agreement does not address this problem, even if the disclosure alerts employees of their right to seek counsel. Few employees are likely to incur

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<sup>143</sup> To the extent we conceive of restrictions on employee mobility as an antitrust matter, it is squarely within federal jurisdiction. See Glick, *supra* note 1, at 404–417 (applying antitrust principles). In addition, federal legislation would create welcome uniformity. See Moffat, *supra* note 34, at 965. The variation in state laws thus far will doubtlessly pose enormous compliance challenges for employers. On the single issue of vulnerable worker status, for instance, no two state laws passed thus far use precisely the same criteria in establishing the relevant income threshold. See *supra* note 36 and accompanying text. It is possible that the desire for consistency and lower compliance costs could incent employers to support model or uniform state legislation that, while limiting the enforceability of noncompetes, would achieve greater predictability. The Uniform Law Commission in 2018 appointed a study committee to explore the matter. See <https://www.uniformlaws.org/projects/committees/study>. As of yet, however, it has issued no proposals.

<sup>144</sup> See Part II.B. *supra*.

<sup>145</sup> States will likely continue to enact vulnerable worker bans, a positive development but one that is necessarily limited and entails relatively few legislative choices beyond setting the applicable income threshold. See *supra* Part II.B.1. California-style bans seem a less realistic prospect and involve even fewer legislative choices. See *supra* Part II.B.2.

<sup>146</sup> See *supra* note 138 and accompanying text.



that expense, particularly at the start of employment when the possibility of a future separation and the prospect of limited job options are not salient.<sup>147</sup> Employees need direct information about the law upon receiving a noncompete and at any point at which they might contemplate separation; in other words, throughout their employment. Some proposals thus far have required employers to post a notice of employee rights, similar to the poster requirement typical of other protective employment legislation.<sup>148</sup> The continued value of physical posters, however, is questionable in our increasingly digital age, particularly for workers in technology fields.<sup>149</sup> In addition to a notice posting, state statutes should require employers to provide an understandable summary of the law and employees' legal rights at three points in the relationship: at the time the job offer is made and prior to the employee accepting, at any point in the relationship when a noncompete or its renewal is requested of an incumbent employee, and at the point of termination. The provision of information to incumbent employees is key to correcting the adverse effects of noncompetes on employee search behavior.<sup>150</sup>

<sup>147</sup> See *The Dilution of Employee Bargaining Power*, *supra* note 84, at 981 (describing cognitive limits on new hires' ability to evaluate the risk of signing a noncompete at the start of employment). The likelihood that cognitive bias limits an individual's ability to meaningfully assess boilerplate terms has been extensively explored in the consumer context. See, e.g., Russel Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHICAGO L. REV. 1203 (2003); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995); James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161 (2013). For this and other reasons, the consensus among contracts scholars is that mandated disclosure is not a solution to the problem of adhesive consumer terms. See, e.g., OMRI BEN-SHAHAR, ET AL., *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (Princeton Univ. Press 2016); NANCY S. KIM, *WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS* 174–210 (2013); MARGARET RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 197–242 (2013). There is reason to hope that advance notice will be more effective in employment relationships than in the consumer context. See *The Rise of Delayed Terms*, *supra* note 121, at 661–62. My contention, however, is that it remains inadequate.

<sup>148</sup> See, e.g., Mobility and Opportunity for Vulnerable Employees Act, S. Res. 1504, 114th Cong. (2015); NY Move Act, Assemb. B. 2504, 142nd Leg. Sess., Reg. Sess. (N.Y. 2019); S.B. 1387, 2019 Reg. Sess. (Va. 2019); S.B. 2872, 218th Leg., Ann. Sess. (N.J. 2018).

<sup>149</sup> See, Lobel, *Enforceability TBD*, *supra* note 31, at 892–93. This concern is one that goes well beyond the particular problem of noncompetes. The need to reach employees through digital channels is one that has been extensively considered in the labor organizing context. See, e.g., Christine Neylon O'Brien, *Employees on Guard: Employer Policies Restrict NLRB-Protected Concerted Activities on E-mail*, 88 OR. L. REV. 195, 198 (2009); Jeffrey M. Hirsch, *Worker Collective Action in the Digital Age*, 117 WEST VIRGINIA L. REV. 921, 923 (2015). Such matters, however, are beyond the scope of this Article.

<sup>150</sup> Arguably the point at which this information is most needed is when an employee is considering whether to search for or accept alternate employment. Since that is not a discrete point in the relationship, it is impossible to mandate a specifically timed disclosure that will address that precise concern. The hope rather is that the requirement to re-provide information

Of course, information campaigns, no matter how effective in reeducating employees, rely on employees to object to or defend against their employer's unlawful contracting practices. That is a risk many, if not most, might rationally decline to take. To reduce the *in terrorem* effects of noncompetes on workers, state legislators must directly target employer overreach. A simple but effective means of doing so would be to statutorily overrule the common judicial practice of modifying overbroad noncompetes. This is hardly a new idea, but it is one that demands recapitulation in light of the current reform movement.<sup>151</sup> Almost every jurisdiction that enforces noncompetes permits a court to pare down and partially enforce a noncompete that is otherwise overbroad in scope.<sup>152</sup> As a consequence of this practice, employers have little incentive to draft noncompetes narrowly. Indeed, they have every reason to overdraft, insofar as they may reap the benefits of the *in terrorem* effects of their overbroad terms during the course of employment. At the same time, the employer has nothing to fear should the reasonableness of its noncompete ever be challenged: if a court ultimately concludes that the agreement is overbroad, most likely it will simply enforce a lesser restraint.<sup>153</sup>

Despite this, and despite the numerous reform strategies that have

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upon a noncompete renewal will partially serve this purpose. Alternatively, legislators could consider requiring employers to provide the relevant information at regular intervals, such as in tandem with annual performance reviews or pay increases, irrespective of whether a renewal is requested.

<sup>151</sup> As previously noted, both Professor Sullivan and I pointed out the perverse incentives created by the judicial modification rule over a decade ago. See *The Dilution of Employee Bargaining Power*, *supra* note 84, at 989; *Bargaining for Loyalty*, *supra* note 7, at 1220; *Puzzling Persistence*, *supra* note 7, at 1128–29; see also Estlund, *supra* note 7, at 422–23.

<sup>152</sup> Exceptions include Wisconsin, where modification is statutorily prohibited, see WIS. STAT. ANN. § 103.465 (2020); *Streiff v. Am. Family Mut. Ins. Co.*, 348 N.W.2d 505, 507 (1984), and Virginia and Nebraska, where the question is governed by common law. See, e.g., *Alston Studios, Inc. v. Guess and Assoc.*, 492 F.2d 279, 284–85 (4th Cir. 1974); *Lanmark Tech., Inc. v. Canales*, 454 F. Supp. 2d 524, 531 (E.D. Va. 2006); *Gaver v. Schneider's O.K. Tire Co.*, 856 N.W.2d 121 (Neb. 1995) (“[I]t is not the function of courts to reform unreasonable covenants for the purpose of making them enforceable.”). For decades Georgia courts adhered to a relatively strict no-modification rule (sometimes referred to as the “red pencil” rule); however, the state legislature recently adopted a modification rule. GA. CODE ANN. § 13-8-54(b) (2020).

<sup>153</sup> See *The Dilution of Employee Bargaining Power*, *supra* note 84, at 989 (“[T]he availability of modification encourages employers to adopt aspirational agreements with the hopes of obtaining an injunction that reaches to the limits of the law.”); Estlund, *supra* note 7, at 423 (“[T]he problem of [employer] overreaching . . . is exacerbated by courts’ increasing willingness to sever or edit offending provisions. . . [F]or the employer who seeks to impose the widest restrictions possible, why not take a chance and overstep the bounds of the law?”). In some cases, where it is clear the employer has vastly overreached, a court may decline to modify. See, e.g., *National Graphics Co. v. Dilley*, 681 P.2d 546, 547 (Co. App. 1984) (affirming refusal to modify where noncompete lacked both a duration and geographic scope). It is unclear, however, how often courts exercise that discretion.

recently been proposed, there has to date been no movement towards eliminating judicial modification. To the contrary, at least three recently adopted state statutes explicitly reaffirm courts' ability to partially enforce overbroad restraints.<sup>154</sup> This includes Massachusetts' new noncompete law, arguably one of the most radically pro-employee overhauls of the new enforcement regime. Others are silent on the matter, which will allow courts to continue their pre-reform modification practices. This is deeply disappointing. It is unclear why judicial modification has been a sleeper issue in the reform movement, but I strongly suspect it reflects the inevitable need for legislative compromise. Those advocating for pro-employee reforms may be ceding this issue in their quest to achieve new substantive limits on noncompetes and procedural protections for workers. While I understand the need for compromise, I believe the matter of judicial modification is too critical to trade.<sup>155</sup>

Indeed, effective noncompete reform legislation, in addition to imposing penalties, must establish a comprehensive enforcement system to police unlawful practices and appropriately compensate aggrieved employees. Such a system must account for the particular needs and vulnerabilities of employees at all stages of the employment relationship. For instance, noncompete legislation should empower and protect employees who challenge an employer's use of an unlawful or overbroad agreement at the point at which it is requested. This can be done by prohibiting retaliation against employees who question, object to, report, or attempt to negotiate a proposed agreement.<sup>156</sup> On the other hand, once an employee has departed

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<sup>154</sup> See, e.g., GA. CODE ANN. § 13-8-53(d) (2020) ("Any restrictive covenant not in compliance with the provisions of this article is unlawful and is void and unenforceable; provided, however, that a court may modify a covenant that is otherwise void and unenforceable so long as the modification does not render the covenant more restrictive with regard to the employee than is originally drafted by the parties."); NEV. REV. STAT. § 613.195 (2020) (providing that if an employer brings an action to enforce a noncompetition covenant that is not in compliance with the statute, "the court shall revise the covenant to the extent necessary and enforce the covenant as revised"); MASS. GEN. LAWS ANN. Ch. 149 § 24L (2020) ("A court may, in its discretion, reform or otherwise revise a noncompetition agreement so as to render it valid and enforceable to the extent necessary to protect the applicable legitimate business interest.").

<sup>155</sup> At a minimum, any statute that maintains judicial modification must impose a monetary penalty on the overreaching employer. See, e.g., WASH. REV. CODE ANN. § 49.62.080 (West 2020) ("If a court or arbitrator determines that a noncompetition covenant violates this chapter, the violator must pay the aggrieved person the greater of his or her actual damages or a statutory penalty of five thousand dollars, plus reasonably attorneys' fees, expenses, and costs incurred in the proceeding."). Such a statute deters over-drafting through the threat of liability while still preserving the court's authority to modify overbroad agreements.

<sup>156</sup> For instance, legislation recently considered in New Jersey would have prohibited an employer from "penaliz[ing] an employee for defending against or challenging the validity or

or is on the brink of defection, that employee requires access to a forum that will swiftly adjudicate the lawfulness of his or her agreement.<sup>157</sup> Departing employees likely also need a mechanism for redressing losses resulting from the imposition or attempted enforcement of an unlawful or overbroad agreement. This can be achieved through the creation of a private right of action that grants employees the right to equitable relief, actual or liquidated damages, costs, and attorneys' fees.<sup>158</sup> Finally, the law must create pathways for incumbent employees to vet their agreements *ex ante*. To be sure, some will and should seek legal counsel before undertaking a job search. It would be appropriate, however, for new legislation to entrust to a state agency the power to investigate noncompetes, respond to individual complaints, and even issue opinion letters to concerned employees.<sup>159</sup>

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enforceability of the covenant." S.B. 2872, 218th Leg., Ann. Sess. (N.J. 2018). Absent such a provision, at-will employees are vulnerable to adverse action should they object to an invalid agreement. In theory, the common law public policy tort or state whistleblower laws could provide a vehicle for relief, but results in such cases have been inconsistent outside of California. *See, e.g.,* Maw v. Advanced Clinical Commc'ns, Inc., 846 A.2d 604, 609 (N.J. 2004) (holding that employee's refusal to sign non-compete after three and a half years of employment was a "private dispute" over contract terms not covered by New Jersey's Conscientious Employee Protection Act); Tatge v. Chambers & Owen, Inc., 579 N.W.2d 217, 222 (Wis. 1998) (holding that termination of an at-will employee for refusal to sign noncompete agreement did not give rise to wrongful discharge claim in violation of public policy exception). This owes in part to the reality that in an at-will employment regime, employers are free to fire or refuse to hire a worker who is unwilling to agree to the employer's proposed terms, provided they are lawful. Noncompete reform legislation that limits the situations in which noncompetes can be used must simultaneously protect any employee who objects to an invalid agreement.

<sup>157</sup> Some proposals have located authority to oversee enforcement and compliance in a government agency. *See, e.g.,* "MOVE" Act, S. 1504, 114th Cong. (2015) (granting U.S. Secretary of Labor authority to "receive, investigate, attempt to resolve, and enforce a complaint of violation"); NY Move Act, Assemb. B. 2504, 142nd Leg. Sess., Reg. Sess. (N.Y. 2019) (granting state labor commissioner "power to receive, investigate, attempt to resolve, and enforce a complaint of a violation"); H.B. 563, 2019 Leg., 203rd Gen. Assemb. (Pa. 2019) (granting state labor department authority to enforce law and "conduct investigations as it deems necessary"). While I believe agencies can play an important role in the new enforcement regime, their authority must not limit departing employees' access to an immediate judicial review in the face of threatened enforcement. Indeed, it would be appropriate for legislation to establish an expedited pathway for employees seeking a declaratory judgment.

<sup>158</sup> *See, e.g.,* WASH. REV. CODE § 49.62.080 (2020); S.B. 2872, 218th Leg., Ann. Sess. (N.J. 2018).

<sup>159</sup> For instance, employers can seek the advice of the Department of Labor regarding certain compliance issues under federal employment laws, such as whether employees are properly classified as exempt from minimum wage and overtime under the Fair Labor Standards Act. The opinion letters issued by the Department can serve as the basis for a good faith defense to liability or liquidated damages in the event of future claims. *See* 29 U.S.C. § 259 (2020). One could imagine a similar scheme enacted through noncompete reform legislation that would allow an employee to obtain a determination as to the enforceability of his or her noncompete prior to accepting alternate employment.

To be sure, no legislative scheme will be perfect. It would be a loss, however, if the current reform movement were to result in legislation that recreates the status quo or, worse, further muddies existing law. Such is my fear with Massachusetts' recent legislation that not only affirms the judicial modification rule, but introduces new areas of legal uncertainty while granting employees no vehicle for review or redress. Whatever substantive limitations or procedural protections new laws might impose, they will be of little use if employers remain free to demand overly broad noncompetes and credibly threaten litigation without fear of penalty or repercussion. The political will necessary for meaningful reform is here; let it not be squandered.

#### V. CONCLUSION

Three hundred years after the seminal court decision sanctioning reasonable noncompetes, change is in the making. Policy makers at all levels of government are considering reform initiatives that range from protections for vulnerable workers, to multifaceted overhauls of state law, to the outright elimination of all forms of employee noncompetes. This new enforcement regime is being fueled in no small part by the recent wave of empirical research bringing to light the aggregate and individual effects of noncompete use. That work, in turn, owes a debt to the foundational theoretical work contributed by Professor Sullivan and other legal scholars reaching back over decades. The confluence of these branches of academic scholarship with real-time reform activity on the ground make this a critical moment for noncompete policy. It is one that cannot be wasted. A regime that wishes to succeed both in freeing workers from oppressive restraints and capturing the economic benefits associated with greater employee mobility must do more than merely outlaw a subclass of vulnerable worker restraints that, in most cases, are already void under existing law. Employers are in a position to overreach relative to what state law permits, a reality with severe implications for all employees who sign. Bolder statutory limitations and procedural requirements must be devised, attentive to the real conditions under which employees agree to and abide by these ancient but ubiquitous agreements.