

**Where Have You Gone,
Law and Economics Judges?
Economic Analysis Advice to Courts
Considering the Enforceability of Covenants Not
to Compete Signed After At-Will Employment
Has Commenced**

MATTHEW C. PALMER*

Covenants not to compete and employment at will are aspects of employment and contract law that affect millions of American workers. An interesting question can arise if the two concepts are implicated in the same employment relationship: whether a covenant not to compete signed after at-will employment has begun is enforceable if the employee receives no additional benefit for signing the covenant, such as an increased wage or number of vacation days.

Seemingly, two logical yet opposing answers to this question exist. One could argue that the covenant not to compete is unenforceable because a basic tenet of contract law, namely that consideration is necessary to render a promise enforceable, is not met here. To the extent that the employee received nothing for signing the covenant not to compete, he or she has gained nothing and has lost his or her freedom to change employers, at least for a certain period of time and within a certain geographic area. Alternatively, one could argue that to the extent that the employment relation was at will, the employer could have fired the employee at any time; hence, the employee's continued employment constituted the consideration necessary to render the covenant enforceable.

Several state courts have addressed this question, and a considerable split among those courts exists in regard to the proper answer. Absent from these opinions and the discussion of this question in general, however, is the use of economic analysis. This seems anomalous in light of the fact that the utility of economic analysis has been recognized in a number of areas of law. This Note fills that void by conducting the requisite economic analysis, which shows that courts should be hesitant in setting forth blanket rulings

* B.S., The University of Akron, 2001; M.A., The University of Akron, 2002; J.D., The Ohio State University Moritz College of Law, expected 2006. My thanks to Professor Larry Garvin for directing my attention to this topic. Further thanks to Professor Garvin and Jason R. Job for taking the time to read drafts of this Note and improving it by making various comments and suggestions. Finally, I thank my parents, Dan and Joyce Palmer, for providing both the motivation and the opportunity to attend law school and to write this Note.

that such covenants will not be enforceable. Although courts holding that such covenants are unenforceable are likely operating under the assumption that they are helping workers of low skill and low wage, such an assumption is erroneous. The economics underlying the question indicate that the more likely outcome of such a ruling would be to exacerbate the plight of the low-skilled American worker, both in terms of wage and unemployment. Furthermore, whether the result would tend toward efficiency in the long run is an industry-specific question, reinforcing the conclusion that a blanket ruling that such covenants are unenforceable is imprudent.

[A] lawyer who has not studied economics . . . is very apt to become a public enemy.¹

I. INTRODUCTION

Two fixtures of American employment relationships are employment at will and covenants not to compete.² Although the prevalence of these concepts is beyond dispute,³ a difficult question can arise when they are combined; namely, whether a covenant not to compete signed after an at-will employee has commenced employment is enforceable.⁴ Because, generally

¹ Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 470 (1916), quoted in WERNER Z. HIRSCH, *LAW AND ECONOMICS*, at xxi (3d ed. 1999).

² The employment at will doctrine has been in existence since the late 1800s, and the concept of covenants not to compete for an even longer period of time. See *infra* notes 27, 29, 98 and accompanying text. Even though these two aspects of United States employment relationships have a long history, they remain in the forefront of societal interest and importance, evidenced by consistent recent national media coverage. See, e.g., Stephen Barr, *Call from Sidelines: More Research Needed Before Allowing 'At Will' Employment*, WASH. POST, Nov. 4, 2002, at B2 (arguing against the application of the at-will employment doctrine to federal employees, after three states had recently applied the doctrine to the employment relationships with their government employees); Kenneth Bredemeier, *Employers Have the Right to Fire Away*, WASH. POST, Dec. 28, 2003, at K1 (discussing the strong presumption toward the doctrine in Virginia, Maryland, and Washington, D.C.); Bernard Stamler, *How Long Is the Reach of Your Former Employer?*, N.Y. TIMES, Feb. 11, 2001, at BU9 (arguing that many more employees are now being asked to sign covenants not to compete, particularly in the "dot-com world").

³ See discussion *infra* Parts II & III.

⁴ The typical situation addressed in this Note can be viewed more concretely with an illustration. *A* is hired by *B* and *A*'s employment is at will. At some time after *A*'s employment begins, *B* asks *A* to sign a covenant not to compete. *A* does so, even though *A* is offered no separate consideration, such as a promotion, a pay increase, or additional

speaking, an employer can discharge an at-will employee for any reason whatsoever or no reason at all,⁵ the question essentially turns on whether the at-will employee's continued employment constitutes consideration sufficient to render the covenant enforceable.⁶

That question, attracting attention from legal commentators,⁷ is a topic of paramount interest to the fields of contract and employment law for a number of reasons. First, the fact that the Ohio Supreme Court has recently addressed the question⁸ underscores both its timeliness and importance to employment relationships. Second, a considerable split exists both within⁹ and among¹⁰ the states in regard to the proper answer to the question.¹¹ Third, the

vacation; however, neither does *B* terminate *A*'s employment, although *B* could have done so because *A*'s employment is at will. Later, the *A-B* employment relationship ends and *A* obtains a position with one of *B*'s competitors or *A* starts a business as a competitor of *B*. *B* subsequently sues, either to enforce the covenant not to compete, to obtain damages, or both. For the facts from an actual case addressing the enforceability of a covenant not to compete signed by an at-will employee after employment has commenced, see *infra* Part IV.

⁵ See, e.g., LLOYD G. REYNOLDS ET AL., *LABOR ECONOMICS AND LABOR RELATIONS* 371 (11th ed. 1998); MICHAEL YATES, *POWER ON THE JOB: THE LEGAL RIGHTS OF WORKING PEOPLE* 223 (1994). There are limitations on this broad statement. See discussion *infra* Part II.B.

⁶ See 1 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 2.10b (3d ed. 2004); JOHN P. DAWSON ET AL., *CONTRACTS* 208–09 (8th ed. 2003).

⁷ See *infra* note 16 and accompanying text.

⁸ *Lake Land Emp. Group of Akron, LLC v. Columber*, 804 N.E.2d 27, 32 (Ohio 2004) (holding that “consideration exists to support a noncompetition agreement when, in exchange for the assent of an at-will employee to a proffered noncompetition agreement, the employer continues an employment at[]will relationship that could legally be terminated without cause”). This decision by the Ohio Supreme Court is consistent with its recent jurisprudence regarding employment at will and covenants not to compete. For example, the court held that it would not read implied covenants into an employment contract that was terminable at will according to “the clear wording of the agreement.” See *Hamilton Ins. Servs., Inc. v. Nationwide Ins. Co.*, 714 N.E.2d 898, 901 (Ohio 1999). Moreover, the court agreed with the appellate court decision overturning the decision of the trial court that the covenant not to compete was unconscionable. See *id.* at 901–02 (tersely concluding that “[w]e agree with the determination of the court of appeals that this is a reasonable restriction”).

⁹ For insight into how dynamic the split can be within a state, see *infra* note 137 and accompanying text regarding the status of Ohio law before *Lake Land*.

¹⁰ See discussion *infra* Part IV.

¹¹ Not only is there a considerable split among the states, a number of states have not yet considered the question of the enforceability of covenants not to compete signed after at-will employment has commenced. BRIAN M. MALSBERGER, *COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY* (4th ed. 2004). The states that have not yet definitively ruled on the matter are Alaska, California, Colorado, Hawaii, Montana, New

employment at will doctrine remains a prevalent tool in American employment relationships,¹² notwithstanding the fact that it has been somewhat limited since its inception.¹³ Thus, the sheer number of American employment contracts affected¹⁴ ensures the significance of this question to the public. Finally, commentators predict a rise in the use of covenants not to compete as high-tech and service industries continue to increasingly dominate the American economy.¹⁵

This Note adds to the academic debate by virtue of the fact that it is driven by economic analysis, which previously has been absent from the literature¹⁶ and judicial opinions¹⁷ addressing the enforceability of covenants not to compete signed after at-will employment has commenced, even though legal scholars and judges have consistently recognized the value of economic analysis in resolving questions of law in a number of fields.¹⁸ Prior to this Note, the literature and judicial opinions addressing the enforceability of covenants not to compete signed by at-will employees after employment has

Mexico, Oklahoma, Rhode Island, and West Virginia. *See id.* In light of the significance of the question, it is likely that those states will address the matter soon.

¹² *See* discussion *infra* Part II.

¹³ *See id.*

¹⁴ Tens of millions of American workers' employment relationships are governed by the at-will doctrine. *See infra* note 25 and accompanying text.

¹⁵ *See* discussion *infra* Part III. For articles addressing the explosion of covenants not to compete, see Melinda Ligos, *Job Contracts with Noncompete Teeth*, N.Y. TIMES, Nov. 1, 2000, at G1 (discussing the rise in the use of such covenants in high-tech industries); Ellen L. Rosen, *More Employers Tighten Ties That Bind Workers to Them*, N.Y. TIMES, Oct. 24, 2004, at MB1 (contending that "lawyers who follow employment litigation say [lawsuits involving covenants not to compete] are on the rise").

¹⁶ *See* 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, 1465-67 (1987) (examining thoroughly the employment at will doctrine, the employer's protectible interest, and various contract defenses, including lack of consideration, economic duress, fraud and misrepresentation, unconscionability, unclean hands, and bad faith; but failing, however, to consider the valuable role of economic analysis in answering this question); Kathryn J. Yates, Note, *Consideration for Employee Noncompetition Covenants in Employments at Will*, 54 FORDHAM L. REV. 1123, 1138-39 (1986) (proffering a solution to the question of enforceability of covenants not to compete signed after at-will employment has commenced that is unsupported by economic analysis).

¹⁷ *See infra* note 133 and accompanying text.

¹⁸ *See infra* Part V.A.

commenced have focused instead only on policy and on the feasibility of possible solutions.¹⁹

The main contention of this Note is that economic analysis seriously advises against a blanket judicial ruling that covenants not to compete signed after an at-will employee has commenced employment are unenforceable; the analysis reveals that such a ruling would disproportionately and negatively affect the most disadvantaged workers in the American economy, the group that judges likely erroneously believe to be helping with such a ruling.²⁰ Studies of the employment at will doctrine are utilized, including those pertaining to the doctrine's economic analysis²¹ and rationales underlying its abdication.²² It is understood, however, that there is a multitude of other factors that courts also must consider when deciding this question.²³ Accordingly, this Note's secondary aim is to generally attract attention to economic analysis, which is instructive as to the decision's effects on employers and employees, to ensure that it receives its proper place as a valuable source in the decision matrix.

Part II introduces the reader to the employment at will doctrine, its foundations, and its current status in American employment and contract law. Part III briefly discusses covenants not to compete, their enforceability, and the strong likelihood that they will be used even more frequently in the future due to changes in the structure of the American economy. Part IV presents a paradigm case and discusses the current split among the states in regard to this issue, thus underscoring its importance and timeliness. Part V provides introductions to law and economics in general, as well as to labor market economic theory. With those foundations in place, Part VI applies the theory to explain that courts should be extremely cautious before ruling that covenants not to compete signed after employment at will has commenced are unenforceable. Part VI also underscores the secondary contention of this Note, namely that courts should remain cognizant of economic analysis as a

¹⁹ See, e.g., Yates, *supra* note 16, at 1138–39 (suggesting the adoption of a unilateral contract approach, but neither employing economic analysis, nor suggesting that economic analysis is a crucial tool in determining the answer to this question).

²⁰ See *infra* Part VI.

²¹ See, e.g., Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1144 (1989) (arguing that abdication of the employment at will doctrine cannot be justified on efficiency grounds).

²² See, e.g., Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 4 (1979) (arguing that discharge without cause constitutes a deprivation of equal protection to unorganized employees of private employers).

²³ See *infra* note 133 and accompanying text.

tool to help them make decisions, particularly in a case such as this which will affect millions of American workers. Part VII concludes the Note by summarizing its additions to the scholarly debate regarding the enforceability of post-employment covenants not to compete in the at-will setting.

II. THE AT-WILL EMPLOYMENT DOCTRINE: FOUNDATIONS, EROSION, AND CURRENT LEGAL STATUS

The employment at will doctrine provides that employees without contracts for a specified period may be discharged with or without cause; thus, the employment is "according to terms solely and completely determined and established by the employer."²⁴ The doctrine is crucial to American employment and contract law because it governs the employment relations of millions of American workers.²⁵

A. History, Development, and Rise of the Doctrine

The history and rise of the employment at will doctrine, unique to the United States in that no foreign country adheres to it,²⁶ is largely credited to a

²⁴ ARLENE BIELEFIELD & LAWRENCE CHEESEMAN, *LIBRARY EMPLOYMENT WITHIN THE LAW* 3 (1993). This broad statement is limited by certain exceptions, for example, civil rights violations. See discussion *infra* Part II. At least one author has argued that although the doctrine was meant to be a rule of contract interpretation, as it was initially stated, courts have "enlarged the rule of interpretation into a substantive rule which overrides the parties' intent." Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 68-69 (2000).

²⁵ It was estimated that although over twenty million workers had employment arrangements governed by collective bargaining agreements, eighty percent of which prohibited discharge unless for cause, seventy to seventy-five percent of the 100 million American employees remained unprotected by such "for cause" protections, either by contract or by statute. Theodore J. St. Antoine, *Unjust Discharge and the Changing Doctrine of At-Will Employment*, in *EMPLOYMENT AT-WILL AND UNJUST DISMISSAL: THE LABOR ISSUES OF THE '80S*, at 3, 5 (Charles G. Bakaly, Jr. & William J. Isaacson eds., 1983). Another study indicates that approximately eighty-five percent of non-union employment contracts are at will. J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 867 (1995), cited in 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, 309-10 (2002). For a recent article discussing the strong presumption toward the doctrine in Virginia, Maryland, and Washington, D.C., see Bredemeier, *supra* note 2.

²⁶ See BIELEFIELD & CHEESEMAN, *supra* note 24, at 7; Summers, *supra* note 24, at 65; *Employment in America: Jobs for Lawyers*, ECONOMIST, Jan. 23, 1988, at 61

legal treatise.²⁷ Although it is now widely accepted that existing law at the time of Wood's treatise did not support his statement regarding employment at will,²⁸ the courts of this country nevertheless subsequently adopted the doctrine.²⁹

("American workers still have nowhere near the job protection taken for granted by most West European ones. Nor will they get it. American employment law remains rooted in the doctrine of 'employment at will.'").

²⁷ See BIELEFIELD & CHEESEMAN, *supra* note 24, at 7; FARNSWORTH, *supra* note 6, § 7.17; Paul Fenn & Christopher J. Whelan, *Job Security and the Role of Law: An Economic Analysis of Employment-At-Will*, 20 STAN. J. INT'L L. 353, 357 (1984); Kim Sheehan, Comment, *Has Employment-At-Will Outlived Its Usefulness? A Comparison of U.S. and New Zealand Employment Law*, 28 CAL. W. INT'L L.J. 323, 324-25 (1997). The person thus given credit by these commentators is Horace Wood, who wrote in his 1877 treatise that:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.

H. G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272 (1877).

²⁸ See, e.g., Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126 (1976) ("[T]he four American cases [Wood] cited in direct support of the rule were in fact far off the mark."); Jeffrey L. Harrison, *The "New" Terminable-At-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327, 328 (1984) (admitting that "[Wood's] assertion evidently was supported only tenuously, if at all, by the law of the day"); Summers, *supra* note 24, at 67 (concurring that "Wood's Rule . . . misstated existing law").

²⁹ See Feinman, *supra* note 28, at 126, 129 ("Whatever its origin and the inadequacies of its explanation, Wood's rule spread across the nation until it was generally adopted."). The United States Supreme Court decision to which many authors cite in support of this proposition is *Adair v. United States*, 208 U.S. 161, 174-75, 180 (1908) (upholding the at-will employment doctrine in ruling that Congress did not have the authority to prohibit employers from terminating employees due to labor organization membership). Indeed, one commentator argues that the doctrine "reached its zenith" with the *Adair* decision. Marvin J. Levine, *The Erosion of the Employment-At-Will Doctrine: Recent Developments*, 45 LAB. L.J. 79, 79 (1994). However, probably the most oft-cited formulation of the doctrine by a court was made by the Tennessee Supreme Court in 1884, when it stated, "All may dismiss their employes [sic] at will, be they many or few, for good cause, for no cause[,] or even for cause morally wrong, without being thereby guilty of legal wrong." *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519-20 (1884) (upholding a trial court decision which dismissed a businessman's complaint regarding the defendant railroad's statement to its employees that their employment would be

Many of the authors who assert that Wood's treatise was crucial to the doctrine's development also contend that the changing United States economy at the time of the statement helped to facilitate the doctrine's acceptance.³⁰ More specifically, the Industrial Revolution moved the average type of job from agricultural to skilled industrial, emphasized the need for particularized job skills, and resulted in an escalation of competition for jobs.³¹ These factors all facilitated a need for employees and employers to sever their employment relationships quickly.³² Coupled with the laissez faire economic philosophy that reigned supreme at the time, the employment at will doctrine became established as a fundamental aspect of labor relations.³³ Thus, a majority of courts and commentators assert that Wood's treatise, along with the economic ramifications of the Industrial Revolution, facilitated the adoption and subsequent prevalence of the doctrine.³⁴

terminated if they traded with the businessman, in part on grounds that such a statement of action by the railroad was prohibited neither by common law nor statute).

³⁰ *E.g.*, BIELEFIELD & CHEESEMAN, *supra* note 24, at 6.

³¹ *See, e.g.*, PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 132 (1969) ("We have already noted the eighteenth-century presumption that a general hiring would be construed as for a year, absent evidence of a more limited commitment. The economic and ideological changes of the Industrial Revolution overturned that presumption."); Mary Ann Glendon & Edward R. Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C. L. REV. 457, 458 (1979); J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340-43 (1974).

³² *See* BIELEFIELD & CHEESEMAN, *supra* note 24, at 6; Daniel A. Mathews, Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1441 (1975). Indeed, one commentator argues that the "main economic significance" of employment at will was that it allowed employers to respond to business fluctuations by easily terminating employees; it also increased the authority of managers by guaranteeing them "the unilateral power to make rules and exercise discretion." *See* SELZNICK, *supra* note 31, at 135.

³³ *See, e.g.*, BIELEFIELD & CHEESEMAN, *supra* note 24, at 7-8; Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 690-91 n.33 (1994) (citing *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 509 (N.J. 1980)). *See generally* SELZNICK, *supra* note 31, at 132-36 (arguing that employment at will arose because "the concept of contract was adapted to what had to be done to maintain the organizational strength of the business enterprise").

³⁴ A more thorough, and slightly different, analysis set forth by one commentator is that the rise of employment at will occurred because it was an adjunct to the development of advanced capitalism. Feinman, *supra* note 28, at 131. Indeed, Feinman admitted that he was in general, but not absolute, agreement with other commentators. *See* Jay M. Feinman, *The Development of the Employment-At-Will Rule Revisited*, 23 ARIZ. ST. L.J. 733, 740 (1991) ("I would phrase the point differently, but I am in general agreement with the idea that the employment-at-will rule was associated with the development of capitalism.").

B. *Erosion of the Doctrine*

The general rule regarding employment at will is that employment without a contract or without a set term is to be considered “according to terms solely and completely determined and established by the employer”,³⁵ however, since the doctrine’s inception, there have been a significant number of qualifications which have eroded or at least limited its reach.³⁶

Feinman argues that because workers cannot “claim a voice in the determination of the conditions of work or the use of the product of their labor” if they can be dismissed at the will of their employers, the at-will employment rule served as an “effective way to assert the owners’ control and their right to management and profits.” Feinman, *supra* note 28, at 133. As a result, the capital owners countenanced no threats to their dominion over their employees or their enterprises, which is a “basic element of the capitalist system.” *Id.*

Feinman further contends that the employment at will doctrine promoted the development of the system of advanced capitalism in the United States by facilitating unproblematic discharge of employees. *See id.* More specifically, he asserts that by “allowing employers in most cases to minimize the costs of discharge by imposing a great part of the burden of capitalist crises on the workers, rather than on themselves,” employers could effectively react to the unstable business conditions of the late nineteenth century, which included high unemployment rates because of technological change and severe business cycles. *Id.* at 134.

A relatively recent paper, however, has strongly questioned the “majority” view of the doctrine’s rise that is generally adhered to by Feinman and other commentators. Morriss, *supra* note 33, at 762. In his article, Morriss attacks the prevailing theory on several grounds. First, he asserts that the rule of employment at will was already in use by seven states before Horace Wood published his treatise in 1877. *Id.* at 681. Second, he argues that any argument claiming that the rule of employment at will was likely spread by the onset of the Industrial Revolution is inconsistent with the pattern of the states adopting the rule. *Id.* He designs an empirical study and contends that its results support his second claim. *Id.*

Morriss ultimately contends that the doctrine arose for court manageability reasons. More specifically, he argues that:

The attraction of the at-will rule for the courts was that it took a difficult class of cases and removed them from juries without requiring the court to resolve conflicting testimony concerning employee performance . . . It was the development of an institutional mechanism which enabled courts to control cases through shifting claims away from juries where judges did not view juries as reliable.

Id. at 696. Asserting that the doctrine is “rooted in the courts’ competence as decision makers to evaluate evidence concerning performance by white collar, skilled employees,” Morriss contends that the doctrine remains viable, because it is as much of a solution to a problem today as it was in the nineteenth century. *Id.* at 762–63.

³⁵ BIELEFIELD & CHEESEMAN, *supra* note 24, at 3.

³⁶ *See* JULIUS G. GETMAN & BERTRAND B. POGREBIN, LABOR RELATIONS 214 (1988) (“The old doctrine of employment at will . . . has given way before a variety of judicially

The limitations on the doctrine can be broadly divided into two categories: statutory limitations and judicial limitations.³⁷ Statutory limitations of employment at will are the more mundane of the two. Generally, they involve now-familiar statutes and obvious grounds (at least in terms of modern-day, socially acceptable thought) that prohibit employers from terminating even at-will employment relationships. These statutory limitations on the at-will doctrine³⁸ began with the laws against child labor,³⁹ continued with the National Labor Relations Act,⁴⁰ and include statutes prohibiting discrimination on the basis of race, sex, or age.⁴¹ One state has even statutorily abrogated the doctrine entirely.⁴²

imposed limitations.”); Joseph W. Ambash, *Recent Developments in Employment-At-Will Law*, in EMPLOYMENT-AT-WILL ON TRIAL 1, 5–6 (1987) (discussing the same); *Employment in America: Jobs for Lawyers*, ECONOMIST, Jan. 23, 1988, at 61 (discussing the same). Such qualifications limiting the doctrine have prevented much of the misuse that could possibly result from it. Nevertheless, some commentators insist on vilifying the doctrine. For a look at a charged attack against employment at will, containing some clear exaggerations of the extent to which the doctrine can reach in United States courts, see YATES, *supra* note 5, at 223 (“Under the at-will doctrine, a worker could be fired for asking for a raise, for being of the wrong religion, for refusing to have sex with the foreman, for joining a union, for doing or saying anything the employer did not like. A fired worker has no legal recourse.”); Summers, *supra* note 24, at 73 (“The employer’s divine right to dismiss at any time, for any reason, and without notice has survived with vigor.”).

³⁷ Some commentators argue that an erosion of the at-will doctrine has occurred as a result of unions representing employees and bargaining for provisions that require terminations only occur for good cause. *E.g.*, BIELEFIELD & CHEESEMAN, *supra* note 24, at 9–10; Steven Greenhouse, *Verizon Talks Are Less Upbeat as Union Cites Unresolved Issues*, N.Y. TIMES, Aug. 5, 2003, at C1 (discussing the struggle between Verizon, the International Brotherhood of Electrical Workers, and the Communications Workers of America, regarding the inclusion of employment at will in a new contract). Indeed, even if there is no provision requiring termination only for good cause, provided the employment is for a term, courts have held that employment can be terminated only with good cause. *See, e.g.*, BIELEFIELD & CHEESEMAN, *supra* note 24, at 9–10. However, to the extent that the union acts on behalf of the employee and bargains either for a “good cause” provision or for employment for a term, the employee is not actually an at-will employee, by definition. Accordingly, I do not agree with other authors who assert that such situations constitute limitations on the employment at will doctrine.

³⁸ *See generally* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 947 (1984), *reprinted in* CONTRACT – FREEDOM AND RESTRAINT 233 (Richard A. Epstein ed., 2000) (discussing these curtailments of the employment at will doctrine); Harrison, *supra* note 28, at 327 (reporting the same).

³⁹ 29 U.S.C. § 212 (2004).

⁴⁰ 29 U.S.C. §§ 151–69 (2004).

⁴¹ 42 U.S.C. § 2000e-2 (2004); 29 U.S.C. § 623 (2004).

⁴² *See* MONT. CODE ANN. § 39-2-904 (2004).

The judicial limitations on the doctrine are more interesting and diverse; moreover, they vary by state. Some courts have limited the doctrine by finding express or implied guarantees of employment on the basis of personnel manuals (unilateral contracts setting forth binding obligations for employers) or oral assurances upon hiring.⁴³ Other courts have limited the doctrine by implying a requirement of good faith and fair dealing into an employment relationship.⁴⁴ Still other courts have eroded the doctrine by use of promissory estoppel.⁴⁵

⁴³ See, e.g., FARNSWORTH, *supra* note 6, § 7.17 (reporting this and providing discussion as well as case law examples); Ambash, *supra* note 36, at 5; Levine, *supra* note 29, at 82–83; St. Antoine, *supra* note 25, at 9–11; Summers, *supra* note 24, at 71–72; see *Thebner v. Xerox Corp.*, 480 So. 2d 454, 457 (La. Ct. App. 1985) (holding that because a personnel policy manual stated that its “policies are not intended to create, nor are they to be construed to constitute a contract, express or implied,” the employee had no contract for a term; yet, implying that a policy manual could create such a contract, by stating that, “[a]fter a careful study of Xerox’s personnel policy manual, we find that the requisite elements for the confection of a valid contract are not contained therein”); *Lewis v. Equitable Life Assurance Soc’y of the U.S.*, 389 N.W.2d 876, 882–83 (Minn. 1986) (“[W]e have determined that, under certain circumstances, employee handbook provisions may create contractual obligations enforceable against an employer.”) (citing *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983)); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1258 (N.J. 1985) (“We hold that absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at will.”); *Sowards v. Norbar, Inc.*, 605 N.E.2d 468, 471 (Ohio Ct. App. 1992) (“[E]mployee handbooks, company policy, and oral representations have been recognized in some situations as comprising components or evidence of employment contracts Thus, an at-will employment contract may be modified by the provisions of an employee handbook where the parties manifest an intention to be bound by the terms therein.”); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1087 (Wash. 1984) (“We agree with these cases that an employee and employer can contractually obligate themselves concerning provisions found in an employee policy manual and thereby contractually modify the terminable at will relationship.”). *But see Tri-City Comprehensive Cmty. Mental Health Ctr., Inc. v. Franklin*, 498 N.E.2d 1303, 1305 (Ind. Ct. App. 1986) (holding that “[t]he courts of [Indiana] have rejected arguments [against being employees at will] based upon the existence of employee handbooks which set out certain procedures to be followed in disciplining or terminating employees”); *Parker v. United Airlines, Inc.*, 649 P.2d 181, 184 (Wash. Ct. App. 1982) (holding that an employment manual which does not contain the phrase “termination at will” does not imply that an employee may be terminated only for cause).

⁴⁴ See, e.g., FARNSWORTH, *supra* note 6, § 7.17 (reporting this and providing discussion as well as case law examples); REYNOLDS ET AL., *supra* note 5, at 372; Ambash, *supra* note 36, at 6–9; St. Antoine, *supra* note 25, at 11; Summers, *supra* note 24, at 72; see *Fortune v. Nat’l Cash Register Co.*, 364 N.E.2d 1251, 1256 (Mass. 1977) (“We believe . . . that in this case there is remedy on the express contract. In so holding

Other judicial limitations on the doctrine arise under a number of public policy justifications. For example, courts have held that causes of action in tort⁴⁶ arise if an at-will employee is terminated in accordance with a number of situations, including the employee's filing of a workers' compensation claim,⁴⁷ acting as a whistleblower,⁴⁸ refusing to commit an illegal act,⁴⁹ or

we are merely recognizing the general requirement in this Commonwealth that parties to contracts and commercial transactions must act in good faith toward one another.”); *Flanigan v. Prudential Fed. Sav. & Loan Ass'n*, 720 P.2d 257, 262 (Mont. 1986) (“Termination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts.”). *But see Hawley v. Dresser Indus., Inc.*, 737 F. Supp. 445, 465 (S.D. Ohio 1990) (“The parties are correct that Ohio law does not recognize an implied covenant of good faith and fair dealing in at-will employment contracts.”) (citing *Mers v. Dispatch Printing Co.*, 483 N.E.2d 150, 155 (Ohio 1985)); *Smith v. Chamber of Commerce of the U.S.*, 645 F. Supp. 604, 611–12 (D.D.C. 1986) (holding that summary judgment was proper for the employer in regard to the at-will employee's claim that the employer breached an implied covenant of good faith and fair dealing); *Guz v. Bechtel Nat'l, Inc.*, 8 P.3d 1089, 1095 (Cal. 2000) (“If an employment is at will, and thus allows either party to terminate for *any or no reason*, the implied covenant cannot decree otherwise [W]here an implied covenant claim alleges a breach of obligations beyond the agreement's actual terms, it is invalid.”); *Martin v. Fed. Life Ins. Co.*, 440 N.E.2d 998, 1006 (Ill. App. Ct. 1982) (“[W]e do not believe that Illinois law recognizes a tort remedy based on an employer's ‘bad faith’ breach of an implied contract covenant of fair dealing.”); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1086 (Wash. 1984) (rejecting the adoption of the implied covenant of good faith and fair dealing exception to the at-will employment doctrine).

⁴⁵ See, e.g., *Ambash*, *supra* note 36, at 19–21 (supplying discussion of this limitation as well as case law examples); see *Litman v. Mass. Mut. Life Ins. Co.*, 739 F.2d 1549, 1559 (11th Cir. 1984) (applying Massachusetts law and holding that a terminated at-will employee had established a prima facie case of promissory estoppel); *Kramer v. Med. Graphics Corp.*, 710 F. Supp. 1144, 1145 (N.D. Ohio 1989) (“The use of [the promissory estoppel] doctrine to limit an employment-at-will contract has recently been deemed appropriate by the Ohio Supreme Court.”) (citing *Mers v. Dispatch Printing Co.*, 483 N.E.2d 150 (Ohio 1985)). Promissory estoppel holds that a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

⁴⁶ The difference between causes of action in breach of contract and in tort can be substantial. Breach of contract damages are limited to those that are economic in nature, including lost wages. Tort damages, however, can include punitive and emotional distress damages, which can be significant. See *Levine*, *supra* note 29, at 85.

⁴⁷ See, e.g., FARNSWORTH, *supra* note 6, § 7.17 (providing discussion and case law examples of this limitation); *Ambash*, *supra* note 36, at 23–24; see *Lally v. Copygraphics*, 428 A.2d 1317, 1318 (N.J. 1981) (“We affirm the Appellate Division's determination . . . that a plaintiff has a common law right of action for wrongful discharge based upon an alleged retaliatory firing attributable to the filing of a workers'

suffering as a target of sexual harassment.⁵⁰ Such causes of action have attracted the attention not only of legal scholars, but also of the national media.⁵¹

compensation claim . . .”); *Wesp v. Liberty Nat’l Bank & Trust Co.*, 501 N.Y.S.2d 207, 208 (N.Y. App. Div. 1986) (holding that an employee cannot be fired for filing such a claim).

⁴⁸ *E.g.*, *Ambash*, *supra* note 36, at 25–29 (providing discussion as well as case law regarding this limitation); *see Wagner v. City of Globe*, 722 P.2d 250, 257–58 (Ariz. 1986) (“We believe that whistleblowing activity which serves a public purpose should be protected . . . [E]mployees who attempt to correct problems of public interest fall within the ambit of the public policy exception to the at-will doctrine.”); *Cagle v. Burns & Roe, Inc.*, 726 P.2d 434, 435–36 (Wash. 1986) (holding that the plaintiff had a cause of action for the tort of wrongful discharge in violation of public policy when she was terminated after repeatedly warning her supervisor that she would report the company to the Nuclear Regulatory Commission if her supervisor continued to direct her to violate the Commission’s procedures) (citing *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984)). *But see Ungrady v. Burns Int’l Sec. Servs., Inc.*, 767 F. Supp. 849, 853 (N.D. Ohio 1991) (“[T]he Supreme Court of Ohio has held that no public policy exception to the employment-at-will doctrine exists for employees who were discharged for engaging in ‘whistleblowing’ during the period predating the enactment of [Ohio Revised Code] § 4113.52(D) [(state whistleblower statute).]”); *Sabetay v. Sterling Drug, Inc.*, 497 N.Y.S.2d 655, 658 (N.Y. App. Div. 1986) (denying the claim of an employee at will who argued that he was terminated in retaliation for reporting illegal activities and not participating in them, and stating that “[t]his court has not and does not now recognize a cause of action in tort for abusive or wrongful discharge . . .”) (quoting *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 87 (N.Y. 1983)).

⁴⁹ *See, e.g., Tameny v. Atl. Richfield Co.*, 610 P.2d 1330, 1332–37 (Cal. 1980) (holding that employees who are terminated for their refusal to engage in illegal activities at the request of their employers may seek remedy in the form of a tort action for wrongful discharge); *Petermann v. Int’l Bhd. of Teamsters, Local 396*, 344 P.2d 25, 27 (Cal. Ct. App. 1959) (“To hold that one’s continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and would serve to contaminate the honest administration of public affairs.”).

⁵⁰ *See Collins v. Rizkana*, 652 N.E.2d 653, 661 (Ohio 1995) (holding that an at-will employee had a valid cause of action in tort “for wrongful discharge in violation of public policy based on sexual harassment/discrimination”).

⁵¹ For recent articles concerning whistleblowing in at-will employment relationships, *see John D. McKinnon, Ruling Aids Worker Who Blew Whistle*, WALL ST. J., July 22, 1998, at F1 (reporting that a Florida court of appeals ruled that an employee, having filed suit claiming that he was fired because he objected to his fellow employees’ alleged misconduct, had a valid cause of action under a Florida state statute designed to provide whistleblowing employees protection from employment at will); *Wade Lambert, New York Judge Rules in Favor of Whistle-Blower*, WALL ST. J., May 25, 1994, at B3 (discussing a New York case which permitted an employee to seek wrongful termination punitive damages as a result of his termination for divulging allegations of a scheme of

Thus, while it is true that the employment at will doctrine remains a doctrine that is important to millions of employees in the United States, it is not as arbitrary as its detractors insist,⁵² as a result of well-founded limitations that have been implemented since its inception.⁵³

C. *Current Legal Status of the Doctrine and the Academic Debate*

While the employment at will doctrine has been significantly limited in the past half-century,⁵⁴ some commentators have called for even further limitations,⁵⁵ often vilifying it in the process.⁵⁶ Nevertheless, the doctrine is

money laundering at his workplace, and reporting that such a ruling “chip[s] away at the state’s at-will employment law”).

⁵² One such employment at will detractor claims that “the reality of the doctrine is this: For workers, employment at will means that they have no right to their jobs; for employers, employment at will means that they can hire and fire workers as they please.” LISA J. MCINTYRE, *LAW IN THE SOCIOLOGICAL ENTERPRISE* 194 (1994). She continues her emotionally-charged attack against the doctrine by maintaining that it “mostly work[s] to the benefit of the employer inasmuch as [it has] kept the relationship in the civil domain where might makes right.” *Id.* at 203. For another article denigrating the doctrine, see Barbara Presley Noble, *When Employers Rule by Whim*, N.Y. TIMES, Mar. 1, 1992, at F33 (characterizing the employment at will doctrine as “the notion that an employer exerts near-omnipotent control over an employee’s continued employment”).

⁵³ See, e.g., Fenn & Whelan, *supra* note 27, at 358–59 (broadly discussing the reforms to the doctrine presented in this Part); Larry Reibstein, *Firms Find It Tougher to Dismiss Employees for Off-Duty Conduct*, WALL ST. J., Mar. 29, 1988, at A33 (“But courts and arbitrators have carved out exceptions for some off-duty conduct. Their decisions are part of a broader legal trend that has curtailed companies’ right to dismiss employees without any cause at all, known as the employment at[will] doctrine.”).

⁵⁴ See *supra* Part II.B.

⁵⁵ See *infra* notes 64–66 and accompanying text.

⁵⁶ One author contends that an employment at will setting creates “a network of spies, who are employees promised benefits or promotions if they report to the boss any ‘disloyal comments’ or talk about unionization by their coworkers.” YATES, *supra* note 5, at 219–20. Another article goes much further, quoting a lawyer who asserted, “If the employer [in an at-will setting] says get down and bark like a dog, [sic] and you won’t do it, you can be fired You have no rights.” Noble, *supra* note 52, at F33.

defended by other authors⁵⁷ and remains an important feature of American employment and contract law.⁵⁸

Many of the arguments against the employment at will doctrine focus on the assumption that employees generally are vulnerable relative to employers because employees are dependent on their working wages⁵⁹ and suffer from a lesser bargaining position than employers,⁶⁰ due to the fact that employees cannot change jobs costlessly.⁶¹ Other opponents of the employment at will doctrine contend that workers have certain property rights in their jobs.⁶² Commentators also assert that the employment at will doctrine, when

⁵⁷ *E.g.*, Epstein, *supra* note 38, at 951 (“There is thus today a widely held view that the contract at will has outlived its usefulness. But this view is mistaken.”); Freed & Polsby, *supra* note 21, at 1144 (defending the doctrine from an economic analysis standpoint and arguing that while one can make a normative claim that the employment at will doctrine should be reformed, the argument that greater efficiency will result should at-will employment be abolished “is wrong”).

⁵⁸ The doctrine governs tens of millions of American employment contracts. *See supra* note 25 and accompanying text.

⁵⁹ *See, e.g.*, Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404 (1967), reprinted in CONTRACT-FREEDOM AND RESTRAINT 200 (Richard A. Epstein ed., 2000) (“[M]ost of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for . . . the various forms of social security.”) (quoting FRANK TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951)).

⁶⁰ *See, e.g., id.* (“[T]he freedom of the individual is threatened whenever he becomes dependent upon a private entity possessing greater power than himself. Foremost among the relationships of which this generality is true is that of employer and employee.”).

⁶¹ *See id.* at 1405. While authors supporting this view concede that terminating one employee and commencing another is not costless for the employer either, they contend that the employee faces higher costs in this process relative to the employer. *See id.* at 1411, 1413; ALAN GEWIRTH, THE COMMUNITY OF RIGHTS 253–54 (1996) (“The employer usually has a far greater pool of willing workers to draw upon than the worker has of willing employers, so that the employer can replace this particular worker far more readily than the worker can replace this particular employer.”).

⁶² *See* GEWIRTH, *supra* note 61, at 254–55 (arguing that a recognition that employees have property rights in their jobs is evidenced by “[t]he rejection of the employment-at-will doctrine,” and this recognition of property rights in jobs is important “because it emphasizes that when persons are employed in factories, offices, or other establishments, property rights are had not only by the employers who own those establishments but also by the employees by virtue of their working in them”). However, in light of the United States Supreme Court’s definition of “property” as based on a reasonable expectation of continued receipt of a benefit, Gewirth’s argument seems unpersuasive. *See infra* note 66.

combined with unequal bargaining power, deprives workers of basic human rights such as freedom and well-being.⁶³

Just as there are many arguments posited in support of limiting the employment at will doctrine, there are also many different methods by which commentators would implement those limitations. One solution asserted is to have, as an exclusive remedy, a neutral arbitrator hear the case of any employee claiming unjust dismissal, with that remedy limited to back pay, reinstatement, or both.⁶⁴ Another commentator offers as a solution to the employment at will doctrine a personal tort remedy of “any damage [the employee] suffers when discharged as a result of resisting his employer’s attempt to intimidate or coerce him in a way which bears no reasonable relationship to the employment.”⁶⁵ As a final example of the extent to which commentators have reached to limit the employment at will doctrine, one scholar argues that the protections of the Fourteenth Amendment are applicable namely to due process and to equal protection rights.⁶⁶

⁶³ See GEWIRTH, *supra* note 61, at 254 (arguing that employment at will should be rejected because it “does not take account, as the principle of human rights requires, of the substantive inequalities between employers and workers with regard to effective freedom and consequences for well-being”); Blades, *supra* note 59, at 1407 (“[M]any of the rights and privileges which are considered so important to a free society that they are constitutionally protected from government encroachment are vulnerable to abuse through an employer’s power.”).

⁶⁴ See William J. Isaacson, *Employment-At-Will: An Idea Whose Time Is Done?*, in *EMPLOYMENT AT-WILL AND UNJUST DISMISSAL: THE LABOR ISSUES OF THE ‘80S*, at 27, 45–46 (Charles G. Bakaly, Jr. & William J. Isaacson eds., 1983). Isaacson contends that such a remedy has the advantage of being quick and inexpensive as well as limiting the risk of excessive jury awards. *See id.*

⁶⁵ See Blades, *supra* note 59, at 1413. Blades asserts that such a cause of action would combine the advantages of deterring an employer from terminating an employee for “an abusive reason” as well as further serving as a deterrent because “a subsequent discharge, even though for good cause, might be associated with a prior attempt of the employer to interfere with the employee’s individuality.” *Id.* at 1414. Blades further contends that such claims, for expertise reasons, could be heard by a special commission dealing with the problem of employer interference and oppression. *Id.* at 1433.

⁶⁶ See Peck, *supra* note 22, at 4, 33–34. Peck argues that because the discharged at-will employee has the judicial remedy of a lawsuit and “the employment relationship is subject to intensive regulation by both the federal and state governments,” it is, therefore, “reasonable to conclude that continued implementation of the rule that an employer under a contract terminable at will may discharge employees without cause is sufficiently bound up with governmental action that the protections of the [F]ourteenth [A]mendment are applicable.” *Id.* at 16–17, 21, 25–26. Having “satisfied” the state action requirement, Peck argues that at-will employees’ jobs are “property” for purposes of due process. *See id.* at 4. Finally, Peck asserts that discharge without cause constitutes a deprivation of equal protection to unorganized employees of private employers. *See id.*

The rebuttals of those defending the employment at will doctrine are likewise many and diverse; however, they are generally grounded in economic or cost analysis. One of the simplest arguments for employment at will is that it has survived over the years and is frequently used in private markets.⁶⁷ Therefore, to the extent that economic theory holds that goods move through markets toward their highest valued use absent a market imperfection, the employment at will doctrine is generally the efficient market solution.⁶⁸

Detractors of the doctrine nevertheless claim that employment at will is contrary to the public interest because it allows employers to exploit their superior bargaining power over the employees they seek to hire. Proponents of employment at will counter such an argument by noting that the argument contains two ideas: first, that employees are at a disadvantage relative to employers in bargaining over the terms and conditions of their employment because they have less money and, second, that employers exercise monopoly power in the labor market.⁶⁹

Although such contentions are beyond the scope of this Note, Peck's reasoning is unconvincing in light of the Supreme Court's holdings on state action, the definition of "property" for due process purposes, and what constitutes a suspect classification for equal protection analysis. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (suggesting a generally deferential standard of review of government measures but a "more searching judicial inquiry" into those aimed at "discrete and insular minorities . . . which tend[] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities"); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 538 (2d ed. 2002) ("[T]he Court [has] made it clear that it was defining property based on a reasonable expectation to continued receipt of a benefit.") (citing *Perry v. Sindermann*, 408 U.S. 593, 599 (1972)).

⁶⁷ See, e.g., Epstein, *supra* note 38, at 948 ("The survival of the contract at will, and the frequency of its use in private markets, might well be taken as a sign of its suitability for employment relations."); Freed & Polsby, *supra* note 21, at 1097 (contending that non-union employment in the private sector "is almost always at will").

⁶⁸ See Freed & Polsby, *supra* note 21, at 1098. At least one commentator has attacked this view on the grounds that it assumes perfect information; in this context, it assumes that at-will employees know what the law is. See Rudy, *supra* note 25, at 310. Rudy contends that studies show, however, that employees do not fully understand the ramifications of at-will employment relationships. See *id.* at 310–11, 314, 359. Notwithstanding such findings, though, Rudy argues that implementing a just cause termination rule would be inefficient, because employees rationally choose to be uninformed regarding the legal ramifications of the at-will employment doctrine (i.e., the market does not induce them to garner such information that is not useful to them) due to the fact that it is in the employers' best interests not to haphazardly terminate their at-will employees; more specifically, employers' own profit-maximizing motives police the at-will relationship, because unjust discharge would impose social and economic costs on an employer. See *id.* at 310–12, 340–41, 354–59.

⁶⁹ See Freed & Polsby, *supra* note 21, at 1099.

In regard to the first idea, inequality of bargaining power is not a market failure; rather, it is consistent with the conclusion that employment at will is efficient.⁷⁰ That is, to the extent that employees have less money than their employers, they forfeit their leisure time (essentially purchasing their leisure time from themselves) to work for their relatively richer employers.⁷¹ By extension of this argument, the relatively richer employers can thus “purchase” the employees’ potential employment for a term.⁷² Far from a market failure, this is a market success because markets function efficiently when they move resources to their most highly valued use.⁷³

In regard to the second idea, a monopolist employer is simply not feasible in a capitalist economy such as the United States, considering the fact that even a monopolist cannot prevent competitors from entering the market.⁷⁴ Moreover, common experience shows that there is no monopoly in the United States, as employers compete with each other to hire the best employees, much like employees compete with each other to obtain the best jobs.⁷⁵ Further, at-will proponents note that even if there were a monopoly in the labor market, such a situation still would not explain the prevalence of employment at will. Although it is true that a monopolist could force employees to accept wages below those that would result in a competitive labor market,⁷⁶ no economic theory posits that an employer could demand that employees forego “just cause” protection⁷⁷ of their jobs.⁷⁸ Finally, if

⁷⁰ See, e.g., *id.*

⁷¹ See *id.* at 1100.

⁷² See *id.* (“By the same token, rich employers will be in a position to outbid employees for terms of employment, such as the tenure property, that are valuable to them.”).

⁷³ See, e.g., *id.* (reiterating the accepted economic proposition that “[a] market is successful when it moves resources from lower-value to higher-value uses”); JACK HIRSHLEIFER & DAVID HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 481 (6th ed. 1998).

⁷⁴ E.g., Freed & Polsby, *supra* note 21, at 1100–01 (contending that a literal monopoly generally is not feasible in capitalist economies, because even if there were only one employer in a given area, the employer cannot protect against competition because new businesses can move into the area to compete and employees can move out of the area or start their own businesses).

⁷⁵ See *id.* at 1101.

⁷⁶ See *id.*; REYNOLDS ET AL., *supra* note 5, at 89.

⁷⁷ The phrases “just cause protection” and “just cause regime” commonly refer to employment relations in which an employer can only terminate an employee for cause; essentially, those phrases refer to the antithesis of at-will employment. See, e.g., Freed & Polsby, *supra* note 21, *passim*.

there were a monopoly in the labor market, “just cause” protection would not solve the at-will problem because the employer could simply implement an offsetting wage reduction, thereby reducing each worker’s total compensation package (wage plus a job security element) to its pre-“just cause” value.⁷⁹ Thus, the usual argument of detractors that employment at will is against the public interest because it constitutes an exploitation of employers’ superior bargaining power relative to employees does not withstand careful economic analysis.⁸⁰

In addition to the simple reasoning posited that the employment at will doctrine is socially valuable because of its robustness, other reasons have been set forth in support of its continued existence. First, employers and employees should be permitted as a matter of right to adopt such a form of contract if they so choose, and one author has argued that freedom of contract advances both individual autonomy as well as the efficient operation of labor markets.⁸¹ An additional reason in support of the doctrine is that the at-will agreement should be recognized as a rule of construction.⁸² That is, when courts introduce a “just cause” provision, they simultaneously introduce the question of which terms should be implied absent an agreement

⁷⁸ See, e.g., *id.* at 1101. Rather, monopolistic theories only predict that the entire compensation package offered to the employee by the monopolist employer will be worth less than the competitive market wage. See *id.* at 1101–02; REYNOLDS ET AL., *supra* note 5, at 88–90.

⁷⁹ See Freed & Polsby, *supra* note 21, at 1102 (“[I]f monopoly is the problem, mandatory tenure is an utterly futile solution. An employer, faced with a legal requirement that it offer its employees tenure protection, predictably would institute an offsetting wage reduction as a quid pro quo . . .”).

⁸⁰ Freed and Polsby further examine the question of whether there is any evidence of a market failure that would perpetuate the employment at will doctrine even though it is not the efficient solution. The authors examine arguments of paternalism on behalf of employees and employers, perceptual distortion, and public goods. *Id.* at 1103–37. Such further analysis regarding grounds in addition to those already explored is useful and valuable to the reader who chooses to explore more fully the economic analysis grounds for the employment at will doctrine, but is beyond the scope of this Part of this Note, which has the purpose of merely introducing the reader to the employment at will doctrine and some of the arguments for and against its continuation.

⁸¹ See Epstein, *supra* note 38, at 951. Epstein contends that “[f]reedom of contract is an aspect of individual liberty, every bit as much as freedom of speech, or freedom in the selection of marriage partners or in the adoption of religious beliefs or affiliations.” *Id.* at 953. Therefore, he contends that it should be presumptively unjust to encroach upon economic liberties, because “[t]he desire to make one’s own choices about employment may be as strong as it is with respect to marriage or participation in religious activities, and it is doubtless more pervasive than the desire to participate in political activity.” See *id.*

⁸² *Id.* at 951.

between the employer and employee in regard to duration or grounds for dismissal.⁸³

Additionally commentators have argued that bringing an end to employment at will would have the undesirable effects of introducing complexity into employment relations law,⁸⁴ increasing civil litigation,⁸⁵ and working to the disadvantage of both the employers and employees.⁸⁶ Finally, the employment at will doctrine is further supported by its utility to both parties.⁸⁷ For employers, it offers the benefit of acting as a low-cost method of reducing agency costs.⁸⁸ Employment at will also helps employees because it allows them to escape employers who continually make increased

⁸³ See *id.* at 951–52. A related point is that courts and other public entities are unlikely to have better information regarding the preferences of the employer and employee than the employer and employee themselves, who actually hold the preferences. See *id.* at 954. For a discussion of the problems associated with supplying omitted terms, interpreting contracts, and determining the intent of the parties to a contract, see DAWSON ET AL., *supra* note 6, at 346–52, 360–61, 427–28, 499–502.

⁸⁴ See Epstein, *supra* note 38, at 953. This argument counters those presented earlier that argue for a tort remedy or arbitration for aggrieved employees. See *supra* notes 64–65 and accompanying text. Indeed, at least one commentator has argued that Epstein's point here, that the complexity introduced by such cases would present significant problems for the courts, was the main reason that the employment at will doctrine rose to its prominent status in American employment and contract law. See Morriss, *supra* note 33, at 696, 762–63.

⁸⁵ *E.g.*, Epstein, *supra* note 38, at 953.

⁸⁶ See, *e.g.*, *id.*

⁸⁷ See *id.* at 963–64 (“[I]t is possible to identify a number of reasons why the at-will contract usually works for the benefit of both sides in employment”); Rudy, *supra* note 25, at 312.

⁸⁸ *E.g.*, Epstein, *supra* note 38, at 964; Fenn & Whelan, *supra* note 27, at 366–69 (contending that many courts have recognized that employment at will is in the employers' interests for business efficiency reasons). Because employees on fixed wages obtain only a portion of the gain from their labor, they can be led to reduce output strategically. See Epstein, *supra* note 38, at 963. While private litigation is likely too blunt for most rather small problems, managers can control employees by means of employment at will, because it “can visit very powerful losses upon individual employees without the need to resort to legal action, and [it] permit[s] the firm to monitor employee performance continually in order to identify both strong and weak workers and to compensate them accordingly.” *Id.* at 964–65; see also Rudy, *supra* note 25, at 354 (arguing that employers not only face increased economic costs, but also guilt and informal sanctions when they “violate the strong ‘no discharge without cause’” norm that has been internalized by employees and employers, even if an at-will relationship is actually in place).

demands,⁸⁹ permits good employees to obtain increased wages,⁹⁰ and allows employees to quickly and freely leave their current employment situations if better employment opportunities present themselves.⁹¹

Thus, while it is true that there are emotionally-charged arguments against employment at will,⁹² it seems there are more solid, economically sound arguments in support of the doctrine. In some situations, at-will employers likely could take advantage of the doctrine; but it seems that such situations rarely present themselves;⁹³ indeed, even detractors of the doctrine concede this point.⁹⁴ Thus, while it is true that even supporters of the doctrine admit that it is not appropriate in all employment situations,⁹⁵ literature and history show that it is useful in a wide variety of employment situations and that it is supported by economic analysis.⁹⁶

⁸⁹ See Epstein, *supra* note 38, at 966 (arguing that an employment at will relationship allows an employee to quit “whenever the net value of the employment contract turns negative”).

⁹⁰ See *id.* at 968. Such a contention follows from the fact that the employment at will doctrine allows an employer to terminate quickly the employment of inferior employees; as a result, all other employees’ wages will rise as productivity per employee increases. See *id.*

⁹¹ See, e.g., *id.* at 969.

⁹² See *supra* notes 52, 56, and accompanying text.

⁹³ For strategic reasons relating to the maximization of profits and worker productivity, it is not in the employer’s interest to haphazardly dismiss his or her employees. See Epstein, *supra* note 38, at 267–68; Rudy, *supra* note 25, at 310–12, 354–59.

⁹⁴ See Peck, *supra* note 22, at 7 (admitting that “[i]t is probably true that most employers do not misuse their power over employees working under employment contracts terminable at will”).

⁹⁵ See, e.g., Epstein, *supra* note 38, at 979. Epstein argues that employment at will works most effectively under employment conditions in which “performance on both sides takes place in lockstep progression,” because, in such circumstances, the doctrine acts as a simple statement against future misfeasance by the other party—terminate or quit. See *id.*

⁹⁶ See Freed & Polsby, *supra* note 21, at 1144 (concluding that commentators are wrong in contending that abolishing at-will employment will result in greater efficiency).

III. COVENANTS NOT TO COMPETE: FOUNDATIONS, ENFORCEABILITY, AND INCREASING PREVALENCE IN AMERICAN EMPLOYMENT CONTRACTS

Covenants not to compete, essentially contractual agreements designed to prevent former employees from competing with their former employers,⁹⁷ have been utilized by employers for centuries⁹⁸ and continue to occupy an important position in many American⁹⁹ employment contracts.¹⁰⁰

A. *The Enforceability of Covenants Not to Compete*

While the basic idea of covenants not to compete seems rather straightforward, many cases¹⁰¹ and commentaries¹⁰² show the extent to which

⁹⁷ See, e.g., ANTHONY C. VALIULIS, COVENANTS NOT TO COMPETE: FORMS, TACTICS, AND THE LAW 1 (1985); Paulette Thomas, *Case Study: When Employees Quit to Become Competitors*, WALL ST. J., Apr. 29, 2003, at B6. More specifically, employers utilize covenants not to compete for two reasons. First, they do so in order to ensure that they obtain the returns of their training investment in employees. See, e.g., Gary P. Kohn, Comment, *A Fresh Look: Lowering the Mortality Rate of Covenants Not to Compete Ancillary to Employment Contracts and to Sale of Business Contracts in Georgia*, 31 EMORY L.J. 635, 636–37 (1982). Second, they do so in order to protect confidential information, trade secrets, and customer lists entrusted to their employees. See, e.g., *id.* at 637.

⁹⁸ The concept of covenants not to compete has been in existence at least since the year 1414. E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 21 (5th ed. 2004).

⁹⁹ While this Note focuses on United States law, covenants not to compete, unlike the at-will employment doctrine, are also utilized in countries other than the United States. See *Carmakers in Europe: The three Fs*, ECONOMIST, Mar. 6, 2004, at 24 (discussing a noncompete clause in the contract of a Ford of Europe executive).

¹⁰⁰ See Ellen L. Rosen, *More Employers Tighten Ties That Bind Workers to Them*, N.Y. TIMES, Oct. 24, 2004, at A1 (contending that “lawyers who follow employment litigation say [that lawsuits involving covenants not to compete] are on the rise”).

¹⁰¹ See, e.g., *Coskey’s TV & Radio Sales & Serv. v. Foti*, 253 N.J. Super. 626, 634–35 (App. Div. 1992) (discussing whether a covenant not to compete is in the best interest of the public and whether it imposes any undue hardship on the employee); *Rogers v. Runfola & Assoc., Inc.*, 565 N.E.2d 540, 542–44 (Ohio 1991) (conducting a balancing of the potential hardships on employees with the protection of the employer’s legitimate business interests).

¹⁰² See, e.g., Harlan M. Blake, *Employment Agreements Not to Compete*, 73 HARV. L. REV. 625, 687–91 (1960) (discussing generally the enforceability of covenants not to compete and underscoring employer methods which could increase the probability that a

the enforceability of such covenants is litigated and discussed.¹⁰³ More specifically, a covenant not to compete is not enforceable unless it is valid, and it is valid only if (1) it is reasonable in scope with respect to both time and geographic area, (2) it is designed to protect a legitimate interest of the employer, (3) it is supported by consideration, and (4) it does not harm the public.¹⁰⁴ Generally speaking, there is no bright-line test as to what constitutes a reasonable period of time or geographic area; courts usually vary, and it seems to be a fact-specific question.¹⁰⁵ The question of whether a covenant would harm the public if it were enforced similarly depends on the

reviewing court would hold such covenants enforceable); Phillip J. Closius & Henry M. Schaffer, *Involuntary Non-Servitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531, 532 (1984) (suggesting “a unifying theory for consistently resolving all litigation of covenants not to compete”); Brett D. Pynnonen, Comment, *Ohio and Michigan Law on Postemployment Covenants Not to Compete*, 55 OHIO ST. L.J. 215, 217 (1994) (comparing Ohio and Michigan law on covenants not to compete and advocating that Michigan adopt Ohio’s reasonableness standard for determining the validity of such covenants).

¹⁰³ Indeed, one author contends that, in regard to covenants not to compete, “[t]here is probably no other area of the law in which there is a greater number of conflicting decisions.” VALIULIS, *supra* note 97, at ix. Disputes regarding covenants not to compete are not solely of interest to legal scholars or practitioners, however. Such matters are of critical importance to the corporate and employment communities as well. See, e.g., *American Express Unit Sues Former Staffers over Noncompete Pact*, WALL ST. J., Sept. 30, 1998, at A4 (reporting that American Express sued former financial planners for violating covenants not to compete in pursuing the company’s clients); Sally Beatty & Teri Agins, *Jones, Polo Relationship Unravels in Court*, WALL ST. J., June 4, 2003, at B1 (reporting that the Jones Apparel Group sued its former president, alleging that she “help[ed] Polo behind Jones’s back,” thereby violating a covenant not to compete); Norihiko Shirouzu, *Noncompete Pact May Foil Fiat Bid to Hire Executive*, WALL ST. J., Aug. 26, 2003, at B4 (discussing a Ford Motor Company executive’s potential departure for Fiat, which was complicated by a noncompete clause); Shawn Young & Joann S. Lublin, *Vice Chairman is Blocked from Joining Rival as CEO: Noncompete Clause at Issue*, WALL ST. J., Feb. 3, 2003, at A3 (reporting that Sprint Corporation’s offer to lure a BellSouth Corporation executive to become Sprint’s CEO was complicated by the noncompete clause in the executive’s contract).

¹⁰⁴ See, e.g., VALIULIS, *supra* note 97, at 1. Of course, there are semantic nuances in the corresponding test for each state; for example, Ohio law requires that covenants not to compete meet a three-pronged reasonableness standard, namely that the covenant (1) must be necessary to protect the employer in some legitimate business interest, (2) must not be unduly harsh or oppressive on the employee, and (3) must not be injurious to the public. See Pynnonen, *supra* note 102, at 217–19. Nevertheless, the Ohio test is representative of the assertion that each state’s tests require substantially the same elements. For a publication listing the enforceability standards in each state and the many issues that they raise which are beyond the scope of this short introduction to covenants not to compete, see MALSBERGER, *supra* note 11.

¹⁰⁵ See, e.g., VALIULIS, *supra* note 97, at ix; Pynnonen, *supra* note 102, at 227.

facts of the particular case.¹⁰⁶ Furthermore, courts' solutions to covenants not to compete which they deem unreasonable also vary.¹⁰⁷ Finally, the analysis could also depend upon a court's general hostility toward covenants not to compete.¹⁰⁸

B. The Rising Importance and Use of Covenants Not to Compete in the United States

Although the utility of covenants not to compete has long been recognized¹⁰⁹ and such covenants have long been utilized,¹¹⁰ the United States economy is currently experiencing changes which indicate that there will be a rise in the use of covenants not to compete in the near future.¹¹¹

¹⁰⁶ *E.g.*, VALIULIS, *supra* note 97, at ix. A good example of a covenant not to compete that would harm the public if enforced is in the case of a rural area with few doctors; in such a situation, a covenant not to compete between a doctor and his former practice likely would not be enforced because of the community's overwhelming need for the doctor's services. *Id.* at 5.

¹⁰⁷ Compare Fullerton Lumber Co. v. Torborg, 70 N.W.2d 585 (Wisc. 1955) (holding that a covenant not to compete that imposed a ten-year restriction was unreasonable and remanding to the trial court to determine a reasonable length of time to protect the employer), with Data Mgmt., Inc. v. Greene, 757 P.2d 62 (Alaska 1988) (recognizing three approaches to dealing with unreasonable covenants not to compete: (1) characterizing them as unconscionable and thus unenforceable; (2) making the covenant enforceable by deleting specific parts of the clause; and (3) altering the covenant to render it enforceable).

¹⁰⁸ See Am. Broad. Cos., Inc. v. Wolf, 420 N.E.2d 363, 367 (N.Y. 1981) (holding that a covenant not to compete "will be rigorously examined and specifically enforced only if it satisfies certain established requirements," because "once the term of an employment agreement has expired, the general public policy favoring robust and uninhibited competition should not give way merely because a particular employer wishes to insulate himself from competition"), quoted in DAWSON ET AL., *supra* note 6, at 177.

¹⁰⁹ See *infra* note 205 and accompanying text.

¹¹⁰ See *supra* note 98 and accompanying text.

¹¹¹ See Tom Jackson, *Court Wins Embolden Noncompete Enforcement*, CRAIN'S CLEV. BUS., Oct. 4, 2004, at 18 ("Although statistics are not kept on how many lawsuits are filed in Ohio to enforce noncompete agreements, the proliferation of technology companies eager to protect their intellectual property has made the cases more common."); Melinda Ligos, *Job Contracts with Noncompete Teeth*, N.Y. TIMES, Nov. 1, 2000, at G1 (contending that covenants not to compete "are thriving in all industries, . . . but particularly in high technology"); Bernard Stamler, *How Long Is the Reach of Your Former Employer?*, N.Y. TIMES, Feb. 11, 2001, at BU9 (arguing that many more employees are now being asked to sign covenants not to compete, particularly in the "dot-com world").

That is, commentators argue that in high-tech fields, which are increasingly dominating the American economy,¹¹² companies depend on their employees' knowledge, innovation, expertise, and other human capital assets to keep them competitive.¹¹³ With such increased reliance on human capital, a large proportion of the relevant information to companies is in the form of trade secrets or understood "know-how," which is most effectively transferred between different companies when employees change jobs;¹¹⁴ employers can be protected from such losses by utilizing covenants not to compete.¹¹⁵ Likewise, as the United States economy continues its move from a manufacturing economy to a service economy, the connection between the specific employee providing the service and the customer will become more crucial to the employer's continued relationship with the customer.¹¹⁶

¹¹² See generally Chiara F. Orsini, Comment, *Protecting an Employer's Human Capital: Covenants Not to Compete and the Changing Business Environment*, 62 U. PITT. L. REV. 175, 177-78 (2000) (citing statistics that online retail sales were projected to grow 500 percent from the year 2000 to the year 2002, and internet sales were expected to surpass \$100 billion in 2001); Christopher Conte & Albert R. Karr, *An Outline of the U.S. Economy*, Feb. 2001, <http://usinfo.state.gov/products/pubs/oecon/> (asserting that in the latter half of the twentieth century, "[m]ost of the increase [in American non-agricultural employment] was in computer, health, and other service sectors, as information technology assumed an ever-growing role in the U.S. economy"); Microsoft, On the Issues: Society and Technology, *Help Wanted*, Apr. 3, 2000, <http://www.microsoft.com/issues/essays/04-03h1b.asp> ("[J]ob opportunities are exploding in the computer science and engineering professions . . . [T]he demand for computer systems' analysts, engineers, and scientists will double in less than a decade . . ."). Using one specific occupation type as an example, a study shows that the percentage of executive contracts containing covenants not to compete has increased from thirty-eight percent in 1998, to sixty-five percent in 1999, to seventy percent in 2000. Rachel Emma Silverman, *Your Career Matters*, WALL ST. J., Mar. 7, 2000, at B16.

¹¹³ See, e.g., Orsini, *supra* note 112, at 178 ("This trend has created a demand for certain types of employees to work in [high-tech] fields, and increased investment in human capital.").

¹¹⁴ See *id.* at 177-79; Ligos, *supra* note 111 (contending that covenants not to compete "are thriving in all industries, . . . but particularly in high technology, where an extremely mobile work force and the high value of intellectual property have some companies drafting and trying to enforce strict noncompete clauses for employees at all levels").

¹¹⁵ See Orsini, *supra* note 112, at 179 ("[T]here are a variety of ways employers can protect their interests. One of these is to use covenants not to compete to prevent the loss of their human capital and with it possibly their trade secrets and confidential information.").

¹¹⁶ See ARCHIBALD COX ET AL., LABOR LAW 997-98 (12th ed. 1996) ("The occupational distribution of jobs in the workforce has undergone enormous change. There

As the United States economy becomes increasingly service- and technology-based, covenants not to compete will become even more crucial as employers seek to protect their customer relationships, trade secrets, and industry-specific knowledge. Combined with the fact that many United States employees are at will,¹¹⁷ it follows that the enforceability of a covenant not to compete signed after an at-will employee has commenced employment is a crucial question not only to the legal community, but also to the many workers whom it will undoubtedly affect.

IV. ENFORCEABILITY OF COVENANTS NOT TO COMPETE SIGNED BY AT-WILL EMPLOYEES AFTER EMPLOYMENT HAS COMMENCED: THE PARADIGM CASE AND THE CURRENT DISPUTE

While a number of state courts have not yet addressed the issue of the enforceability of covenants not to compete signed after an employee at will has commenced employment,¹¹⁸ there is a dramatic split among the states that have addressed the question.¹¹⁹ *Lake Land v. Columber*¹²⁰ exemplifies the fact pattern in this line of cases.

A. *Lake Land v. Columber: An Illustration of the Factual Scenario Underlying Covenants Not to Compete Signed by At-Will Employees After Employment Has Commenced*

The facts of the recent Ohio Supreme Court case are presented here in order to illustrate a representative case of the enforceability of covenants not to compete signed after at-will employment has commenced.¹²¹ Lee Columber began employment with Lake Land Employment Group of Akron, LLC in 1988; his employment was at will.¹²² In September of 1991, Lake Land presented Columber with the covenant not to compete; he asserted that he vaguely remembered the event and did not discuss it with an attorney,

has been a major shift away from the production of goods to the performance of services"); VALIULIS, *supra* note 97, at vii.

¹¹⁷ See, e.g., St. Antoine, *supra* note 25, at 3, 5 (estimating that seventy to seventy-five million American workers are not protected by just cause provisions); Verkerke, *supra* note 25, at 838 (indicating that approximately eighty-five percent of non-union employment contracts are at will).

¹¹⁸ See *supra* note 11 and accompanying text.

¹¹⁹ See *infra* notes 131–32 and accompanying text.

¹²⁰ *Lake Land v. Columber*, 804 N.E.2d 27 (Ohio 2004).

¹²¹ *Id.* at 29–30.

¹²² *Id.* at 29.

although he conceded that he read the document before signing it.¹²³ The covenant provided that for three years after the termination of his employment with Lake Land, Columber could not engage in any business that (1) competed with that of Lake Land, and (2) was within fifty miles of Akron, Ohio.¹²⁴ The trial court found no disagreement over the fact that Columber received no benefit for signing the agreement.¹²⁵ In 2001, ten years after signing the covenant not to compete, the employment relationship between Lake Land and Columber was terminated.¹²⁶ Shortly thereafter, Lake Land filed suit, claiming that Columber violated the covenant and seeking monetary damages as well as an order prohibiting Columber from again violating the covenant's terms.¹²⁷

B. *The Present Discord and the Reasoning of Each Approach*

While the factual scenarios of the cases addressing the enforceability of covenants not to compete signed after an at-will employee has commenced employment are all substantially the same; but the ultimate answer to the question is not.¹²⁸ The different conclusions reached by the states¹²⁹ basically follow two general lines of reasoning.¹³⁰ One group of state courts holds that

¹²³ *Id.* at 29–30.

¹²⁴ *Id.* at 29.

¹²⁵ *Id.*

¹²⁶ The recitation of facts in the opinion provides no information regarding either the reason behind the termination of the Columber-Lake Land employment relationship or Columber's subsequent alleged violation of the covenant. *See Lake Land*, 804 N.E.2d at 29–30.

¹²⁷ *Id.* at 29.

¹²⁸ However, the opinions do contain another common feature, namely an absence of any discussion of the economic analysis of the question, which plays a crucial role in the determination of the proper answer to the question. For an example of this, see the court's analysis in *Lake Land*, 804 N.E.2d at 31–33.

¹²⁹ Some states have not yet reached a conclusion on this issue at all. The states that have not yet considered whether continued employment constitutes consideration sufficient to uphold a covenant not to compete signed after an employee has commenced employment are Alaska, California, Colorado, Hawaii, Montana, New Mexico, Oklahoma, Rhode Island, and West Virginia. MALSBERGER, *supra* note 11.

¹³⁰ Some cases present unique facts which permit courts to avoid the question of whether the employer's not terminating the at-will employee's employment constitutes sufficient consideration.

For example, courts have found that the covenant is enforceable when the employee is subsequently employed for a substantial period after signing the covenant. *See, e.g., Millard Maint. Serv. Co. v. Bernero*, 566 N.E.2d 379, 384 (Ill. App. Ct. 1990) (holding

since the employer could have terminated the employee at any time for any reason, the employee's continued employment constituted the consideration given by the employer.¹³¹ The alternative approach holds that when the

that consideration was present when the employment actually continued for an additional four years after the signing of the covenant); *Zellner v. Conrad*, 589 N.Y.S.2d 903, 907 (App. Div. 1992) (holding that consideration existed "where, as here, a[n] [employment] relationship continues for a substantial period after the covenant is given," even though the court hinted that it would have held that consideration was not present had the employment been terminated shortly after the covenant was signed); *Cent. Adjustment Bureau, Inc., v. Ingram*, 678 S.W.2d 28, 35 (Tenn. 1984) (holding that because the employees remained employed for seven years after signing the covenants, the covenants were supported by consideration and hence enforceable).

Additionally, courts have held that such a covenant is enforceable when the employee has received an additional benefit at the time of signing the covenant. *See, e.g.*, *Mail-Well Envelope Co. v. Saley*, 497 P.2d 364, 367 (Or. 1972) (holding that increased salary constituted the new consideration necessary to enforce the covenant not to compete); *Whittaker General Med. Corp. v. Daniel*, 379 S.E.2d 824, 827 (S.C. 1989) (covenant not to compete was ancillary to the employee's promotion from part-time secretary and part-time salesperson to full-time sales person, with a "substantial raise in salary"); *Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 541 (Wyo. 1993) (employee received a pay raise that constituted consideration for the signing of the covenant not to compete).

Finally, one commentator claims that courts employing both methods of analysis have found that consideration is present when the employer specifically threatens to terminate the at-will employee, should the employee refuse to sign the covenant not to compete, because such a circumstance "tends to show that continued employment was bargained for." *Yates, supra* note 16, at 1131, 1131 n.35, 1133 nn.46-47 (citing *Tasco, Inc. v. Winkel*, 281 N.W.2d 280, 282 (Iowa 1979)). *See also* FARNSWORTH, *supra* note 6, § 2.10b ("If it is shown that the employer actually threatened to discharge the employee if the employee did not sign the covenant, plainly there is consideration.").

¹³¹ *See, e.g.*, *Affiliated Paper Cos. v. Hughes*, 667 F. Supp. 1436, 1448 (N.D. Ala. 1987) (recognizing that Alabama courts have held that continued employment is valid consideration to support covenants not to compete); *Olin Water Services v. Midland Research Labs., Inc.*, 596 F. Supp. 412, 415 (holding that the employees in question were at-will employees and could be terminated at any time; thus, their continued employment was sufficient consideration to support the covenants not to compete that they signed); *Robert Half Int'l, Inc. v. Van Steenis*, 784 F. Supp. 1263, 1273 (E.D. Mich. 1991) ("As to lack of consideration, continued employment constitutes sufficient consideration for the [employee's] execution of the restrictive covenants in the Employment Agreement—where, as here, the [employee's] employment is otherwise 'at-will.'"); *Int'l Paper Co. v. Suwyn*, 951 F. Supp. 445, 448 (S.D.N.Y. 1997) ("Because [International Paper], an at-will employer, had the right to discharge Suwyn [(the employee)] without cause, forbearance from that right was a legal detriment which forms consideration for the restrictive covenant."); *Mattison v. Johnston*, 730 P.2d 286, 288 (Ariz. Ct. App. 1986) ("[T]he continued employment of a terminable-at-will employee is sufficient consideration to support a restrictive covenant executed by the employee more than two years after commencement of employment."); *Research & Trading Corp. v. Powell*, 468 A.2d 1301, 1305 (Del. Ch. Ct. 1983) ("[T]here is no legally significant difference

employee at will has commenced employment and the employer later asks him or her to sign the covenant not to compete, the employer must provide consideration in addition to continued employment in order for the covenant to be enforceable. The reasoning is that absent some additional consideration, the employer's promise is illusory because he or she can terminate the employee at any time, for any reason, or for none whatsoever.¹³² Advocates

between the carrot, 'sign it and you will be promoted', [sic] and the stick, 'don't sign it and you will be demoted' In either case, the employee gains something. In the one case, he gets a promotion and, in the other, a job."); *Coastal Unilube, Inc. v. Smith*, 598 So. 2d 200, 201-02 (Fla. Ct. App. 1992) ("[W]here employment was a continuing contract terminable at the will of either employer or employee, the Florida Courts [sic] have held continued employment constitutes adequate consideration to support a contract."); *Abel v. Fox*, 654 N.E.2d 591, 593 (Ill. App. Ct. 1995) ("Continued employment constitutes adequate consideration for a post-employment covenant not to compete."); *Cellular One v. Boyd*, 653 So. 2d 30, 34 (La. Ct. App. 1995) (affirming decision of trial court and rejecting at-will employees' contention that the covenants not to compete that they signed after employment commenced were unenforceable due to lack of consideration); *Brignull v. Albert*, 666 A.2d 82, 84 (Me. 1995) ("Employment itself has been held to be consideration for a noncompetition covenant in an employment contract."); *QIS, Inc. v. Indus. Quality Control, Inc.*, 686 N.W.2d 788, 789 (Mich. Ct. App. 2004) ("Mere continuation of employment is sufficient consideration to support a noncompete agreement in an at-will employment setting."); *Camco, Inc. v. Baker*, 936 P.2d 829, 832 (Nev. 1997) ("[W]e adopt the majority rule which states that an at-will employee's continued employment is sufficient consideration for enforcing a non-competition agreement.").

¹³² See, e.g., *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1132 (7th Cir. 1997) (applying Indiana law) ("[W]hen an employer has made no specific promise, the mere fact of continued employment does not constitute consideration for the employee's promise."); *Ikon Office Solutions, Inc. v. Belanger*, 59 F. Supp. 2d 125, 131 (D. Ma. 1999) ("[I]n order for a restrictive covenant to withstand scrutiny, some additional consideration ought pass to an employee upon the execution of a post-employment agreement."); *Gagliardi Bros., Inc. v. Caputo*, 538 F. Supp. 525, 528 (E.D. Pa. 1982) ("[T]he [Pennsylvania Supreme] Court has held that 'continuation of the employment relationship at the time the written contract is signed . . . [is] not sufficient consideration for the covenant despite the fact that the employment relationship was terminable at the will of either party.'" (quoting *George W. Kistler, Inc. v. O'Brien*, 347 A.2d 311, 316 (Pa. 1975)); *N. Amer. Outdoor Prods., Inc. v. Dawson*, No. CV040490177S, 2004 WL 2284289, at *3 (Conn. Super. Ct. Sept. 21, 2004) ("Employment may not be sufficient to support these covenants not to compete if the employee can be terminated at will. There is no consideration to support a covenant signed after the employment relationship has begun because past consideration cannot support the imposition of a new obligation."); *Advanced Copy Prods., Inc. v. Cool*, 363 N.E.2d 1070, 1071 (Ind. Ct. App. 1977) ("[S]ince the trial court found that there was no evidence which indicated that [the employee's] continued employment with ACP was dependent upon his signing the new contract which contained the covenant not to compete, . . . such continued employment did not constitute adequate consideration to support such covenant."); *Ins. Agents, Inc. v. Abel*, 338 N.W.2d 531, 533 (Iowa Ct. App.

of both sides of the argument have attempted to supplement their main arguments by employing alternative reasoning.¹³³

1983) (holding that new consideration is required if the covenant not to compete is signed later, after employment has commenced); *Midwest Sports Mktg. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254, 265–66 (Minn. Ct. App. 1996) (holding that because the employer did not provide “any real advantages” to an at-will employee who signed the covenant not to compete that were not also provided to an at-will employee who refused to sign the covenant not to compete, “the noncompetition agreement fails for lack of consideration”); *Reynolds & Reynolds Co. v. Tart*, 955 F. Supp. 547, 553 (W.D.N.C. 1997) (holding that “a covenant [not to compete] entered into *after* an employment relationship already exists must be supported by new consideration, such as a raise in pay or a new job assignment”); *George W. Kistler, Inc. v. O’Brien*, 347 A.2d 311, 316 (Pa. 1975) (“[W]e have stated that the continuation of the employment relationship at the time the written contract was signed was not sufficient consideration for the covenant despite the fact that the employment relationship was terminable at the will of either party.”); *Poole v. Incentives Unltd., Inc.*, 525 S.E.2d 898, 900 (S.C. Ct. App. 1999) (rejecting the employer’s contention that because the employee was at will, her continued employment constituted consideration for her signing of the covenant, because the employee “enjoyed no benefit the day after she signed the agreement that she did not have the day before The promise of continued employment was illusory because even though [the employee] signed the covenant, [the employer] retained the right to discharge her at any time”); *Martin v. Credit Prot. Ass’n*, 793 S.W.2d 667, 670 (Tex. 1990) (“Since an employment-at-will relationship is not binding upon either the employee or the employer and either may terminate the relationship at any time, continuation of an employment-at-will relationship does not constitute independent valuable consideration to support the covenant.”); *Flake v. EGL Eagle Global Logistics, L.P.*, No. 14-01-01069-CV, 2002 WL 31008136, at *2 (Tex. Ct. App. Sept. 5, 2002) (“However, as previously stated, a covenant not to compete included in an at-will employment contract may still be enforceable if the contract contains another promise that is not dependent upon the illusory promise of continued employment.”); *Labriola v. Pollard Group, Inc.*, 100 P.3d 791, 794 (Wash. 2004) (holding that continued at-will employment is not sufficient consideration because “[a] noncompete agreement entered into after employment will be enforced if it is supported by independent consideration”) (citing *Rosellini v. Banchemo*, 517 P.2d 955 (Wash. 1974)); *Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 541 (Wyo. 1993) (holding that a pay raise in the addendum to the covenant constituted consideration, making the covenant enforceable, but the covenant would not have been enforceable without such an additional, separate consideration); *see also Lake Land Emp. Group of Akron, LLC v. Columber*, 804 N.E.2d 27, 34 (Ohio 2004) (Resnick, J., dissenting) (“[T]o be binding, either Lake Land must have given something for [the covenant] or Columber must have received something in return. Yet, when all is said and done, the only difference in the parties’ employment relationship before and after [the covenant was signed] . . . is the noncompetition agreement.”).

¹³³ For example, proponents of the position that continued employment constitutes consideration sufficient to uphold covenants not to compete argue that whether the consideration is continued employment or an agreement not to discharge, the consideration is the same. *See Research & Trading Corp. v. Powell*, 468 A.2d 1301, 1305 (Del. Ch. Ct. 1983) (“[T]here is no legally significant difference between the carrot, ‘sign it and you will be promoted’, [sic] and the stick, ‘don’t sign it and you will be

demoted . . . ' In either case, the employee gains something. In the one case, he gets a promotion and, in the other, a job."'). Furthermore, some courts point out that although the employer could do so, it is unnecessary and cumbersome to terminate and rehire an at-will employee on the condition of signing the covenant not to compete. *See Corroon & Black of Ill., Inc. v. Magner*, 494 N.E.2d 785, 791 (Ill. App. Ct. 1986); *McRand, Inc. v. Van Beelen*, 486 N.E.2d 1306, 1314 (Ill. App. Ct. 1985); *Simko, Inc. v. Graymar Co.* 464 A.2d 1104, 1108 (Md. Ct. App. 1983); *Trugreen LP v. Richwine*, No. 3098, 1994 WL 312937, at *3 (Ohio Ct. App. June 29, 1994). Additionally, it has been noted that such termination and rehiring of employees would exalt form over substance and could present problems with employee seniority and benefit packages. *See Simko*, 464 A.2d at 1108. Some also claim that to hold such covenants unenforceable would be to disrupt freedom of contract and principles of equity. *See Maint. Specialties, Inc. v. Gottus*, 314 A.2d 279, 284 (Pa. 1974) (Manderino, J., dissenting) (contending that to hold such covenants unenforceable would "seriously encroach[] on the legitimate freedom of an employer" and rhetorically asking "[w]hy should an employer who requests a legal restrictive covenant at the time of initial employment have any advantage over an employer who later decides he should have such a restrictive covenant and no breach of any oral or written contract or other illegality is involved?"). Finally, the argument that continued employment is sufficient consideration to uphold post-employment covenants not to compete signed by at-will employees is strengthened by the fact that even that position's opponents concede that it is the more logical approach. *See id.* at 284 (Pomeroy, J., concurring) ("I believe that sound policy supports this exception to the general rule [of employment at will] even if strict logic does not.").

Advocates of the position that continued employment does not constitute consideration sufficient to uphold covenants not to compete signed after at-will employment has begun similarly buttress their contention with other arguments. Some courts have done so in part by relying on their general aversion to covenants not to compete. *See Midwest Sports Mktg. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254, 265 (Minn. Ct. App. 1996) ("Minnesota courts do not favor noncompetition agreements because they are partial restraints on trade."); *Morgan Lumber Sales Co. v. Toth*, 321 N.E.2d 907, 908 (Ohio Misc. 1974). Other courts have come to this conclusion for what they deem public policy reasons. *See Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 541 (Wyo. 1993) ("We believe strong public policy favors separate consideration.") (quoting HOWARD A. SPECTER & MATTHEW W. FININ, *INDIVIDUAL EMPLOYMENT LAW AND LITIGATION* 450 (1989)). Specter and Finin contend that the "better view, even in the at-will relationship, is to require additional consideration to support a restrictive covenant entered into during the term of employment," because "the increasing criticism of the at-will relationship," unequal bargaining power of the employee relative to the employer, and the fact that covenants not to compete place an "onerous restraint on the ability to earn a living." *Id.* Other courts similarly cite unequal bargaining power. *See Leatherman v. Mgmt. Advisors, Inc.* 448 N.E.2d 1048, 1051 (Ind. 1983) (Hunter, J., dissenting) ("An employee could agree to the covenant one day and be fired the next day. The opportunity for coercion is too great."); *Apronstrings, Inc. v. Tomaric*, No. 11-272, 1987 WL 15445, at *2 (Ohio Ct. App. Aug. 7, 1987) ("Since agreements of this nature are frequently the result of unequal bargaining power some consideration, beyond a mere promise of continued employment, must be provided by an employer."); *Maint. Specialties*, 314 A.2d at 284 (Pomeroy, J., concurring) ("An employee who has an economic stake, or even an emotional stake, in the continuation of

Some courts¹³⁴ and commentators¹³⁵ recognize “continued employment is sufficient consideration” as the majority rule among the states. However, there are a large number of states on each side of the argument.¹³⁶ To complicate the matter, there are also courts within states that employ both approaches.¹³⁷ This supports the contention that such a majority/minority

an existing at-will employment arrangement may find it difficult indeed not to accept a covenant not to compete when his employer demands it.”)

¹³⁴ *E.g.*, *Camco, Inc. v. Baker*, 936 P.2d 829, 832 (Nev. 1997) (“Today we adopt the majority rule which states that an at-will employee’s continued employment is sufficient consideration for enforcing a non-competition agreement.”).

¹³⁵ *See, e.g.*, *Yates*, *supra* note 16, at 1128–29.

¹³⁶ *See supra* notes 131–32 and accompanying text.

¹³⁷ For example, the Ohio Supreme Court recently resolved this matter in Ohio. *Lake Land Emp. Group of Akron, LLC v. Columber*, 804 N.E.2d 27, 32 (Ohio 2004). However, before that case, there was a considerable split among the Ohio appellate courts in regard to the proper solution to the question, although the majority of appellate districts were in agreement with the ultimate decision in *Lake Land*. More specifically, of Ohio’s twelve state appellate districts, two had not addressed the question, nine had held that continued employment was sufficient consideration, and four had held that it was not; from these numbers, it can be ascertained that some of the appellate districts vacillated on the issue. *Swagelok Co. v. Young*, No. 78976, 2002 WL 1454058, at *3–4 (Ohio Ct. App. July 3, 2002).

For the decisions holding that continued employment is sufficient consideration to uphold a covenant not to compete signed after an at-will employee has commenced employment, see *Swagelok*, 2002 WL 1454058, at *5 (“We agree with the majority of Ohio districts that have held that continued employment constitutes sufficient consideration to uphold a non-compete agreement that was entered into after the commencement of the employment relationship.”) (8th Dist. Ct. App.); *Willis Refrigeration, Air Conditioning & Heating, Inc. v. Maynard*, No. CA99-05-047, 2000 WL 36102, at *6 (Ohio Ct. App. Jan. 18, 2000) (“We thus hold that continued employment alone constitutes sufficient consideration to support a restrictive covenant signed in the midst of employment by an at-will employee.”) (12th Dist. Ct. App.); *Fin. Dimensions, Inc. v. Zifer*, Nos. C-980960, C-980993, 1999 WL 1127292, at *4 (Ohio Ct. App. Dec. 10, 1999) (“Such a continuation [of at-will employment], when [the employer] was under no obligation to continue the relationship, constituted consideration for [the employee’s] reciprocal promise to abide by the terms of the contract.”) (1st Dist. Ct. App.); *Sash & Storm, Inc. v. Thompson*, No. 1-97-43, 1997 WL 784350, at *2 (Ohio Ct. App. Dec. 22, 1997) (“Since an employer is not legally required to continue the employment of an employee at-will, continued employment is consideration for the contract not to compete.”) (3d Dist. Ct. App.); *Bruner-Cox v. Dimengo*, No. 17732, 1997 WL 72095, at *3 (Ohio Ct. App. Feb. 12, 1997) (“Because Dimengo was an at-will employee, his continued employment was sufficient consideration to support the covenant not to compete contained in the . . . agreement.”) (9th Dist. Ct. App.); *Canter v. Tucker*, 674 N.E.2d 727, 730–31 (Ohio Ct. App. 1996) (“This court would note that an employer is *not* legally bound to continue an at-will employee’s term of employment. Thus, . . . we find that continued employment alone constitutes consideration.”) (10th Dist. Ct. App.); *Trugreen, LP v. Richwine*, No. 3098, 1994 WL

312937, at *3 (Ohio Ct. App. June 29, 1994) (“We are not persuaded that *Prinz* [(holding that continued employment is not sufficient to uphold an anticompetitive covenant)] is correct. The distinction between an indefinite promise of employment made when an employee is initially hired and an indefinite promise of employment to an existing employee seems artificial to us.”) (2d Dist. Ct. App.); *Copeco, Inc. v. Caley*, 632 N.E.2d 1299, 1301 (Ohio Ct. App. 1992) (“We concur . . . that continued employment serves as sufficient consideration to support the employment agreement [W]e see no substantive difference between the promise of employment upon initial hire and the promise of continued employment subsequent to ‘day one.’”) (5th Dist. Ct. App.); *Nichols v. Waterfield Fin. Corp.* 577 N.E.2d 422, 423 (Ohio Ct. App. 1989) (“Furthermore, we find that even if consideration were required to modify the at-will employment contract, that [the employee’s] continued employment was sufficient consideration to modify the contract.”) (9th Dist. Ct. App.); see also *O’Brien v. Prod. Eng. Sales Co.*, No. 10417, 1988 WL 2436, at *4 (Ohio Ct. App. Jan. 8, 1988) (“Since [the employer] was under no obligation to continue to employ the [employee], the consideration or ‘quid pro quo’ for [the employee’s] acceptance of a lower future commission schedule was [the employer’s] agreement to continue to employ the appellant.”).

For the decisions holding that continued employment is not sufficient consideration to uphold a covenant not to compete signed after an at-will employee has commenced employment, see *Prinz Office Equipment Co. v. Pesko*, No. 14155, 1990 WL 7996, at *4 (Ohio Ct. App. Jan. 31, 1990) (“Where the restrictive covenant was not agreed to by the employee upon his or her initial hire, it must be supported by something more than a promise of continued employment.”) (9th Dist. Ct. App.); *Apronstrings, Inc. v. Tomaric*, No. 11-272, 1987 WL 15445, at *2 (Ohio Ct. App. Aug. 7, 1987) (“The foregoing unequivocally serves to demonstrate that no inducement was given to [the employee] when the covenant of noncompetition was executed. Hence, the trial court correctly determined that the covenant was unenforceable for want of consideration.”) (11th Dist. Ct. App.); *Burnham v. Digman*, No. CA-3185, 1986 WL 8560, at *3 (Ohio Ct. App. July 21, 1986) (holding that because the employee had been working with the firm for a number of years and her employer “testified that [the employee] did not receive any increase in salary or consideration for entering into the non-solicitation agreement, which was part of the employment contract[,] . . . [w]e do not find that continued employment is sufficient consideration”) (5th Dist. Ct. App.); *Toledo Clutch & Brake Serv. v. Childers*, No. L-85-069, 1986 WL 2683, at *3 (Ohio Ct. App. Feb. 28, 1986) (“Furthermore, when a covenant not to compete is not contained in the original employment contract, but is instead incorporated into a subsequent contract for continued employment, there must be new consideration given by the employer, beyond mere continued employment, in order for the covenant to be valid.”) (6th Dist. Ct. App.); *Morgan Lumber Sales Co. v. Toth*, 321 N.E.2d 907, 909 (Ohio Misc. 1974) (“Accordingly, the court concludes that the present agreement [covenant not to compete signed after an at-will employee has commenced employment] fails for want of consideration.”).

It should be noted, however, that before *Lake Land*, even courts that were supposedly agreeing with the contention that continued employment is not sufficient consideration were eager to find that consideration existed even under dubious circumstances that suggested nominal consideration. See *Midwest Paper Specialties Co. v. Holler*, No. L-94-228, 1995 WL 326377, at *2-3 (Ohio Ct. App. June 2, 1995) (holding that ten dollars as well as continued employment were sufficient consideration to uphold a covenant not to compete, even though the court stated that it was following

distinction is misleading, as it imparts to the reader a sense that the current state of the law is more certain and the boundaries are better defined than they actually are.

V. FOUNDATIONS OF LAW AND ECONOMICS AND LABOR MARKET THEORY

Having acquired a rudimentary understanding of the at-will employment doctrine, covenants not to compete, the current conflict regarding the enforceability of covenants not to compete signed after an at-will employee has commenced employment, and the increasing importance of the question in light of the changing American economy, we now turn to the economic analysis of the problem, which the prior commentary and cases have omitted.¹³⁸ Before economic analysis can be employed in determining the appropriateness of a rule that renders post-employment covenants not to compete signed by an at-will employee enforceable, one must first have an understanding of the basic labor market theory underlying the analysis. In accomplishing that, however, one must, in turn, appreciate economics as a means of effectively evaluating legal rules. Law and economics thus begins the discussion.

A. Introducing Law and Economics: Economic Analysis as a Tool for Courts in Making Legal Decisions

The law and economics movement seeks to combine the two disciplines. This movement has only been in existence since the 1960s,¹³⁹ yet it has produced novel results and grown in popularity among courts and

the holding of *Toledo Clutch*, which held that continued employment alone is not sufficient).

¹³⁸ See *supra* notes 16, 19, and 133.

¹³⁹ Richard A. Posner & Francesco Parisi, *Law and Economics: An Introduction*, in LAW AND ECONOMICS VOLUME 1: THEORETICAL AND METHODOLOGICAL FOUNDATIONS ix (Richard A. Posner & Francesco Parisi eds., 1997). The two articles given credit as those beginning the law and economics movement are Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) (examining tort liability schemes through the impact of relative costs, prices, and wages on employers' and consumers' decisions), and Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1, 1, 42-44 (1960) (using economic analysis to examine the approach to problems involving social costs, such as a factory producing smoke to the dismay of nearby residential districts, and advocating that such approaches should "take into account the costs involved in operating the various social arrangements . . . as well as the costs involved in moving to a new system"). RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 25 (5th ed. 1998).

legislatures.¹⁴⁰ As one commentator points out, it is likely that the quality of judicial opinions and legislation has increased as a result.¹⁴¹

In order to understand what law and economics seeks to accomplish, one must first acquire an understanding of the meaning of the terms. Economics can best be defined as “the study of how societies use scarce resources to produce valuable commodities and distribute them among different groups.”¹⁴² Judge Posner, a pioneer in the field of law and economics, states that because the range of behavior that the legal system encompasses is so large, law and economics could be defined as being “virtually coextensive” with economics.¹⁴³ However, he argues that such a definition is not very useful, so he carves out a separate field and calls it law and economics in order “to identify the area of economic inquiry to which a substantial knowledge of law in both its doctrinal and institutional aspects is relevant.”¹⁴⁴

Having an idea of what is meant by “law and economics,” we now look at how the two disciplines interact and how that interaction is utilized. Judge Posner and Francesco Parisi describe the interaction of the two disciplines as follows:

Law and economics relies on the standard economic assumption that individuals are rational maximizers, and studies the role of law as a means of changing the relative prices attached to alternative individual actions. Under this approach, a change in the rule of law will affect human behaviour by altering the relative price structure—and thus the constraint—of the optimization problem. Wealth maximization, serving as a paradigm for the analysis of law, can thus be promoted or constrained by legal rules.¹⁴⁵

¹⁴⁰ See HIRSCH, *supra* note 1, at xiii. While law and economics is most often utilized in antitrust law, it has been applied to a number of other areas, including criminal, employment, property, contract, environmental, tort, family, corporate, and constitutional law. See *id.* at 4; POSNER, *supra* note 139, at 25; Posner & Parisi, *supra* note 139, at xviii–xlvi.

¹⁴¹ See HIRSCH, *supra* note 1, at xiii.

¹⁴² See *id.* at 4 (quoting PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 5 (13th ed. 1989)).

¹⁴³ Richard A. Posner, *The Law and Economics Movement*, *AM. ECON. REV.*, May 1987, at 1, 3, reprinted in *LAW AND ECONOMICS VOLUME 1: THEORETICAL AND METHODOLOGICAL FOUNDATIONS* 5 (Richard A. Posner & Francesco Parisi eds., 1997).

¹⁴⁴ *Id.* at 3–4.

¹⁴⁵ Posner & Parisi, *supra* note 139, at xi.

Concretely speaking, there are three basic paradigm approaches to achieving the synergistic effects of law and economics.¹⁴⁶ First, law and economics can be combined to formulate more socially useful legal rules.¹⁴⁷ This approach essentially consists of utilizing welfare economics to maximize allocative efficiency, usually after an existing legal rule has failed to achieve its desired goal.¹⁴⁸ The second basic paradigm approach of law and economics is effect evaluation.¹⁴⁹ Effect evaluation likewise has foundations in welfare economics; it attempts to predict the responses of economic actors with respect to a potential or newly-instituted change in the law.¹⁵⁰ The third and final basic paradigm approach combines law, economics, and organization, and concentrates on how legal organizational forms operate.¹⁵¹

Effect evaluation, the second basic paradigm approach discussed above, is utilized in this Note. More specifically, by implementing basic results of labor market and general microeconomic theory, this Note examines the probable labor market effects of a court holding that continued employment does not constitute consideration to support the enforcement of a covenant not to compete signed by an at-will employee.¹⁵² The effects are considered

¹⁴⁶ See HIRSCH, *supra* note 1, at 5.

¹⁴⁷ See *id.* at 5–6.

¹⁴⁸ See *id.* Allocative efficiency exists when resources are being used to make products that consumers most value; thus, in a situation of allocative inefficiency, society's total wealth is reduced. See HIRSHLEIFER & HIRSHLEIFER, *supra* note 73, at 477–83; WILLIAM G. SHEPHERD, *THE ECONOMICS OF INDUSTRIAL ORGANIZATION* 35 (4th ed. 1997); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 72–74, 86–89 (1982).

¹⁴⁹ See HIRSCH, *supra* note 1, at 10.

¹⁵⁰ See *id.* This approach utilizes microeconomic analysis to determine the likely effect of a particular law. *Id.*

¹⁵¹ See *id.* at 11. Mainly, this approach is applied to problems in contract and antitrust law. See *id.*

¹⁵² While law and economics has acquired the status of a widely used, effective tool in legal analysis, for the sake of completeness it should be noted that it is not without its detractors. For example, one commentator, upset that economic analysis has been utilized in examining the proper scope of limitations on the employment at will doctrine, protests that “[o]ne of the sources of this trend is the importation into labor law of misconceived market economics which equate a labor market to the market for fish.” Summers, *supra* note 24, at 85. However, it is important to note that Summers does not attack the assumptions or methodology of law and economics; indeed, it seems as though he implicitly understands that such an effort would be futile, and he thus elects to argue based on emotion rather than logic.

not only with respect to labor market efficiency, but also as to whether the costs of such a policy are borne disproportionately by workers in certain industries.

B. Foundations of Labor Economics: Economic Analysis Applied to Labor Markets

In order to examine the economic effects of holding enforceable covenants not to compete signed after an at-will employee has begun employment, one must first understand the microeconomic theory underlying the most basic operations of the labor market.¹⁵³ In addition to the basics of how the market-clearing wage is determined, the reader must also be comfortable with other similarly fundamental economic concepts, such as shifts in the labor demand and supply curves.¹⁵⁴

¹⁵³ For a brief, well-written, accessible introduction to the basic theory of supply and demand, see Harrison, *supra* note 28, at 331–34; HIRSHLEIFER & HIRSHLEIFER, *supra* note 73, at 26–60; REYNOLDS ET AL., *supra* note 5, at 17–22; SULLIVAN & HOVENKAMP, *supra* note 98, at 43–54.

¹⁵⁴ As a basic introduction, firms demand employees (labor) because they need them to produce the goods or services that the firms manufacture. Demand curves for labor slope downward and to the right, assuming a graph in which the quantity of labor employed is measured on the horizontal axis and the wage rate is measured on the vertical axis. See, e.g., HIRSHLEIFER & HIRSHLEIFER, *supra* note 73, at 27; REYNOLDS ET AL., *supra* note 5, at 17; SULLIVAN & HOVENKAMP, *supra* note 98, at 44. That is, as the price for workers (the wage rate) rises, the quantity of workers demanded will fall, for several reasons. First, a rise in the wage rate increases the cost of producing the product, and hence the price of the product itself; because consumers substitute out of goods whose relative prices rise, the firm reduces production and thus needs fewer employees. See, e.g., REYNOLDS ET AL., *supra* note 5, at 17. Additionally, to the extent that labor is just one factor of production, some interchangeability of factors exists; hence, as the price of labor rises relative to the other factors, the rational, profit-maximizing firm will substitute out of labor and into relatively cheaper factors of production. See, e.g., *id.*

The supply curve for labor, in contrast to the demand curve for labor, slopes upward and to the right, again assuming that quantity of labor employed is measured on the horizontal axis and wage rate is measured on the vertical axis. See, e.g., HIRSHLEIFER & HIRSHLEIFER, *supra* note 73, at 27; REYNOLDS ET AL., *supra* note 5, at 19; SULLIVAN & HOVENKAMP, *supra* note 98, at 52–53. This occurs because, assuming that workers are rational and seek employment in the field that offers them the greatest net advantage, all other things being equal, a higher wage in a particular field induces workers to choose that field over others. See, e.g., REYNOLDS ET AL., *supra* note 5, at 19. Of course, there are many factors (esteem, working hours, and working conditions, to name a few) that could also contribute to one's choosing a particular occupation, but, nevertheless, a rise in the wage in a particular field relative to others, holding other things constant, will increase that field's total compensation package and induce at least some new workers on the margin into that field. See *id.* at 18–19. For the sake of completeness, the theoretical

A shift in the labor supply curve to the right in a particular market signifies that at every single wage, more people are available for work in the particular market.¹⁵⁵ Such a shift could occur for many different reasons. For example, the job could require a college education and the number of people graduating from college could be increasing, or the job characteristics unrelated to wage could have improved, such as the government giving all of its employees another annual holiday; such conditions are consistent with an increase in the number of workers available at each wage, and hence a shift in the labor supply curve to the right.¹⁵⁶

possibility of a backward-bending labor supply curve should be noted; however, it is accepted that such a supply curve will almost never exist in regard to a single industry, and hence the concept is immaterial for the purposes of this Note. See HIRSHLEIFER & HIRSHLEIFER, *supra* note 73, at 358–60 (citing Charles Link & Russell Settle, *Wage Incentives and Married Professional Nurses: A Case of Backward-Bending Supply?*, 19 ECON. INQUIRY 144 (1981)).

Because the labor supply curve slopes upward to the right and the labor demand curve slopes downward to the right, the two will intersect at what is commonly referred to as the market-clearing wage. See, e.g., HIRSHLEIFER & HIRSHLEIFER, *supra* note 73, at 27–28; REYNOLDS ET AL., *supra* note 5, at 20. If the wage is slightly higher than the market-clearing wage, the quantity supplied will exceed the quantity demanded and some workers will agree to work for less; this will occur until the wage is bid down to the market-clearing wage. See, e.g., HIRSHLEIFER & HIRSHLEIFER, *supra* note 73, at 27–28; REYNOLDS ET AL., *supra* note 5, at 20; SULLIVAN & HOVENKAMP, *supra* note 98, at 53–54. Similarly, if the wage starts out below the market-clearing wage, the number of workers who want to work in that particular industry falls short of the number of workers that firms in that industry would like to hire, and firms will offer workers outside the industry more money to induce them to come to work for them. This will occur until the wage is bid up to the market-clearing wage. See, e.g., HIRSHLEIFER & HIRSHLEIFER, *supra* note 73, at 27–28; REYNOLDS ET AL., *supra* note 5, at 20; SULLIVAN & HOVENKAMP, *supra* note 98, at 53–54. At the market-clearing wage, the labor market is said to be in equilibrium because the number of workers who want to work in that industry is precisely equal to the number of workers that firms in the particular industry would like to hire. See, e.g., REYNOLDS ET AL., *supra* note 5, at 20.

¹⁵⁵ See, e.g., REYNOLDS ET AL., *supra* note 5, at 23. A shift in the labor supply curve to the left in a particular market indicates that at every single wage, fewer people are available to work in the particular market. See *id.*

¹⁵⁶ See *id.* For recent examples of shifting labor supply curves, see John Markoff, *Silicon Valley's Own Work Threatens Its Domination*, N.Y. TIMES, July 22, 1999, at C2 (suggesting that potential Silicon Valley employers would have a difficult time fulfilling their demand for skilled labor because of “increasing quality-of-life concerns”); Edward C. Prescott, *It's Irrational to Save*, WALL ST. J., Dec. 29, 2004, at A8 (discussing the well-accepted result that labor supply will be affected by changes in tax rates, because “workers are rational . . . mak[ing] labor/leisure choices on the margin”); *The Decline of English Burglary*, ECONOMIST, May 29, 2004, at 23 (arguing that burglary has decreased over the past twenty years in England partially because of changes in the criminal labor force, notably the number of skilled burglars leaving the trade as a result of a “flurry” of

Just as the labor supply curve in a particular market can shift, so too can the labor demand curve. An upward shift in the labor demand curve in a particular market indicates that at every wage, employers would prefer to hire more people who can perform that particular job.¹⁵⁷ A shift in the labor demand curve, like a shift in the labor supply curve, could occur for a number of reasons. For example, with the recent advent of DVD players, the demand for VCRs, and hence the demand for workers at plants producing VCRs, has likely declined at every wage, thus resulting in a downward shift of the labor demand curve in that market.¹⁵⁸

The shifts of the labor supply and demand curves are not terribly interesting per se; rather, it is their effects on the market-clearing wage and number of workers employed that attracts our attention. It is not difficult to see, when reminded that the demand curve slopes downward to the right and the supply curve slopes upward to the right, that an increase in the labor supply (that is, a shift to the right of the market labor supply curve), holding all other things constant, results in an increase in the market-clearing quantity of workers employed and a decrease in the market-clearing wage.¹⁵⁹

police warnings to watch out for their modus operandi before such criminals are released from prison).

¹⁵⁷ See REYNOLDS ET AL., *supra* note 5, at 24–25. Conversely, a downward shift in the labor demand curve for a particular industry indicates that at every wage, employers would prefer to hire fewer people who can perform that particular job. See *id.* For recent articles discussing labor demand, see Edmund S. Phelps, *Crash, Bang, Wallop*, WALL ST. J., Jan. 5, 2004, at A14 (contending that new profit visions increase the values placed upon new investments in business assets by entrepreneurs and chief executive officers, which increases investment in those assets, in turn increasing the financial power of firms and the power of investors to finance new projects, which has a positive labor demand effect); Robert A. Hamilton, *A “Help Wanted” Sign Fails to Stir Much Help*, N.Y. TIMES, Jan. 20, 2002, at 14CN3 (discussing the labor demand consequences in Rhode Island and Connecticut resulting from a contract with the Navy to build a new class of submarine).

¹⁵⁸ This simplistic example assumes that workers and manufacturers that produce VCRs do not produce DVD players, which, as we know, is not true. Typical reasons given for shifts in labor demand curves in a particular market are: (1) changes in the demand for the product being manufactured by the employee, (2) technological changes, (3) the price of other factors of production, and (4) the wage rates of workers in other markets. See, e.g., REYNOLDS ET AL., *supra* note 5, at 86–87. For a general discussion of factors which cause demand and supply curves to shift, dichotomized in terms of “inside” and “outside” variation sources, see HIRSHLEIFER & HIRSHLEIFER, *supra* note 73, at 30.

¹⁵⁹ See HIRSHLEIFER & HIRSHLEIFER, *supra* note 73, at 28–34; REYNOLDS ET AL., *supra* note 5, at 24; SULLIVAN & HOVENKAMP, *supra* note 98, at 53. Of course, a shift in the labor supply curve to the left would result in the opposite outcome: an increase in the market-clearing wage and a decrease in the quantity of workers employed in that market. See REYNOLDS ET AL., *supra* note 5, at 24; SULLIVAN & HOVENKAMP, *supra* note 98, at

Likewise, an increase in the labor demand (that is, a shift upward of the market labor demand curve), holding all other things constant, results in an increase both in the market-clearing wage and the market-clearing quantity of workers employed.¹⁶⁰

As a final fundamental aspect of economic analysis, we consider the result of an increase both in labor supply and labor demand.¹⁶¹ According to the analysis above, it is clear that the market-clearing quantity of workers employed would increase from such a shock.¹⁶² However, the effect on the market-clearing wage is not as certain, because the supply increase exerts a negative pressure on the market-clearing wage and the demand increase exerts a positive pressure on it. The solution to the problem depends, in part, on the relative elasticities of supply and demand.¹⁶³

Elasticity essentially measures responsiveness to changes in price for a commodity,¹⁶⁴ here the wage rate for labor. It can be quickly determined by examining the slope of any supply or demand curve—if the curve is relatively steep, even a large change in the wage rate will not significantly affect the corresponding quantity of labor on the schedule; accordingly, such a curve is said to be inelastic, as it is not very responsive to wage rate changes.¹⁶⁵ It is clear from the foregoing that the ultimate effect on the market-clearing wage rate when there is an increase in both demand and supply depends on the relative elasticities of demand and supply. Assuming

53. This basic analysis assumes both that the market in question is competitive, not monopsonistic, and that there is no minimum wage in the market.

¹⁶⁰ See, e.g., REYNOLDS ET AL., *supra* note 5, at 25. Alternatively, a decrease in labor demand for a particular market results in a decrease both in the market-clearing wage and the quantity of workers employed in that market. See, e.g., HIRSHLEIFER & HIRSHLEIFER, *supra* note 73, at 29; REYNOLDS ET AL., *supra* note 5, at 25.

¹⁶¹ Such results actually are rather common, as it is rare that an event has only an isolated impact on either market demand or market supply, but not both. See REYNOLDS ET AL., *supra* note 5, at 25.

¹⁶² Both an increase in supply and an increase in demand result in an increase in the market-clearing quantity of workers employed. See *supra* notes 159–60 and accompanying text.

¹⁶³ E.g., REYNOLDS ET AL., *supra* note 5, at 25. Of course, the ultimate result also depends on the magnitude of the supply curve shift vis-à-vis the magnitude of the demand curve shift. See *id.*

¹⁶⁴ See, e.g., *id.*; HIRSHLEIFER & HIRSHLEIFER, *supra* note 73, at 134–38.

¹⁶⁵ See, e.g., REYNOLDS ET AL., *supra* note 5, at 25–27. Alternatively, a curve that is not very steep will be highly responsive to even slight changes in the wage rate and is said to be elastic. See *id.* The determining factors of elasticity of labor demand are: (1) the price elasticity of the product (that is, the elasticity is derivative), (2) the percentage of labor costs in total production costs, (3) the difficulty of substituting other factors of production for labor, and (4) the supply curves of non-labor productive services. E.g., *id.* at 91–92.

that the magnitude of the supply and demand shifts are equal, if the market demand curve is elastic relative to market supply, the market-clearing wage rate will rise; if the market demand curve is inelastic relative to the market supply curve, the market-clearing wage rate will fall.¹⁶⁶

Having developed an understanding of law and economics generally as well as basic labor market theory, those theories are next applied in performing an economic analysis of the question of the enforceability of covenants not to compete signed after at-will employment has commenced.

VI. CONTINUED AT-WILL EMPLOYMENT CONSTITUTING INSUFFICIENT CONSIDERATION TO UPHOLD A COVENANT NOT TO COMPETE: AN ECONOMIC ANALYSIS

Economic theory permits a more thorough analysis of the legal question than has been employed by the courts and previous commentaries.¹⁶⁷ Examining the issue of the enforceability of post-employment covenants not to compete in the at-will setting yields implications that advise against courts rendering such covenants unenforceable.

A. *The Economic Analysis*

If a court were to hold that a covenant not to compete signed after an at-will employee has begun employment is unenforceable absent other consideration,¹⁶⁸ the effects, in terms of economic analysis, would be similar to a new policy requiring termination only for cause (a “just cause” regime), which affects both the supply and the demand for labor in a particular market.¹⁶⁹ Therefore, we can examine the economic effects of such a judicial ruling by considering the economic effects of such a policy.

Just as the demand curve for labor in the affected industry would shift downward after the implementation of a “just cause” regime, the same result would occur under an unenforceability ruling, since implementing such a measure results in labor becoming a less attractive factor of production.¹⁷⁰ More specifically, under a “just cause” regime, employers will substitute other factors of production for labor because employers subjectively prefer

¹⁶⁶ See *id.* at 25–26; Harrison, *supra* note 28, at 338–40.

¹⁶⁷ See *supra* notes 16, 19, 133, and accompanying text.

¹⁶⁸ Because describing such a potential judicial ruling is rather cumbersome, hereinafter I will refer to such a ruling as an “unenforceability ruling.”

¹⁶⁹ See, e.g., Harrison, *supra* note 28, at 335–36.

¹⁷⁰ E.g., *id.* at 335.

employees who can be discharged at will¹⁷¹ and face increased costs as a result of the new policy, namely those associated with less flexibility in termination decisions and increased litigation costs.¹⁷² Similarly, under an unenforceability ruling, the demand curve for labor would shift downward. To the extent that employers have to provide some consideration to the at-will employee in order to make the covenant not to compete enforceable,¹⁷³ the at will employee is a less desirable factor of production under such a ruling than he or she would be in a jurisdiction like Ohio in which the employer need not sacrifice anything additional to enforce the covenant not to compete. As stated earlier, the result from the downward shift of the demand curve for labor will be a lower market-clearing wage and a lower level of employment;¹⁷⁴ hence, commentators often argue that the cost of job security via the new policy is at least partially passed on to workers,¹⁷⁵ as would be the freedom to take one's services wherever one desires under an unenforceability regime.

The supply curve for labor in the particular market affected under a "just cause" regime would shift to the right, because some potential workers consider the job in that market to be more attractive¹⁷⁶ with the newfound increased security which jobs in the affected market offer.¹⁷⁷ The same result would occur under an unenforceability regime, as an at-will employee knows that he will now face either of two positive situations: (1) the freedom to quit a job at any time and take a new job or to start his own business in the same industry and geographic area without any concerns of violating a covenant not to compete, or (2) additional consideration for giving up such a right. One way of examining this phenomenon would be to conclude that employees in the affected market are willing to work the same amount of time as before, but now at lower wages.¹⁷⁸

From this analysis, a few critical points will be developed in the next Part (discussing the implications of the analysis).¹⁷⁹ First, it is clear that as a result of an unenforceability ruling, wages will fall; but, as stated before, whether

¹⁷¹ See *supra* note 88 and accompanying text; Harrison, *supra* note 28, at 335.

¹⁷² See Harrison, *supra* note 28, at 335.

¹⁷³ For a discussion of consideration that has been upheld as sufficient in such jurisdictions, see *supra* note 130 and accompanying text.

¹⁷⁴ See *supra* note 160 and accompanying text.

¹⁷⁵ See Harrison, *supra* note 28, at 336.

¹⁷⁶ See *supra* notes 155-56 and accompanying text.

¹⁷⁷ See *id.*

¹⁷⁸ See, e.g., *id.*

¹⁷⁹ See *infra* Part VI.B.

employment rises or falls ultimately depends on the magnitude of the supply curve shift vis-à-vis the magnitude of the demand curve shift as well as the relative elasticities of supply and demand.¹⁸⁰ As stated before, employees are more likely to bear the burden of costs due to increased job security when labor supply is inelastic relative to labor demand in the particular market.¹⁸¹

Second, also important to the economic analysis is that a shift in labor demand can be viewed as a measure of the value employers assign to the loss of their unfettered termination rights under a “just cause” regime (the loss of their ability to enforce covenants not to compete under an unenforceability ruling) and the shift in labor supply as a measure of the value employees assign to the gain of their increased job security under a “just cause” regime (or their increased job freedom under an unenforceability ruling).¹⁸² Defining the shifts in this way allows us to see that if the shift in labor demand is less than the shift in labor supply, then the change from the new “just cause” policy (or unenforceability ruling) results in a more efficient state.¹⁸³

Third, an unenforceability ruling, like the “just cause” regime, would not only affect the labor market, but it would also affect the market for the product of that labor, the output market.¹⁸⁴ More specifically, the costs of the increased job security (or increased freedom) of employees of the affected market will be borne by consumers as well as employers and employees.¹⁸⁵ Because the employer will likely be unable to place the entire burden of increased cost due to higher job security (or increased freedom) on the employees, there will be a rise in the cost of production.¹⁸⁶ A rise in the cost of production shifts the supply curve for the firm’s product to the left,

¹⁸⁰ See *supra* Part V.B; Harrison, *supra* note 28, at 336–37.

¹⁸¹ See *supra* Part V.B; Harrison, *supra* note 28, at 338–40.

¹⁸² See Harrison, *supra* note 28, at 337.

¹⁸³ See, e.g., *id.* This analysis can be extended by introducing further complexities. If there were a minimum wage, the market would be restricted from reaching an equilibrium wage lower than the state-imposed minimum; as a result, the impact ordinarily resulting in lower wages instead results in lower levels of employment. See *id.* at 340–41. A monopsonistic situation (one in which there is only one “buyer” of labor in the market and hence the employer makes his or her hiring decisions based on a marginal revenue curve instead of a demand curve) results in the same basic consequence, although the analysis is slightly more complicated. E.g., *id.* at 341–42. See generally HIRSHLEIFER & HIRSHLEIFER, *supra* note 73, at 336–41 (introducing the concept of monopsony, providing examples, and discussing the determination of the market-clearing wage and quantity of workers employed in such a situation).

¹⁸⁴ See Harrison, *supra* note 28, at 342–43.

¹⁸⁵ See *id.*

¹⁸⁶ See *id.* at 343; *supra* notes 161, 163, and accompanying text.

increasing product price and decreasing firm output.¹⁸⁷ As before, the portions of the cost increase that are absorbed by the firm and consumers depend on the relative elasticities of the demand and supply curves of the product the firm manufactures.¹⁸⁸

B. *Implications of the Analysis*

The preceding analysis shows that the effect on the labor markets as a result of the implementation of a “just cause” regime—and, by turn, the effect as a result of an unenforceability ruling—depends on the relative magnitudes of the shift of the labor supply and demand curves as well as the relative elasticities of those curves.¹⁸⁹ Thus, we must examine those factors in determining whether courts addressing the problem in the future¹⁹⁰ should reach such a decision, contrary to the holding of the Ohio Supreme Court.¹⁹¹ The literature, combined with the foregoing analysis, indicates that a court would be ill-advised, from an economic standpoint, to hold that a covenant not to compete is unenforceable because consideration is not present when the at-will employee signs the covenant not to compete after commencing employment.

First, and most importantly, the relative cost of an unenforceability ruling depends on the relative elasticities of supply and demand for labor.¹⁹² Labor markets in which demand is elastic relative to supply will result in the cost of the change being borne more by employees than employers.¹⁹³ However, labor markets with such characteristics are likely to be dominated by employees who are “low skilled and relatively poor.”¹⁹⁴ Thus, while the judiciary may feel that it is assisting workers who are at a bargaining power

¹⁸⁷ See, e.g., HIRSHLEIFER & HIRSHLEIFER, *supra* note 73, at 30; Harrison, *supra* note 28, at 343.

¹⁸⁸ See, e.g., HIRSHLEIFER & HIRSHLEIFER, *supra* note 73, at 25–26; Harrison, *supra* note 28, at 343–44.

¹⁸⁹ See *supra* Part V.B.

¹⁹⁰ For a discussion of the importance of this question and the great likelihood that it will be addressed by other state supreme courts in the near future, see *supra* Part IV.

¹⁹¹ Lake Land Emp. Group of Akron, LLC v. Columer, 804 N.E.2d 27, 32 (Ohio 2004).

¹⁹² See *supra* note 163 and accompanying text.

¹⁹³ E.g., *id.*

¹⁹⁴ See Harrison, *supra* note 28, at 351, 360 (implying that “markets characterized by a relatively inelastic supply and an elastic demand” are disproportionately comprised of “workers with low skills and few alternative employment opportunities”).

disadvantage vis-à-vis their employers,¹⁹⁵ rendering such covenants not to compete unenforceable would likely have unintended negative effects on the wages and employment levels of those who are most in need.¹⁹⁶

Second, research indicates that, in the long run, labor supply curves are very elastic.¹⁹⁷ Therefore, in the long run, an unenforceability ruling would, consistent with the aforementioned discussion regarding elasticities of labor supply and demand curves, manifest itself entirely in a change in the quantity of workers employed in a particular market.¹⁹⁸ Yet, as was shown before,¹⁹⁹ an unenforceability regime would have a depressive effect on the market-

¹⁹⁵ Opponents of the at-will employment doctrine in general, and opponents of a court holding that covenants not to compete signed after at-will employment has commenced are enforceable, often present this argument. See *supra* notes 63 and 133.

¹⁹⁶ While some may contend that an employer will only request his or her employee to sign a covenant not to compete if the employee's occupation is one of high skill, and hence high wage, the case law proves otherwise, abounding with examples of covenants not to compete either remanded to determine reasonable temporal and geographic limitations on the covenant, or held enforceable outright against employees with jobs that possess the characteristics of low skill, low wage, or both. See, e.g., *Clark v. Liberty Nat'l Life Ins. Co.*, 592 So. 2d 564, 565, 568 (Ala. 1992) (person employed to collect insurance premiums door-to-door and solicit new orders); *Booth v. WPMI Television Co.*, 533 So. 2d 209, 209–11 (Ala. 1988) (advertising salesman); *Nobles-Hamilton v. Thompson*, 883 So. 2d 1247, 1248, 1251 (Ala. Ct. App. 2003) (employee of a health food store); *Keystone Auto. Indus. v. Stevens*, 854 So. 2d 113, 114–16 (Ala. Ct. App. 2003) (auto parts sales manager); *Daniel v. Trade Winds Travel, Inc.*, 532 So. 2d 653, 653–55 (Ala. Ct. App. 1988) (travel agent); *Bailey v. King*, 398 S.W.2d 906, 906–08 (Ark. 1966) (laundry delivery services); *Piscitelli v. Pepe*, No. CV044002472S, 2004 WL 2898630, at *1, *4 (Conn. Super. Ct. Nov. 5, 2004) (hairdresser); *Sabatasso v. Bruno*, No. CV030284486S, 2004 WL 886968, at *1, *5 (Conn. Super. Ct. Apr. 8, 2004) (spa employees performing hair styling and coloring); *Pino v. Spanish Broad. Sys., Inc.*, 564 So. 2d 186, 187, 189 (Fla. Ct. App. 1990) (disc jockey); *A.B. Dick Co. v. Am. Pro-Tech*, 514 N.E.2d 45, 46–50 (Ill. App. Ct. 1987) (copy machine repairman); *Trost v. O'Connor*, 893 So. 2d 974, 975, 979 (La. Ct. App. Feb. 2, 2005) (drywall installation and painting); *Griffin v. Guy*, 192 A. 359, 359–61 (Md. Ct. App. 1937) (barber); *Cape Mobile Home Mart, Inc. v. Mobley*, 780 S.W.2d 116, 117–19 (Mo. Ct. App. 1989) (mobile home salesman); *Langberg v. Wagner*, 139 A. 518, 519–20 (N.J. Super. 1927) (window washer); *J & L Sales, Inc. v. Natali*, No. 85 C.A. 71, 1986 WL 6822, at *1–2 (Ohio Ct. App. June 16, 1986) (office equipment repairman); *Baker v. Hooper*, 50 S.W.3d 463, 466–71 (Tenn. Ct. App. 2001) (nail manicurist); *Unitel Corp. v. Decker*, 731 S.W.2d 636, 638–41 (Tex. Ct. App. 1987) (cellular phone salesman).

¹⁹⁷ See REYNOLDS ET AL., *supra* note 5, at 26 (citing Richard Freeman, *An Empirical Analysis of the Fixed-Coefficient Manpower Requirements Model 1960-1970*, 15 J. HUM. RESOURCES 176 (1980)).

¹⁹⁸ See REYNOLDS ET AL., *supra* note 5, at 26.

¹⁹⁹ See *supra* Part VI.A.

clearing quantity of workers employed.²⁰⁰ Thus, again the economic analysis of the unenforceability regime indicates negative effects on the labor markets, namely the possibility of exacerbating unemployment in the long run.

Finally, it was shown earlier that whether a court setting forth an unenforceability ruling would tend toward efficiency in the labor markets depends on whether the at-will employees value their newfound freedom to contract more than the employers value their recent loss of the ability to enforce a covenant not to compete against an at-will employee.²⁰¹ However, commentators note that the determination of the proper answer to this question, even for only one specific labor market or industry, would require an extraordinary amount of research and economic analysis.²⁰² Moreover, to the extent that the results will differ according to different economic conditions in different industries,²⁰³ a blanket judicial opinion setting forth an unenforceability ruling is especially unjustifiable; indeed, if any entity is fit to engage in such a massive undertaking, it is the legislature and not the courts.²⁰⁴ Furthermore, not only does economic analysis support the conclusion that covenants not to compete signed after at-will employment has commenced should be held enforceable, but the contention is robust in that it withstands other attempted means of condemnation proffered by detractors.²⁰⁵

²⁰⁰ See *supra* note 162 and accompanying text.

²⁰¹ See *supra* Part VI.A.

²⁰² See, e.g., Harrison, *supra* note 28, at 358–59.

²⁰³ See *id.* at 358 (“A major barrier to the efficiency goal lies in discovering those instances in which a change will be efficient. What is efficient in one labor market may be inefficient in another.”).

²⁰⁴ See *id.* (“The types of information listed here are not likely to be generated in a trial setting A legislative setting is more appropriate for the collection and study of the types of economic data needed to identify changes that actually do have the desired economic effects.”).

²⁰⁵ More specifically, advocates of the contention that covenants not to compete signed after at-will employment has begun should be held unenforceable in part base that contention on hostility toward covenants not to compete as anticompetitive devices, the exploitation of workers because of unequal bargaining power, and “increased” criticism of the at-will doctrine. See *supra* note 133 and accompanying text.

First, the argument that covenants not to compete deserve hostility from the courts beyond the enforceability restrictions that already exist is unfounded. See *supra* Part IV for a discussion of the enforceability requirements. Dating back at least as far as the year 1414, the longevity of covenants not to compete alone supports the contention that they have social utility. See SULLIVAN & HOVENKAMP, *supra* note 98, at 21. More concretely, the courts have historically recognized, and still do, the importance of such agreements.

VII. CONCLUSION

As the American economy becomes more dominated by service and high-tech industries, covenants not to compete will continue to gain in popularity, even though they have long occupied a prevalent position on the employee relations landscape.²⁰⁶ At-will employment is similarly pervasive, governing millions of American employment relationships.²⁰⁷ These two realities combine to form a question of vital importance to millions of American workers as well as to employment and contract law practitioners and legal scholars: whether a covenant not to compete signed after an at-will employee has commenced employment is enforceable if the only consideration the employee is given in exchange for signing the covenant is continued employment. The timeliness of the question, evidenced by the Ohio Supreme Court's recent decision, and by the split among the states in regard to its proper answer could not be more drastic, likewise underscores its importance.

See United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (6th Cir. 1898) (describing covenants not to compete as “equally for the good of the public and trade” and “useful to the community”), *aff'd*, 175 U.S. 211 (1899); Lake Land Emp. Group of Akron, LLC v. Columber, 804 N.E.2d 27, 30 (Ohio 2004) (“The law upholds these agreements [(covenants not to compete)] because they allow the parties to work together to expand output and competition”) (quoting Polk Bros., Inc. v. Forest City Ent., Inc., 776 F.2d 185, 189 (7th Cir. 1985)).

Second, the argument that such covenants should be held unenforceable because they capitalize on unequal bargaining power is similarly unavailing. More specifically, even if unequal bargaining power exists in such relationships, an efficient solution will result which is in the public interest, absent the existence of some market failure which detractors have yet to produce. *See* Freed & Polsby, *supra* note 21, at 1099–1100; discussion *supra* Part II.C.

Third, and also consistent with the last point, commentators increasingly have realized the importance of the at-will doctrine; specifically, that workers and employers alike benefit from it. *See* Epstein, *supra* note 38, at 963–68 (arguing that at-will employment benefits employees by allowing them to escape an employer who continually makes increased demands, by permitting them to obtain increased wages if they are productive, and by allowing them to quickly and freely leave their current employment situations should a better employment opportunity present itself). It seems that the beneficial aspects of the doctrine have supplanted its criticisms, especially in light of the fact that many of the negative aspects of the doctrine have been eradicated, either judicially or by statute. *See* discussion *supra* Part II.C.

Hence, while economic analysis, which advises courts against holding that a covenant not to compete signed after employment at will has begun is unenforceable, should be utilized by courts when they seek to address that question, the other factors to be considered in the analysis, while largely beyond the scope of this Note, seem to compel the same holding.

²⁰⁶ *See* discussion *supra* Part III.

²⁰⁷ *See* St. Antoine, *supra* note 25, at 3, 5; Verkerke, *supra* note 25, at 838.

While there are other papers in existence on the topic, further evidencing its importance, this Note adds economic analysis to the discussion,²⁰⁸ an aspect that the Ohio Supreme Court's address of the question chose to ignore.²⁰⁹ The developed model, relying on basic microeconomic and labor market theory as well as other economic analyses, indicates that negative economic results could very likely occur should a state court choose to hold that continued employment does not constitute consideration sufficient to render the covenant not to compete enforceable. Specifically, the negative effects of such a holding would likely be concentrated on the most disadvantaged workers in our economy and could result in increased unemployment for workers in all industries. Accordingly, the judiciary should not set forth blanket holdings that could, even with the best intentions of trying to help workers generally, have adverse impacts on those whom our society should most be seeking to protect, particularly considering the fact that an informed decision in regard to this issue that is supported by economic analysis would have to be conducted on an industry-specific basis. Indeed, the ultimate hope of this Note is that state courts become cognizant of the evaluative capabilities of law and economics and that they exploit such capabilities, or leave the matter to the more able state legislatures, as they select their courses of action in regard to this critical endeavor.

²⁰⁸ There have been relatively few articles in general that examine the enforceability of covenants not to compete signed after at-will employment has commenced; those that have been written have not considered the economic analysis of the question. See Leibman & Nathan, *supra* note 16, at 1465–67 (examining the employment at will doctrine, the employer's protectible interest, and various contract defenses, including lack of consideration, economic duress, fraud and misrepresentation, unconscionability, unclean hands, and bad faith; failing, however, to consider the valuable role economic analysis plays in answering this question); Yates, *supra* note 16, at 1138–39 (suggesting the adoption of a unilateral contract approach, but neither employing economic analysis, nor suggesting that economic analysis is a tool that has utility in determining the answer to this question).

²⁰⁹ See *Lake Land*, 804 N.E.2d at 31–33.

