2023

Antitrust Worker Protections: Rejecting Multi-Market Balancing as a Justification for Anticompetitive Harms to Workers

Laura Alexander
American Antitrust Institute

Steven C. Salop
Georgetown University Law Center, salop@law.georgetown.edu

University of Chicago Law Review, Vol. 90, Issue 2, Pp. 273.

Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting of Out-of-Market Benefits

Laura Alexander† & Steven C. Salop††

*Anticompetitive conduct toward upstream trading partners may have the effect of benefiting downstream consumers even as the conduct harms the firms' workers or suppliers. Defendants may attempt to justify their upstream conduct—and may rely on the ancillary restraints doctrine in doing so—on the grounds that the restraints create efficiencies benefitting downstream purchasers, rather than focusing solely on the impact of the restraints on the workers or suppliers in the upstream market. Such balancing of harms against out-of-market benefits achieved by a different group should be rejected by antitrust doctrine generally, and specifically in the case of harms to workers. This type of out-of-market balancing is not supported by either economic analysis or the basic goals of the antitrust laws. Antitrust's consumer-welfare prescription properly protects the trading partner participants (e.g., workers) in any relevant market who are harmed by anticompetitive restraints. Doctrinal and practical considerations weigh against allowing that protection to be traded against out-of-market benefits flowing to other groups. This proposition flows both ways; putting aside antitrust exemptions, it is similarly inconsistent with antitrust doctrine to permit firms to coordinate in ways that harm downstream purchasers, based on a purported justification that this purchaser harm is offset by the out-of-market benefits to the workers. We conclude that in all cases, multimarket balancing that treats out-of-market benefits as cognizable justifications for the restraints on workers or other input suppliers should be rejected. However, since courts may not agree in some limited circumstances such as two-sided platforms, we also briefly discuss how and in what circumstances such balancing might be undertaken. We apply this analysis to a series of real and hypothetical scenarios that raise paradigmatic issues involving these potential conflicting effects as they relate to workers. We also apply our analysis to a likely post-*Alston *case attacking the NCAA*

† Director of Markets & Competition Policy, Washington Center for Equitable Growth.

†† Professor (Emeritus) of Economics & Law, Georgetown University Law Center and Senior Consultant, Charles River Associates. The views expressed in this Essay are our own and may not reflect the views of our colleagues, consulting clients, WCEG, or its advisors or sponsors. We are grateful for helpful comments from Dennis Carlton, Daniel Francis, Scott Hemphill, Jon Jacobson, Tom Krattenmaker, Mark Lemley, Doug Melamed, Eric Posner, and Randy Stutz, and research assistance of Tessa Griego. All errors are our own.

restraints on noneducation payments to student-athletes, in light of the points made in Justice Brett Kavanaugh's concurrence in Alston.

INTRODUCTION

Antitrust law has never been a major player in supporting worker welfare.[1] Antitrust enforcement has tended to focus on anticompetitive conduct directed against downstream purchasers, not workers. In the first decades after the passage of the Sherman Act,[2] antitrust law was used as a sword against trade unions. Unions were eventually exempted from the antitrust laws by Section 6 of the Clayton Act in 1914.[3] In 1948, the Supreme Court made clear that a buyer cartel directed at farmers was a per se violation of the Sherman Act.[4] As late as 1996, it was necessary for the Supreme Court to explain that "a marketwide agreement among employers setting wages at levels that would not prevail in a free market may violate the Sherman Act."[5] In recent years, courts have vacillated on whether wage-fixing and (vertical or horizontal) no-poach agreements constitute per se violations, and Department of Justice (DOJ) and private plaintiffs have lost a series of cases attacking worker restraints.[6]

Several factors might explain this neglect by antitrust of concerns about worker harms. First, a central focus of labor economics is unionization, and unions are seen as cartels, albeit legal ones.[7] Second, it was commonly assumed that the employers were perfectly competitive purchasers of labor, not monopsonists.[8] Third, and our focus here, the fact that higher wages can lead to

---

1 *See, e.g.*, Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 LAW & CONTEMP. PROBS. 65, 76–78 (2019); Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 86 U. CHI. L. REV. 595, 597–601 (2019); Hiba Hafiz, *Labor Antitrust's Paradox*, 87 U. CHI. L. REV. 381, 394–98 (2020); Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 542 (2018). *See also generally* Douglas L. Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183 (1980); ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS (2021).

2 15 U.S.C. §§ 1–7.

3 15 U.S.C. § 17.

4 Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 242 (1948).

5 Brown v. Pro Football, Inc., 518 U.S. 231, 252 (1996) (Stevens, J., dissenting) (citing Anderson v. Shipowners Ass'n of Pac. Coast, 272 U.S. 359 (1926)).

6 *See generally* Jury Verdict, U.S. v. DaVita, Inc., 1:21-CR-00229, Dkt. No. 264 (D. Colo. Apr. 15, 2022); Jury Verdict, U.S. v. Jindal, 4:20-CR-00358, Dkt. No. 112 (E.D. Tex. Apr. 14, 2022); Turner v. McDonald's USA LLC, 1:19-CV-05524 (N.D. Ill. June 28, 2022).

7 Leslie, *supra* note 1, at 1185.

8 *See* POSNER, *supra* note 1, at 561.

higher downstream prices can create a fundamental conflict between the interests of downstream purchasers and the interests of workers (putting aside the fact that most consumers are also workers).[9] Antitrust's consumer welfare standard and the ancillary restraints doctrine sometimes have been taken to imply that only the effects on downstream purchasers matter, or that benefits to downstream purchasers should take precedence over any harms to workers or other upstream trading partners.[10]

Concerns about anticompetitive conduct directed at workers have been increasing. One reason is the recognition of the decline in the relative position of middle- and lower-income workers. Compensation of median workers trailed economy-wide (net) productivity growth by roughly 43% between 1979 and 2017.[11] "During this time 90% of U.S. workers experienced wage growth slower than the economywide average."[12] Labor's share of gross domestic product has declined significantly.[13] At the same time, the share of income captured by the 1% and 0.1% of wage earners has risen dramatically.[14] Corporate profits have risen significantly from around 8% in 1985 to over 11% in 2016.[15]

There are numerous causes of this decline in workers' relative well-being that are not driven by antitrust issues. The weakening of labor law, the reduction in unionization, and industry deregulation have led to lower worker income shares.[16] Free trade has increased competition from foreign firms with lower labor costs and weaker regulations. Various industries have become more automated or capital intensive over time, and new capital-intensive industries have become more important.[17] Those

---

9 *See* Hafiz, *supra* note 1, at 393–94.

10 *See id.* at 396, 403.

11 Lawrence Mishel & Josh Bivens, *Identifying the Policy Levers Generating Wage Suppression and Wage Inequality*, ECON. POL'Y INST. (May 13, 2021), https://perma.cc/R5SP-WUKT.

12 *Id.*

13 *See, e.g.*, David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *Concentrating on the Fall of the Labor Share*, 107 AM. ECON. REV. 180, 180 (2017); David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q.J. ECON. 645, 660–63 (2020).

14 Mishel & Bivens, *supra* note 11.

15 Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 732–33 (2018).

16 *See generally* John Peters, *Labour Market Deregulation and the Decline of Labour Power in North America and Western Europe*, 27 POL'Y & SOC'Y 83 (2008).

17 *See* Daron Acemoglu & Pascual Restrepo, *Artificial Intelligence, Automation and Work*, 4–5, 7 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24196, 2018).

industries have lower demand for production workers, given a particular level of output. Of course, any weakening of antitrust that permits increased downstream market power also reduces the real wages of workers.

The tides of worker welfare in antitrust appear to be shifting. In the past decade, there has been increased antitrust enforcement against restraints directed at workers. A notable matter was an agreement to eliminate competition for engineers that was orchestrated by the CEOs of Apple and Google, in addition to other bilateral agreements that involved Adobe, Intuit, Intel, and Pixar.[18] Yet, even here, the DOJ has held back. The DOJ chose to bring the case against these agreements as a civil, not criminal, matter, perhaps because of the novelty of enforcement against this type of conduct.

It was only in 2016 that the DOJ announced that it would bring such horizontal no-poach agreements criminally.[19] Yet, as an illustration of the lack of attention previously given to per se illegal restraints directed at workers, the defendant in *United States v. Surgical Care Affiliates, LLC*[20] filed a motion to dismiss, arguing that it would violate "[f]undamental principles of due process and fair notice" to allow a criminal prosecution before it has been established in the civil context that no-poach agreements are per se illegal.[21] They argued that neither the Sherman Act nor the Government's 2016 announcement were sufficient notice.[22]

A similar reticence has been shown in the treatment of no-poach agreements among franchisors with their franchisees. In some of these cases, courts have evaluated these agreements as ancillary restraints, applying the rule of reason on the grounds that they lead to lower prices to downstream purchasers.[23]

---

18 United States v. Adobe Sys., Inc., 2011 WL 10883994 (D.D.C. Mar. 18, 2011). For another civil matter brought by the DOJ for an alleged agreement between competitors to restrain competition for skilled employees, see *United States v. Lucasfilms Ltd.*, 2011 WL 2636850 (D.D.C. June 3, 2011).

19 *See* U.S. DEP'T OF JUSTICE ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3–4 (2016) ("Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws. . . . Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements.")

20 3:21-CR-00011, Dkt. No. 38-1 (filed Jan. 5, 2021).

21 Memorandum in Support of Defendants' Motion to Dismiss, United States v. Surgical Care Affiliates, LLC, 3:21-CR-00011, Dkt. No. 38-1, at *1 (N.D. Tex. Jan 5, 2021).

22 *Id.* at 15–18.

23 *See, e.g.*, Deslandes, 2018 WL 3105955, at *7; Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786, 797 (S.D. Ill. 2018); Ogden v. Little Caesar Enters., Inc., 393 F. Supp. 3d 622, 632–35 (E.D. Mich. 2019).

Similarly, some commentary suggests that outside of naked price-fixing, the overarching consumer welfare standard should only condemn conduct that leads to classical monopsony power, which is power that typically also harms downstream purchasers as well as workers or suppliers.[24]

In this Essay, we examine how workers' interests can be protected by current antitrust law. We explain how greater appreciation of the antitrust harms suffered by workers, combined with a recognition that balancing of out-of-market benefits against in-market harms is generally inappropriate, can better protect workers under existing law. In addition to adding consistency to antitrust doctrine, such recognition of antitrust harms to workers is consistent with economic and social policy goals of reducing income inequality.[25]

We are not the first to recommend that antitrust pay more attention to worker harms from anticompetitive conduct or that worker welfare be considered as important as the welfare of downstream purchasers.[26] We follow and extend the approach of the recent article by Professors Scott Hemphill and Nancy Rose, which analyzed mergers that lead to lower wages from either classical monopsony or increased bargaining leverage of the merging firms.[27] They argued that merger benefits to downstream purchasers do not justify the harms to workers because these benefits are "out of market" effects and disallowed under *United States v. Philadelphia National Bank (PNB)*[28]. In this Essay, we develop

---

[24] *See, e.g.*, Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 339 (1991); Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1, 21 (1991); Debbie Feinstein & Albert Teng, *Buyer Power: Is Monopsony the New Monopoly?*, 33 ANTITRUST 12, 12–13 (2019).

[25] For discussion of the complexity of these issues for the context of antitrust policy, see Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. 1, 24–26 (2015). *See also generally* Daniel Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171 (2016).

[26] *See, e.g.*, Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 LAW & CONTEMP. PROBS. 45, 56 (2019); Paul, *supra* note 1, at 76–78 (2019); Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1383–93 (2020); POSNER, *supra* note 1, at 161; *cf.* John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2427–30 (2013) (discussing the importance of antitrust protections for a different trading partner—small suppliers). *See generally* RANDY M. STUTZ, THE EVOLVING ANTITRUST TREATMENT OF LABOR-MARKET RESTRAINTS: FROM THEORY TO PRACTICE 21 (2018).

[27] *See generally* C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078 (2018).

[28] 374 U.S. 321 (1963).

and apply this approach to a variety of nonmerger restraints.[29] Moreover, while this Essay's analysis of the case law focuses primarily on restraints that harm workers, our basic analysis can be applied generally to the rule of reason, including to the role of the ancillary restraints doctrine where harm to other input suppliers is at issue.

We specifically propose that workers (as trading partner participants in a market) harmed by an anticompetitive restraint should be protected by the antitrust laws. We also propose that the *PNB* approach to mergers also should apply to all buyer-side restraints analyzed under the Sherman Act. Where a buyer-side competitive restraint in the labor market harms workers through a reduction in competition (whether from classical monopsony or increased bargaining leverage monopsony), the restraint violates the Sherman Act. No separate showing of harm to downstream purchasers is required. Even if the restraint benefits downstream purchasers, those benefits should neither be considered a cognizable justification nor be balanced against the competitive harms suffered by the workers from the restraint. Neither the ancillary restraints doctrine nor any other legal principle requires this result. We thus agree with the spirit of Justice Brett Kavanaugh's concurrence in *National Collegiate Athletic Ass'n v. Alston*,[30] where he stated that "[college football] traditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated."[31]

Because the Court may ultimately disagree with the *PNB* approach in certain multimarket situations, we also consider how a court might engage in a multimarket welfare-balancing exercise. If such balancing is to be permitted, we specifically propose that courts allow balancing in only limited circumstances and place a relatively high burden of proof on the defendant to establish those circumstances and prove that the balance clearly favors the restraint.

Some commentators have suggested that independent contractor workers should be permitted the freedom to negotiate

[29] We also follow a similar approach to Randy Stutz. *See* Randy M. Stutz, Am. Antitrust Inst., Comments of the American Antitrust Institute (Sept. 23, 2019).

[30] 141 S. Ct. 2141 (2021).

[31] *Id.* at 2169 (Kavanaugh, J., concurring).

terms collectively with the firms that purchase their services.[32] Such negotiations are treated today as per se illegal. We suggest that, under existing law, the creation of worker associations that negotiate collectively with client firms could pass muster under *Broadcast Music, Inc. v. Columbia Broadcast System, Inc.*[33] (*BMI*) and similar cases if the associations lack market power and also provide integration benefits to the market.

The remainder of this Essay is organized as follows. In Part I, we identify the three flavors of monopsony conduct—classical monopsony that harms downstream purchasers, classical monopsony that does not harm downstream purchasers, and monopsony bargaining leverage (i.e., non-classical monopsony) that can benefit downstream purchasers—and their disparate effects on downstream purchasers. In Part II, we explain why the consumer welfare standard, properly understood, neither ignores harms suffered by workers nor privileges the effects of conduct on downstream purchasers over upstream worker harms. We then present our view that courts should follow the *PNB* doctrine beyond merger cases and reject claims that benefits to downstream purchasers are cognizable procompetitive justifications for competitive restraints that harm workers. We also explain when and how courts might balance effects if they disagree with our approach of extending the *PNB* doctrine. In Part III, we apply this analysis to a variety of specific restraints that can harm workers. These include no-poach agreements, exclusionary restraints, joint purchasing of labor, and seller-side cartels. We also analyze collective negotiation of wage rates by contract workers. In Part IV, we apply our approach to the likely post-*Alston* case attacking the NCAA's restrictions on payments to student-athletes that are not education-related, concluding that the restraints would not pass muster under the rule of reason.

---

32 *See, e.g.*, Naidu et al., *supra* note 1, at 596. *See also generally* Warren S. Grimes, *The Sherman Act's Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power*, 69 ANTITRUST L.J. 195 (2001); Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543 (2018).

33 441 U.S. 1 (1979).

I. ECONOMIC ANALYSIS OF MONOPSONY (BUYER-SIDE MARKET POWER)

Buyer-side market power—or monopsony, broadly defined—has not been ignored by industrial organization and antitrust scholars.[34] The basic economic model is classical monopsony, which is the buyer-side analogue to monopoly, or market power more generally.[35] Classical monopsony exercised against upstream trading partners typically reduces downstream output as well as upstream prices and volume or, in the case of workers, wage rates and employment, so it harms downstream purchasers as well as upstream workers or other input suppliers. However, in certain scenarios, classical monopsony may harm workers or other upstream trading partners without having any economic impact on total output or downstream purchasers. Finally, buyer-side market power in the form of increased bargaining leverage harms workers and other upstream suppliers but may not harm downstream purchasers. In fact, it may even increase output and benefit downstream purchasers.

Particular restraints that are imposed to exercise and reinforce monopsony power (such as no-poach agreements on fast food workers) may fit into any of these categories; the impact on consumers in the downstream market from monopsony is largely determined by the elasticity of supply in the labor market and the demand and competition faced by the labor monopsonist in the downstream market where it sells to consumers, not by the type of restraint. The important realization is that, for all types of monopsony restraints, there can be welfare conflict between upstream trading partners, such as workers, and downstream

---

[34] *See generally, e.g.*, Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589 (2005); John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U. L. REV. 1485 (2012); Blair & Harrison, *supra* note 24. If workers have imperfect information regarding the wage rates offered by various firms, even small firms can have "informational" monopsony power that leads to wage rates below the competitive level. For the analogous analysis on the seller side, see Steven C. Salop, *Information and Monopolistic Competition*, 66 AM. ECON. REV. 240, 243–45 (1976). Buyer power also might be exercised to force the workers to raise the prices that they charge rival sellers, rather than to reduce the costs of the monopsony buyer. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 8 (2010) [hereinafter MERGER GUIDELINES].

[35] The term "monopsony" is often understood to refer solely to what we are calling "classical" monopsony. In this Essay, we will use the term "monopsony" to include all three variants discussed here. This corresponds to usage on the seller side, where an increase in bargaining leverage from a merger is treated as an anticompetitive unilateral effect, that is, an effective increase in market power. MERGER GUIDELINES, *supra* note 34, at § 6.2.

purchasers. We explain these economic concepts below in the context of worker harms, but the same analysis can be applied more generally to the exercise of buyer-side power against all types of upstream trading partners.

A. Classical Monopsony That Harms Downstream Purchasers

"Classical" monopsony over workers arises where the buyer faces a rising input supply curve of atomistic workers and offers workers a uniform "take it or leave it" wage rate. The classical monopsonist realizes that if it restricts the number of workers it hires, it will be able to pay less to those fewer hired workers, and it calculates its marginal cost of labor based on this assumption. As a result, it maximizes profits by setting a lower wage and hiring fewer workers. This also leads the firm to produce less output, which will lead to higher downstream prices, if other competing sellers do not expand to offset its reduction in output. If the monopsonist also has market power in the downstream market, employment and output will be further restricted. This is because the firm also takes into account the fact that it will be able to charge a higher price, if it restricts output.[36] This also entails further reducing employment and the wage rate, as estimated by economists Chen Yeh, Claudia Macaluso, and Brad Hershbein.[37] Thus, the conduct causes competitive harm to workers and consumers and reduces economic efficiency.

The exercise of classical monopsony power is limited to the situation where the supply of labor is rising with the wage rate. If the labor supply curve is perfectly elastic (i.e., flat) at the competitive wage rate, then the classical monopsony model does not apply. In the past, it was sometimes assumed that this was the typical case, which may be a reason why monopsony has often been ignored. However, it is clear the labor supply curve is almost never perfectly elastic.[38]

36 As a technical matter, the firm maximizes profits by hiring labor until the point where the value of the workers' marginal-revenue product is equal to the marginal cost.

37 Chen Yeh, Claudia Macaluso & Brad Hershbein, *Monopsony in the U.S. Labor Market*, 112 AM. ECON. REV. 2099, 2112 (2022).

38 José Azar, Steven Berry & Ioana Marinescu, Estimating Labor Market Power 1 (July 25, 2021) (unpublished manuscript) (on file with author) (finding that workers produce about 21% more than their wage level). In fact, if workers have imperfect information and search costs, then even small firms have some monopsony power.

B. Classical Monopsony That Does Not Harm Downstream Purchasers

Classical monopsony may not harm downstream purchasers. First, classical monopsony power does not lead to lower output when the supply of labor is perfectly inelastic in the region where demand and supply are equal, meaning that the labor supply in that region does not respond to changes in the wage rate.[39] Supply may be perfectly inelastic when there is literally a limited number of qualified workers and hours. Alternatively, a number of workers may have invested in certain qualifications that have now been sunk, so that their labor supply is essentially inelastic. A buyer-side agreement here would lead solely to a reduction in the wage rate below the competitive level but would have no effect on employment, output, or downstream prices charged by the firms. For example, absent the players' union, suppose the team owners agreed to reduce the salaries of the top players by some percentage. In this case, a sole focus on downstream output would fail to recognize the anticompetitive harm to the players.[40]

Second, classical monopsony would not harm downstream purchasers if a single firm with classical monopsony power sells in a perfectly competitive downstream market, and its downstream competitors have constant marginal costs (and, therefore, perfectly elastic supply). In that situation, its output reduction would be completely offset by the increases in output by others. (By contrast, classical monopsony conduct by all the firms would lead to higher downstream prices.)

Third, the potential for perfect substitution to other inputs also can lead to monopsony harms to workers without harms to downstream purchasers. To illustrate, suppose that the cost of delivering a meal purchased online on a college campus with a robot

---

[39] A minimum wage can also prevent competitive harm to downstream purchasers from monopsony by thwarting the exercise of classical monopsony in the first place. When the monopsonized workers are paid the minimum wage, which is set at or above the perfectly competitive level, harm to workers and to downstream purchasers will be avoided, because the monopsonist will be unable legally to reduce wages below competitive levels. Where a minimum wage is introduced or increased in a monopsonistic labor market, it may increase employment by limiting the ability of the monopsonist to exercise its monopsony power. Dale Belman & Paul J. Wolfson, *What Does the Minimum Wage Do?*, UPJOHN INST. FOR EMPLOYMENT RSCH. 12–14 (2014), https://doi.org/10.17848/9780880994583. The employment level *may*, but does not necessarily, increase.

[40] In the long term, however, lower salaries may lead fewer people to invest in required qualifications for the relevant profession, reducing supply. *See* Noll, *supra* note 34, at 600–02 (discussing the case of physicians).

is $10 per delivery. Suppose that students can also be hired to make the deliveries and students differ in the fees they would be willing to accept as payment, and where a higher fee will attract more delivery students. If the college acts competitively and offers students a fee of $10 per delivery, suppose that there will be enough students to deliver 100 meals. If total meal demand is 200 meals, the robots will make the other 100 deliveries. However, suppose that the college instead exercises monopsony power by offering students a fee of (say) $7. If the number of students accepting this fee are able to deliver (say) 80 meals, then the college will use robots for the other 120 meals and end up with lower total delivery costs.[41] Yet, there will be no impact on the marginal cost of delivery, which will remain at the $10 cost of the robots. Thus, there would be no effect on the college's profit-maximizing price for delivered meals or output. Instead, the sole impact will be harm to the student workers.

Finally, theoretically, downstream purchasers may not be harmed if the labor cost savings from the exercise of monopsony power lead to increased investment by the monopsonist. A reduction in a firm's average costs can incentivize further demand-increasing investment.[42] Depending on the production technology, this effect could also conceivably lead to incremental increases in employment, offsetting or even reversing the effect of the monopsony.

C. Monopsony Bargaining Leverage That Can Benefit Downstream Consumers

Monopsony defined generally—that is, buyer-side market power—also is richer than classical monopsony. It also can involve bargaining leverage in bilateral negotiations between a worker and a buyer. In a market that involves bilateral negotiations between individual buyers and sellers, a buyer-side merger or combination can increase the bargaining leverage of the buyers and harm the sellers.[43] For example, suppose that the top figure skaters have unparalleled ability as a result of talent and sunk investments. Suppose that two promoters compete to secure the

---

41 With these numbers, the total delivery cost will be $1760 (i.e., $7 x 80 + $10 x 120), whereas the previous cost had been $2000 (i.e., $10 x 200).

42 For the classic economic model, see Robert Dorfman & Peter O. Steiner, *Optimal Advertising and Optimal Quality*, 44 AM. ECON. REV. 826 (1954).

43 Similarly, a seller-side merger can harm buyers. MERGER GUIDELINES, *supra* note 34, at § 6.2.

skaters' services, allowing the skaters to obtain a high fee per performance. If the promoters merge, each of the skater's bargaining leverage will decline, since they would now be unable to play off the offers of the two promoters against each other. In economic terms, the merged promoter will obtain a higher share of the gains from trade (i.e., the "bargaining surplus") by paying a lower fee per performance. In light of the lower fees, it may have the incentive to increase the number of performances and charge lower ticket prices, thereby benefiting downstream purchasers.

Another example of this bargaining leverage analysis involves a merger or buyer-side combination that countervails or disrupts a worker oligopoly or monopoly and transforms the market from sellers having classical market power to a bilateral bargaining situation that can lead to a higher, efficient level of employment and a wage rate that divides the total gains from trade according to the parties' relative bargaining power. Thus, employment and output increase, and consumers benefit.[44] Bargaining leverage thus also may increase market efficiency.

This logic can be applied to a hypothetical based loosely on the facts of *California v. Safeway, Inc.*[45] in a way that abstracts from any downstream collusion issues. Suppose that the workers are members of a union that supplies workers to all the supermarket chains. If the union were to engage in a strike against one chain, that chain would lose business to other chains, which also would need to hire more unionized workers to pick up the slack. This would give the union substantial bargaining leverage over each individual supermarket chain and allow it to negotiate a high hourly wage rate. However, suppose that the supermarkets agree that if the union engages in a strike against one chain, the others will compensate that chain, where each other supermarket will contribute a fixed dollar amount per month.[46] This potential

---

44 The previously employed workers likely are harmed, but the previously unemployed workers gain.

45 651 F.3d 1118 (9th Cir. 2011).

46 This assumption means that there will not be upward pricing pressure on the prices of the other chains, contrary to what was alleged in *Safeway*. Opening Brief of Appellant, California v. Safeway, Inc. CV-04-0867, Dkt. No. 08-55708, at *20–21:

> By requiring a Defendant that gained (or retained greater) sales in comparison to another Defendant to pay the profit on those additional sales to the loser, [the agreement] created strong disincentives to compete for those sales. By assigning a market share to each Defendant and insuring that it kept only a share of the combined profits proportionate to its allotted market share, the [agreement]

compensation will increase the bargaining leverage of each supermarket chain facing a strike because it will suffer lower costs from the strike. As a result, the union will settle for a lower wage rate. And because supermarket workers are a variable cost, the lower wage can lead to lower supermarket prices paid by consumers and more employment. This means that there can be a direct welfare conflict between the workers and the downstream purchasers.[47]

* * *

Whichever of these causes, there is evidence of buyer-side market power over workers and that the combination of buyer-side and seller-side market power reduces workers' real wages. For example, a recent econometric article by Yeh, Macaluso, and Hershbein that accounts for the fact that both labor markets and product markets are imperfectly competitive found that, on average, workers obtain only 65% of their marginal productivity.[48]

To see how this figure is derived, a recent econometric study by Professors José Azar, Steven Berry and Ioana Marinescu estimates labor supply elasticities that imply that workers' wages are equal to approximately 79% of the marginal revenue generated.[49] However, these results do not take into account the effects of seller-side market power, which further reduces the share of productivity captured by workers.[50] To see the reinforcing effect of seller-side market power, suppose that the only input is labor and that market power in the product market leads to a price-cost margin price of 18%, in which case the share measured by Azar, Berry, and Marinescu would be equal to 82% of the price. Combining this margin with the researchers' estimate that buyer-side

created disincentives to increase output or lower prices in order to gain market share.

[47] This conflict may disappear in the longer run. In the longer run, fewer people may choose to undertake the investment to become (say) skaters, leading in the first instance to fewer skaters, lower output, and higher prices paid by downstream purchasers. *See, e.g.,* Noll, *supra* note 34, at 603–06. But there also could be offsetting investment incentives on the other side of the market. Because they are earning higher profits, skating promoters may invest in more flamboyant exhibitions, which could lead to increased demand by skating fans. Estimating and balancing these conflicting effects would be difficult for economists as well as courts. *See, e.g.,* Noll, *supra* note 34, at 611.

[48] *See* Yeh et al., *supra* note 37, at 2131.

[49] Azar et al., *supra* note 38, at 20. For more general analysis of labor market monopsony, see also generally Orley C. Ashenfelter, Henry Farber & Michael R. Ransom, *Labor Market Monopsony*, 28 J. LAB. ECON. 203 (2010).

[50] Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561, 571 (2020).

market power leads to a wage rate that is 79% of the revenue generated by the worker at the margin implies that the real wage of the workers is equal to 65% (i.e., 82% x 79%) of the workers' marginal productivity.[51] This is a significant wage markdown.

These three monopsony models form the background for the tension in antitrust law and policy that is the focus of this Essay. If antitrust is assumed to be focused solely on welfare of downstream purchasers, then only classical monopsony would be considered a cognizable competitive concern. However, if competitive harms to workers also count, then antitrust concerns also arise when there is classical monopsony that does not harm downstream purchasers or increased monopsony bargaining leverage. Antitrust law must decide how to deal with these conflicting welfare effects. Should the principle that "antitrust is a consumer welfare prescription" imply that the interests of downstream purchasers should take precedence? Or should the *PNB* merger principle that beneficial "out-of-market" effects are not cognizable efficiencies apply? Or should the type of balancing suggested by the Court in *Ohio v. American Express Co.*[52] for a single two-sided transaction platform market be extended to balancing of adverse effects on worker and beneficial effects on downstream purchasers? Resolving these questions is the central issue facing antitrust law in evaluating buyer-side restraints.

II. Proposed Antitrust Approach: Recognizing Workers as Protected Trading Partners and Prohibiting Out-of-Market Benefits from Justifying In-Market Anticompetitive Harms

Our proposed approach has four main prongs. First, the consumer welfare standard, properly understood (and perhaps

[51] The technical details are as follows: Suppose there is monopsony power in the labor market that leads to the wage rate being 17% below the firm's marginal-revenue product of labor. If the firm has market power in the product market, the firm sets its marginal revenue equal to marginal cost, which implies that marginal revenue is less than the product price by the difference between price and marginal cost, as a percentage of price (the Lerner margin). If this margin is 30%, then marginal revenue is equal to 70% of the price. Thus, if the wage rate is equal to 83% of the marginal-revenue product and marginal revenue is equal to 70% of the price, then it follows that: (1) the *nominal* wage rate will be equal to 58% of the value of the workers' marginal product, and (2) the *real* wage (i.e., the nominal wage relative to price) will be equal to 58% of the workers' marginal product. By contrast, if the product market were perfectly competitive, the real wage would be equal to 83% of the marginal product.

[52] 138 S. Ct. 2274 (2018).

renamed for clarity), is broad enough to encompass harms to workers (and other input suppliers) as cognizable antitrust harms, even if downstream purchasers are not harmed.

Second, downstream purchaser welfare should not be privileged under the antitrust laws. As succinctly stated by Professor Herbert Hovenkamp, "restraints should be assessed in the particular market that is restrained."[53] Nor should application of the consumer welfare standard compare and balance the benefits to downstream purchasers against the harms to upstream trading partners or vice versa. A better method is to extend the longstanding approach of merger law and reject claims that out-of-market benefits can justify harms from competitive restraints directed at workers and other upstream trading partners. Restraints that reduce competition for workers and worker income are antitrust harms, just as are similar harms to purchasers faced with seller-side market power. Antitrust entitlements to competitive markets apply to both.

Third, welfare balancing across groups of trading partners is resource intensive and error prone.[54] Because antitrust defendants typically have higher stakes than plaintiffs, the defendants will invest more in the litigation, skewing the errors toward false negatives and underdeterrence.

Finally, balancing is often unnecessary to achieve the downstream benefits. This is because firms that are buyers in an upstream market and firms that are sellers in a downstream market can compensate their upstream trading partners to voluntarily take actions that benefit downstream purchasers, rather than coercing desired actions via anticompetitive restraints. If welfare balancing is to be mandated, the task is better left for Congress, not the courts.[55]

---

53 Herbert Hovenkamp, Competition Policy for Labor Markets 4 (May 17, 2019) (background note submitted to the OECD Directorate for Fin. & Enter. Affs. Competition Comm.) (on file with author).

54 *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig., 958 F.3d 1239, 1269 (9th Cir. 2020) (Smith, J., concurring) ("Realistically, the Rule of Reason analysis is judicially administrable only if it is confined to the single market identified from the outset."), *aff'd sub nom.* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

55 *Id.* at 1270 (quoting United States v. Topco Assocs., Inc., 405 U.S. 696, 611 (1972)):

> [C]ourts employing a cross-market analysis must—implicitly or explicitly—make value judgments by determining whether competition in the collateral market is more important than competition in the defined market. As the Supreme Court has warned, this is not what the antitrust laws invite courts to do. "If a decision is to be made to sacrifice competition in one portion of the

Our proposed approach applies to the conventional three-step rule of reason analysis. The rule of reason is a burden-shifting framework under which the plaintiff must make an initial showing of harm to competition. If the plaintiff does so, then the defendant has an opportunity to identify a plausible efficiency rationale for its conduct and show evidence of procompetitive benefits that could not be achieved without the conduct. And if the defendant does so, then the burden shifts back to the plaintiff to show that the conduct is harmful on balance or that there is a less restrictive alternative.[56]

Our approach also has implications for the application of the ancillary restraints doctrine. The ancillary restraints doctrine has a long history in antitrust, dating back to then–Chief Judge William Howard Taft's 1898 opinion in *United States v. Addyston Pipe & Steel Co.*,[57] which predated the formulation of the rule of reason in *Standard Oil Co. of New Jersey v. United States*[58] and *Board of Trade of City of Chicago v. United States.*[59] While still referenced, such as by the *Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.*,[60] *North Jackson Pharmacy, Inc. v. Caremark RX, Inc.*,[61] and *Deslandes v. McDonald's USA, LLC*[62] courts, the doctrine has been largely subsumed today by a default presumption that some form of the rule of reason applies to most types of conduct cases that do not involve naked restraints.[63] Under the ancillary restraints doctrine, if otherwise per se illegal conduct is shown to be ancillary to a procompetitive agreement or venture in which it is embedded, then the court will apply the rule of reason to the conduct to evaluate whether consumers are harmed or

economy for greater competition in another portion this too is a decision that must be made by Congress and not by . . . the courts. . . . [C]ourts are ill-equipped and ill-situated for such decisionmaking."

56 *Alston*, 141 S. Ct. at 2160 (2021).

57 85 F. 271 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899).

58 221 U.S. 1 (1911); *id.* at 62.

59 246 U.S. 231 (1918); *id.* at 238.

60 9 F.4th 1102 (9th Cir. 2021).

61 385 F. Supp. 2d 740 (N.D. Ill. 2005).

62 (*Deslandes I*) 2018 WL 3105955 (N.D. Ill. June 25, 2018).

63 As explained in a leading casebook, the doctrine "is best understood as a rhetorical device for identifying plausible and cognizable efficiencies. It is no longer necessary as a legal basis for injecting efficiency considerations and adds little to the rule of reason analysis of competitive effects." ANDREW I. GAVIL, WILLIAM E. KOVACIC, JONATHAN B. BAKER & JOSHUA D. WRIGHT, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 256 (4th ed. 2022)

benefited by the restraint.[64] In this sense, the ancillary restraints doctrine can be seen as a preliminary analysis, as a way to distinguish "restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment" under the rule of reason.[65] Alternatively, it might be seen as part of the second step of the rule of reason, where the defendant must identify a plausible efficiency rationale and provide sufficient evidence of competitive benefits to shift the burden back to the plaintiff.[66]

Under our approach, an otherwise–per se illegal restraint would be entitled to rule of reason treatment (e.g., because it qualifies as an ancillary restraint) only where the procompetitive purpose of the larger agreement or venture is directed at the market that is restrained. Similarly, in the context of the conventional rule of reason, only competitive benefits accruing to the allegedly harmed trading partners in the relevant market are considered cognizable. Benefits to other trading partners in the same or other markets or levels of the supply chain would not be cognizable. In the particular case of restraints imposed on workers in the upstream market, the relevant inquiry under our approach would be whether the restraint is ancillary to a legitimate procompetitive purpose benefiting those upstream trading partners. Only the benefits accruing to the allegedly harmed trading partners would be cognizable. Out-of-market benefits accruing to purchasers in the downstream market would not be considered cognizable. To put an even finer point on it, the ancillary restraints doctrine is not an invitation to engage in balancing of out-of-market

---

64 Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,792 F.2d 210, 224 (D.C. Cir. 1986).

65 Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 781 (1999).

66 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1912c, 347 (2019). A third way to understand the ancillary restraints doctrine is that it shifts the scope of the conduct subject to analysis. If a defendant shows that otherwise–per se illegal conduct is ancillary to an agreement (including joint ventures) with a legitimate procompetitive purpose, then the court will proceed to apply the rule of reason to the competitive effects of *that agreement* in the downstream market in which it operates. The restraint embedded in the agreement would only be enjoined if there is a less restrictive alternative to it. However, in our view, this interpretation of the ancillary restraints doctrine has properly been superseded by the modern rule of reason that would find liability based on the impact of *the restraint* in the market in which it is imposed, even if the basic agreement might be procompetitive. For example, the Court in *National Collegiate Athletic Assoc. v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), enjoined the joint-broadcast-licensing restraint even while allowing the other operations of the NCAA venture to remain intact. *Id.* at 101, 120.

benefits against in-market harms to justify harms in the relevant market.

A. The Consumer Welfare Standard Does Not Privilege Downstream Purchasers

As discussed above, not all monopsony restraints that harm workers also harm downstream purchasers. More pointedly, some restraints that harm workers may benefit downstream purchasers. Where the welfare of upstream trading partners—including workers—and downstream purchasers has come into conflict, policy to date has tended to favor downstream purchasers. We disagree with this approach for several reasons.

One key rationale for this favoritism is a common misunderstanding that the "consumer welfare standard" somehow means that the antitrust laws protect only the downstream purchasers, whether these direct purchasers are individuals or firms. The term "consumer welfare standard" was introduced into the antitrust lexicon by then-Professor Robert Bork's provocative book, *The Antitrust Paradox*,[67] and then seemingly blessed by the Supreme Court in its 1979 decision in *Reiter v. Sonotone Corp.*,[68] where the Court cited Bork in opining that antitrust is a "consumer welfare prescription."[69] This phrase has become a talisman for a narrow focus on the welfare of downstream purchasers (whether corporations or humans), rather than the welfare of trading partners generally. For example, in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,[70] even while focusing solely on the possible anticompetitive effects on the timber owners who were upstream sellers, the Court opined that "predatory bidding presents less of a direct threat of consumer harm than predatory pricing . . . [because] a predatory-bidding scheme could succeed with little or no effect on consumer prices because a predatory bidder does not necessarily rely on raising prices in the output market to recoup its losses."[71]

---

67 ROBERT H. BORK, THE ANTITRUST PARADOX 107–15 (1978).

68 442 U.S. 330 (1979).

69 *Id.* at 343 (1979).

70 549 U.S. 312 (2007).

71 *Id.* at 324 (citing Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 676 (2005)). This talismanic effect led one of us to treat evidence of downstream effects as required. By contrast, Professor John Kirkwood did not treat a showing of downstream effects as required. *See* John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625, 655 n.85 (2005).

Invoking *Sonotone*'s declaration that the Sherman Act is a "consumer welfare prescription" as a rationale for privileging downstream purchaser welfare is a misinterpretation of the *Sonotone* case. The *Sonotone* defendants had moved to dismiss the damages claim on the ground that the plaintiff had not sustained an injury to her "business or property" within the meaning of § 4.[72] The Court of Appeals agreed that the phrase "business or property" was intended to limit standing to those engaged in commercial ventures.[73] The Supreme Court rejected this argument with the aforementioned quote.[74] The Court then went to quote its previous decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[75] as follows:

> [W]e described the Sherman Act as "conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers," and the treble-damages provision of the Clayton Act as "conceived primarily as 'open[ing] the door of justice to every man . . . and giv[ing] the injured party ample damages for the wrong suffered.'"[76]

By dubbing the Sherman Act a "consumer welfare prescription," the *Sonotone* Court was noting not its limited focus on downstream purchasers, but rather the broad scope of its protection of all parties harmed by diminished competition. The Court refers to "[t]he people of the United States as individuals," a phrase that surely includes workers.[77] And the additional comment "especially consumers" in *Brunswick* is not surprising, as the Court in that case sought to emphasize that the law does not protect competitors from competition.[78] Its invocation in *Sonotone* also is consistent, because downstream purchasers were the potentially injured group there. Thus, using the term "consumers" here should no more be taken as excluding or downplaying harm to workers than the use of the term "every man" be taken to exclude or downplay harm to women.

---

72 *Sonotone*, 442 U.S. at 330.

73 *Id.* at 330.

74 *Id.* at 343.

75 429 U.S. 477 (1977).

76 *Sonotone*, 442 U.S. at 343–44 (quoting *Brunswick Corp.*, 429 U.S. at 486 n.10).

77 The legislative history of the Sherman Act expressed concerns about the welfare of workers and farmers. For one recent review, see Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 204 & nn.125–26 (2021).

78 *See Brunswick Corp.*, 429 U.S. at 486 n.10.

Just as the Court's adoption of Bork's turn of phrase should not be overread, Bork's "consumer welfare" standard was, in substance, closer to a total welfare standard, and Bork was inconsistent even on that point.[79] In any event, courts have never embraced the content of Bork's welfare standard; the central focus in simple seller-side cases has remained prices, wealth transfers, and output, not efficiency and total welfare. Efficiency in such cases only counts in that it contributes to the welfare of the purchasers.

The declaration that antitrust is a consumer welfare prescription also does not mean that anticompetitive harms suffered by workers (or other input suppliers) are not cognizable. That antitrust is called a consumer welfare prescription in no way excludes the idea that it also protects other trading partners. The term "consumer" in this context is best understood as a term of art, the scope of which should not be taken as coextensive with the colloquial usage. The statutes make no mention of consumers, and precedent belies the notion that the courts have limited the antitrust laws' protections only to downstream consumers. For example, in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*,[80] the Court held that the Sherman Act protects upstream sellers to the same extent that it protects downstream purchasers: "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of

[79] Bork based his "self-named" consumer welfare standard on Williamson's article. *See* BORK, *supra* note 67, at 108–12; Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968). But that article and diagram are focused on *aggregate* economic welfare, which is not *consumer* welfare. *See* Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 347–48 (2010) [hereinafter Salop, *True Consumer Welfare Standard*]; John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 200 n.30 (2008). Aggregate welfare also includes the profits of the defendant and its rivals, and workers and other input suppliers, not just the welfare of consumers who purchase the product. In Williamson's diagram, there is no apparent impact on workers or other input suppliers. The profits of the merging firms are part of aggregate welfare; that is, the defendant's stockholders are treated as "consumers." Williamson assumed merger to monopoly, so there are no harmed rivals. But, if there were harmed rivals, their injuries also would be included in the aggregate-welfare calculation, and their stockholders would also be treated as "consumers." Salop, *True Consumer Welfare Standard*, *supra* at 344 n.22. However, Bork elsewhere treated the injury to rivals as irrelevant, showing that he was not even following this welfare standard. BORK, *supra* note 67, at 63–65.

[80] 334 U.S. 219 (1946).

these."[81] The Court did not require the victims of this buyer-side cartel to demonstrate harm to downstream purchasers to sustain their claims.[82]

A better characterization of the "consumer welfare standard" is that competitive restraints that harm the trading partner participants in the relevant market—whether downstream purchasers, workers, other input suppliers—violate the Sherman Act. In short, the "consumer welfare standard" is a misnomer, as the standard as applied actually focuses on the welfare of any trading partner in a relevant market. And, as is the case across antitrust, anticompetitive conduct can create anticompetitive effects and harm in multiple relevant markets.[83]

Properly understood, the "consumer welfare standard" thus does not privilege the downstream purchasers over other trading partners in the chain of production. Restraints on competition among buyers directed at workers transfer workers' wealth just as do seller-side restraints directed at customers. Antitrust is intended to protect participants from such restraints. Antitrust, and the "consumer welfare standard" in particular, focuses on the potential harmful effects suffered by the trading partner participants in a properly defined relevant market restrained by the conduct. In this sense, these harmed trading partners in the relevant market are the relevant "consumers." The purchase of labor services or other inputs clearly can define a relevant market, and workers are the harmed participants.[84] Thus, the terms "trading partner" or "counterparty" welfare standard might be better.

---

81 *Id.* at 236.

82 Although the Court analyzed the alleged effect of the restraint on the downstream market for refined sugar, it did so on jurisdictional, not substantive, antitrust grounds. Because sugar beets must be refined near where they are grown, the market in which the refiners purchased sugar beets was limited to Northern California, which raised a question about whether the restraint affected interstate commerce and thus whether it could be governed by Congress. *Id.* at 225. The Court ultimately held that the restraint permeated every level of the market, including the downstream interstate market for refined sugar, and it found jurisdiction on that basis. *Id.* at 239. As clearly as the *Mandeville* Court appears to reject balancing and any requirement for downstream purchaser harm, it bears noting that the Court's jurisdiction analysis concluded that the restraint would necessarily diminish downstream competition between the refiners and reduce the quantity of refined sugar being sold. *Id.* at 240–42. Thus, the Court was not forced to confront a scenario where a buyer-side cartel arguably benefited downstream purchasers.

83 For example, seller-side price fixing by competitors in a product market may also harm their workers in the buyer-side labor market. *See infra* Part III.E.1.

84 *See, e.g.*, Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 989 (9th Cir. 2000).

For example, the agencies have challenged some mergers on the grounds of buyer-side competitive concerns that also raise concerns about harms to downstream purchasers and some that do not raise downstream concerns.[85] The DOJ's recent complaint in the Penguin Random House–Simon & Schuster publishing merger alleges harm to authors but not harm to book buyers.[86] The Merger Guidelines also explain that, in such cases, it is not necessary to show harm to downstream purchasers.[87]

B. Out-of-Market Benefits to Downstream Purchasers Should Not Count

This discussion helps to explain the lingering confusion that persists over the term "consumer welfare." This confusion has led some courts, enforcers, and academics to undervalue competitive harms to worker and other input suppliers when downstream purchasers are not harmed by a restraint or when they are even benefited. Clearing up this confusion, and recognizing that workers should be treated as protected trading partner participants under the antitrust laws, leads to the further question of how the law should reconcile situations where a restraint harms the trading partners in the relevant market (e.g., workers) but benefits trading partners in another relevant market (e.g., downstream purchasers). Under an overly narrow (and incorrect) view of "consumer welfare," where only downstream purchaser impacts matter, there is a simple (but incorrect) answer for a restraint that harms workers and benefits downstream purchasers. But under the richer conception of consumer welfare that includes other counterparties in upstream markets that we endorse, a different answer is needed.

Our answer is that out-of-market benefits to downstream purchasers and any associated increases in downstream competition flowing from an anticompetitive restraint that harms workers should not be treated as a cognizable justification for that restraint under the rule of reason. This approach has both normative and doctrinal rationales.

[85] Hemphill & Rose, *supra* note 27, at 2086 nn.24–30.

[86] Complaint, United States v. Bertelsmann SE & Co. KGaA, 1:21-CV-02886, Dkt. No. 1, at *2 (D.D.C. Nov. 2, 2021).

[87] MERGER GUIDELINES, *supra* note 34, at § 12 (2010) ("Nor do the Agencies evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of the effects in the downstream markets.").

There are four normative rationales. First, allowing workers to suffer the adverse consequences of anticompetitive conduct because it benefits downstream consumers is analogous to robbing Peter to pay Paul. It would deprive workers of the benefits of competition to which they are entitled in the name of enriching others. Perhaps this is just a principle of basic fairness. As Justice Kavanaugh explained in *Alston*, "those [college sports] traditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated."[88] In *Alston*, the NCAA sought to justify its limits on compensation to players (i.e., workers) by pointing to the benefits of the restraint to fans (i.e., downstream consumers) whom it alleged prefer to watch "amateur" (i.e., unpaid) players.[89] There was no serious argument that the restraint benefitted the players at all. This type of trading-off of welfare between different groups is a task for Congress, not the courts, as it involves choices that are inherently political.[90]

Second, balancing of in-market harms to workers and out-of-market benefits to downstream purchasers would be exceedingly resource intensive and prone to error. The harms and benefits may not simply be financial but may involve various factors that are not directly commensurable, such as price, quality, safety, and so on.[91] Even in the limited case of financial harms and benefits, the appropriate comparisons and tradeoffs are not straightforward; the economic positions of the worker and downstream purchasers may differ substantially, and courts are not well-positioned to weigh their competing interests. This administrability problem is a reason to avoid balancing.

Third, this complexity also would reward the party that invests the most resources in the litigation, including possibly muddying the waters, making the merits somewhat harder to discern. And because of the typical asymmetric stakes of the parties, the outcomes would be distorted in the direction of false negatives.

---

88 *Alston*, 141 S. Ct. at 2169 (Kavanaugh, J., concurring).

89 *Id.* at 2152.

90 *Topco*, 405 U.S. at 611 ("If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this [ ] is a decision that must be made by Congress and not by private forces or by the courts."); *see also PNB*, 374 U.S. at 371 (concluding that an "ultimate reckoning of social or economic debits and credits" is a "value choice of such magnitude" as to be "beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress").

91 For analysis of incommensurability, see generally Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1 (2016).

Because the defendant would achieve or maintain the future profits from exercising its market power through the restraints, it typically would have larger stakes in winning the litigation than would the plaintiffs. As a result, the defendant would have the incentive to invest more in the litigation, which would tend to skew the likely outcome in its favor away from the merits-based likelihood.[92] This distortion in litigation outcomes would reduce deterrence.

Fourth, an agreement to restrain competition for workers is generally not necessary for them to obtain the benefits of the restraint. If the restraint would cause an increase in total net benefits, the company itself should be able to redistribute those benefits to compensate the workers while profitably engaging in the restraint. This provides both a further reason for the law to reject out-of-market benefits as a cognizable justification and provides reassurance that, in doing so, antitrust law would not be depriving the economy of tremendous consumer benefits that could only have been gained on the backs of restrained workers.

As explained in the law and economics literature, when an action harms one party while benefiting another, an efficient way to resolve the tradeoff between harms and benefits is to assign liability to minimize transaction costs.[93] In this case, the party with the lowest transaction costs is the firm imposing the restraint. Direct bargaining between downstream consumers and workers is not viable, but the firm has established relationships with both groups and is in the best position to gauge effects and strike a deal that improves the welfare of workers, purchasers, and itself, if welfare can be increased by a restraint.

By holding the firms liable for their restraints that harm workers, and by precluding legal arguments to justify those restraints by pointing to downstream consumer benefits, courts would force the firms imposing the restraint to internalize the costs and benefits of the restraints and act accordingly. Instead of forgoing a profitable restraint that leads to net benefits, the firm will distribute those benefits among its trading partners (i.e.,

---

92 Erik Hovenkamp & Steven C. Salop, *Litigation with Inalienable Judgments*, 52 J. LEGAL STUD. (2022) (unpublished manuscript) (on file with author). In class actions, the skew arises from the fact that the attorneys investing in the litigation have lower stakes than do the members of the class.

93 *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1096–97 (1972); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 50–52 (9th ed. 1986).

workers and downstream purchasers) so that none are harmed. If the firm does not do so and the workers are harmed by the restraint, that fact suggests the benefits from the restraint do not actually outweigh the harms.

For example, suppose that a firm would be able to reduce its prices and increase its sales and profits if its worker-turnover costs were reduced by a lower worker quit rate, since the lower quit rate would allow it to save on training and other employee onboarding costs.[94] Rather than (secretly) adopting a no-poach agreement with its buyer-side competitors that coerces lower quit rates, the firm could reduce its turnover costs by unilaterally increasing the wage rate it pays its workers.[95] Initial results from studies of the fast food industry after the wide-scale elimination of no-poach restraints suggests the restaurants did just that.[96] To attract workers who are less likely to quit, the firm can offer low entry-level wage rates that increase with the duration of employment.[97] In short, the workers would be willing to accept provisions that disincentivize quitting in exchange for higher wages. And, if the legal framework prohibits multimarket balancing, then employers would have incentives rebalance the benefits of a restraint themselves, rather than forgo a net-beneficial restraint altogether.

C. Structuring the Rule of Reason To Avoid Balancing In-Market Harms and Out-of-Market Benefits

As a doctrinal matter, our approach is an extension of the longstanding approach of merger law. In *PNB*, the Court held that a merger that causes competitive harms to purchasers in the

---

94 *See, e.g.*, Janet L. Yellen, *Efficiency Wage Models of Unemployment*, 74 AM. ECON. REV. 200, 203 (1984); Steven C. Salop, *A Model of the Natural Rate of Unemployment,* 69 AM. ECON. REV. 117, 119–20 (1979). These lower costs give the firm the ability and incentive to pay higher wages because these costs can be amortized over a longer period. A lower turnover rate can similarly incentivize the firm to offer more training because the firm will be assured of obtaining the productivity benefits of that training for a longer average period, which also will give the firm the ability and incentive to pay higher wages.

95 If restraints are fully disclosed and new workers are well-informed, some market constraints will result. But even with full information, such agreements will increase the bargaining leverage of the firms, except in the extreme case of a perfectly competitive labor market.

96 Brian Callaci, Sérgio Pinto, Marshall Steinbaum & Matt Walsh, The Effect of No-poaching Restrictions on Worker Earnings in Franchised Industries (July 16, 2022) (unpublished manuscript) (on file with author).

97 Joanne Salop & Steven Salop, *Self-Selection and Turnover in the Labor Market*, 90 Q.J. ECON. 619, 622–23 (1976).

relevant market is not justified by benefits to purchasers in another relevant market.[98] That remains good law today. As a result, claimed out-of-market procompetitive effects from mergers are not considered cognizable efficiency benefits. Only benefits accruing to consumers within the relevant market are counted by courts and enforcers when assessing the competitive impacts of a proposed merger.[99] There is no economic or doctrinal reason why this approach should not also apply to other conduct analyzed under the Sherman Act, particularly in the context of harms to workers and other upstream trading partners.

While the question of whether out-of-market benefits are cognizable in nonmerger cases has never been clearly resolved by the Supreme Court, underpinnings of our answer find support in the Court's precedent. In addition to strongly affirming that the Sherman Act protects all trading partner participants, not just consumers, the Court in *Mandeville Island Farms* also rejected balancing of the harms to one party from a restraint against the benefits flowing to other parties affected by the restraint.[100] The balancing at issue in *Mandeville Island Farms* involved trading participants in the same market, not participants in different markets in the same supply chain. But the Court's reasoning is broadly applicable. Just as the Sherman Act protects multiple groups, antitrust harm to one party or group is not nullified by benefits flowing to another party or group.

Two years after *PNB*, even Bork opined in the context of nonmerger cases under the rule of reason that courts' "decisions will, of course, necessarily affect the distribution of income both as between groups of producers and as between particular producers

98 *PNB*, 374 U.S. at 370–71.

99 In the Anthem-Cigna merger case, the DOJ claimed that the merger would raise the price of health insurance. The parties claimed that cost savings from negotiating lower hospital and provider fees would lead to lower insurance prices. The D.C. Circuit rejected this claim. *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017). But then-Judge Kavanaugh's dissent apparently would have accepted this claim as a cognizable efficiency benefit if the lower provider fees were the result of increased bargaining leverage (which would lead to benefits to downstream purchasers) rather than classical monopsony (which would lead to harm to downstream purchasers). *Id.* at 372–73 (Kavanaugh, J., dissenting).

100 *Mandeville Island Farms*, 334 U.S. at 242–43:

> It does not matter, contrary to respondent's view, that the growers contracting with the other two refiners may have been benefited, rather than harmed, by the combination's effects, even if that result is assumed to have followed. It is enough that these petitioners have suffered the injuries for which the statutory remedy is afforded.

and consumers, but the courts are not permitted by the main tradition to take these effects into account in the decision of cases."[101] In *United States v. Topco Assocs., Inc.*,[102] the Court cited *PNB* in opining that "[i]mplicit in such freedom [to compete] is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy."[103] More recently, in *American Express*, Justice Stephen Breyer's dissent (joined by three other Justices) cited *Topco*, stating that "[a] Sherman Act § 1 defendant can rarely, if ever, show that a pro-competitive benefit in the market for one product offsets an anticompetitive harm in the market for another."[104]

The Court has taken a similar approach in applying Section 2 of the Sherman Act. In *Weyerhaeuser*, predatory overbuying case brought by injured rivals rather than by the timber owners, Justice Clarence Thomas, writing for the Court, rejected the suggestion that the plaintiffs, sawmill owners that competed with the defendant, would have to show harm to downstream purchasers from the restraint. Rather, the Court focused solely on the impact in the market for purchasing timber and made the point that the impact on downstream lumber purchasers was not relevant to its analysis.[105]

In the recent *Alston* case involving NCAA restraints on education-related payments to student-athletes, the Court declined to wade into whether the *PNB* approach should apply because the parties did not specifically raise the issue.[106] Rather, the Court

---

101 Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 838 (1965). However, by 1978, Bork himself concluded that the income transfer to the monopolist producer from purchasers was not a cognizable antitrust harm, stating that "[t]he consumer welfare model, which views consumers as a collectivity, does not take this income effect into account." BORK, *supra* note 67, at 110.

102 405 U.S. 696 (1972).

103 *Id.* at 610 (citing *PNB*, 374 U.S. at 371).

104 *Am. Express*, 138 S. Ct. at 2302 (2018) (Breyer, J., dissenting) (citing *Topco*, 405 U.S. at 611).

105 549 U.S. at 322:

> A predatory-pricing plaintiff alleges that a predator cut prices to drive the plaintiff out of business and, thereby, to reap monopoly profits from the output market. In parallel fashion, a predatory-bidding plaintiff alleges that a predator raised prices for a key input to drive the plaintiff out of business and, thereby, to reap monopsony profits in the input market.

106 *Alston,* 141 S. Ct. at 2155 ("[T]he student-athletes do not question that the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market.").

simply took the lower court's approach as a given. It also went out of its way to note that amici (including one of this Essay's coauthors) had argued that such balancing is improper, and that the Court was not deciding the issue.[107] The Court favorably cited *Mandeville Island Farms* when noting that the NCAA did not argue that "to prevail, the plaintiff student-athletes must show that its restraints harm competition in the seller-side (or consumer facing) market as well as in its buyer-side (or labor) market."[108]

In *Alston*, and in the other sports league cases that have come before the Court, application of the rule of reason in lieu of the per se rule has been justified on the grounds that competitive sports leagues cannot survive without *some* horizontal agreements between competing teams.[109] But this does not mean that all the league's rules are permissible or that all of them should be evaluated under a rule of reason that focuses on downstream effects. In particular, harms to workers cannot be justified by benefits to competition or purchasers in downstream markets. Indeed, in *Law v. National Collegiate Athletic Ass'n*,[110] cited largely favorably by the Court in *Alston*, the Tenth Circuit evaluated another NCAA wage restraint, this one on assistant coaches. The court applied the rule of reason, but it nevertheless condemned the arrangement under a quick look analysis, holding that the anticompetitive effect was apparent and rejecting the NCAA's allegedly procompetitive justifications.[111] Among the rejected justifications was the NCAA's argument that lowering costs was necessary to provide opportunities for less experienced coaches, to allow less wealthy schools to effectively compete, and to maintain competitive balance.[112] The court held that, even if this had been

---

107 *Id.* at 2154.

108 *Id.* at 2155 (citing *Mandeville Island Farms*, 334 U.S. at 235); *see also id.* (quoting Brief for American Antitrust Institute as Amicus Curiae, *Alston*, 20-512, Dkt. No. 92, at *3, 11–12):

> Some *amici* argue that "competition in input markets is incommensurable with competition in output markets," and that a court should not "trade off" sacrificing a legally cognizable interest in competition in one market to better promote competition in a different one; review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury. . . . But the parties before us do not pursue this line.

109 *Id.* ("Perhaps dominantly, [the NCAA] argues that it is a joint venture and that collaboration among its members is necessary if they are to offer consumers the benefit of intercollegiate athletic competition. We doubt little of this.").

110 (*Law II*) 134 F.3d 1010 (10th Cir. 1998).

111 *Id.* at 1024.

112 *Id.* at 1022–24.

established as a factual matter, such cost reductions, even if passed on to consumers, cannot justify a buyer-side restraint because, if they could "then section 1 can never apply to input markets or buyer cartels[ ]" and "[t]hat is not and cannot be the law."[113]

Finally, Justice Kavanaugh's *Alston* concurrence appears to have joined the debate, explaining that the benefits to consumers from the NCAA's brand of amateur football cannot justify the anticompetitive effects in the labor market.

> [T]he NCAA and its member colleges maintain important traditions that have become part of the fabric of America . . . . But those traditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.[114]

We take these cases as a navigable path to adoption of the *PNB* approach by the Court in a future case where the parties squarely present the issue. We discuss the possibility that the Court will do so in a post-*Alston* case.[115]

Despite this compelling argument for applying *PNB* to conduct cases, courts have sometimes appeared to weigh downstream purchase benefits against upstream harms. In the cases surveyed below, the courts' rule of reason analysis applied the ancillary restraints doctrine to buyer restraints in a way that focused solely on the effects of the restraint on downstream purchasers. This approach is inconsistent with the line of decisions discussed above. It is also inconsistent with the way courts apply the ancillary restraints doctrine to seller-side restraints.

In a typical seller-side case, sellers can escape per se liability by showing that their agreement is an ancillary restraint. That

---

[113] *Id.* at 1023 (quoting Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2643 (1996)). The district court had rejected the claim that the downstream benefits mattered, citing both *PNB* and *Topco*. Law v. Nat'l Collegiate Athletic Ass'n (*Law I*), 902 F. Supp. 1394, 1406 (D. Kan. 1995).

[114] *Alston*, 141 S. Ct. at 2168–69.

[115] *Infra* Part IV.

is, they must demonstrate that the agreement is necessary to accomplish a procompetitive goal that benefits competition and purchasers in the downstream market. If the sellers make this showing, then the restraint is evaluated under the rule of reason. Importantly, under the ancillary restraints doctrine as applied to conduct by sellers, no amount of benefit to the *sellers* themselves or to their employees or their upstream trading partners normally is sufficient to escape per se liability; these are not cognizable benefits. An agreement among sellers will only be considered an ancillary restraint if it is necessary for an arrangement that benefits competition and the *purchasers* of the product, that is, the relevant consumers. Courts do not allow sellers to justify or escape per se liability for cartels based on the benefits of the cartel to the cartelists. The anticompetitive profits gained from antitrust violations are considered the fruits of theft, not legitimate benefits.[116]

Our approach is also consistent with the way in which the ancillary restraints doctrine originally was developed in the context of noncompetition agreements attached to the sale of a business.[117] To illustrate, to obtain a higher sale price for his popular bakery, the baker promises not to open a new bakery nearby. In these cases, the restrained party and the benefited party are the same person, the selling baker. This is very different from a scenario in which the restrained parties are workers hired by McDonald's and the benefited parties are franchisees and consumers who patronize McDonald's. In the cases analyzed here, there is no showing that the workers benefited.

National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma[118] provides a good example of this distinction. The increased broadcast fees accruing to the colleges from the joint negotiation and output restraints was not considered a cognizable benefit.[119] Nor were the benefits from selling more tickets and having a larger audience for live games, which in any case arguably was a separate market.[120] The only potentially cognizable efficiency benefit from the joint action was the possible increase in competitive balance. An increase in competitive balance allegedly would raise the quality of games, which would have

116 Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 114 (1982).

117 Mitchel v. Reynolds (1711), 24 Eng. Rep. 347.

118 468 U.S. 85 (1984).

119 *Id.* at 113–14.

120 *Id.* at 116–17.

benefited both the TV networks that broadcast the games and their advertiser clients (i.e., the direct and indirect purchasers in the restrained market).[121] Had this claim not been rejected on the facts, it would have justified a rule of reason analysis to determine whether the restrained networks (and, by implication, their customers) likely were benefited or harmed by the restraint.[122]

Similarly, consider intrabrand vertical restraints by manufacturers such as the minimum resale pricing in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[123] As a result of these seller-side restraints, the retail purchasers may pay higher nominal retail prices for the product, but the procompetitive efficiency claim is that the same purchasers also gain the offsetting benefits of various non-price services. These offsetting benefits lead to a lower effective "quality-adjusted" price, which leads in turn to higher total demand and sales of the product. This is consistent with our approach of focusing solely on benefits to trading partners in the same market in which the harms are alleged.

Contrast this approach with the faulty approach taken in *North Jackson Pharmacy*, which involved a buyer-side restraint, but where the court focused on effects on downstream purchasers. North Jackson Pharmacy brought a class action suit against Caremark, a pharmacy benefits manager (PBM), alleging that health insurers used the PBM to implement a cooperative buying scheme that violated § 1 of the Sherman Act.[124] The court determined that the rule of reason should apply to the claims, despite finding that the agreement was horizontal.[125] The court reasoned that the alleged restraint was ancillary to an efficiency enhancing agreement whereby the PBM performed a variety of services for the insurance companies.[126] After concluding its ancillary restraints analysis in this way, the court noted that "two other related factors" supported its application of the rule of reason.[127] First, "the antitrust laws 'are designed to drive producers' prices

---

121 The TV viewers (i.e., the indirect purchasers) also would benefit, of course.

122 The Court nominally applied the rule of reason because "this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Bd. of Regents*, 468 U.S. at 101. However, the Court nonetheless rejected the competitive-balance claim and then held the NCAA liable without the need to evaluate market power. *Id.* at 118–20.

123 551 U.S. 877 (2007).

124 *Id.* at 744.

125 *Id.* at 746.

126 *Id.* at 749.

127 *Id.* at 750.

down rather than up.' To hold an agreement that tends to lower consumer prices illegal per se, without careful examination of the agreement's true economic consequences, would seem at odds with the Sherman Act's purpose."[128] Second, "[a]ny premature ruling that one of the primary functions performed by PBMs is per se illegal would have particularly far-reaching consequences for the delivery of affordable prescription drugs to a large portion of the population . . . ."[129] These factors, while not formally factoring into the ancillary restraints analysis, suggest that the court weighed the agreement's potential to lower consumer prices against its harm to sellers. This is a stark departure from the approach taken in seller-side cases.

Under our approach, restraints on labor market competition (and input market competition generally) would, like sell-side cases, be evaluated by their effects on competition in the labor market and on the workers, who are treated as the trading partners in that market. Such an approach reflects the fact that buyer-side restraints are the mirror image of seller-side restraints. It also adheres to the underlying rationale for ancillary restraints in the first place: the recognition that while some agreements technically restrain competition in some way, they do so as part of a broader arrangement that actually enhances competition *in the market at issue*.[130] Accordingly, to satisfy the ancillary restraints test (and escape per se treatment or condemnation under the quick look rule of reason) under our approach, a restraint on workers must be shown to be necessary to accomplish a procompetitive goal that benefits the restrained workers. Any downstream harms or benefits to consumers from the restraint are noncognizable and irrelevant to evaluating the worker's claims. This result applies regardless the relative magnitude of the alleged benefits. Under *PNB* and *Topco*, no balancing of effects is normally permissible.[131]

Finally, this approach would not permit buyers broad discretion to make agreements to countervail the market power of the sellers, where that market power is achieved from superior skill,

[128] *N. Jackson Pharmacy*, 385 F. Supp. 2d at 750 (quoting Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 251 (7th Cir.1994)).

[129] *Id.*

[130] For an example of the convoluted reasoning required to explain courts' approach in this and other buyer-power cases if it must be assumed that downstream purchaser welfare is privileged under the Sherman Act, see generally Laura M. Alexander, Note, *Monopsony and the Consumer Harm Standard*, 95 GEO. L.J. 1611 (2007).

[131] We discuss balancing below in Part III.D.

a natural shortage of qualified workers, a union benefiting from an antitrust exemption, or even permissible conscious parallelism in a worker oligopoly. For example, a few college football players have far more talent than others, which can endow them with market power. Suppose that the restraint has the purpose and effect of countervailing this market power, leading to lower payments to the more talented players, lower downstream prices, increased output, and improved welfare of the downstream purchasers. The other examples of worker market power also involve legally achieved market power, so the welfare of the downstream purchasers should not be privileged. Such "self-help" is not permissible.[132]

D. Cognizable Justifications: Restraints that Benefit Upstream Trading Partners

This analysis raises the question of what benefits would be considered cognizable justifications under our approach, allowing the defendant to escape per se condemnation or quick look condemnation under the rule of reason (including the ancillary restraints doctrine version). Where a restraint is directed at upstream trading partners, benefits would have to accrue to the restrained upstream trading partners in order to be considered cognizable. For example, where the upstream trading partners are workers, a defendant would have to show that the restraint benefits workers, not just downstream customers. The following examples illustrate permissible and impermissible efficiency claims.

Suppose that the defendants defend a wage-fixing agreement on the grounds that the lower labor costs will incentivize them to reduce their downstream prices, which will benefit workers by increasing employment when they increase output. They argue that competition among them for workers requires an agreement to increase their bargaining leverage. This claimed justification would fail. It is the equivalent of attempting to justify a seller-side price-fixing agreement on the grounds that it would benefit customers (and workers) by leading to more investment and higher quality products simply because the companies would be

---

[132] United States v. Apple, Inc. 791 F.3d 290, 298 (2d. Cir. 2015); Fashion Originators' Guild of America v. Fed. Trade Comm'n, 312 U.S. 457 (1941) (holding that a fashion guild that was formed with an intent to protect against "style-copyists" constituted unfair competition); *see also* LAURA M. ALEXANDER, COUNTERVAILING POWER: A COMPREHENSIVE ASSESSMENT OF A PERSISTENT BUT TROUBLING IDEA 5 (Am. Antitrust Inst. ed. 2020).

earning a higher per unit profit margin. Just as any seller-side cartel could make this claim, so could any buyer-side cartel make the equivalent claim.[133]

But consider the following variation, which would be a cognizable justification: Suppose that several firms involved in competing or noncompeting industries contemplate working together to create a new technology useful to each of them. Suppose that the research and development and the later production process will require highly skilled production workers and engineers, who will be trained as part of the joint research and development process. The potential partners realize that subsequent competition between them for the workers would lead to such high salaries that the whole enterprise would be unprofitable. In this unusual scenario, if it is true that a no-hire agreement would be essential to the viability and creation of the venture, then it would be justified. Because total demand for labor would increase as a result of having a viable venture, the workers would benefit, relative to the venture being abandoned.

The analysis of vertical wage restraints would be analogous. Suppose that a large automobile manufacturer requires its dealers to pay lower wage rates, claiming that the lower labor costs will incentivize the dealers to offer better working conditions or more worker training. This will improve the quality of repair services provided to customers, which in turn will lead to more new car sales. The manufacturer also claims that this will increase employment at the dealers, thereby ultimately benefiting the restrained workers. Suppose that the manufacturer further argues that it cannot rely on the dealers' own incentives because they are focused only on their profits, not also the manufacturer's profits. And suppose it argues that it cannot simply require the dealers to increase training or improve working conditions because that approach would involve it bearing prohibitively high monitoring costs.[134] Theoretically, this justification could be valid. However, because the immediate harm to workers is direct and apparent, and the justification is so easy to simply assert without proof, the manufacturer should be required to bear a heavy evidentiary

[133] Note also that whether the firms have market power in the downstream market is irrelevant.

[134] These arguments are analogous to one of the standard justifications for intrabrand vertical restraints. *See Leegin*, 551 U.S. at 891–92.

burden to show that workers are benefited overall. This will be difficult in light of the lower wage rates.[135]

In this case, a court might be tempted to first require the plaintiff to show that the manufacturer's dealers have market power in the labor market. However, this requirement does not make good economic sense. The justification itself is premised on the ability of the restraint to lead to lower wage rates.[136] Nor would it make sense to require the plaintiff to show that the manufacturer has market power in the automobile market. This is because the restraint is focused on the labor market, not the downstream market.

Contrast an example where the auto manufacturer requires that the dealers provide the workers with certain expensive training designed to improve the quality of repair service. Suppose that the unilateral response of many dealers to this requirement is to reduce wage rates, or not to pay workers during the training period. This restraint would not be condemned on a quick look.

E. Lack of Market Power as a Rule of Reason Defense

In the seller-side rule of reason cases discussed in Part I, defendants may argue that the agreement cannot cause competitive harms because the parties lack market power. For example, if Wendy's and Arby's were to propose a merger or a joint marketing program for a new sandwich that they jointly developed, they would argue that competition from McDonald's, Burger King, and others would prevent harms to restaurant patrons. This argument might well succeed.

Defendants in cases attacking no-poach agreements, joint wage setting, or other restraints on workers and upstream suppliers might make similar arguments, claiming that they lack the power to set or cause noncompetitive wage rates. As an initial matter, it is important to recognize that this argument would only be relevant if the defendants escape condemnation under the per se rule or quick look, so that the restraint is analyzed under the

---

135 The benefited workers are not the workers who would be employed at the higher wage rates in the unrestrained world but rather the additional workers who are hired. This is analogous to the point that resale-price maintenance may benefit the customers that value the nonprice services incentivized by the higher retail margins by more than the price increase, but it harms the customers that do not value the services and so are harmed by the higher retail price. *See* William Comanor, *The Two Economics of Vertical Restraints*, 5 REV. INDUS. ORG. 99, 107 (1990).

136 Classical monopsony power also is not required.

full rule of reason. This escape should occur only if the defendants can show plausible, cognizable efficiency benefits accruing to the restrained workers. As discussed in the previous sections, these benefits often will not be shown.

Even if the defendants overcome this hurdle, they will face others. First, the no-market-power argument can apply only if the workers had awareness and appreciation of the restraints, conditions that may not apply to undisclosed no-poach agreements. In this regard, the franchise no-poach provisions were part of the franchise agreement, not the employment agreement and it is not clear that the workers were aware of them.[137] Second, if workers lack the relevant information, or if they face search and mobility constraints, even small employers may have market power.[138] Third, for entry level workers paid the legally minimum wage, the no-poach provisions might be characterized as regulatory evasion.[139] Lack of market power is not normally a cognizable defense for restraints that explicitly restrain worker wage rates or movement among employers. However, it could apply to our hypothetical example of the two firms engaged in procompetitive joint recruiting, training, and research and development.

F. Accounting for Non-Monopsony Harms

A merger or other buyer combination can lead to worker or supplier harms that do not arise from monopsony conduct. For example, suppose that a group of noncompeting firms create a joint venture (JV) to produce an essential component for their various production processes in an automated factory at a much-reduced variable and total cost. Suppose that this JV factory uses virtually no production workers, but simply two engineers, whereas the production processes previously used by each of the firms employed many workers.

These worker harms would not automatically be considered anticompetitive. This effect is a standard production efficiency

137 *See, e.g.*, *Deslandes I*, 2018 WL 3105955, at *4–7.

138 This fact is well established on the seller-side. *See, e.g.*, Peter Diamond, *A Model of Price Adjustment*, 3 J. ECON. THEORY 156, 157–58 (1971); Joseph E. Stiglitz & Steven C. Salop, *Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion*, 44 REV. ECON. STUD. 493, 508 (1977); Joseph E. Stiglitz, *Equilibrium in Product Markets with Imperfect Information*, 69 AM. ECON. REV. 339, 340 (1979).

139 This is because the no-poach agreements can facilitate the firms' reducing work-quality with less fear of increased turnover. While such regulatory evasion does not amount to an antitrust violation on its own, it does mean that the conduct cannot be assumed to be procompetitive.

benefit in that the combination achieves the same output at lower cost with fewer workers. Assume further that this combination leads to a decline in the total demand for labor in the local area where these firms and the JV factory are located, which causes the competitive wage rates paid by other employers in the area to fall. In this scenario, workers overall will be harmed, despite the increase in efficiency. However, our approach would not condemn this JV. Although this adverse impact on workers arises from a buyer combination, the impact does not involve classical monopsony or an increase in bargaining leverage, but rather a reduction in the competitive wage rate flowing from the more efficient factory. Thus, we also would not treat these worker harms as competitive injuries.[140] In this way, our approach is consistent with workers being denied standing when mergers cause them to lose their jobs for these reasons.[141] The same analysis would apply to a merger that reduces or eliminates the need for any other input through production efficiencies.

G. A Less-Preferred Alternative: Limited Multimarket Balancing

In evaluating American Express's anti-steering vertical restraint, the Court was willing to balance benefits and harms among diverse parties. But it also explicitly limited this balancing solely to two-sided simultaneous transaction platforms, where it defined a single relevant market that included participants on both sides. In this way, it avoided any notion that multimarket balancing should be permitted.[142]

---

140 For a similar position, see Hemphill & Rose, *supra* note 27, at 2105–06.

141 See Int'l Assoc. of Machinists & Aerospace Workers, AFL-CIO, Loc. Lodge No. 1821 v. Verso Paper Corp., 80 F. Supp. 3d 247, 271–76 (D. Me. 2015) (holding that the employees of a paper mill that was to be closed by purchaser lacked standing as employees to challenge the acquisition, because their loss of employment would stem from the mill's closure and not from a loss of competition); Reibert v. Atl. Richfield Co., 471 F.2d 727, 728, 731–32 (10th Cir. 1973) (denying standing to a worker whose job was eliminated as redundant post-merger because he "ha[d] suffered no direct injury as the result of the prohibited lessening of competition" and he was not "within the area of competitive economy protected against unlawful mergers").

142 The Court's decision has been widely criticized. *See, e.g.*, John B. Kirkwood, *Antitrust and Two-Sided Platforms: The Failure of* American Express, 41 CARDOZO L. REV. 1805, 1815 (2020); Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law:* American Express *and the Evolution of Antitrust*, 168 U. PENN. L. REV. 2061, 2101 (2000); Jeffrey Harrison, Ohio v. American Express*: Misunderstanding Two-Sided Platforms; the Charge Card "Market;" and the Need for Procompetitive Justifications*, 70 MERCER L. REV. 437, 455 (2019); Herbert Hovenkamp, *Platforms and the Rule of Reason: The* American Express *Case*, 2019 COLUM. BUS. L. REV. 35, 52 (2019); Dennis W. Carlton,

Whether balancing is appropriate in the limited case of two-sided transaction platform markets, such multimarket balancing is not appropriate for situations where a firm (or group of firms) adopts restraints that create competitive harm for workers and benefit downstream purchasers, for the reasons discussed above. That balancing also would be unnecessary since the firms each could compensate workers and still obtain residual benefits for downstream purchasers and itself, if the benefits exceed the harms.

We recognize that the Court may disagree with our proposed bar on balancing in-market harms against out-of-market benefits. If the Court ultimately decides that such balancing is to be permitted, we nonetheless propose that courts place a high burden of proof on the defendant to show that the benefits of their restraint disproportionately exceed the harms.[143] The defendant also should have the burden to show that it could not have avoided the harm by compensating the workers directly. The defendant also should need to show that its restraints are no more restrictive than necessary to achieve the benefits with substantially less harm to the workers.

These requirements are not unlike the approach outlined in the agencies' 2010 Horizontal Merger Guidelines, except our proposal is not rooted in prosecutorial discretion. The Guidelines explain that while normally the agencies' analysis of a merger will be restricted to the relevant market where the harm is alleged, the agencies (as matter of prosecutorial discretion) will consider out-of-market benefits only if those benefits are inextricably linked and would be substantial relative to harms, and only if those benefits would be lost if the harmful effect were prohibited.[144]

The Anticompetitive Effects of Vertical Most-Favored-Nation Restraints and the Error of Amex, 2019 COLUM. BUS. L. REV. 93, 93 (2019); Michael Katz & Jonathan Sallet, *Multisided Markets and Antitrust Enforcement*, 127 YALE L.J. 2142, 2158 (2018); Steven C. Salop, Daniel Francis, Lauren Sillman & Michaela Spero, *Rebuilding Platform Antitrust: Moving on From* Ohio v. American Express, 84 ANTITRUST L.J. 883 (2022). This latter article suggests that in the case of two-sided platforms with significant indirect network effects, balancing cross-platform harms and benefits experienced by consumers on the two sides of the platform, defined as two separate markets, would be an improvement over the *American Express* Court's single-market approach.

143 This high burden of proof on the defendant would avoid false negatives. *See* Andrew I. Gavil & Steven C. Salop, *Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct*, 168 U. PENN. L. REV. 2107, 2112 (2020).

144 MERGER GUIDELINES, *supra* note 34, at § 10 n.14.

Our approach places a substantial burden on the defendant. However, this burden is appropriate to avoid false negatives in the face of the complex analysis and the need to provide incentives to defendants to mitigate harms where possible.[145] This approach also is appropriate to avoid the false negatives by compensating for the skewed outcomes that flow from the parties' asymmetric litigation stakes.

III. ANTITRUST APPLICATIONS TO RESTRAINTS HARMING WORKERS

We next assess how this analysis can and should be applied to various antitrust restraints on workers. These examples also illustrate the neglect and erroneous analysis of some these concerns by antitrust enforcers and courts.

A. Naked Buyer-Side Wage Restraints

Naked buyer-side cartels, such as an agreement between competing local hospitals to fix the wages of nurses below competitive levels, are the economic mirror image of naked seller-side cartels, and the Supreme Court has unequivocally held that they deserve equally stark per se treatment: "[A] horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers."[146] Benefits to the cartelists are disregarded as noncognizable. Seller cartels do not escape per se treatment because they benefit the sellers or their workers or their suppliers. Accordingly, our approach would disregard benefits to buyers and downstream purchasers from buyer-sider cartels as noncognizable. Buyers should not be able to defend their buyer-side cartels on the basis that they pass the cartel benefits on to downstream purchasers, regardless of whether those benefits come from classical monopsony or increased monopsony bargaining leverage. This follows and expands on the Supreme Court's approach.

---

[145] Hovenkamp & Salop, *supra* note 92, at 13.

[146] *See* Todd v. Exxon Corp., 275 F.3d 191, 201 (2d Cir. 2001) (citing *Mandeville Island Farms*, 334 U.S. at 235).

B. No-Poach Agreements

1. Clearly naked horizontal worker-no-poach agreements.

The DOJ's 2010 "Silicon Valley" case is an example of a clearly naked no-poach agreement that should be condemned under per se liability.[147] The conspiracy supposedly began when Apple CEO Steve Jobs allegedly called Google CEO Eric Schmidt: they reached an explicit agreement to not "cold call" each other's employees and they each placed each other's engineers on their internal "Do Not Call" lists.[148] Apple and Adobe senior executives subsequently reached a similar bilateral agreement, then Apple and Pixar, then Google and Intel, and then Google and Intuit.[149] Although it arguably may have been permissible for the firms to agree not to solicit each other's engineers involved in certain joint projects on which they were collaborating, the agreements went much further. They included agreements not to solicit *any* of each other's engineers, regardless of whether they were involved in the joint projects and regardless of job title.[150]

While this agreement was a naked noncompetition agreement orchestrated at the highest levels of the companies, the DOJ surprisingly did not bring the case as a criminal matter.[151] Nor did the DOJ explain why it chose only to bring a civil case. Five years later the DOJ released guidance that they would bring such cases as per se illegal criminal matters.[152] The first criminal charges were subsequently brought against no-poach agreements in *Surgical Care Affiliates* in 2021. Yet, as an illustration of the lack of attention previously given to per se illegal restraints directed at workers, the defendant filed a motion to dismiss, arguing that it would violate "[f]undamental principles of due process and fair notice" to allow a criminal prosecution before it has been

147 United States v. Adobe Sys., Inc., 2011 WL 10883994 (D.D.C. Mar. 18, 2011).

148 The complaint states only that "[s]enior executives . . . reached an express no cold call agreement." Complaint, *Adobe Sys.*, 1:10-CV-01629, Dkt. No. 1, at *5.

149 *Id.* at *6–8.

150 *Id.* at *5–8.

151 The case settled in 2011. *See generally* Final Judgment, *Adobe Sys.*, 1:10-CV-01629, Dkt. No. 17. In subsequent class action litigation, Pixar, Intuit, and Lucasfilm settled for $20 million, and Adobe, Apple, Google, and Intel settled for $415 million. Order Granting Plaintiff's Motion for Final Approval of Class Action Settlement, *In re* High-Tech Emp. Antitrust Litig., 11-CV-02509, Dkt. No. 1111, at *5 (N.D. Cal. 2012).

152 U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION & FEDERAL TRADE COMMISSION, *supra* note 19, at 4. A 2018 case was brought as a civil matter because the original agreement preceded the 2016 statement. Competitive Impact Statement, United States v. Knorr-Bremse AG, 1:18-CV-00747, Dkt. No. 3, at *10–11 (D.D.C. July 11, 2018).

established in the civil context that no-poach agreements are per se illegal, and that neither the Sherman Act nor the Government's 2016 announcement were sufficient notice.[153]

2. No-poach provisions with downstream price benefits.

Defendants might argue that the lower labor costs achieved via a no-poach agreement are passed on to downstream customers as lower prices, and that those price decreases render the agreements non-naked and deserving of rule of reason treatment. This argument should fail. If such an agreement were accepted in no-poach "market division" cases, then it also would logically apply to an otherwise naked horizontal agreement to fix wage rates. However, *Mandeville Island Farms* appears to rule out this argument,[154] and as the Tenth Circuit said in *Law*, "[t]hat is not and cannot be the law."[155] The DOJ agrees. Its 2016 HR Guidance states that:

> From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services. It is unlawful for competitors to expressly or implicitly agree not to compete with one another, even if they are motivated by a desire to reduce costs.[156]

Defendants would have a better chance of success if their no-poach agreement were attached to an otherwise efficient labor market agreement, so that the ancillary restraints doctrine might arguably be properly applied.[157] Under our approach, though, a restraint on workers should only be deemed ancillary if the

---

[153] Memorandum in Support of Defendants' Motion to Dismiss, *Surgical Care Affiliates*, 3:21-CR-00011 at *1, *15–17 (N.D. Tex. Mar. 26, 2021). A similar motion was denied by the court in the *DaVita* case. Order Denying Defendants' Motion to Dismiss, United States v. DaVita, Inc., No. 1:21-CR-00229, Dkt. No 132, at *17–18 (D. Colo. Jan. 28, 2022).

[154] *Mandeville Island Farms*, 334 U.S. at 236.

[155] *Law II*, 134 F.3d at 1023 (quoting Roberts, *supra* note 113, at 2643). The district court had rejected the claim that the downstream benefits mattered, citing both *PNB* and *Topco*. Law v. Nat'l Collegiate Athletic Ass'n (*Law I*), 902 F. Supp. 1394, 1406 (D. Kan. 1995).

[156] U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION & FEDERAL TRADE COMMISSION, *supra* note 19, at 2.

[157] *See, e.g.*, Eric Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165, 194 (2020) ("[E]mpirical research suggests that employee noncompetes are on average anticompetitive.").

agreement plausibly benefits workers. Courts have not always made this distinction. A recent decision by the Ninth Circuit in *Aya* illustrates how courts may improperly downplay or ignore the competitive harms suffered by workers in the upstream labor market, relative to possible competitive benefits accruing to purchasers in the downstream output market.

AMN and Aya both supply traveling nurses to hospitals under contracts.[158] AMN is the leading firm.[159] When AMN found that it had insufficient nurses to staff new contracts, it apparently did not turn down the opportunity to bid nor did it hire new nurses on its own.[160] It instead entered into subcontracts with competitors, including Aya.[161] Aya agreed not to attempt to solicit any AMN nurses during the duration of the subcontract.[162] AMN allegedly had similar subcontract agreements with other competitors.[163]

Aya violated the nonsolicitation agreement and AMN terminated their contract.[164] Aya then brought an antitrust case alleging that the nonsolicitation agreement was a violation of both Sections 1 and 2 of the Sherman Act.[165] Aya identified both sales of staffing services to hospitals and purchases of labor by the agencies as separate relevant markets where harms occurred.[166] In the labor market, Aya's allegations amounted to a claim that AMN orchestrated what might be characterized as a buyer-cartel among buyers of nurses' services with its multiple nonsolicitation agreements.[167] The district court rejected Aya's per se claim and awarded summary judgement to AMN under a rule of reason standard on the grounds that Aya did not show harm to competition in the downstream market.[168] The Ninth Circuit affirmed.[169]

The court found that the nonsolicitation provision was a horizontal agreement, but that it was an ancillary restraint and

158 *Aya*, 9 F.4th at 1106.

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.*

163 *Aya*, 9 F.4th at 1106.

164 *Id.*

165 *Id.*

166 *Id.* at 1107. As a member of the alleged conspiracy—rather than one of the nurse or hospital client victims—Aya was not the ideal plaintiff. And it may not have framed its complaint in the strongest way, perhaps for that reason.

167 *Id.* at 1113.

168 *Aya*, 9 F.4th at 1107, 1111–12.

169 *Id.* at 1106.

therefore should be evaluated under the rule of reason.[170] Under our approach, the court's determination that the nonsolicitation provision was an ancillary restraint was flawed. Under our approach, a horizontal restraint on a labor market can only be considered an ancillary restraint if it is subordinate to and reasonably necessary to achieve a collaboration that has procompetitive effects in the *labor market* to which the restraint applied. Rather, the court found that the collaboration between Aya and AMN was procompetitive and, therefore, legitimate, because it benefitted customers in the *downstream market* for hospital staffing services.[171]

The court in *Aya* further erred in its application of the rule of reason by holding that it was necessary to show harm to downstream purchasers—that is, the hospitals—not simply harm to the nurses.[172] While Aya had alleged both sales of nursing labor to hospitals and purchases of labor by staffing agencies as separate markets for its Section 1 claims, the court rejected both claims on the basis that it found no competitive effect in the downstream market in which hospitals buy nursing services.[173] The court mentioned the labor market harms only in the context of evaluating Aya's claim of "retaliatory damages," stating that Aya had not proven an express buyer cartel.[174] Anticompetitive effects in the labor market should have been sufficient to sustain Aya's

170 *Id.* at 1108.

171 The court found that the collaboration between Aya and AMN was legitimate because it "promote[d] competitiveness in the healthcare staffing industry," and as a result, "more hospitals receive more traveling nurses." *Id.* at 1110 (quotation marks omitted). This finding is dubious in its own right, as it is not at all clear that the hospitals would have been worse (or no better) off with Aya and AMN independently providing staffing services—they could have simply hired from both. In fact, the subcontracting agreements themselves may have amounted to anticompetitive revenue-sharing agreements. *Cf.* Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49 (1990).

172 The Ninth Circuit did not clarify that, when it used the word "consumers," it meant the hospitals. It is theoretically possible that it may have been referring to the "counterparty" in the relevant market (i.e., workers in the labor market; hospitals in the output market). *Aya*, 9 F.4th at 1113 ("Aya did not carry its initial burden to prove that AMN's non-solicitation agreement has a substantial anticompetitive effect that harms consumers in the relevant market."). In its briefs, Aya uses the phrase "harm to competition" rather than "harm to consumers" in its rule of reason analysis. *See generally* Appellant's Opening Brief, *Aya*, 20-55679, Dkt. No. 46, at *56–57. It alleges that the measures "restricted competition between rival travel-nurse agencies for hires in the relevant labor markets and sales in the relevant service markets." Appellant's Reply Brief, *Aya*, 20-55679, Dkt. No. 83, at *22. But much of its analysis was unclear about whether it was speaking of seller-side or buy-side harms.

173 *Aya*, 9 F.4th at 1113.

174 *Id.*

Section 1 claim regarding nursing services under *Mandeville Island Farms* and its progeny.

The AMN-Aya labor no-poach agreement might have been justified under our analysis if it were intended to prevent AMN from hiring away the nurses that Aya supplied to the AMN contracted hospitals under the subcontract, since these involved the cooperative relationship. In that case, AMN might have argued that the protection of the no-hire agreement benefited Aya's nurses by allowing them to access jobs that otherwise would not have been available to them. But these were not the facts. Aya was not trying to hire away AMN nurses that were working on subcontracted projects. Nor was Aya trying to hire nurses that AMN had introduced to Aya. To the contrary, and like the Silicon Valley case, Aya was trying to hire away AMN nurses who had no relationship to these contracts but were nurses working for AMN on other unrelated contracts. Aya was not free riding on AMN's efforts to hire nurses.[175]

The lack of connection between the no-poach agreement and the arguably procompetitive collaboration should have been sufficient to defeat Aya's ancillary restraint argument. As an economic matter, the restraint applied wholly outside the joint project. This is the standard antitrust distinction between a restraint applied to the product of the cooperation and a restraint applied to products outside the cooperation.[176]

3. Franchise no-poach agreements.

This analysis raises the question of whether agreements between franchisors and their competing franchisees should be treated differently. Some franchise agreements prohibit the franchisees from soliciting or hiring employees that currently or

175 By contrast, the nonsolicitation contract in *Consultants & Designers, Inc. (C&D) v. Butler Service Group, Inc.*, 720 F.2d 1553 (1983), was more defensible. Butler had an agreement with TVA to supply TVA with technical workers. TVA paid Butler a price about 30% above the wage rate Butler paid to the workers. Butler had a noncompete agreement with the workers. (It had a separate noncompete with TVA during the period of the contract.) When the contract expired, C&D and Butler bid for the next contract and C&D won. C&D then hired some of the workers that Butler had initially provided. In response to Butler's objections, C&D alleged that Butler's noncompetes were anticompetitive. The court's analysis recognized that Butler had made investments to bring the workers to TVA and that once TVA learned about the workers, it would have an incentive to hire away those workers without having to compensate Butler. The noncompete with the workers and with TVA thus makes some economic sense. *Id.* at 1555–60.

176 Polygram Holding, Inc., v. Fed. Trade Comm'n, 416 F.3d 29, 38 (D.C. Cir. 2005).

previously worked at another franchised store. These broad agreements even cover entry-level workers. There have been numerous such cases brought by state attorneys general and by private plaintiffs in class actions. If the franchisees had agreed among themselves, the agreement would be considered horizontal and the previous analysis would apply. However, because the agreements are between the franchisor and the franchisees, courts may treat the agreement as vertical and automatically apply the rule of reason or perhaps apply an ancillary restraints analysis.[177]

The *Deslandes* class action against McDonald's and its franchisees concerned a department manager at a McDonald's franchisee who was trying to become general manager, which required additional training. When she was denied the training opportunity, Deslandes applied to be hired by a different franchisee but was unable to move because of the no-poach restraint.[178] The complaint alleged that the no-poach agreements among McDonald's and its franchisees were either per se unlawful horizontal agreements under Section 1 of the Sherman Act or illegal under the quick look.[179] The court held that although the restraint had vertical elements, the agreement was a horizontal restraint on trade because McDonald's itself runs some McDonald's-brand restaurants (McOpCo Restaurants) and thus competes directly with the franchisees for employees.[180]

In its 2018 order rejecting McDonald's motion to dismiss, the court refused to deem the agreement per se unlawful, as it was deemed "ancillary to [the] franchise agreements" which have a "procompetitive effect" in the downstream market.[181] However, the court explained that this did not automatically imply that evaluating the hiring restraint required the full rule of reason. As the court explained, "[t]he very fact that McDonald's has managed to continue signing franchise agreements even after it stopped including the provision in 2017 suggests that the no-hire provision was not necessary to encourage franchisees to sign."[182] The court suggested that a quick look analysis might be appropriate, explaining that "[e]ven a person with a rudimentary

177 For a criticism of this approach, see Steinbaum, *supra* note 26, at 52–53.
178 *Deslandes I*, 2018 WL 2105955, at *1.
179 *Id.* at *5.
180 *Id.* at *6.
181 *Id.* at *7.
182 *Id.*

understanding of economics would understand that if competitors agree not to hire each other's employees, wages for employees will stagnate. Plaintiff herself experienced the stagnation of her wages."[183] Moreover, the court rightly focused on the competitive effects in the upstream market, not interbrand effects in the downstream market, recognizing that "[t]his case, though, is not about competition for the sale of hamburgers to consumers. It is about competition for employees, and, in the market for employees, the McDonald's franchisees and McOpCos within a locale are direct, horizontal, competitors."[184] This analysis tracks our approach to the ancillary restraints doctrine set out above.

However, the court then reversed its approach in its 2021 order denying class certification.[185] In making this determination, the court lost its focus on the labor market and focused instead on the impact in the downstream market. Claiming to be applying the reasoning in *Alston*, the court concluded that the rule of reason should apply because it lacked experience to conclude that, on a quick look, this restraint "so obviously threaten[s] to reduce output and raise prices."[186] The court relied on McDonald's economic expert, who opined that "the hiring restraint increases output in the hamburger market, because it encourages the very training that enhances the brand . . . . That suggests the provision itself was output enhancing in the market for hamburgers and fries."[187] The court apparently also accepted that the proper focus was on classical monopsony, explaining that the expert concluded that "it does not make economic sense for McDonald's, as franchisor, to enable its franchisees to act as monopsony purchasers of labor."[188]

In our view, the court erred in its class certification analysis. Had the court focused exclusively on the labor market, it could have condemned the restraint on the basis of the quick look. The McDonald's training argument apparently was mere assertion

---

183 *Deslandes I*, 2018 WL 2105955, at *7.

184 *Id.* at 8.

185 Deslandes v. McDonald's USA (*Deslandes II*), LLC, 2021 WL 3187668 (N.D. Ill. July 28, 2021).

186 *Id.* at *7 (quoting *Alston,* 141 S. Ct. at 2156); *see also* Deslandes v. McDonald's USA, LLC (*Deslandes III*), 2022 WL 2316187 (N.D. Ill. June 28, 2022) (granting motion for judgment on the pleadings).

187 *Id.* at *9.

188 *Deslandes II*, 2021 WL 3187668, at *10. As the court further explained, "[t]o the extent a franchisee is a labor monopsonist, the franchisee would hire less labor (reduce labor output) at a lower price. In the process, the franchisee would increase his profit but would be limited in his output of hamburgers," which "is good for the franchisee, but it is terrible for the franchisor, who is paid based on franchisees' revenue, not profit." *Id.*

and did not show that workers were benefited, only that downstream purchasers might be benefitted. Our approach also would not have required proof that McDonald's and the franchisees were classical monopsonists.[189]

Similarly, the *Butler v. Jimmy John's Franchise, LLC*[190] class action alleges that the franchise agreement was a horizontal agreement that violated Section 1 of the Sherman Act.[191] Pursuant to the agreement, franchisees are prohibited from hiring individuals who were employed at another franchise location within the last year.[192] The agreement also stated that other franchisees, as third-party beneficiaries of the agreement, had the right to enforce the no-hire agreement against other franchisees.[193] The court described the conduct as a "hub-and-spoke" agreement; but, unlike other hub-and-spoke agreements, "[a]ll of the firms in this case deal in the same brand."[194] The court cited *Continental Television, Inc. v. GTE Sylvania Inc.*[195] for the proposition that restricting trade within one brand cannot be per se illegal.[196] Butler argued that the level of independence between the franchisees was more than in a typical franchise business.[197] At the motion to dismiss stage, the court did not decide whether the agreement was per se unlawful, but held that the standard would apply to the agreement would depend on the independence of the franchisees. "If the evidence of franchise independence is Herculean," the court reasoned, then the agreement might be per se unlawful; but if the franchisees were not very independent, then the case would be judged under the rule of reason.[198]

If a court focuses solely on the downstream purchasers of fast food, these restraints could be characterized as an intrabrand vertical restraint subject to a full rule of reason analysis. In *Leegin*,

---

[189] *Id.* at *10. The court might still have rejected the plaintiff's nationwide class on the grounds that one could not devise a common damages methodology that would apply to every local market since McOpCo Restaurants only existed in some local markets. *Id.* at *10 n.5. However, for liability purposes, there would be harm in every local market, if the downstream efficiency benefits were rejected as noncognizable as a matter of law.

[190] 331 F. Supp. 3d 786 (S.D. Ill. 2018).

[191] *Id.* at 791.

[192] *Id.* at 790.

[193] *Id.*

[194] *Id.* at 795–96.

[195] 433 U.S. 36 (1977).

[196] *Butler*, 331 F. Supp. 3d at 796 (quoting Cont'l Television, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54–56, 58 (1977)).

[197] *Id.* at 797.

[198] *Id.*

for example, the Court mandated rule of reason treatment for a vertical price agreement between the manufacturer and its retailers.[199] *Leegin* involved restraints placed on the behavior of retailers with respect to their interaction with purchasers and the resulting effects on those purchasers.[200] But in *Leegin*, both the alleged harm and the alleged benefits from the restraint applied to the downstream purchasers, and thus there was no out-of-market balancing.[201]

These franchise no-poach cases are different because the harms are borne by the workers employed by the franchisees and the benefits accrue to the purchasers of the franchisees' products. To make the situations comparable, the restrained workers themselves would need to be benefited by the restraints.[202] For example, suppose that the no-poach restraints reduced the likelihood that workers would quit, and this lower quit rate led franchisees to increase the training provided to workers. As a result of the increased training, worker productivity would increase, which would lead the franchisees to pay the workers higher wages. In this hypothetical scenario, the workers would benefit and there would be no need for multimarket analysis. The restraint instead could be justified on the basis of these worker benefits without a need to rely on any additional benefits accruing to the customers of the franchise. In fact, it is not clear that the franchisor would even need to force the franchisee to mandate these restraints on workers under these facts; the franchisee and the workers would have the mutual incentive for adopting the restraint.[203] As the *Deslandes* court explained, "[e]mployers have plenty of other means to encourage their employees to stay without resorting to unlawful market division. Those options include paying higher

---

199 *See generally Leegin*, 551 U.S. 877.

200 *Id.* at 882–83.

201 The *Leegin* analysis could apply to a franchisor rule that cheeseburgers be sold at a price no greater than $2.99 because the franchise advertises that $2.99 price. While purchasers are harmed by the higher price, they benefit from being able to rely on the reputation of the franchise brand. Thus, both the benefits and harms are focused on purchasers.

202 The complaint alleges that the no-poach agreement reduces incentives to train workers. Class Action Complaint, *Deslandes I*, 17-CV-4875, Dkt. No 1, at *20. McDonald's claimed that the no-poach agreements were needed to incentivize training. *Deslandes I*, 2018 WL 3105955, at *8 ("Defendants argue that the no-hire restriction promotes intrabrand competition for hamburgers by encouraging franchisees to train employees for management positions.").

203 *See supra* Part II.B.

wages/salaries and contracting directly with each employee to set an employment term."[204]

Such training benefits also are less credible for McDonald's or Jimmy John's if the training is provided by the franchisor rather than the franchisee, or if the franchisee's cost of the training is very limited. In *Deslandes*, for example, the lead plaintiff obtained training that was provided by McDonald's corporate. For one type of training, she was required to attend McDonald's Hamburger University, which was paid for by the franchisor.[205] The franchisees only had to pay travel costs and certain other expenses.[206]

Even if these expenses were significant, they still would not justify the no-poach agreement. A less restrictive alternative would require the franchisee seeking to hire the worker to pay some appropriate cost-based compensation to the franchisee that loses the worker. This alternative makes more economic sense because the training would then be retained within the brand's franchise system when an employee wishes to change employers. By contrast, the no-poach agreement leads to dissatisfied employees leaving the system, whereby the value of the training is lost to the brand. This reasoning also suggests that the training justification is pretextual.

C. Joint Purchasing Organizations

It is common for groups of firms to engage in joint purchasing of inputs. For example, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*[207] involved a group of office supply retailers that joined together to purchase wholesale office supplies.[208] To take another example, hospitals may join together into buying groups for the purchase of a variety of medical instruments and other supplies. In these buying groups, some members may be competitors while others are not.

Such collective action may allow the members to gain monopsony power over the suppliers or workers (in the case of joint purchasing of labor) and reduce costs to downstream purchasers as a

---

[204] *Deslandes I,* 2018 WL 3105955, at *8.

[205] Class Action Complaint, *Deslandes I*, 17-CV-4875, Dkt. No 1, at *13.

[206] *Id.* at *17 ("Franchisees are required to enroll present and future managers at McDonald's training centers, the travel cost and expense of which is borne by franchisees.").

[207] 472 U.S. 284 (1985).

[208] *See generally id.*

result. Under our standard, these downstream benefits would not be a cognizable justification for the restraint. But, if the joint purchasing simultaneously creates real technological efficiencies that lead to lower input costs, our standard would condemn the agreement only if the workers are harmed by the cooperative's exercise of monopsony power (including increased monopsony bargaining leverage).[209] The source of the benefits to the downstream purchasers is not relevant; the point is that they accrue in a different market and thus cannot be used to offset the competitive harm to the workers.

The DOJ and FTC's 1996 Statement of Enforcement Policy on Joint Purchasing Arrangements Among Health Care Providers illustrates enforcement policy that neglects the legitimate antitrust interests of input suppliers.[210] The sole focus of the statement is classical monopsony, not increased monopsony bargaining leverage.[211] This statement also creates an "antitrust safety zone" if the JV participants account for less than 35% of total sales of providers and the payments to the providers by the JV participants account for less than 20% of the revenue of JV participants.[212] If the JV is considered non-naked and falls within the safety zone, the claimed efficiency benefits would not even be evaluated to determine if they improve upon what the parties could achieve unilaterally, whether the joint fee setting is reasonably necessary, or whether the upstream input suppliers are benefited from the creation of the JV.

By contrast, our standard would focus on worker welfare since the allegation is that there are anticompetitive effects in the relevant market for the purchase of workers' services. Thus, to escape liability, it would be necessary for the purchasing group to show that any competitive harms to workers are completely offset by benefits to the *workers* from the arrangement. This might be the case if the efficiencies are sufficient to give the firms the incentive to raise the fees paid to the workers or to make the buying group otherwise profitable without exerting bargaining leverage on workers.

---

209 *See supra* Part II.C.

210 U.S. DEP'T OF JUST. ANTITRUST DIV. & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTHCARE (1996).

211 As the statement explains: the agencies' concern over the "exercise [of] market power in the purchase of the product or service" is limited to "the power to drive the price of goods or services purchased below competitive levels." *Id.* at 53 & n.16.

212 *Id.* at 54–55.

This does not mean that all joint labor purchasing that leads to lower wages would violate the antitrust laws. As noted above, only agreements that create *anticompetitive* harms to workers would be condemned; that is, agreements that lower wages by the exercise of monopsony power. Agreements that lead purely to production efficiencies would be permitted, even if they lead to a reduction in employment or a reduction in the competitive wage rate not caused by monopsony. By hiring or training workers jointly, costs may be reduced and workers may be assigned more efficiently—both of those results can benefit workers, in addition to employers, and lead to more employment as well as lower downstream prices. For example, a "nanny share" is a common arrangement where two families with young children jointly hire a nanny because neither can afford a full-time nanny salary. Since most nannies want full-time work and are capable of caring for more than one child at a time, jointly hiring a nanny through a nanny share reduces families' costs and increases employment for nannies. But if the efficiency leads to lower demand for workers and the competitive wage rate falls, there also would be no liability.

This analysis also raises the question whether the same rules should apply to a standalone firm that acts as a purchasing agent. For example, *Kartell v. Blue Shield of Massachusetts, Inc.*[213] involved a dominant health insurer, Blue Cross Blue Shield of Massachusetts (BCBSM), that negotiated low rates and other terms with Massachusetts health care providers.[214] Then-Judge Breyer characterized BCBSM as a single entity whose rates were regulated by the state. He concluded that BCBSM was an agent purchasing for its subscribers in the same way that a parent purchases for his or her children.[215] However, this characterization ignores the fact that BCBSM was the dominant insurer with monopsony power.[216] BCBSM could instead be characterized as a

---

[213] 749 F.2d 922 (1st Cir. 1984).

[214] *Id.* at 923.

[215] *Id.* at 925.

[216] As another example, Multiplan is a company that essentially acts as an agent in providing out-of-area provider networks for local health insurers. Multiplan advertises how it negotiates lower rates on behalf of its client, Optima Health:

> MultiPlan's PHCS Network allows Optima Health to offer more providers in network, in more places than its key competitors—both at home in the mid-Atlantic and across the country. Between improved network access and discounts, MultiPlan gives Optima Health a competitive edge. With 65 percent of

monopsony agent for what amounts to a "buyer cartel" of downstream healthcare purchasers.[217] In light of the other services provided by a health insurer, BCBSM might not be a naked cartel. But that does not mean that its exercise of monopsony on behalf of its subscribers should be excused.[218]

D. Buyer-Side Exclusionary Restraints

The previous analysis has focused on *collusive restraints*, that is, restraints that are designed to achieve market power through cooperation among competitors. However, a dominant firm may use its buyer-side market power to create *exclusionary restraints* that raise rivals' costs and allow it to maintain or enhance its market power.[219] These exclusionary restraints might involve agreements covered by Section 1 or monopolization (or attempted monopolization) under Section 2. The analysis also may be more complex if the restraints benefit some workers while harming others or benefit workers in the short run while harming them in the longer run.

The class action brought by mixed-martial arts fighters against the Ultimate Fighting Championship (UFC) and its parent company, Zuffa, provides a possible example of this type of restraint.[220] The plaintiffs alleged that the UFC engaged in exclusionary conduct that allowed it to exercise monopsony power in the market for fighter services, enabling it to underpay its fighters.[221] The exclusionary conduct included long-term exclusive contracts with fighters and acquisitions of rival promoters.[222]

If the UFC had been a monopolist facing a threat of downstream entry, the exclusivity could have raised entry barriers,

---

> MultiPlan's savings to Optima Health coming from network contracted claims, plan members are insulated from unexpected balance billing.

Optima Health, MULTIPLAN 1 (2018), https://perma.cc/JS8M-XZJY.

[217] Professors Peter Hammer and William Sage suggest that the BCBSM was both dominant and only loosely regulated by the state. *See* Peter J. Hammer & William M. Sage, *Monopsony as an Agency and Regulatory Problem in Health Care*, 71 ANTITRUST L.J. 949, 983–84 (2004).

[218] Interestingly, a buyer cartel of final consumers raises their welfare even though it leads to an inefficient reduction in output.

[219] Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 223–24 (1986).

[220] Le v. Zuffa, LLC, 216 F. Supp. 3d 1154 (D. Nev. 2016).

[221] *Id.* at 1159–60.

[222] *Id.* at 1160.

and the exclusives could have harmed the fighters.[223] However, if the exclusives had been used to *achieve* monopoly power, then some workers might have benefitted in the short run from receiving payments for exclusivity.[224] Those workers and others nonetheless would have been harmed in the longer run from the monopsony once the rivals had exited or had been marginalized. Those workers nonetheless would have been harmed in the longer run from the monopsony power gained, if and when rivals had exited from the market as a result of the foreclosure, or if the rivals were marginalized from lower quality or higher costs. In addition, if the defendant would have also gained monopoly power downstream and raised prices, the resulting output reduction would have further reduced demand for the workers' services.[225]

This raises the legal question of whether it should be sufficient for the fighters to prove recoupment in the form of lower salaries or other income, or whether they must also prove harm to downstream purchasers. In *Weyerhaeuser*, the Court concluded that the sole focus of the analysis should be the effects on timber owners.[226] That is, it was not necessary to show harm to downstream lumber purchasers. This is consistent with our approach, which would not require the workers to show harm to downstream purchasers in order to recover.[227]

E. Downstream Conduct that Harms Workers and Suppliers

An overlooked issue that our approach illuminates is the harm to workers from their employers' anticompetitive conduct as sellers in downstream markets. Workers can be harmed by seller-side conduct that is collusive or exclusionary.

---

223 *Id.* at 1159–60. This is analogous to the impact of the advertiser exclusives in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

224 This is analogous to overbuying in a case like *Weyerhaeuser*, where the timber owners would gain higher prices in the short run until the rival sawmills exited from the market. *Weyerhaeuser*, 549 U.S. at 317.

225 However, even if there were no downstream effects, say, because the UFC competes with boxing, the fighters still could be harmed by the monopsony. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220 (1993).

226 *Weyerhaeuser*, 549 U.S. at 318–19.

227 The Court extended *Brooke Group* to predatory buying and rejected the plaintiff's claim because it did not show that Weyerhaeuser's conduct amounted to below-cost pricing. *Weyerhaeuser*, 549 U.S. at 322–24, 326.

1. Seller-side collusion that harms workers.

Consider the case of a seller-side cartel that fixes downstream prices and reduces output. The workers may be harmed by the associated reduced demand for labor in the form of lower wages, reduced work hours, or both. Like the plaintiff in *Blue Shield of Virginia v. McCready*,[228] the workers' injury is "inextricably intertwined" with the injury the cartelists seek to inflict on buyers.[229] Whether or not the workers are the target of the conduct, their injury is an inevitable effect. Accordingly, those workers should have standing to sue for antitrust damages.

Such damages actions would not be precluded by *Illinois Brick Co. v. Illinois*.[230] *Illinois Brick* precludes damages claims that rely on pass-on to indirect purchasers, but these workers' injury would not involve pass-on. Their injury is a distinct harm in the upstream market inflicted directly by the cartel and thus should not be precluded as derivative of harm to others. The distinct nature of the harm is evidenced by the separate benefit that inures to the cartelists from the labor costs saved from the reduced output. Accordingly, there is no concern of a risk of duplicative recovery, nor the evidentiary demands of proving pass-on, nor issues with derivative injury, nor disputes among groups of plaintiffs over a shared recovery.[231]

Damages to workers from a seller-side cartel are somewhat analogous to umbrella damages, which many courts have found recoverable,[232] and which Professors Phillip Areeda and Herbert

---

228 457 U.S. 465 (1982).

229 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters (*AGC*), 459 U.S. 519, 538 (1983) (quoting *McCready*, 457 U.S. at 484).

230 431 U.S. 720 (1977).

231 *Cf. id.* at 730–32; Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

232 *See In re* Modafinil Antitrust Litig., 837 F.3d 238, 266 (3d Cir. 2016) (holding that all market participants have standing when a conspiracy prevents a competitive market from forming); *In re* Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1167–68 (3d Cir. 1993) (holding that plaintiffs had standing to collect damages despite being "indirect" purchasers and that indirect-purchaser status is not "the death knell of plaintiffs' claim"); *In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1164–65 (5th Cir. 1979) (holding that plaintiffs had standing to collect umbrella damages where they claimed that the conspiracy affected wholesale prices generally); U.S. Gypsum Co. v. Ind. Gas Co., Inc., 350 F.3d 623, 627–28 (7th Cir. 2003) (holding that buyers from "fringe firms" had standing where they claimed that the conspiracy elevated prices in the affected market). *But see In re* Coordinated Pretrial Proc. in Petroleum Prods. Antitrust Litig., 691 F.2d 1335, 1338–41 (9th Cir. 1992) (denying standing to recover umbrella damages to nonconspiracy purchasers in multilevel distribution schemes); Gelboim v. Bank of Am. Corp., 823 F.3d 759,

Hovenkamp and other academics have endorsed.[233] Umbrella damages in a seller-side case result when competitors not participating in the cartel nonetheless are able to raise their prices because the presence of the cartel shields them from losing customers. *Illinois Brick* does not preclude umbrella damages, because there is no claim of pass-on and the damages are distinct from those arising from the cartelist's sales. Worker harm from a seller-side cartel is similar, as it represents a distinct injury inflicted without pass-on. Indeed, the case for worker recovery in this scenario is stronger. Unlike those who buy from those firms outside of the cartel, workers are in privity with the cartelists, and the cartelists inflict the harm and receive the benefits from that harm in the form of cost savings.

Yet workers rarely bring claims alleging harm from their employers' output-reducing anticompetitive conduct. And they often are denied standing when they do.[234] But in some cases, courts have found employees of seller-side conspirators do have standing.[235] And some courts have noted doubts about the validity of "judicial glosses" that restrict the broad language of the Clayton Act to deny standing to injured workers injured by their employer's anticompetitive downstream conduct.[236] Courts also are

780 (2d Cir. 2016) (holding that umbrella damages are generally recoverable but finding that they would be highly speculative on the facts of the case at hand).

[233] PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 347, 261 (4th ed. 2019); *see, e.g.*, Sharon E. Foster, *Antitrust Efficient Enforcer and the Financial Products Benchmark Manipulation Litigation*, 13 OHIO ST. BUS. L.J. 99, 133–39 (2019); Roger D. Blair & Christine Piette Durrance, *Umbrella Damages: Toward a Coherent Antitrust Policy*, 36 CONTEMP. ECON. POL'Y 241, 247, 254 (2018); William H. Page, *The Scope of Liability in Antitrust Violations*, 37 STAN. L. REV. 1445, 1465–67 (1985).

[234] *See, e.g.*, Contreras v. Grower Shipper Vegetable Assoc. of Cent. Cal., 484 F.2d 1346, 1347 (9th Cir. 1973) (holding that farm workers were not within the "target area" of a conspiracy to limit lettuce production); Gutierrez v. E. & J. Gallo Winery Co., 604 F.2d 645, 646 (9th Cir. 1979) (holding that farm workers lacked standing to sue based on reduced hours from a wine price-fixing conspiracy); Eagle v. Star-Kist Foods, Inc., 812 F.2d 538, 541–43 (9th Cir. 1987) (denying tuna-fishing-vessel crew members and their union standing to sue tuna canneries for an alleged conspiracy to set price for tuna artificially low, which resulted in lower wages for the workers).

[235] *See, e.g.*, Roseland v. Phister Mfg. Co., 125 F.2d 417, 419 (7th Cir. 1942) (holding that a salesman of fire-prevention equipment had standing to sue for lost business from a market-allocation agreement among suppliers); Wilson v. Ringsby Truck Lines, Inc., 320 F. Supp. 699, 701–03 (D. Colo. 1970) (granting truck drivers and warehousemen standing to sue their employer for lost wages as a result of their employer's market-allocation agreements). Both cases involved market-allocation schemes, although it is not clear what role that played in the standing analysis.

[236] *See, e.g.*, Hoopes v. Union Oil Co. of Cal., 374 F.2d 480, 485 (9th Cir. 1967) ("As this court and others have noted, language in a number of Supreme Court opinions casts

split on whether employees fired for their refusal to participate in their employer's anticompetitive conduct have standing, though this is a somewhat different issue.[237] Under our approach, workers in each of these cases would have standing.

While *Associated General Contractors of California, Inc. v. California State Council of Carpenters*[238] (*AGC*) may appear to take a contrary position, the unusual facts of that case distinguish it.[239] The union plaintiff in *AGC* was part of a collective bargaining agreement with the defendant association of contractors.[240] The union alleged that the association coerced its members and their customers to direct some of their business to nonunion firms.[241] The Court found that such coercion violates the antitrust laws because it "prevents its victims from making free choices between market alternatives" and therefore "is inherently destructive of competitive conditions,"[242] and that the union had alleged "a causal connection between an antitrust violation and harm to the Union and further [ ] that the defendants intended to cause that harm."[243] However, the Court denied the union antitrust standing because the union's "primary goal is to enhance the earnings and improve the working conditions of its membership" and "that goal is not necessarily served . . . by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals."[244] Put differently, the Court was concerned that the union was trying to use the antitrust laws to protect its own (legal but anticompetitive) cartel, and not to promote the public interest in competition.

---

doubt upon these and other restrictive 'judicial glosses' upon the broad language of the Clayton Act.").

237 *Compare* Ostrofe v. H.S. Crocker Co., 740 F.2d 739, 742 (9th Cir. 1984) (holding that an employee had standing to sue over an agreement between conspirators to discharge him and boycott his future employment in furtherance of an antitrust conspiracy), *with* McNulty v. Arctic Glacier, Inc., 2016 WL 465490, at *22 n.11 (E.D. Mich. Feb. 8, 2016) (denying plaintiff standing because his "injury did not result from a lack of competition in the labor market" and expressly rejecting the reasoning of *Ostrofe* (quoting *In re* Indus. Gas Antitrust Litig., 681 F.2d 514, 517 (7th Cir. 1981)).

238 459 U.S. 519 (1983).

239 *AGC* is primarily an exclusion case, not a collusion case, but the issues are equally relevant here.

240 *AGC*, 459 U.S. at 521.

241 *Id.* at 522–23.

242 *Id.* at 528.

243 *Id.* at 537.

244 *Id.* at 539.

The Court also found that the union's harms were the result of harms to unionized businesses and workers.[245] Thus, the union's claims were derivative and raised pass-on concerns that would not be present in a case where workers are directly harmed by their employer's anticompetitive output reduction.[246] Indeed, the Court expressly noted that had the union contractors that lost business, rather than the union itself, brought the claims, their claims would have been more direct.[247]

This is not to say that workers would have injury or standing in every seller-side cartel. For example, where a seller-side cartel increases prices without reducing output, as it might in a market where demand is perfectly inelastic, unionized workers conceivably may benefit in the form of higher wages.[248] And, if so, they may even facilitate such a cartel.[249] In these situations, their benefits should not be regarded as offsetting the harm to buyers or balanced against those harms in assessing the legality of the cartel.

2. Seller-side exclusionary conduct that harms workers.

Just as collusive conduct by sellers in the downstream market can harm their workers, so can seller-side exclusionary conduct. For example, suppose that a dominant seller locks a large portion of its customers into long-term exclusive contracts, causing its seller-side competitors to exit and it to achieve or enhance monopoly power. As a result, suppose that the firm reduces output and raises prices, which reduces its demand for labor.[250] Moreover, if the company also gains classical monopsony power or monopsony bargaining leverage, its workers also could further suffer

---

[245] *AGC*, 459 U.S. at 541.

[246] *Id.* at 540–42.

[247] *Id.* at 541 n.46. *AGC* also notes that "yet a number of decisions have denied standing to employees with merely derivative injuries." *Id.* But the cases it cites in support stand for the unremarkable proposition that stockholders and employees of a company that is the *victim* of an antitrust scheme lack standing to sue because their injuries are wholly derivative of the injury to the company. *See, e.g.*, Pitchford v. PEPI, Inc., 531 F.2d 92, 97 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976).

[248] *AGC*, 459 U.S. at 539. To take another example, airline and railroad regulations helped support higher unionized worker incomes.

[249] *Id.* at 539 n.41 ("'[T]he elimination of competition based on wages among the employers in the bargaining unit,' which directly benefits the union, also has an effect on competition in the product market." (quoting United Mine Workers of Am. v. Pennington, 381 U.S. 657, 664 (1965))).

[250] If the conduct permits a dominant firm instead to *maintain* monopoly power, then the harm involves a reduction in output and employment relative to the more competitive market that would have occurred absent the exclusionary conduct.

reduced wages and hours. Either way, the workers should have standing to recover for this injury.[251]

In the famous *United Mine Workers of America v. Pennington*[252] case, the leading coal producers with capital-intensive mining technology orchestrated a higher industry-wide union wage rate that raised their costs, but that also raised the costs of the smaller labor-intensive firms by more, so that the competitive price of coal could have increased by more than the costs of the leading firms (as explained in Professor Oliver Williamson's classic article).[253] This conduct thus would give these larger firms "collective" market power. At the same time, it could harm the workers, despite the increase in union wage rates. First, a shift in a fixed level of production from the labor-intensive firms to the capital-intensive firm would reduce employment. Second, a reduction in production from the anticompetitively higher coal prices would further reduce employment, including employment by the capital-intensive producers. In our approach, the workers harmed by the cartelists' reduced demand for employment from the higher coal prices could have standing to allege these anti-competitive effects in the labor market.[254]

F. Agreements Among Workers

Workers have incentives to engage in joint action that can lead to higher wage rates. These range from naked cartels to efficient joint ventures.

1. Naked worker cartels.

It has been suggested that nonunionized contract workers should be permitted to collectively negotiate to countervail employer monopsony.[255] If the sole purpose of this coordination is to negotiate higher wages, then the clear antitrust answer is that

---

[251] Alternatively, the workers might have a separate case, alleging that the purpose and effect of the conduct was to achieve or maintain long-run market power in the upstream labor market, as did the MMA fighters in *Zuffa*, 216 F. Supp. 3d at 1167–69.

[252] 381 U.S. 657 (1965).

[253] *See generally* Oliver E. Williamson, *Wage Rates as Barriers to Entry: The* Pennington *Case in Perspective,* 82 Q.J. ECON. 85 (1968).

[254] The workers would not have standing regarding the shift in production away from their labor-intensive employers because their harm would be derivative of the harm to their employers.

[255] *See, e.g.*, Grimes, *supra* note 32; Lao, *supra* note 32; Marinescu & Posner, *supra* note 26; Hiba Hafiz, Opinion, *How Drivers Can Beat Uber at Its Own Game*, N.Y. TIMES (July 17, 2019), https://www.nytimes.com/2019/07/17/opinion/uber-drivers.html.

this is not permissible. The per se rule against seller-side cartels is unchanged when the cartelists are workers who sell labor.

Congress has used labor and antitrust law to immunize certain types of horizontal agreements and cooperation among workers from antitrust scrutiny.[256] But outside of the bounds of those exceptions, worker cartels normally are treated like any other seller-side cartel. For example, in *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*,[257] the Court condemned as per se illegal a one-day strike and associated threats by the lawyers for higher pay. In several complaints, the FTC has condemned certain trade association bylaws of music teachers,[258] interpreters[259] and ice skating coaches[260] that prohibited poaching the clients of other members. This is consistent with our approach of embracing the idea that workers should have equal, but not exceptional, status under the antitrust laws. However, in a case that likely will be appealed to the Supreme Court, the First Circuit recently upended this view, ruling that the alleged cartel conduct of horse-racing jockeys was exempted under labor law.[261]

2. Non-naked worker associations.

This raises a further question of whether a worker association—what Professor Sanjukta Paul has called a "for-profit hiring hall"[262]—might escape the per se rule and prevail under the rule of reason by creating a joint venture with the type of efficient integration that passed muster in *BMI*.[263] For example, consider an association of drivers who provide services to ride-hailing firms like Uber and Lyft and delivery services like DoorDash and Amazon. Assuming that the drivers cannot become classified as employees, such an association might create efficiency-enhancing integration by providing services such as recruiting, screening drivers for criminal and driving records, administering

---

256 15 U.S.C. § 17 (exempting labor associations from antitrust scrutiny); 7 U.S.C. § 291 (exempting farm cooperatives from antitrust scrutiny).

257 493 U.S. 411, 436 (1990).

258 In the Matter of Music Tchrs. Nat'l Ass'n, Inc., 2014 WL 1396512 (F.T.C. Apr. 3, 2014).

259 In the Matter of Int'l Ass'n of Conf. Interpreters, 123 F.T.C. 465 (1997).

260 In the Matter of Prof'l Skaters Ass'n, 2015 WL 1088939 (F.T.C. Feb. 13, 2015).

261 Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F.4th 306, 314 (1st Cir. 2022).

262 *See generally* Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233 (2017).

263 *BMI*, 441 U.S. at 1.

personality tests and other metrics to find drivers that would provide good service, periodically inspecting vehicles for safety and quality, and having "secret shoppers" check on the quality of service provided. Because of the inspections and screening, the association could be an efficient insurer, and so it could provide low-cost liability insurance to association drivers and the customer firms. If the association has a large number of members, it also could ensure a sufficient number of drivers to meet clients' peak demands. By working with multiple types of clients (e.g., ride-hailing companies, store and restaurant deliveries, courier services, etc.), the association could enjoy economies of scope to match the client's needs, both with respect to demand volatility and driver types. For example, a chauffeuring firm might need a driver with a concealed carry license for one of its clients. By providing all these services, the association might be able to reduce the costs of the client firms and increase the quality of driver services provided.

The association may argue that individual drivers could not provide these benefits as efficiently on their own. For example, the association might provide a coordination function in assigning the number and type of drivers needed by the client firm. The association might also provide certifications that a driver cannot credibly provide themself. The association also could lower the drivers' costs in other ways, for example, with fleet cards to purchase gas. Thus, there is a plausible argument that the association could be seen as an efficiency-enhancing joint venture.

In principle, the client firms could provide many of these services themselves, but that may be less efficient for several reasons. First, the association may benefit from its economies of scope by contracting with multiple clients, particularly with respect to assigning drivers. Second, as owners of the association, the drivers could have the incentive to monitor the performance each other, which would reduce monitoring costs and increase efficiency. Third, the ownership stakes in this type of cooperative may also increase worker satisfaction, which leads to higher quality service.

The association likely would want to prohibit members from contracting directly with clients. Members of ASCAP and BMI music collectives were permitted to engage in direct dealing with licensees outside of the association, which was a key fact for the

Court.[264] However, nonexclusivity may create a free rider problem for the driver association that was not present in *BMI*, which the association may argue justifies exclusivity. Once the association screens and certifies drivers, client and nonclient firms might free ride by hiring them independently in reliance on the screening and certification.[265]

If the association would want to set the payment terms, rather than each driver setting its own fees, this would be the knottiest issue.[266] In *BMI*, the blanket license was permitted because it was a not a product that the individual composers could provide individually.[267] By contrast, the *Alston* Court said that the NCAA colleges (or the individual conferences) should negotiate with the broadcast networks individually rather than the NCAA setting prices.[268] In light of the ancillary restraints discussion above, the association would have to show that its setting of payment terms—a restraint that operates in the market for the sale of labor to client firms—is reasonably necessary to achieve benefits for the client firms and that it is no more restrictive than necessary. The association thus would have to argue that, in addition to providing drivers, it is substantially reducing the transaction costs of the client firms and engaging in joint production through its coordination functions, and that joint fee setting is necessary to achieve these benefits. It is not clear that these arguments would succeed.

The driver association might argue that other worker associations are routinely permitted to set prices jointly. For example, law firm partnerships are comprised of potential competitors who could, in principle, set rates independently, as are doctors in joint medical practices. The association might argue that it has the same type of joint production, coordination, and integration efficiencies. If it can make this showing, it is not clear why an

---

264 *Id.* at 23–24 ("The individual composers and authors have neither agreed not to sell individually in any other market . . . . The District Court found that there was no legal, practical, or conspiratorial impediment to CBS's obtaining individual licenses; CBS, in short, had a real choice.").

265 This free riding also might be limited by the drivers' preferences for the association.

266 The joint fee setting may lead to higher rates charged to client firms. However, the association can explain that while clients are paying a higher *nominal* fee (e.g., per hour or per ride), the higher-quality service would lead to lower-*quality-adjusted* fees.

267 *BMI*, 441 U.S. at 23.

268 *Alston*, 141 S. Ct. at 2164 ("[T]he [district] court emphasized that its injunction applies only to the NCAA and multiconference agreements; individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still.").

association of blue-collar drivers should be treated differently by the antitrust laws than other joint ventures.

The antitrust agencies might suggest that employees of standalone firms should be treated differently than those of firms that are joint ventures of competitors. If the courts were to find this distinction relevant to the association's liability, however, the association might set itself up as a standalone firm in which the workers are not owners but would obtain equivalent benefits. For example, the association could replace worker ownership shares with year-end bonuses that lead to the same economic effects and incentives, or even "shadow stock."

While providing plausible justifications, these arguments are not certain to succeed, and any efficiency claims would require careful scrutiny. The courts further may not be convinced that these efficiencies justify joint pricing, even if they do create integrative efficiencies. However, that uncertainty does raise the key question: If this type of association raises substantial antitrust risks, then why has antitrust been permissive with respect to law firm partnerships and medical practices?[269] Similarly, why should standalone firms that hire workers to provide labor service to clients—such as labor staffing firms—be permitted to set fees, rather than having the workers do so?[270] It may be that law firms and labor staffing firms differ significantly in the efficiencies that they offer or in other competitively significant ways, and we have not attempted to conduct that analysis here. But, absent some principled distinction in the law, these organizations should be treated comparably.

Finally, we note that even if the association would pass muster under prevailing antitrust jurisprudence, practical impediments could prevent its success. These include substantial sunk costs to develop the testing and monitoring protocols and services, promotion, possible antitrust litigation costs, as well as risk of failure. The driver-owners are unlikely to have the savings to finance the start-up and bear the risk. If the association brings in

---

269 For an interesting analysis of these issues that raises provocative questions about how the structure of antitrust law supports a particular type of organization of production and control, see Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 1016–19 (2016). For an economic approach, see Sanford J. Grossman & Oliver Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691, 709 (1986).

270 This issue was raised in the complaints against Uber. *See* Complaint, Meyer v. Kalanick, 1:15-CV-09796, Dkt. No. 1, at *7–11 (S.D.N.Y. 2016); Complaint, Swink v. Uber Techs., Inc., 4:16-CV-01092, Dkt. No 1, at *5–6 (S.D. Tex. Apr. 22, 2016).

a venture capitalist, that could lead to potential conflicts of interest if the capitalist has substantial control.[271]

IV. POTENTIAL POST-ALSTON NCAA LITIGATION

Our recommended approach to joint purchasing applies directly to the likely future case in which the DOJ or a class action (such as *House v. National Collegiate Athletic Ass'n*[272]) attacks the NCAA's ban on non-education-related payments to student-athletes. The district court in *Alston* evaded this issue with its "split the baby" decision on education expenses and the Supreme Court went along. But this approach may not work twice: a case squarely alleging that restrictions on non-education-related payments to student-athletes constitutes a clear anticompetitive horizontal agreement.[273]

In his *Alston* concurrence, Justice Kavanaugh emphasized three key points. First, *Alston* "does not address the legality of the NCAA's remaining compensation rules."[274] Second, the analysis of the remaining compensation rules "should receive ordinary 'rule of reason' scrutiny under the antitrust laws" that ignores "the decades-old 'stray comments' about college sports and amateurism . . . [which] have no bearing on whether the NCAA's current compensation rules are lawful."[275] And third, in his view, "there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny[ ]" because the NCAA may lack a "legally valid procompetitive justification."[276]

---

271 Another potential conflict of interest could arise because the association managers could have incentives to take actions that would drive unprofitable association growth to justify their higher salaries. While it would be ironic for a worker-owned association to oppress the workers, the Dairy Farmers of America agricultural co-op has been accused of abusive conduct towards its members. *See* Claire Kelloway, *Milking Profits: The Dairy Monopolies That Are Hurting Farmers*, WASH. MONTHLY (Sept. 14, 2020), https://perma.cc/RGQ8-GGYB.

272 545 F. Supp. 3d 804, 812 (N.D. Cal. June 24, 2021).

273 Even if the next class action–plaintiff group of athletes reaches a split-the-baby agreement, an opt-out plaintiff group may not.

274 *Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring).

275 *Id.*

276 *Id.* Justice Kavanaugh's concurrence echoes the concurrence of Judge Milan Smith in the Ninth Circuit below. Judge Smith likewise looked hopefully toward a future case that would directly address the out-of-market balancing issue that the parties avoided in *Alston*: "Lacking a robust justification, I fear that our cross-market Rule of Reason analysis frustrates the very purpose of the antitrust laws . . . . I hope our court will reconsider this issue in a case that squarely raises it." *In re* Nat'l Collegiate Athletic Ass'n Athletic

Our analysis indicates that the NCAA's prohibition on payments that are not education-related cannot pass muster under the rule of reason. Those restraints cannot be saved by attempting to apply an ancillary restraints doctrine that focuses on the benefits to the downstream purchasers of college sports. The alleged competitive benefit in *Alston* was the consumer appeal of college sports as distinct from professional sports. It is not clear that the appeal of college sports flows from nonpayment of players rather than simply the use of less seasoned athletes and traditions. In any event, these benefits to fans would not represent a legally valid procompetitive justification under our approach because they are outside the relevant market. As we have discussed, deeming this downstream justification cognizable would be a misuse of the ancillary restraints doctrine. The doctrine is properly limited to restraints that increase welfare in the same market in which the restraints are applied. As Justice Kavanaugh pointedly explained, "a monopsony cannot launder its price-fixing of labor by calling it product definition."[277]

Even taking as given the claim that there is distinct demand for college football played by underpaid student-athletes, the NCAA's mandatory rule would be condemned because the rule is not necessary to achieve the claimed benefit. If there is such demand, each college can make its own independent decision of whether and how to compensate student-athletes.

Even taking as given the claim that there is distinct demand for college football played by underpaid student-athletes, the NCAA's mandatory rule would be condemned because it is not necessary to achieve the claimed benefit. Justice Kavanaugh's reductio ad absurdum analogy to (say) a group of law firms that agree to "cabin lawyers' salaries in the name of providing legal services out of a 'love of the law[ ]'"[278] illustrates the point. Presumably, some clients would prefer law firms comprised of such

Grant-In-Aid Cap Antitrust Litig., 958 F.3d 1239, 1271 (9th Cir. 2020) (Smith, J., concurring).

277 *Alston,* 141 S. Ct. at 2168 (Kavanaugh, J., concurring). Of course, the NCAA might avoid such a tautological market-definition claim. Instead, it could attempt to argue that college football played by student-athletes who are not paid more than their education expenses is a differentiated product with substantial consumer demand and argue that payment restraints are necessary to support this consumer demand, implying that the restraints are ancillary restraints that should be analyzed under the rule of reason with a sole focus on the downstream product market. However, under our approach to the doctrine, this argument would fail.

278 *Id.* at 2167 (Kavanaugh, J., concurring).

lawyers, so there could be distinct demand. But while a single law firm might unilaterally adopt this approach, a group of law firms could not agree to set a salary cap. Such a restraint should and would be condemned under the quick look or per se rule.

In fact, there is a precedent for this approach to NCAA restrictions. As discussed earlier, the Tenth Circuit in *Law* applied a quick look analysis that found clear anticompetitive effects on the coaches' salaries.[279] It rejected the argument that there were within-market benefits to coaches by retaining an additional entry-level coach.[280] It also rejected the argument that the restraint would be procompetitive because it would reduce costs,[281] as well as various flavors of a claim that the restrictions would benefit downstream competition by improving competitive balance among the teams.[282]

CONCLUSION

Our analysis suggests that antitrust law should adopt the following four propositions: (1) antitrust analysis should focus on the welfare of the trading partner participants in the relevant market alleged to be harmed by a competitive restraint and should not privilege the welfare of downstream purchasers; (2) courts applying Sections 1 and 2 of the Sherman Act should adopt the *PNB* doctrine that rejects out-of-market benefits as cognizable justifications for restraints that harm the trading partner participants in the relevant market; (3) the ancillary restraints doctrine should only allow departures from the per se rule escape from quick look condemnation for restraints that are ancillary to a legitimate collaboration and have procompetitive benefits to the participants in the relevant market alleged to be harmed by the restraint; and (4) if the only justifications for a restraint involve benefits to participants in another relevant market, the otherwise anticompetitive restraints should be condemned under the quick look or per se rule.

The first proposition is fundamental and well-established in antitrust law. The others are less clearly established. But our

279 *Law II*, 134 F.3d at 1020.

280 *Id.* at 1021–22.

281 *Id.* at 1022–23.

282 As summarized by the court, the rule "is not directed towards competitive balance nor is the nexus between the rule and a compelling need to maintain competitive balance sufficiently clear on this record to withstand a motion for summary judgment." *Id.* at 1024.

analysis indicates that they are consistent with basic antitrust principles and represent sound antitrust policy. Thus, we hope that courts adopt these propositions. While we focus on restraints that harm workers in this Essay, our analysis can be applied to the rule of reason (and the ancillary restraints doctrine) involving allegations of harm to other input suppliers.

We recognize that this approach might be seen by some as a significant change, and that that might lead the Court to soften these propositions by allowing balancing of effects in some limited circumstances. If such balancing is to be permitted, we recommend that courts place a substantial burden of proof on the defendant to clearly show beneficial "net effects." The defendant also must carry the burden of explaining why it was not possible to avoid the harms with a voluntary agreement. If the defendant carries both of these burdens, the plaintiff would be permitted to apply a less restrictive alternative analysis, showing that the benefits to the downstream purchasers could be obtained with substantially less harm to the workers.

This raises the question of whether this approach has any likelihood of being embraced by the Court, perhaps in a subsequent case involving non-education-related payments to college athletes. We can only speculate. However, the dissenting Justices in *American Express* embraced the statement that defendants "can rarely, if ever, show that a pro-competitive benefit in the market for one product offsets an anticompetitive harm in the market for another."[283] In addition, Justice Kavanaugh's *Alston* concurrence appears open to this approach, at least with respect to college athletes. While this does not constitute a majority, it does suggest a possible path to adopting our approach.

---

[283] *American Express*, 138 S. Ct. at 2302 (Breyer, J., dissenting). Less clear is the significance of Justice Amy Coney Barrett's question to counsel for the United States, as amicus curiae, at the *Alston* oral argument about whether the cross-market balancing framework deployed by the lower courts in the case was "performing any kind of distorting effect that would influence the way we think about this case in a bad way?" Transcript of Oral Argument, *Alston*, 20-512, at *85.