[MUSIC PLAYING]

EVAN STARR: --San Diego. Everybody likes San Diego. And Claremont. So we were already there [INAUDIBLE] anyway.

SPEAKER 3: All right, so I think we told you guys 15 minutes for presentation, but you're going to have time for 20. If you want to go a little bit over, that's fine.

EVAN STARR: Thank you.

SPEAKER 3: I'm flexible.

EVAN STARR: You were smart to print it out. I was trying, like what did I-- what's on my slides? I've forgotten.

JOHN MCADAMS: All right, well, welcome back, everyone. This next session is going to be dedicated to the current economic literature on non-compete agreements, as well as topics for future research. We have four panelists here today-- Kurt Lavetti, who is an associate professor of economics at Ohio State University; Ryan Nunn, who you heard from before lunch, who's a fellow and policy director at Brookings; Evan Starr, who's an assistant professor of management and organization at Maryland; and Ryan Williams, who is an assistant professor of finance at Arizona. I just want to start off by saying thank you to all our panelists. We really appreciate that you guys came out today and are going to share your expertise with us, and I also want to thank Dave Schmidt, who organized the panel.

The format is just going to be-- we're going to have the three economists who haven't spoken yet each give a presentation, and then we'll have the remainder of the time for questions. And I think someone is going to be circulating with note cards. If you have a question, just flag that individual down, and then they'll hand off those questions to me, and then I'll ask them during the Q&A. So first up is, I believe, Kurt Lavetti.

KURT LAVETTI: Yeah, I'd like to reiterate thanks to the organizers. It's a pleasure to be here. I would like to organize my discussion in terms of thinking about what economists would refer to as the welfare consequences of non-complete agreement, and I think there are three primary channels, each of which has been discussed in isolation a little bit previously today. And those are effects on workers, on firms, and on consumers.

I think we've got relatively large amount of empirical evidence on the first channel, on workers, and some of that's been mentioned by Ryan today, and by others. But I'd like to talk a little bit about what's missing from the empirical literature and what we know and what we don't know yet about this discussion. So I want to emphasize the fact that, even though the focus is on labor markets, rightfully so, there's potential for non-compete agreements to impact welfare outside of labor markets.

So on the worker dimension, to reiterate what's-- a lot of what has been discussed today, we're frequently concerned about impacts on earnings levels, on the career trajectory of earnings within a job or over one's career, mobility patterns on job matching-- by that, we mean the ability of a worker to be matched to the job at which their skills are most productive-- and on training of workers that impacts the productivity over their career cycle. On the firm side, we might be concerned about hiring costs, both for firms that use non-competes and for those that choose not to use non-competes. Other concerns are the ability to invest in innovative activities, other forms of investment decisions, and competition, both in input and output markets. On the consumer side, the concerns primarily take the form of concerns about product prices, but there's also concerns about access and service continuity, which I'll talk a little bit about in the health care sector.

So my overall assessment, I think I would say, is that the empirical evidence has, quite convincingly, shown that strengthening the enforceability of non-compete laws reduces average earnings and worker mobility, and that has been consistent across a broad range of studies. I think we're still far from reaching a scientific standard of concluding that non-compete agreements are bad for overall welfare, and by overall welfare, I mean including those other two components about which we have relatively less information. I don't think we fully understand the distributional effects of non-competes on workers, and I'll talk a little bit about why I emphasize the word "average" relative to distributional effects.

I also want to think about-- talk a little bit about the context specific welfare tradeoffs and the extent to which the effects-- the welfare effects might be heterogeneous across context. So with respect to employees-- who we might think about employees of different levels of education, of different earnings levels, some of which has been discussed today-- on the firm side, we might want to distinguish between research intensive firms, manufacturing firms, and service firms, and thinking about the reasons why firms might benefit from non-compete agreements and the justification for using them in different contexts. And then on the consumer side, also, we draw a contrast between things like health care versus Jimmy John's, which has become the punching bag of this discussion, and thinking about the extent to which we should care about things like service continuity across different consumer settings.

So there's been a lot of great discussion so far summarizing the literature by Ryan. There's also a new working paper by John that provides a great overview of this literature. I'll add a little bit of that from a recent working paper that some co-authors and I just completed a couple months ago, that I think corroborates, I think, what the story is that a lot of others have discussed today.

So in the recent paper by Matt Johnson and Mike Lipsitz and I, we study, within state changes and the enforceability of non-compete laws over just over 20 years, what we found is that increasing the enforceability from the 10th percentile to the 90th percentile of the distribution-- that is, so if we think about the entire policy space, California doesn't allow the enforceability of non-competes at all. Other states, like Florida, allow them to be enforced quite liberally. We think about, so what is the range of policy spectrums that we could consider? If we move from the low end of that spectrum to the high end of that spectrum, wages fall, on average, by about 3% to 4% for a typical worker, and job mobility falls by about 9%.

If you were to extrapolate, a bit further, what would an outright ban do, we estimate that wages would increase, on average, by about 7%. Now, that's a sort of extreme extrapolation a little bit, but I think when you-- so that's the headline number, and a lot of similar numbers have been discussed today. But when you dig into the details, it actually looks even a little bit worse than this. The earnings effects are twice as big among women and minority workers as they are for white males, so to some extent, there appears to be an interaction between the impact of non-compete agreements and these demographic groups for whom observably similar skills are not rewarded as highly in the labor market, potentially due to other concerns about bargaining and bargaining position.

If you think about the labor-- the literature and labor economics more broadly, there's longstanding evidence that firms tend to insure workers against shocks to productivity. So most workers understand this colloquially, but this was first shown by [INAUDIBLE] in 1991. Essentially, what that means is that past labor market conditions affect wages today, even conditional on current conditions.

One simple story of that is that, during a recession, firms tend to not cut nominal wages, so workers are protected. Even though the firm might take a productivity hit, they might be losing money, workers wages are not cut commensurately. But when firms are doing well, to some degree, workers share in the upside growth of that. So firms implicitly insure their workers against shocks to productivity. This is a known fact about labor markets.

What we show in this paper is that, even though this fact is true on average, and it remains true today despite many changes in the labor market over the last 30 years, there's a lot-- there appears to be an interaction between the enforceability of non-competes and the extent to which this is true today. So we find that this fact only holds true in states that have weakly enforceable non-compete laws. If you look at states where-- that allow strict enforceability, it is not true that this holds, so firms do not appear to be insuring their workers against risk, downside risk, and shocks the productivity, and the mechanism through which this occurs seems to be that non-competes dampen the ability of workers to renegotiate higher wages during good times commencerate with the productivity gains of their firms. So even these things that we think of as stylized facts about the way that labor markets hold seem to be evolving today, and our understanding of them interacts with the enforceability of non-compete agreements.

And then a third argument, which Eric Posner mentioned this morning, relates to the freedom of contract-- freedom to contract argument. So one argument in favor of allowing non-compete agreements to be enforced is that they potentially fall within the scope of freedom to contract, that an informed worker and an informed firm should be allowed to write such an agreement. From a policymaker perspective, that argument comes, really, into question if you think that there are spillover effects on other workers who are not themselves a party to this contract, and we find exactly that in the study.

So the way that we do that is we look at labor markets that are commuting zones that are bisected by state borders, so you can think about Cincinnati on the Ohio-Kentucky border. It's a single labor market that spans both states. Each of those states has different policies regarding the enforceability of non-compete agreements. What happens when one state changes the laws that affects a portion of the labor market, but not the other portion?

What we found was that there are, in fact, spillover impacts on workers across the state border. Those workers are not, themselves, directly affected by the non-compete laws. These are workers that live and work in a different state, but their-- they share an overlapping labor market with the workers who are affected. We estimate that, on average, about 90% of the negative wage effect spills over to the bordering counties. As you go further away from the border, the effects dampen.

We can reject that the spillover is smaller than 10%. So there is very convincing evidence that there are spillover effects. There are negative externalities on other workers, and I think this is pretty convincing evidence that something ought to be done to protect especially vulnerable workers.

But returning to a broader discussion of the welfare components, I'd like to return to the idea that the context matters. So although non-compete agreements can reduce earnings on average, in some context, there's evidence that they might systematically increase earnings. There's work by Ryan and co-authors on corporate executives.

There's some other great work on this. I have a paper with some co-authors, studying physicians, that shows that both physician firms and workers appear to benefit from the use of non-compete agreements. I'll talk a little bit more about the extent to which consumers benefit from that, but the context seems to matter.

A little bit of background on the primary care physician case, because I think this is an informative and a little bit cautionary example about the potential impacts of a blanket ban on non-compete agreements. So in this paper with Carol Simon and Will White, we conducted a survey of primary care physicians in five states. We found that about 45% of primary care doctors operating in group practices were currently bound by a non-compete agreement, and in the paper, we explore the reasons why physicians tend to use non-compete agreements and try to compare empirical evidence with theoretical models about what is the justification for using them.

What we conclude is that non-compete agreements actually appear to play a fairly valuable role in this context in the sense that patient relationships are a valuable asset to physicians. It's illegal for physicians to implicitly buy or sell patient referrals. We have laws protecting against that, so this very valuable asset-- essentially, physician groups, physicians themselves, have no legal control over their primary asset. If you look at when physician practices are bought and sold, the price of the purchase is typically a function of the book of patients. But there's really no way to protect that asset, and non-compete agreements are a mechanism that allows firms to have a second best form of protection.

What we find is that, in physician groups that use non-compete agreements, doctors are much more likely to make referrals of their patients to other doctors within the same practice because they don't have to be as concerned about their fellow colleagues getting to know their patients and then opening a business next door and poaching the patients. That, in turn, leads these practices to generate 17% more revenue per hour worked. For an average physician who signs a non-compete agreement, the net present value of the earnings effect at the time that they signed the contract is positive $650,000 over a single job spell, which is about 15 years on average. They make substantially more money, and all of that difference comes from larger within job earnings growth.

So the time they sign the contract, they make about the same amount of money as physicians that don't, but their earnings grow much faster, and the story's really this patient sharing story. There's much more fluid referral of patients across doctors within groups that use these types of contracts, and these gains don't seem to occur in states that have non enforceable NCA laws. So I think there is a potential argument to be made here that both workers and firms can benefit in some cases, but on average, that's not, of course, the overarching story. It's just a cautionary case study, and thinking about the extent to which we should consider boundaries in policy regulation that limits the ability to use non-competes.

I want to point to one other case study that builds on this, as a cautionary-- another cautionary tale in thinking about what those boundaries should look like. So if you listen to this physician case study, you might think that, in the context of high skilled service firms that care about relationships with their patients, there's potential value to non-compete agreements such as physicians. There's a recent working paper by Gurun, Stoffman, and Yonker, that study what looks like a very similar market-- financial advisors. What they find is that, when non-compete agreement policies are relaxed-- and this was due to a within-industry change specific to financial advisors-- advisors take clients with them to other firms, and this looks very similar to the story of patient relationships with doctors. It's client relationships with financial advisors.

But what they show is that relaxing the enforceability of non-competes actually makes firms less willing to fire their workers and leads to higher rates of misconduct among financial advisors. So this could actually be potentially harmful for consumers. Consumers are also charged higher fees. So even though it looks like the motivation and rationale for using these contracts is very similar to the physician case, where both workers and firms appear to benefit, in this case, it might not be as obvious that this is a positive welfare effect because of the higher rates of misconduct.

Impacts on firms-- so the second major channel through which non-competes might relate to or might cause welfare consequences is through impacts on firms. There is some suggestive evidence in the empirical literature on innovation and investment incentives and the extent to which they relate to the use and enforceability of non-competes, but I don't think we have nearly as much comprehensive evidence on this dimension as we do for labor markets. I'll talk about one recent study that Naomi Houseman and I just completed on impacts on firms that I think gives you some intuition for why this channel might potentially be important even though we know a lot less empirically about this channel overall. So this is from a study of primary care physicians looking at changes within state enforceability of non-compete laws and what happens to the organization of physician practices as these laws change.

So this is a graph, if you can see it. The vertical axis here is the concentration in physician markets measured by practice size. So loosely, how many doctors are there at each office? The vertical line in the middle is Year 0. That's the year in which the enforceability of non-compete agreements in that state increases.

So what you can see is that, essentially, after the ability to enforce non-compete agreements goes up, physician offices got smaller. There are fewer doctors per office. So something about the use of non-compete agreements was related to firms' decisions about staffing and how many doctors were going to be employed at each office.

However if you recalculate the axis-- instead of thinking about the size of a particular office, think about the size of the firm as a whole, allowing for the possibility that physician groups often have multiple locations at which the doctors treat patients-- firms overall are growing. So firms increase in size, even though there are fewer doctors at each location. This is suggestive that the ability to use and enforce non-compete agreements potentially has some impact on firms to coordinate across locations, potentially impacting merger decisions.

It remains to be seen whether this is good or bad for consumers. Consumers may, of course, value access to convenient integrated practices, where records and computer systems are shared across locations. There are more location-- there are more convenient locations for them. The flip side of having larger firms, of course, is that there could be higher prices negotiated with insurance companies, and in fact, that's what this slide shows.

This is showing that, when the enforceability of non-compete agreements goes up, a 1/10 increase in the policy spectrum-- so moving from, say, the median state policy to the 16th percentile, a relatively modest increase, is associated with 10% higher physician prices for an average bundle of services. If you were to extrapolate that to estimate what the impact would be of a national ban on the enforceability of non-competes, on just physician spending alone, it would be $25 billion per year. So potentially, very large consequences for consumers in terms of prices.

Now, a lot of this, I want to caution, comes from the fact that we see smaller establishments. Because establishment size is shrinking, small establishments tend to have higher overhead and, therefore, higher prices. And so this is really operating through an organizational channel in part, and that's-- but there are implications for consumers and prices.

So just to summarize, I think, overall, I would say that more empirical evidence is necessary before a comprehensive ban would be scientifically justified to curtail non-competes in all contexts. It does seem like there is very convincing evidence that workers are harmed on average, but there are some important exemptions. And I think it's worth exploring whether there is a scope for reasonable compromise between worker protection and the need for more evidence to be gathered before a more comprehensive ban would be justified.

There is a lot of discussion about attributing general wage stagnation in the labor market to non-compete agreements. I just want to comment that I think, to some extent, that's an oversimplification. There's a lot of factors that have contributed to this, and I don't think we really are-- have come close to being able to conduct a thorough decomposition of all these factors, including changes in skill biased technological change and how those types of other exogenous things that have been happening in the labor market interact with the use and enforceability of non-compete agreements over time.

So I just want to caution against thinking that policy changes are really going to have a first order effect on wage stagnation given how much is unknown elsewhere about the broader labor market trends. The empirical evidence, as I mentioned, is a lot more sparse when we think about the welfare-- the channels through which non-compete agreements might affect welfare on the firmer consumer sides. Even in the case of physicians, where as a case study industry, I think the literature is a little bit more developed, it's still quite difficult to make an overall welfare assessment about the extent to which the labor market or firm side of things offset the consumer side.

So my summary opinion overall, just to wrap up, is that-- my own opinion is that the scientific standard for a complete ban on non-compete agreements should be quite high. Non-competes have been used for a long time, and the literature is, in a relative sense, nascent compared to the history of the use of non-compete agreements. I think there are policies that can be used to protect vulnerable workers while still permitting non-competes in other contexts. A lot of other people today have discussed examples of such policies, like setting minimum earnings and wage floors for non-compete-- for workers who are bound by non-compete agreements.

Another way of structuring this would be to say that, if you sign a non-compete agreement, there has to be an explicit compensating wage differential that's tied to that non-compete agreement. So for example, in the contract, it might say, if you accept this non-compete agreement, your wage will increase by X dollars. That will also potentially deal with some of the other issues that panelists have been discussing today, about the salience of non-competes in contracts, the fact that a lot of workers don't read their contracts thoroughly or might not be aware that they're signing these.

If there's a line in your contract that says your salary is going to be $5,000 higher if you check this box, that will potentially reduce some of the salience issues. So making a more explicit tie between compensation-- a change in compensation and the acceptance or rejection of a non-compete agreement, rather than just a wage floor, might be a way to approach these two birds with one stone. And then building on the discussion of timing, it seems unequivocal to me that some progress can be made here in regulating the extent to which firms should be allowed to disclose the requirement of a non-compete after a job has already been accepted. It's hard to imagine any economic rationale why it would be welfare improving to allow firms to do that.

JOHN MCADAMS: Great. Thank you, Kurt. Next up, we have Evan Starr.

EVAN STARR: (WHISPERING) Thank you. Can I get the clicker?

KURT LAVETTI: (WHISPERING) Oh, yeah.

EVAN STARR: (WHISPERING) Thank you.

I'm going to come over to the podium. Thank you. Thank you to John and to David for organizing and for having me here. It's a real pleasure.

Over the last five years or so, I've been working on understanding the use and effects of non-competes and the policies that enforce them, and I want to share with you, today, some of that research. So I want to begin with a simple description of why I think the FTC should care about non-compete, and many of the points I'm going to make were discussed in the first panel. So first, I just highlight that these are restraints of trade in the labor and the product markets because they prohibit workers from starting new firms, not just joining incumbents.

The second thing I want to-- the second point I want to make is maybe a little bit nuanced, but I just want to say it upfront-- that if you're thinking about measuring labor market concentration in the first place, and there's a whole range of recent studies which are trying to do exactly this, many of them don't account for non-competes or similar restrictions. And I just want to highlight that, if you're trying to measure labor market concentration, then a non-compete is essentially going to knock out many of the within-industry opportunities that you have. And so if you ignore that, what it means is that you're going to essentially find that the observed concentration that you can see in the data is less than the effective concentration that would be in place if you could see that there were non-compete in that labor market. And so if you're going to think about anything to do with concentration, M&A, whatever it is, non-competes and similar provisions are going to be important for the Federal Trade Commission to think about, and the DOJ.

I also want to highlight that, because these are also restraints on entering the product market, that if you have a concentrated market, sometimes justifications are made that potential competition in the future is going to prevent firms from abusing their market power. And so if you think that this argument about potential competition in the future is really important, then you also need to think about non-competes, because non-competes are going to potentially prevent that future potential competition from coming to fruition. And so I just want to start with those broad points.

The key tension in the non-compete debate, as I see it, is that non-competes essentially give firms future labor and product market power, and there are many bad things that we can think of that will come with that power. There is potential for reduced wages, for firms to underemploy their workers, lower entrepreneurship, lower firm output, higher consumer prices, and the potential for negative externalities. On the upside, though, there are several efficiency justifications, a few of which we've touched on. The first one is this incentive motivation, that firms can basically be incentivized to invest because they're not scared that their employee is going to go and join a competitor and share everything that they have given to them.

The second common argument is what-- is this freedom to contract argument. This is pretty straightforward. It just says workers are never going to agree to a contract that hurts them, and these are, I think, really good arguments.

And the question is, where does the evidence lie? Where does this put us? And so let me let me just summarize some existing evidence today, and I'd like to highlight some of the discrepancies in the work, including Kurt's and Ryan's, and point to some directions for future work here.

So let me start with what I see as a key distinction in this literature. I want to make the distinction between the study in the use of non-competes and the enforceability of non-competes. So most of the studies that are in this literature are examining within or across state changes, so this is like studying California versus Florida or examining, for example, Oregon before and after they pass a ban on non-competes relative to a set of states whose policies remain the same. That's a study of enforceability.

A study of use would be comparing a worker who has signed a non-compete to another worker who isn't bound by one, and-- or you can imagine comparing the same worker over time when they're bound by a non-compete versus when they're not, and a few recent studies take this approach. And I just want to highlight that these two approaches estimate very different parameters. One estimates, hopefully, the causal effect of passing a certain policy. The other one estimates the causal effect of signing such an agreement, and those can be very different, though they might be related. In particular, the approach of enforceability incorporates the possibility of spillovers because you're allowing the possibility that other workers in the market are affected, and that's not the case in the studies of use.

I also want to highlight that it's much harder to estimate the causal effect of using non-compete agreements. I'll show you some evidence in a moment. CEOs are the most likely to sign a non-compete agreements. Low wage workers still sign them, but less so. And so when you compare workers who have signed a non-compete to those who haven't, you have to worry that there are other differences between those workers, not just whether they've signed the non-compete, which could be driving any outcomes you observe. And it makes it really tricky, and I don't think we really have any great studies so far that really isolate random variation in the use of non-competes.

So let me just start with some facts. Non-competes are widespread in a 2014 survey that I ran with JJ Prescott and Norman Bishara. We found that about 18% of the US workforce was bound by non-competes. Colvin and Shierholz have an establishment level survey which suggests the number is closer to 28%, at least 28% as the lower bound.

You find them more frequently in executive positions, about 70% to 80%. You find that tech workers are more likely to sign them. Physicians are more likely to sign them. But you still find them in low wage occupations, so you find 14% of them that are earning less than $40,000.

And I think this is, for me, one of the most surprising facts. When you look at who is bound by a non-compete, 53% of them are paid by the hour, which means that the modal non-compete signer is not some executive or not some high tech worker or some physician. It is an hourly paid worker, and the median earnings for those guys is around $14 an hour.

So what happens when we ban non-competes? So let me run through a few studies here. So this is a recent study with Mike Lipsitz, where we examine this policy in Oregon, where Oregon was the first state to ban non-competes for low wage workers. And so Oregon passed this law under some very recent pressure from lawyers who were discovering that non-competes were used in jobs where they didn't quite expect them to be used. And so what they did is they banned them for hourly workers and for workers who were under the median income for a household of four.

The hourly ban alone, just-- so to keep us in perspective-- accounts for 67% of the workforce in Oregon. So this ban affected over 2/3 of the workers in Oregon even though hourly workers don't necessarily sign them at very high rates. And so what we do in this study is we look at the wages and mobility of workers in Oregon relative to workers in surrounding states that didn't have their policies changed.

And so the graph on the left here shows you two patterns. The dotted blue line is looking at those who were in job-- so all these are hourly workers. The blue line are those in jobs that are most likely to be bound by non-compete agreements.

The black line is the overall average, and you can see the pattern is roughly the same, that before 2008, Oregon is trending similar to other states, but then there's this discrete increase rising over time up to, in the high-use occupations, quite large point estimates of around 10%. For the average population, we get up to about 5% or 6%.

If you look at what happens to job to job mobility in Oregon, that's in the right panel. In the right panel, what you can see is that overall mobility rises after 2008, and that this is largely driven by an increase in within-industry mobility, which is what non-competes would prohibit. And so overall, this paper kind of suggests that banning them for low wage workers does appear to benefit low wage workers. We do a whole bunch of extra analysis. We find the effects are stronger for women, just like Kurt did in his other paper, and so I think this is interesting, to say that maybe these low wage bans that have been proposed, maybe they are on somewhat solid footing here.

But what about moving up the occupation chain? What happens if we ban them, let's say, for high tech workers? And so here in this paper with Natarajan Balasubramanian, and many other co-authors, we study the recent ban on non-competes for high tech workers that Hawaii implemented in 2015. And I'll show you the same graphs here as I showed you for the mobility graph on the last slide-- the low wage graph on the left side.

So Hawaii bans non-competes in 2015. On the left graph, what you can see is that the wages for new hires starts rising almost immediately after the ban. It's about four 4 and 1/2% higher, and we also see mobility in Hawaii starts spiking after this ban is in place. And so it looks like, even when you ban them for high tech workers, we see wages and mobility rise similar to the low wage workers.

So what about the investment story? Well, in a followup paper, I look at training and wages as separate outcomes for workers, and I'm trying to get a sense of, are workers-- if you happen to live in a state that more vigorously enforce is non-competes, do firms actually invest more in their workers? And so on the left graph, what I find is that workers do receive more training, about 14% if you compare an average enforcing state to one that doesn't enforce them at all, but workers also suffer wage losses.

So they're not capturing the returns to this training. The firms appear to be capturing the returns to this training. So there's a little bit of trade off there.

I want to talk about entry as well. So similar to Kurt's study, I have a paper where we're looking at physicians and the provision of medical care, and what we exploit in this paper are several bans that occurred in the late '70s and '80s of non-competes for physicians. And so there's been a recent move by several states to ban non-competes for physicians, and-- but it's actually an old policy that was adopted in the late '70s and '80s. And so there are three states here-- Delaware, Massachusetts, and Colorado-- which banned them all around the same time period.

And so what we do is compare those states where non-competes became banned relative to states where they were still enforced, and we're looking at a variety of outcomes here. I'll just show you two. This is the log number of medical practices in the county, and then the log number of practice locations, and some practices could have multiple locations. In both of them, we find that the number rises after these bans take place, suggesting that there were-- the non-competes were, in fact, holding down medical-- the number of medical establishments in the area, that banning them would increase access to care.

I want to highlight another dimension as well, which is that non-competes may not only discourage entry, but they may also make it harder for firms to hire. And I think Eric Posner highlighted this earlier, that if you agree to a non-compete with a worker, one of the third parties that's affected by that are the firms that are-- that may want to hire that worker in the future who are not party to that contract. And so in this paper with Natarajan Balasubramanian and Mari Sakibara, we look at the universe of workers in 30 states, and we find firms-- we look at what happens to the size of new firms and their subsequent growth and survival if they happen to be in a state that enforces non-competes more vigorously, versus those that are less likely to enforce them.

We also exploit, in this paper, the little known fact that non-competes are unenforceable for lawyers in all 50 states, and that forms part of our control group. And so I'm not going to run through all the numbers here, but in column 8, you'll see there's a negative 0.14, which highlights that if you are a firm that more vigorously enforces non-competes, those firms tend to start out smaller if you are in a higher enforcing state, which is indicative that these firms struggle to hire. It's harder for them. There are some differential effects here for firms that we call within-industry spinouts, which-- there are fewer of those in states that enforce non-competes, but they appear to be relatively better off through what we think is a screening mechanism.

So coming back to some of the key questions, does this evidence suggests that the freedom to contract story is wrong? And if you look at the evidence from enforceability, you would say, yes, workers appear to be hurt. Why would they be hurt? But if you look at some evidence of the use of non-competes, the evidence has been more nuanced.

So there is some evidence that suggests the freedom to contract story is wrong. One is that, less than 10% of workers reported negotiating over non-competes. Another one is that 83%, when you ask them, simply sign and read the contract. Only 17% report consulting friends or family or legal counsel.

When you ask workers, what did you-- what were you promised in exchange for signing a non-compete, 86% of them say nothing, and roughly a third of non-competes were delayed until after the worker accepted the job without any change in responsibilities or a promotion. So all of this suggests that maybe this freedom to contract stories is a little bit wrong, but when you look at some of the correlations you do see that, when workers are provided with non-competes upfront, they appear to have higher earnings. And there are some caveats to that finding, one which I think is really important, is that when you include controls for other contractual provisions that workers sign-- like nondisclosure agreements, non-solicitation agreements, non-poaching agreements-- a lot of the non-compete, the positive non-compete [INAUDIBLE]-- it falls, suggesting that there could be some selection here that we're not accounting for.

The second thing that is counterintuitive is that we do find positive wage effects, but they are reduced in states that more vigorously enforce non-compete agreements, which is the opposite of what you would expect. If you thought the non-competes would be always good for workers, you would expect that, in higher enforcing states, the workers-- those are the workers that would benefit the most, and that's not what we find here. And then of course, Kurt's study, which he just went through, and Ryan's study of executives, which I'll let him talk about, find that there may be some benefits to workers from signing non-competes.

I also want to highlight that these studies all ignore the potential for spillovers. And I want to just iterate-- reiterate Kurt's concern about spillovers in the market, and I have one study on the topic. And the idea here is to compare workers in labor markets where non-competes are really prevalent and highly enforceable, to labor markets where they may be less prevalent or less enforceable. And what we're going to do is look at the workers who haven't signed them, so look at the workers who are not bound by these provisions, and we're going to ask if they're affected by the use and enforceability of these contracts.

Now, what you would expect-- if half of the workforce, let's say, was bound by a non-compete, you might expect that the other half would get all of labor demand, and that their wages would rise more. They would be more in demand, and so you would expect that there'd be positive spillovers. But that's not what we find at all. We find that, where non-competes are really common and highly enforced, the whole labor market suffers.

Wages are lower. Mobility is lower. Job satisfaction is lower. Job offers are less frequent. And so it seems to me that there are some negative spillovers here that maybe pushes outside of this freedom to contract argument a little bit and provide maybe a more sound base for public policy responses.

So what about the investment argument? Is that wrong? So I just want to highlight a few arguments here that you hear quite commonly.

The first one is that people point to Silicon Valley as an obvious counter argument to say that, well, how could it hurt innovation if we have Silicon Valley in California? That provides a baseline of maybe thinking that maybe it's actually good that we've banned non-competes for innovation, and there is some evidence suggesting that investment and innovation is hurt when you enforce non-competes. On the other, side there are few studies which find benefits here from non-compete use and enforceability, and so I think that we really-- we haven't really resolved this question of which is correct, and this is an important avenue for future work.

But I want to push forward, and I want to ask this question about unenforceable non-competes. So here's a map of the US. We've talked about how non-competes are unenforceable in several states-- here in California, Oklahoma, North Dakota. And there's also-- they're permitted with some exceptions in the gray states and permitted more liberally in the black states.

So where do you find non-competes? So this is a very, very recent-- literally, I think, three weeks ago from Heidi Shierholz and Alexander Colvin, looking at the use of non-competes, and they break it out by states. So here's California at the top, and what they do is they ask-- this is an employment survey. So it's a survey of firms, and they ask, does your firm use any non-competes with any of your workers? And then they ask, do you use it with all workers?

So just look at that top line result. They find that 50% use them with any employees, and 31% use them with all employees. If you go to the second line, you'll see that broken down by California. So this-- they find, as I found in my other work, and I think others have found as well, that 28.6% of firms in California use non-competes with all employees, and these non-competes would be totally unenforceable if they made it to a court a court of law.

So you might ask yourself, well, so what? Who cares? Does this matter? So I have a second paper looking at the importance of even unenforceable non-competes.

So this is from survey work with JJ Prescott and Norman Bashara, and we asked workers in this survey about job offers they'd received from competitors. And if they told us that they had declined a job offer from a competitor, we just asked them a direct question that you can see here in panel A. Was your non-compete factor in your choice to turn down your job offer from a competitor? And these are only people who are bound by non-competes.

So overall, 41% said their non-compete was a factor, but we can break it down further based on the state that they were in. And we find that the percentage in non-enforcing states, like California, Oklahoma, and North Dakota, 37.5% versus 42% in states that enforce non-competes, so roughly the same. So then we followed up, and we tried to figure out why some workers were more likely to say that their non-compete was a factor, but others weren't, and what we found was that the role of the law actually had nothing to do with it. What mattered were a few things.

The first things were, what do you believe about the law? The second is, do you believe your firm's going to go after you? And the third was, did your firm remind you about your non-compete? So this prompted us to look more into the beliefs. What do workers believe about non-competes?

So I want to show you some very recent work with JJ Prescott. We also asked workers in the survey who signed non-competes, if you went to court, what's the likelihood that your court-- that the court would enforce your non-compete agreement. That's the probability on the left axis here of this graph. On the x-axis is the level of enforceability.

On the far left, you've got states like California, North Dakota, Oklahoma. On the far right, you've got states like Florida and Connecticut that vigorously enforce them. And then I'm breaking this graph out here both by education, just to show you that it doesn't matter.

So what you see here is that, essentially, workers are totally uninformed about the law. In fact, in California and these non-enforcing states, workers still believe their non-competes are enforceable. And if they were informed about the law, there should be an upward-- these all should be upward sloping lines, but they're relatively flat, and in fact, maybe even downward sloping.

So this prompted us to look into one potential reason why, and that's that workers can be reminded about non-competes. So if you're leaving your job, you get an alternative offer, your firm can say, hey, remember that contract you signed. We're going to call that a reminder.

We also asked about that in the survey, and to our surprise-- we couldn't believe this. But when you look at reminders, they happened about 50% of the time, but they're almost 25 percentage points more likely in states that don't even enforce non-competes. And so you have these firms in California who are more likely to remind workers of unenforceable contracts when they're departing than in states where they are actually enforceable.

So finally, I want to end here-- I may have one more slide after this-- looking at the whole suite of provisions. So non-competes are just maybe the tip of the iceberg-- maybe the most restrictive tip, but just the tip of the iceberg. So there's many other restrictions you can think of that are relevant. So here, just six of them-- you've got a nondisclosure agreement, a non-solicitation agreement of clients, non-solicitation of co-workers, you have a non-compete, an IP assignment agreement, which gives the firm ownership of any intellectual property you create on the job, and then you've also got arbitration agreements.

So in a survey of firms, we were able to ask the firms, do you use these provisions with some or with all of your workers, and I just want to show you the histogram of the use here. So these are-- this is the histogram looking at, does your firm use any or all of these provisions? And so what you can see is, bunching here at 5 and 6, those are the highest likelihood outcomes, which means that most firms here are using all of these provisions together.

It is not just non-competes. It's not just NDAs. They're bunching all of these practices together, and so I think I want to echo Orly's comments in the beginning-- to begin to expand our inquiry outside of just non-competes.

So let me close up here. So where do I think future work should go? I think we need to ask-- we need studies to estimate the causal effect of non-compete use. I think this is really challenging because, one, you need some longitudinal data, and second, you need some exogenous variation. And that's-- we haven't had that so far.

I think we need to reconcile some of the investment discrepancies in the literature that exists. I think we need to examine substitution across all of these various provisions and see if there is differential effects on investment, especially. It would help to have data on actual contracts to do that instead of relying on surveys, and more on product market effects, like Kurt suggested.

So let me just say where were they I think there is consensus. So I think there is consensus on the fact that non-competes are widespread and in jobs where they're totally unwarranted. The fact that 53% of them are paid hourly and that they can be implemented in less than transparent ways-- those are very concerning on their own right. I think there's agreement that banning non-competes raises wages and mobility for even technical workers, and that there's evidence of negative spillovers. And this, in some sense, challenges the freedom to contract and investment arguments on their own.

Finally, CNCs are prevalent and effective in states where they are entirely unenforceable, and so because they're unenforceable, they can serve very little investment purposes. And I think that, once you realize that it raises-- the fact that they're so prevalent in non-enforcing states should raise some concern about the validity of the investment arguments in states where they are actually enforceable. So I think I will end on that point. Thank you.

JOHN MCADAMS: Thank you, Evan. Next up, we have Ryan Williams.

RYAN WILLIAMS: Thank you to the organizers for the invitation. I appreciate coming out here. I'll try to keep things quick given-- uh-oh-- given that we all had lunch and all that other good stuff. So speaking of lunch, I had a really awesome sandwich, and given that Jimmy John's has been the whipping boy today, I found myself wanting to ask the workers about non-compete contracts. Even living in Arizona, my Spanish was not quite up to snuff for such a joke, so I had to skip that.

As Kirk mentioned, I get to be Professor Happy here and say some good things about non-compete contracts. So we're looking at CEOs here, so specifically, non-compete contracts for executives. And we do have some of the data that Evan highlighted, so hopefully, we-- it's a starting point for researchers.

So if I look at this from the company's point of view, I have a bunch of assets. I have factories. I have machines. I have forklifts, and I have [INAUDIBLE] pulleys.

My human capital assets are unique in that, in our legal system, I'm not allowed to own human capital. I can own every other form of capital except for human capital. As a retired college baseball player, I'd also like to say there's this weird social loophole for athletes. They can be bought and sold, apparently with no problem. I like to joke with attorneys that they wish they could trade one partner for two principles at another firm just to terrify their staff and associate to be named later, some of these other things.

So it is-- there is this one weird situation where you can buy and sell humans, sports, but otherwise, you can't do it. And so companies obviously want to control these assets somehow, and we look at non-competes as a way for them to not own, but in some way control top talent within the boundaries of the firm. So again, the way we're looking at this problem is a little bit different than what we've seen today.

We're not talking about low level workers. We're talking about CEOs, who presumably, a lot of times, they have their own legal representation in these contracts. So we're kind of evening out, in a sense, the bargaining power that you don't get with regular employees in our study.

So we look at three things basically they're all related. So where do non-compete contracts come from in these settings? So as Evan mentioned, some CEOs and firms have them. Some CEOs and firms don't, so we try to explain who has them and who don't.

There's this puzzle in finance that's been around for a while that shows that CEOs don't get fired for poor performance as often as theory would predict they do. And so we look at non-competes in that context and hope to solve-- not solve, but partially solve that puzzle. And then we look at what happens after these things are signed. So what do CEOs do, and what do firms do after they sign these non-competes contracts?

So again, as I mentioned, my tone is going to be mostly positive because we're talking about CEOs and not sandwich workers, but it does seem like there is some rational bargaining going on here between the CEO and the firm. So I'll give some details in a minute, but as a company, as my predation risks go up, as I worry more about competitors poaching my talent, they're more likely to insist on these things. And then as me, as the CEO, as my perceived job risk goes up, I'm less likely to agree to one. So if the company is riskier, if the industry is riskier, then I'm going to push back harder not to sign one of these things. So again, a rational story here between both players, and again, this is because there is a bargaining game here, unlike some of the worker level studies that we've seen today.

The other thing you see is that, when there's a non-compete in place, the firm is more likely to fire a CEO for bad performance. So you-- as I mentioned, there's this weird puzzle that's been around for decades in finance, that CEOs don't seem to get fired often enough for poor performance. What seems to be going on is, even if they're not that great as a CEO, if you fire them, and they run with all your trade secrets to the competitor, then you're worse off. So there's more leash when there's not a non-compete.

There's a lot of states where non-competes are enforceable even if you're fired, and that's where we tend to find this effect. So it does seem to make them more accountable for performance when they have a non-compete in place, and then after the fact, as mentioned earlier-- so the CEOs understand that this increases their job risk. They're losing something by signing a non-compete, so they get more compensation as a tradeoff for this job risk. And I'll talk very quickly about our empirical identification for my econometrics nerds out there, but I'm not going to spend a lot of time on it today.

And so the firm does give them higher compensation, but remember that, as a CEO, I can do things to make the firm less risky, so things that may not be in my shareholders' best interests. So I can cut back on R&D spending. That's probably not a great thing for the firm, but it makes my job safer.

So the firm responds with compensation in a form of equity base pay that does encourage these guys and gals not to screw around with the risk levels of the firm. So overall, between executives in the firm, what we find seems to be a relatively positive story, that there is bargaining going on before the contract is signed. And then after the contract gets signed, the CEO gets compensated for this risk, and the firm compensates them in a way that makes them make good decisions, in a sense.

So we actually-- to Evan's point, in our study, we do use the state level data on enforceability that I'll talk about in a second. But we actually also had an army of research assistants go out for 1,5000 publicly traded companies over 22 years, read every one of these contracts, and build a database. This took about two years, and I just want to flash a couple up here. So we have individual contract level data for the 1,500 largest companies in the US, publicly traded, and give you an idea of what the courts look at when they decide the enforceability of these things.

So this was DirecTV's, I think, 2010 non-compete agreement with their CEO. So this was for two years, which is, you tend to see between one to three here, and it very, very specifically says what companies they can't go to. So they're basically saying, you can't go to any sort of a multi-channel video company.

The other thing I wanted to point out-- it's kind of funny. This is in California. I'll have a little bit to say on California as well. And if you notice down here in the last paragraph, this is written under New York law.

So you tend to see about 20% or 30% of these are written under the state law of the state that they're not in. If they got sued in California, tough luck. California court's just won't-- they don't care what state you put on the contract. If the lawsuit happens in California, California courts will enforce California law. So you do tend to see, in about a third-- less than a third of our sample, that the state of the legal regime is different from the physical location of the headquarters.

And then another one, just a flash-- this was for PetSmart, and I like this one because, if you look and see who they're not allowed to go to, it's basically Petco. So for my pet owners in here, it says you can't go to a pet food story that has 10,000 square feet of retail space. In the US, that's Petco, so they're basically saying Petco without saying Petco in the contract. And this one was for one year.

So again, we collected data. I think we have, in whole, about 17,000 CEO contract years in the sample, and that's about half, because about half of these men and women do not have official employment contracts at all. So again, I mentioned we collected this for 22 years for 1,500 companies. They have to put these in SEC filings, so we did have an army of RAs go through and read these.

And again, about half of these companies don't use contracts at all with their CEOs, so kind of a surprise. There's implicit contracting going on, not explicit contracting. Out of the half we find the contracts for, about 60% of the CEOs have non-compete clauses in their contracts.

So again, just very quickly on the empirical stuff, so we have all sorts of control variables that mostly are interested in the job risk of the CEO and the product market [INAUDIBLE] risk for the firm. And as the job risk goes up, CEOs less likely to sign these, and as the firm's product market risks go up, they're more likely to insist on them. Then we go in, and what we're going to do-- so Evan spent a lot of time talking about use versus enforcement, and since we have data for both, we have time series variation in the state's enforceability as well as cross-sectional and time series variation in the firms with contracts. So CEOs within the firm go from not having a non-compete to having a non-compete, and it's rare, but also the other direction. They go from having one to not having one, especially later in their career.

So we piggybacked on a great study by Garmaise, and we have a discrete index that goes from 0 to 14 on how enforceable non-competes are in that state, and these are just a sample of some of the questions. So does the state have a law about non-competes, is the first one, yes or no. Basically, who has the burden of proof in court? So sometimes, it's the company that has to prove damages, and other times, it's the employee that has to prove damages. If it's the company, then they're less enforceable.

And then this-- there's one in here called Blue Pencil that's a really fun one. So it's already mentioned today, but basically it's, if there's one line in the contract that violates state law, in some states the entire contract gets tossed. In other states, the judge can go in and what's called Blue Pencil-- sometimes, you see Purple Pencil as well. It's kind of a hybrid between the two. The judge can go in and change the one offending item.

So my favorite example, and this is in our-- the state is in our data actually. But there was one state where the contract just said, you can't compete for 12, period, onto the next sentence. And so two weeks later, the employee was working for another company. They sued each other, and the employee got to court and said, oh, I thought it was 12 days.

And the judge said, clearly, they meant 12 months and basically took his blue pencil and wrote "months" into the contract, so where you don't have to toss the entire contract for a typo. We're human beings. We screw up. There's no such thing as a perfect contract, so that also factors into this questionnaire.

So again, we piggybacked-- Garmaise had done this up to, I think, 2008. And then Russell Beck, who's in the audience, was kind enough to share his year by year survey for the rest of the year so that we were able to extend Garmaise's enforceability index out into the end of our sample period. So this is a little bit of a busy slide, but it basically shows, for each state, what that score was. This is in our paper, so I won't spent some time on it.

But you also have, up here, column 4, whether or not these things are enforceable if you get fired or not, which is kind of important for our study. And you see that, in a lot of states, they are. A lot of states, it's not come before a judge, and so all my attorneys in the crowd, these are the states to go sue somebody in because you can set precedent.

And then again, just to piggyback on something, I did want to say something about California here. So this is-- the index goes up left to right, and then we've got our states plotted up here. So you can see that, even for the CEOs with contracts, about 40% of them in California have signed a non-compete.

And so just to play devil's advocate to a lot of the discussion that's been going on today about California, which is these-- the companies are being mean to their employees and threatening them with non-competes even when they're not enforceable. That may be true at the worker level, but the CEOs and the firms are not stupid. So if it's going on in California with the CEOs, then they're clearly making some sort of rational choice here, and it's not because the CEOs and the firms are dumb or they're feeling threatened or something.

In my litigation consulting work, I've done some evaluation of these non-competes for California firms, and what seems to be going on is, as long as they abide by them, and they don't-- there's no lawsuit, then they can use the cost of the non-compete agreement-- remember, it costs the CEO something to sign these. They can't go work for another competitor. They can use the economic value of that cost to offset their severance package for tax purposes. So if there's no IRS people in the room, there is no federal law, which is part of what today is meant to discuss.

But it seems like, at the federal level, since there is no overarching federal non-compete law, they're using it to offset income taxes, basically, for these non-competes in California. So again, just to provide a little bit of a different tint here, because for executives, it's pretty unlikely that they don't know what they're signing. At least 40% of the largest firms in the US and California-- I think that's kind of a tougher one to swallow.

So again, this is the time series variation. I think it was-- Illinois, down at the bottom, was the one with the 12 months that the employee said 12 days. And again, from 2008 onward, this data came from Russell Beck, so thank you. I'm really indebted to him.

So again, basically, I have, again, a largely positive story when we talk about these things for executives, because here, unlike the employees, where I think there is a strong argument that the bargaining power is heavily in favor of the firm with the employee level things, for CEOs, this is equalized a little bit. They seem to know what they're signing. As their job risk goes up, they're less likely to sign these things, and as the firm's product market risks go up, they're more likely to insist on them. It seems to improve the turnover performance sensitivity, so the CEOs are more likely to get fired for bad performance when there's a non-compete in place. So it seems to, in that sense, benefit shareholders.

CEOs seem like they understand this job risk. They demand higher compensation. The board gives them higher compensation, but it's highly incentive based pay to keep the CEOs from messing around with the firm's risk as well. So at least for the CEO executive side, it seems to be more of a rational bargaining game than what we're seeing the evidence at the employee level here today, and again, we do have contract level data.

So hopefully it's a step in some of Evan's calls to future research, in that we have contract level data. We have longitudinal time series panels to where we can use some of these staggered shocks and things to get better identification and make more causal arguments than we've gotten in the past. So I'll finish early, so we have some time for questions. That's all I got.

JOHN MCADAMS: Great. Thank you, Ryan. So we have time now, about half an hour, for questions. If there are any questions from the audience, we can take those. Dave, you want to go ahead?

AUDIENCE: So on the last point-- so we observed, in California-- we observed non-competes, and we suspect that they're supposed to serve the same function, as in businesses where they're unenforceable, people don't know they're unenforceable. But if your story is that, for CEOs, everybody knows the score, then why would you ever see one?

RYAN WILLIAMS: So I mean, that question is-- come to mind, we don't have any data on that. But having spoken to other valuation people out in California, one potential story-- again, in case there's any IRS people in the room, one potential story is that there is an economic cost of these, and as a financial valuation guy, I can value that. So I look at what my salary would be without a non-compete, I look at what it's going to cost me in terms of lost salary in the future to have that non-compete, and I can put a price on what that is worth, or what it cost me.

And so when they get fired or leave or whatever, and they get a big severance payout, they can apply the cost of that non-compete against the severance and reduce their taxable income to the IRS. So that seems-- and as long as they don't go to court, and I just go sit on the sidelines for six months or whatever, then there's no-- I mean, you have to sue somebody to end up in front of a judge to get it tossed. That discussion was happening all morning, that the lower level employees don't know, or don't have the resources to take this to court.

AUDIENCE: Can I ask one follow-up?

RYAN WILLIAMS: Yeah.

AUDIENCE: If that's the case, that the only reason why fully sophisticated have them was for this tax reason--

RYAN WILLIAMS: Yeah, I don't know that that's the only reason.

AUDIENCE: But if that is the reason, that would have the implication that you could look and see if they are confined to people for whom that tax deduction is available. I assume it's not for every worker in the company. So you can see whether you take the set of people for whom it's true, that if this-- that you deduct this cost and see if the non-competes are confined to find them among the sophisticates or not, and then that would inform that story.

RYAN WILLIAMS: Yeah, so there's definitely a positive relation between the existence of a severance package and a non-compete, but I can't say that that's causal. So it could just be that those are the people more likely to have all this-- I mean, as Evans said, when you look at these contracts, they tend to just have the kitchen sink thrown in. So I don't know that the non-compete is causally affected by the severance, but-- or that they just put all that stuff in the contract. But definitely, there is a positive relation between the existence of a severance agreement and the existence of a non-compete clause for CEOs at least, so consistent with what your idea was.

JOHN MCADAMS: So do we have any idea why states like California don't just ban non-competes rather than making them unenforceable?

RYAN WILLIAMS: Yeah, so in-- one thing I kind of skipped over is that, in the states, there's some states don't have non-competes because there was a court decision. That's most of them. But about a third of them, the legislative body in the state has passed a law.

So Georgia is one in our study where it was actually a legislative decision and not a court decision, but as mentioned, it's kind of a patchwork at the state level. So some are court, some are legislated, and it's frustrating for everybody here. But as an empirical researcher, I love this patchwork because it gives me clean identification through the studies.

EVAN STARR: Can I jump on there, John? So I think that the California law was adopted in 1872, and it's-- I think that, in many situations, there aren't penalties written into most of these laws for banning non-competes. That's a relatively recent phenomenon. I think most people thought that making it voidable would do most of the work, and so I think, that as we uncover more evidence that-- about how even unenforceable contracts affect worker behavior, I think we're going to see more attempts to deter firms from using purely unenforceable provisions. But I think it's a relatively recent phenomenon.

JOHN MCADAMS: And here's a more technical question from the audience. So for studies that use variation in state enforceability for identification, are we worried that there's sort of-- not no first stage effect on use, but sort of a somewhat attenuated first stage effect on use?

RYAN WILLIAMS: So just in ours, when we-- the first thing we do is try to predict whether-- or when-- what situation do you see a non-compete or not. And definitely, the enforceability plays a role in whether you're going to see the non-compete or not. So the states where they're enforcable-- and I had the graph up. So states where they're enforceable, you definitely see, on average, more non-competes at the CEO level.

What we did is, since we had data on the contracts, is we interacted, in a sense, enforcement times use. And the technical side, we put in firm fixed effects, so that within a firm, when it goes from a 0 to a 1, in a sense-- non-compete to not having a non-compete-- we can look at the effect within the firm of the change of non-compete status, change in enforceability, on things like the turnover performance relation or salaries or these sorts of things. So again, it's not perfect identification, but hopefully, it's getting towards what Evan was demanding in his presentation.

RYAN NUNN: I think the premise of the question, though, is well taken when it comes to the bulk of workers for whom we're just starting to get this evidence. Evan talked about that. The beliefs are not really associated with the actual regime at the state level, and as tied away as we might worry.

But it does make me think of what exactly are we thinking of as the first stage here? Is it the use of non-competes, or is it worker beliefs about non-competes? And maybe there's a different answer depending on that.

EVAN STARR: I would say it is concerning to me, John. It's a great question that-- the first time I saw there wasn't a super high correlation, at least in some of my data sets, about the use of non-competes enforceability, it raised red flags. And I do think that it's possible that a non-compete in California versus a non-compete in Florida could have differential effects. I think it certainly concerns me, and I would say, at this point, I don't think we have a great understanding of why non-competes are so common in states where they're entirely unenforceable and have been so for a long time.

KURT LAVETTI: I guess I would add, this is somewhat of an interpretation question. If you think about the fact that policymakers, the lever that they have is enforceability. To some extent, it's less of a concern exactly who has a non-compete and who doesn't if what you know is the aggregate effect is x. That's the lever you have to work with. So it could be that changing enforceability changes the share of the workforce that's bound by a non-compete agreement, and these complicated changes in composition and changes in the size of an effect translate into some aggregate dimension.

But ultimately, as a policymaker, what you might care about is just the overall outcome. I would also add that, because of the evidence in many studies of externalities, it doesn't necessarily matter what the size of the first stage is because you can't take an intent to treat estimate and scale it by the fraction of workers who are bound by non-compete agreements to recover a treatment on the treated when they're externalities. Their spillover effects on the unaffected people. So that information, while it's useful, is secondary, I think, in this case.

JOHN MCADAMS: So, Evan, you mentioned heterogeneity, and I know state policy variation's hard to come by in this context. But do we know anything about the components that go into these enforceability indexes, like how different levers might have different effects?

EVAN STARR: So I mean, I think Ryan did a pretty good job describing several of the pieces that go into these overall indices. And I'm not sure it's worth running through all 14 components that Brian Malsberger covers in his book. But basically, the way these are constructed are based on this enormous tome by Brian Malsberger, which is updated every year, on every single state policy on several dimensions.

And basically, we have people read these books, and they calculate some index for all of these different components, and then they weight them and add them up together. And that's how you're getting these overall scores. And I do think that, in about 10 years, after several of these states have passed new laws, like Massachusetts and Illinois and Washington, in five, six, seven, eight years, we can do studies looking at the long term effects of those, and that's going to be a much more clean on/off switch than these kind of policies that we've studied in the past.

RYAN NUNN: Let me just put a plug in for-- Evan didn't mention he has a somewhat more sophisticated way to provide relative weights to those components, which I think is a nice-- using confirmatory factor analysis and letting the data speak as to which dimensions of enforceability are most important.

EVAN STARR: Yeah. Yeah, and I think that the conceptual point is that, suppose you're interested in, for example, the firing dimension. You want to know-- Willis did enforce a non-compete even if the worker's fired from their job. But suppose that rarely ever happens. Suppose that happens less than 1% of the time. Then if a state changes their policy, there's not much of an effective change, and so that's the argument for wanting to weight these various dimensions.

JOHN MCADAMS: So I think we've heard two series as to why we might see relatively high incidences of non-competes in states that don't enforce them. Are there any other theories you've heard or evidence you've seen? The two theories being there's some sort of tax benefit, and it might be a low cost way for employers to dissuade workers from leaving.

RYAN NUNN: The other explanation I've heard is that firms that have operations across many states are just not trying to deploy contracts that are specialized to the conditions in a given state.

KURT LAVETTI: I guess I would add, we found that about 30% of doctors in California have non-competes. These are non hospital owned primary care doctors that typically don't span state borders, so they're common even within established-- within state establishments.

RYAN WILLIAMS: Again, just to add to Ryan's point, I'd shown the DirecTV example, where they were headquartered in California, but the contract it was written under New York law. What you see sometimes, is even if I'm in California, I write the contract under the law of the state where my competitor is headquartered, and so if they go to work for the competitor, I can sue them in that state's court, which is where the contract is written. So again, this kind of patchwork of state laws is a bit of a mess.

From a legal perspective is, there's some shopping for the jurisdiction, and again, this is at the CEO level. It's unlikely I'm going to go chase down my Jimmy John's worker in Texas, but you-- there is some strategic choice of contract based on where the competitor is likely to be as well. So I think there's-- to Ryan's point, when you have a national or international firm, does it really matter if your headquarters are in California if your competitor's not?

JOHN MCADAMS: And I know some of you have touched on this already, but what types of policy responses do you think the current economic evidence supports? So a broad based ban, a targeted ban towards certain occupations or income levels, some sort of disclosure requirement, a garden leaf provision-- that sort of thing?

EVAN STARR: I'll start. So for me, I think the low wage story is relatively compelling. I haven't heard anyone really offer a great reason why minimum wage workers, or even those making the median income, should be bound by these things. Maybe there are some specific occupations you can think of, but I haven't heard great arguments. I think there's broad based agreement on that.

The other arguments-- the other one that I think there's broad based agreement on is the need for transparency and-- especially in contracting. I think there's a-- so I think both of those are uncontroversial. The question is, how high up the ladder do you go if you're going to ban these things?

And I think there, you get into questions like, maybe you're OK with executives signing non-competes. I'm totally OK with that. But if you look at the study of tech workers, and you see that their wages don't respond, maybe that suggests that the threshold should be relatively high. So I think that there are some questions here that-- about exactly what that level is and how exactly to pitch it that need to be resolved in a way that attempts to be not totally arbitrary.

So Russell Beck and I have talked about maybe using FLSA and non-exempt status, other ways to tie it to existing law. I think that the evidence does support a ban for some occupations, low wage occupations. I think that evidence is pretty strong. We do see more evidence on outcomes, on various prices and another outcomes, but I think the evidence, at least for the worker side, is pretty strong at this point.

RYAN NUNN: I agree with Evan and would add just that I think on the modification of overbroad non-compete contracts by courts that we do want to avoid the situation where it's not that employers have a typo in their contract, it's that they've intentionally written an overbroad contract to have the chilling effect of that, knowing that in the event that it does go to litigation, they'll be able to rewrite the contract. And so that seems like a relatively easy thing to modify.

EVAN STARR: Can I amend my testimony briefly? The thing that most concerns me is really not what happens in the or are not what happens to executives. It's all of the workers who are chilled by these provisions in the first place. Especially ones that wouldn't hold sway in court at all.

And so from a policy perspective, I think the question is how do you deter the use of these provisions in the first place? And I think that is a place where we don't have a lot of answers. Because if you hold them unenforceable like we do in California, we see that that didn't really do very much. And we can debate about the executives at another time.

And so if the goal is to reduce the use of non-competes, then you need to think about either offering some carrots to employers. You need to think about maybe requiring the employers to pay workers during the prohibition period, or otherwise known as garden leave. Or you try to catch them and you find them.

Another approach, which I think is really interesting, is just to provide information. Just a few years ago, Amazon was caught using a non-compete with hourly temporary workers. It came out in the news. Within a day they dropped the non-compete. Cushman and Wakefield was involved in litigation, I think it was last year-- where's Erik, somewhere here-- and with a janitorial supervisor. And the janitorial supervisor was making $18 an hour. It wasn't a pure non-compete. It was a contract that said she couldn't work at a particular location that she had worked at before.

That got some press and they dropped it immediately. And so somehow the provision of this information appears to be enough, in some cases, to get these firms to drop these lawsuits and knock its entirely. And so I think that if there was a more sustained effort to gather evidence, to require firms to report, and to post it publicly, I think that could go a long way on its own.

RYAN WILLIAMS: Yeah, just to jump in as well. I think there-- even in mine, right, I've made a big emphasis on bargaining power. And I think that's really kind of the key. Where do you draw the line? I think that's always a sticky-- it's kind of a national minimum wage. It's mean something very different in rural Nebraska than it does in New York City.

The tech worker thing is interesting to me, as well, because the R&D has a longer term lifecycle, I'd say, in the sense. And if you talk to people in Massachusetts that have been in this game for a long time, there is a perception-- because until the early '90s, Massachusetts was the tech hub of the US, right? And so there's this perception that California used the unenforceability of non-competes to suck the tech talent out of Massachusetts out to California and create the tech boom.

And they're kind of giggling and pointing now when you see things like Uber steal the guy at Google who is doing the self-driving car technology, and there is not a darn thing that Google could do about it since they're all headquartered in California. I mean, so now as these tech startups are becoming more mature companies 20, 30 years down the road, you're starting to see that those companies have different incentives now than they had when they were startup companies and poaching talent. Now they're getting their talent poached and they're singing a very different tune than they were 20 or 30 years ago.

So Evan did mention 10 years from now going back and looking at things. I'd be curious to see the tech workers stuff looked at again, now that California's become giant firms instead of startups. So I'm just curious. You get a very different perspective when you speak to employment attorneys in Boston, for example, that have done this for 30 years.

AUDIENCE: If I could just say, it's not that there's not a darn thing that can be sued--

RYAN WILLIAMS: Yeah, yeah.

AUDIENCE: --they actually got a huge settlement and that guy was ousted and now he's criminally prosecuted.

RYAN WILLIAMS: Right. And so this-- and so that was-- that was a good point cause this morning in your presentation, the non-compete agreements are just one piece in this patchwork of trade secret laws and involuntary disclosure laws. And you have other weapons in the arsenal, even if the non-compete is not enforceable. So I think that you made that point this morning. That's an excellent point. Yeah, absolutely.

JOHN MCADAMS: So is there any empirical evidence or data on how often employers take legal action to enforce non-competes? Understanding that they might have a chilling effect even if they are enforced in the courts.

EVAN STARR: I think if you look at the data, there's about-- where's Russell? Correct me if I'm wrong-- about 1,500 non-compete lawsuits a year.

AUDIENCE: I don't remember the number but it has leveled off.

EVAN STARR: Yeah, it's level. But I think it's more than-- it's like 1500 reported cases in a year. But I think that-- and I'm not an attorney who litigates these things. But from my conversations, I think that those case-- that's just the tip of the iceberg in terms of what you mean by enforcement. That's kind of the final stage. But if you think about firms sending threatening letters, that's-- from what I've heard, 90% of the time that just-- that stops it right there. So that's kind of the most common and formal enforcement mechanism.

JOHN MCADAMS: And I have one last question. So if I hypothetically speaking you were tasked with designing a study to understand the effects of non-competes and you had the resources of the FTC behind you, what do you think would be sort of the data or information you think would be most useful to acquire?

RYAN NUNN: First thing I'd love to be able to do is go back in time and ask workers 10, 20, 30 years ago how likely they were to have non-competes. Sadly, we don't have that.

EVAN STARR: There's so many things.

KURT LAVETTI: You've written a lot of papers on this.

EVAN STARR: Yeah. I mean, I think-- so the key issue-- so I think there's a few low hanging fruits. One is that the FTC could gather data and just report the data. Whether you're going to report the firm name alongside, I'm not sure of the legal issues. Firms may be unwilling to share that information with you if they know their name's going to come along with it. And so I think those are issues that-- but I think that the FTC could begin collecting this data on a longitudinal basis.

I do think that, hopefully, the Bureau of Labor Statistics is, I think, added a question to one of their longitudinal surveys and should have more data forthcoming. But the FTC-- there's no reason the FTC couldn't also engage in that sort of practice. I think that the key would be to identify places where the use of non-competes becomes-- is random. And so you can identify the proper counterfactuals.

And so I think that that is-- I think it's going to be challenging to do. I don't have the best research design, because you don't control the firms and the CEOs. And you can't tell them to randomly deploy them at some branches and not other ones. You can't randomly tell them to use them as some workers and not other workers. And so it's a really tricky question. A shot in the dark, the FTC could form another branch and then randomly deploy them with some workers over there. See how it goes.

RYAN WILLIAMS: Yeah. I mean, just to echo that, I think just knowing what's going-- it goes back to disclosure calls all morning long is to make firms disclose what they're doing to the workers. It'd be great if they disclosed it to researchers, as well, right? That was a really pain in the neck to spend those two years just getting the CEO contracts.

I couldn't imagine the workload involved to get it at the employee level for all of these companies, right? I mean, I think it would have to be something that they report to maybe the Bureau of Labor Statistics, or something, which sounds like it's going on.

EVAN STARR: And let me just-- the challenge is even if the FTC did collect all the data, all right, so you know which firms using non-competes, which ones aren't for which types of workers there, which ones there, the key issue is maybe there are other differences outside of the non-compete that are going to cause wages to be different, that are going to cause innovative outcomes to be different. And so it's not clear you're going to be able to overcome any of those challenges with just purely observational data.

And so you're going to need-- you might need something else, maybe a natural experiment or something, to take advantage of. So I'm not-- maybe there's examples of firms who are dropping them randomly that you could exploit. But it is not an easy task.

KURT LAVETTI: I was moving in the same direction as Evan. I think for all the discussion of how prevalent these are in labor markets, if we think of non-competes as this costless thing that firms can tack onto any contract, it should be surprising that not all firms use them. The majority of firms still don't use them.

And I like to think, as a labor economist, that although labor markets are very frictional and there are lots of information, asymmetries, and gaps in this market, there's still a market here. And that some of the firms that are not using non-compete agreements and some of the workers that are not bound to them are sorting into those jobs by choice. And so there's something taming the market. And without a study that can accommodate the sort of sorting on preferences, for example, that is really difficult to address all of these confounding factors. I think to do it appropriately would probably have to randomize at the worker level rather than at the firm level to get around some of those issues.

EVAN STARR: The SEC has been known to do this just randomly, short selling bans on random firms so we can do experiments in academia. So these guys-- you guys could do the same thing.

RYAN NUNN: If I could just add a real quick research question that we haven't discussed that kind of concerns me that I'd love to know more about. It's-- what's the substitution on the employer side between non-competes and other restrictive covenants, and illegal employer collusion? I mean, I worry in places where non-compete certain are not use-- they're not enforceable that they might go that route. And I just-- I don't think there's much evidence here.

AUDIENCE: Can I just jump in on that? It's not only those substitutions, but also because of the carrots we tend to [INAUDIBLE].

JOHN MCADAMS: Is there any international evidence on non-competes?

EVAN STARR: I think the answer is yes. I don't know how high quality evidence it is, though, so I-- yeah, I would be-- I mean, there's one study I'm aware of which looks at enforceability across countries and finds reduced entry of firms. But I think that there's not much international evidence at this point.

RYAN WILLIAMS: We were trading emails a couple weeks ago and apparently they have them in France, which surprised both of us. So I was stuck there for the strikes recently and we were talking about French non-compete contracts. They have them, which is surprising, given their employment laws.

JOHN MCADAMS: So my questions are exhausted. If there are any more, we have three minutes.

AUDIENCE: Are there any-- so CEOs might be the ones for whom those sort of efficiency [INAUDIBLE] would be strongest, that they'll take all their [INAUDIBLE] with them. Are there-- is there any similar evidence-- probably not-- [INAUDIBLE] of people who are like high enough that you would think they would be sophisticated enough to noe be easily pushed around, but don't have a high insurgent or something like that? They get paid a fortune because they're graded [INAUDIBLE], or whatever. But they don't know anything that is-- that would-- because that would matter. Because if they really are confined to the people even at the high end, to people for whom one of these sufficient justifications seems to attach, then that would make me really say, all right, unless you have a great inten-- if you observe these where there's not a great efficiency story, you should think there are [INAUDIBLE]. Is that question clear?

RYAN WILLIAMS: Yeah, I think so.

AUDIENCE: [INAUDIBLE] who don't have we don't have that kind of efficiency [INAUDIBLE].

RYAN WILLIAMS: Yeah. Yeah. I mean, again, our study was only on CEOs. But you definitely see that when there's a lot of intellectual property and these sorts of things they're more likely. And, specifically, if sort on industry, you get some weird industry outliers where you wouldn't expect to see non-competes. But one thing that comes up in industries is these industries where there's a lot of processes that are non-patentable-- so, for example, I can't patent algorithms or computer code and things-- you tend to see the non-competes more in those industries.

So if I can patent this thing, it doesn't really matter if they walk away or not. They can't use my patent. But if the intellectual property is up here and I don't have any legal claims to that, I try to exercise that if I can through a non-competes. Is that kind of what you're going after me?

EVAN STARR: I mean, I think so. In my paper of low-wage workers with Mike Lipsitz, we do look at managers. And we find that after you ban non-competes the wages go up the most for managers. And so now these are hourly paid managers. And so maybe they're not the VP or whatever level you're thinking of.

But the fact that wages rise when you ban non-competes from managers suggests that, even that high up, they were being hurt by these provisions. That it wasn't the kind of executives that Ryan's looking at.

JOHN MCADAMS: So does the existence or prevalence of arbitration clauses impact data availability and outcomes?

EVAN STARR: Well, I don't know if we--

RYAN WILLIAMS: I don't know actually.

[LAUGHTER]

EVAN STARR: I think we're just beginning to learn about these arbitration agreements, as well. I mean, I think that-- what was the most recent evidence? Something like over 50% of firms are using arbitration agreements? I mean, our study, Ryan and mine, I think we find that firms are bundling arbitration agreements with these other contracts. And so, certainly, I think they're often found together.

And I think we should probably all talk about class action waivers, as well. And I think a large concern with low-wage workers, if you think about the whole bundle, is that workers have signed away their right to be part of a class and they've agreed to arbitrate.

And so it makes it really hard for them to get legal counsel if they experience some wrongdoing in the workplace, whether it's a non-compete or wage theft or something else.

KURT LAVETTI: Building on a comment that Orly made and that others have touched on with respect to these other contractual restrictions, I think it's worth thinking about, and I don't think we know empirically any answers about this yet, of like what the substitution patterns would be if non-competes were banned in a specific occupation. Are there substitute provisions that would likely be used?

And those might not be the types of provisions that are on your list. So, for example, there's a paper by Jim Rebitzer and Lowell Taylor that argues that the reason why we see law practices use these sort of up or out style structure and promotion to partner is because the legal profession bars the use of non-compete agreements. And that's sort of a second or third best actually way of rewarding the people who stick around, sort of back-loading compensation because they can't use non-compete agreements.

So there are substitution patterns that are not just these restrictive covenants within contracts but might affect the entire organizational practice of firms. And I don't think we know enough about what the substitution patterns will look like.

JOHN MCADAMS: And I think we have time for one more question. So do any states have penalties for signing non-competes?

EVAN STARR: I think also in Oregon's 2008 law, they mandate that the worker would pay 50% of their-- well, it's going to be that the greater of your-- 50% of your salary or your annual salary or the median income for a household of four during the prohibition period. And so you can think of that as a penalty that the firm would have to pay. Enforcement of that, I'm not sure-- I haven't seen evidence of how often firms abide or don't abide by that. But that's one evidence of a penalty.

And I think there-- Illinois didn't pass them, right? Yeah.

AUDIENCE: I think the new Washington state law does and puts penalties for illegal use.

EVAN STARR: Yeah.

AUDIENCE: So use now barred by the new law.

EVAN STARR: That's right. Yeah. So Washington does allow some penalty. Does Massachusetts, too?

AUDIENCE: No, but Maine does.

EVAN STARR: Maine does. OK. Yeah. I'm so glad you guys were here.

[LAUGHTER]

JOHN MCADAMS: Well, I think we're out of time. I just want to say thank you again to our wonderful panel. We're going to break until 2:45, after which we'll hear from--

AUDIENCE: [INAUDIBLE]

JOHN MCADAMS: Oh, there's one more question. Sorry.

AUDIENCE: That was my question, but if you read the next line where I was talking about garden leave. So I'm from Massachusetts. And so my question was, if there's no penalties for unenforceable-- so for example, I applied for a non-exempt job this summer and there was no garden leave, first of all, I'm supposed to be exempt altogether. No garden leave, two years, 100 miles.

And when I tried to negotiate I was told, best of luck, when it should have been exempt altogether. Two other jobs, same thing. I was supposed to be inside sales. They were calling me outside sales.

And then the third one was with a recruiter. And, basically, they told me, these recruiters said, we don't know anything about this new law. And we're surprised that we haven't been told anything about this new law.

And from talking with a lot of people, the 10 days is never followed. I've never heard of anyone who's had the 10 days notice. And I've worked in an industry that non-competes were very persuasive, used all the time because it was a [INAUDIBLE] say, a fierce competition.

So I can tell you that there's no teeth that long. And no one's following it. From my experience.

[LAUGHTER]

JOHN MCADAMS: Thank you for that. All right. We're going to break and reconvene at 2:45. Thanks.

[APPLAUSE]

NOAH PHILLIPS: OK. Good afternoon, everyone. It's great to be here. Today's workshop-- oh, sorry. I'm Noah Phillips. I'm the Commissioner here at the FTC.

Today's workshop is a great example of one of our agency's most important functions. And that is convening experts to inform policy-making about competition and consumer protection issues with an impact on the American economy.

It's great to see familiar faces. I think Orly-- oh, Orly Lobel is in the back now and Evan Starr, who presumably is somewhere here, and to learn from them and all of the rest of the incredible group that's been gathered here today. And with that in mind, thanks to Sarah and Bilal and the rest of the staff for putting together a really interesting day.

This workshop comes at a critical time. America has a labor mobility problem. Over the past several decades, American workers have been increasingly unlikely to move to new places, or start new jobs, or even to switch jobs in the same location. The New York Times' Sabrina Tavernise recently reported citing data from the Census Bureau that Americans are moving at the lowest rate since the government started keeping track.

And that's in the 1940s. It's not the '70s, the 1940s. In a world of declining transportation and communication costs, where moving ought to be easier, those are surprising and I think troubling results.

Labor mobility is good for the economy. It helps businesses by allowing labor to allocate itself more efficiently. As David Schleicher describes in his article, Stuck! it allows the federal economic policies that we choose, whatever they are, to work better.

And, critically, as we've heard today, labor mobility helps workers. Evidence shows that people get bigger raises when they switch jobs than when they stay where they are.

But labor mobility isn't just about leaving for the job you want tomorrow, it's about making the job that you have today better. AO Hirschman described three responses that employees can have to declining working conditions-- exit, voice, and loyalty. When you can exit a job, you have greater leverage to improve the terms of your employment. It is therefore unsurprising that scholars point to declining labor mobility as a culprit in slow wage growth.

The story of declining labor mobility is a very complex one. But the non-compete clauses that we're discussing today are, I believe, a part of it. As we at this agency well know, competition matters a great deal. And labor markets are no exception to that.

The more mobile workers are, the more firms effectively compete for their labor. Policies that favor labor mobility increase that competition and practices that inhibit it, including non-competes, reduce it and prevent work from getting where it needs to go.

Over the past several years, empirical research by Professor Starr, Professor Williams, and others has advanced our understanding of the prevalence and potential effects of non-compete clauses. We do not know if non-competes have been increasing in frequency. But they are certainly more ubiquitous than many of us thought.

And they appear in contexts where the traditional justifications for non-competes are not obvious, for example, some 12% of workers earning less than $40,000 a year, or seasonal Amazon warehouse workers. They also appear where they are not allowed or not enforced. And all of that concerns me.

At the same time, as we've heard today, non-competes can serve good purposes-- incentivising investment in workers and protecting trade secrets, worthy goals in our increasingly knowledge-based economy. Evidence on the effects of non-competes seems to tell both sides of the story, indicating harms to workers but also benefits in some contexts.

Today, federal and state legislators, Republican and Democrats alike, are grappling with how to address non-compete agreements. I was honored in October to testify before the House Subcommittee on Antitrust about competition in labor markets. And I focused on the role of non-competes. Above all, I hope today's workshop informs that policy-making process.

Do non-competes present a policy problem? If so, is law enforcement or changing the law the way to address it? Federal or state law? Are there grounds for blanket prohibition? Or how and where should the law demarcate legality and illegality or tip the scales through legal presumptions?

Would disclosure requirements increase the likelihood that workers share in the benefits that non-competes can foster? We've already heard some really interesting testimony bearing on some of these questions.

While legislators consider these questions, some stakeholders are pushing for the FTC itself to address non-competes through a rule-making. We heard some of those calls this morning.

We heard a little less, however, about the legal basis for doing so. This is a real issue that gives me-- someone who is concerned about non-competes-- pause and about which I want to learn more. To the extent the rule-making in question regards unfair methods of competition, how we proceed may implicate not only the law of non-compete clauses, but also more fundamental questions about the Constitution and its separation of powers.

The FTC has issued a competition rule just once in its history in the 1960s. That rule, which was never enforced and was withdrawn in the 1990s, prescribed conduct more or less barred by the Robinson-Patman Act. To reach non-competes, by contrast, we would have to rely on the competition role side for the first time solely on the FTC Act's prohibition of unfair methods of competition.

That broad language raises the specter of the nondelegation doctrine, which requires Congress to provide an intelligible principle to guide an agency to which it has delegated legislative discretion.

As Justice Gorsuch wrote in his recent dissent in Gundy vs. United States, enforcing the Constitution's separation of powers to prohibit unconstitutional delegations of legislative power is quote, "about respecting the people's sovereign choice to vest the legislative power in Congress alone. It's about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law."

Justice Gorsuch cited the Schechter Poultry case in which the Supreme Court struck down Congress' delegation under the National Industrial Recovery Act, the New Deal law that gave the president authority to approve-- wait for it-- codes of fair competition, almost the exact wording at issue here.

Justice Cardozo dubbed this "delegation running riot." In Schechter Poultry, the court explicitly distinguishes the NIRA from the FTC Act. But the key distinction that saved the FTC was its adjudicative process in which the Commission, acting as a quote, "quasi-judicial body" determines what are unfair methods of competition in particular instances upon evidence in light of particular competitive conditions via a process of formal complaint, fair notice, and hearing, and findings supported by evidence, all subject to judicial review.

That is different from rule-making. Nondelegation concerns may also be exacerbated by other factors here, including the lack of clarity in the rule-making authority, the traditional commitment of the issue to the states, the fact that neither the FTC nor any court has found non-competes to violate the FTC's Act's prohibition against unfair methods of competition, and the lack of a good historical precedent.

All of that concerns me, as well. And I hope to hear more. Today's proceedings, as I said earlier, have been great in general. And I look forward to hearing what the upcoming presenters have to say on all of these important questions as well as to reviewing comments that are submitted.

So, with all of that said, I do want to introduce our next speaker. Where is Aaron? Aaron Nielson. Aaron is a Professor at Brigham Young Law School, where he focuses on administrative law, civil procedure, federal courts, and antitrust. Before joining Brigham Young, Aaron was a partner at Kirkland & Ellis, where he remains of counsel. So, Aaron, thanks very much.

[APPLAUSE]

AARON NIELSON: All right. Do I have the clicker? All right.

AUDIENCE: [INAUDIBLE]

AARON NIELSON: While we're waiting for the clicker, I'll tell a story. Why not? I've got the room.

So when I was a brand new law student, their very first job I ever had was here at the Federal Trade Commission. I worked in the Office of Policy Planning. And I never thought the day would come when I would get to sit up here in this very formidable table.

So I'm glad to be here. I'm honored to be here. Thank you so much.

Well, how does this clicker work? Just--

AUDIENCE: [INAUDIBLE]

AARON NIELSON: OK. There we go. Awesome. All right. So here it is.

I came back, not in a capacity as an antitrust expert. But I'm here to speak about administrative law and, in particular, rule-making. So you've heard all day all sorts of substantive content about whether non-competes are good or bad, or when they're good, and when they're bad. All of that is not what I'm here to talk about.

I'm here to talk about the procedures that the FTC would use to do a rule-making. So this is for any type of rule-making. I am content neutral. I'm here as a strict proceduralist. So let's talk procedure.

With that, here's the basics. I wasn't sure what the screen would be. Maybe the bigger is better than the small here.

This is the steps you have to go through any agency to do a rule-making. Thankfully, at least in terms of simplicity, the FTC is a little bit different. The FTC, as an independent agency, does not have the same interface with the White House and OMB as some of the other agencies. But there's still a whole bunch of steps.

And we're going to talk about those steps today so you get a feel for what it would take to do a rule-making on non-competes. And it's actually fairly complicated. So let's start here.

One of the first things you need to know is what law authorizes rule-making. So you need to go and find the relevant statute. Now, not all agencies have rule-making power. Sometimes they have rule-making power for certain things and not for other things.

So a good threshold question you always want to know is, under what statute am I regulating? And do I have rule-making power? And, if so, subject to what conditions?

So I went back and said, well, what are the FTC's rule-making powers? Well, the FTC thankfully-- I'm not going to go through this entire thing. Thankfully, the FTC has a web page that says, here is our rule-making authority. And we'll kind of skim here to the parts that really matter for our purposes here.

And that is, in the original FTC Act, there was an authority to make rules. That's under Rule 6, or Section 6. And it's the authority to make rules.

And in the 1970s, there was a case that said that authority includes not just the power to make procedural rules for the agency, it also includes the power to make substantive rules. So that case in 1973, National Petroleum Refiners Association is one of the big cases in administrative law in general and a big case in particular for the Federal Trade Commission.

But here's where it gets a little bit more complicated. Following that case, the FTC, through some adventures in the 1970s that did not have a good political outcome in terms of the Hill, received a bunch of restrictions on the agency's power to make rules when it comes to consumer protection. And that's where we're going to talk a little bit first.

So I wasn't sure what it would be. The green is the regular rule-making. The yellow is going to be what's called "Magnuson-Moss rule-making." So here we go.

And I'm going to borrow a lot here from an article written by Jeff Lubbers. Jeff is an Administrative Law Professor at American. He knows as much about rule-making as anybody alive. And he has studied this issue at length. This was recently in an issue of The George Washington Law Review. And he went through all of the steps of Magnuson-Moss rule-making, or Mag-Moss rule-making for short.

So anyone who's thinking about how this works, I recommend go look at the article. It's really helpful. And it goes through empirically and shows all of the pieces.

Here's a whole bunch of steps the Magnuson-Moss requires, which are different from ordinary rule-making that are under the Administrative Procedure Act. And we're to spend a little bit of time going through the various steps of rule-making under Mag-Moss. So here we go.

Before you ever do anything with Mag-Moss, you will do an advanced notice of proposed rule-making. So we've got two future things. We have a rule-making. Before you get to the rule-making, you have a notice of proposed rule-making.

Before you get to the notice of proposed rule-making, you need an advance notice of proposed rule-making. And that is a notice of what you're going to do. You're put in the Federal Register. It's going to have a description of what you're trying to accomplish and why you're trying to accomplish it.

And then you send it over to the Senate. And it'll go to certain committees of the Senate. So they have to have a heads up. Before you do anything in the consumer protection space, you're letting the Senate know.

This is not typical. This is not how most agencies operate. It is how the FTC operates when it comes to consumer protection. So start doing your homework now, if that's the plan. Because you need to have a pretty good-- you need to see the end before you get started in ways that are not necessarily the same with other agencies.

Second, you need a detailed notice of proposed rule-making. All agencies under the APA do a notice of proposed rule-making. The FTC's requirements are particularly specific.

So you're going to say with particularity the text of the rule, including any alternatives which the Commission proposes to promulgate, and the reason for the proposed rule. So you need to not have just a general sense of what you might do, and then get comments, and then figure out what it is.

No, no, no, no, no. You need specificity, particularity, in what the proposal is going to be. Again, that means start doing your homework because you're not going to have the ability to necessarily change what you end up with. So you have to have the work done early and you'll see comprehensively.

Next, a preliminary regulatory analysis. Again, you're going to have to go through a concise statement of the need for and the objectives of the proposed rule, a description of any reasonable alternatives to the rule, and a preliminary analysis of the projected benefits and adverse costs or economic effects of the rule. So in other words, you're going to do cost-benefit analysis.

So there's a lot of economists in the building. This is the sort of thing that they do. But be ready for that because that's part of the Mag-Moss process.

Next, an oral hearing. This is very, very unusual. One of the things that I study is formal rule-making. It's called the Yeti of administrative law. That is what Justice Thomas called it because it's essentially disappeared from the administrative process.

Not so at the FTC. At the same time where most other agencies do not have to have oral cross-examination and hearings of that sort, the FTC, they re-added it to the FTC. So the FTC is different from most agencies in that respect, which means that if you're going to have one of these things, there will be a hearing.

And they'll have the experts and they'll testify. And the other side will have the opportunity to cross-examine, all in oral, all in person. Not just written comments. But it's an actual hearing process, complete with the cross-examination.

Next, and this is for the staff. You will have a staff report with a hearing officer. So the staff will do a detailed comprehensive report about what they've learned from the comments, and the hearing, recommending why they're going to do something, why they're not going to do something.

And then the hearing officer, which is going to be there when they have the cross-examination and what not, is going to write a detailed report about what is going on here, why they think regulation makes sense, and so on, and so on that's going to end up to the Commission.

So and you're going to have a publication, a Federal Register notice seeking comments, at least 60 days on the staff report, and the hearing officer's report, as well. There's more.

Next, communication with outside parties and commissioners. I thought this was very interesting. Notice of meetings with outside parties must be included on the FTC's weekly calendar. And quote, "a verbatim record or summary of any such meeting, or of any communication relating to any such meeting, shall be kept, made available to the public, and included in the rule-making record. Communications between officers, employees, and agents of the FTC with any investigative responsibility relating to any rule-making proceeding within the operating bureau of the Commission and commissioners or their personal staff must be made available to the public and included in the rule-making record."

So if the commissioners are involved in this process, make sure that that ends up in the administrative record. This is a close record type of proceeding. That is not the way a lot of rule-making works. A lot of rule-making, you have the public record. But if, say, one of the heads of the agencies is curious or wants to talk to staff and figure out what's going on, that doesn't end up necessarily in the record.

Not so with Mag-Moss. With Mag-Moss, that is going to be in the record. So if you're working from the staff, you're doing that, make sure all that information makes it into the record.

Why? Why do they have this? Well, this way-- I mean, just to go back for the theory, is you want to make sure-- you know, the theory is that what's coming out of the process isn't tainted by outside influences. Everybody knows who's saying what to whom. And it's going to based a lot of on the record that comes through the cross-examination and the hearing officer kind of process. It's a much more formal type process of regulation.

Then you will have a final regulatory analysis, which is similar to the preliminary regulatory analysis, but the final version of it. They'll go through with the statement of need, a description of any alternatives to the final rule that should be considered, an analysis of the projected benefits and costs, an explanation for the rule, and a summary of any significant issues raised by the comments.

So all of these things are going to go out into the record and it's going t take a lot of work to do it. But people will be able to look exactly at why the agency did this. Did they consider this? Did they consider that? Here's a comment. What's your response to all of the comments?

You'll have a statement of basis of the purpose of the rule. And then there's special provisions for judicial review that come under Magnuson-Moss, as well, including that the facts will be reviewed for substantial evidence, not ordinary arbitrary and capricious review.

So it's the heightened-- arguably heightened standard. We'll talk about whether it's really heightened or not. But arguably a heightened standard of review of your factual conclusions that are reached, whereas in the ordinary APA process, if they're arbitrary and capricious, here, they have to be supported by substantial evidence.

All right. So where does this lead? This leads to what Professor Lubbers calls "mossification." In the admin law, that's like the funniest joke.

[LAUGHTER]

Welcome to my world.

[LAUGHTER]

But the idea being that it's actually really, really hard for the FTC to use Mag-Moss to make rules. So what Jeff, Professor Lubbers did is he went back and he looked at all of the rule-makings that have been done under Mag-Moss to figure out how long it really takes. And since Mag-Moss-- and it was amended in the early '80s-- there's only been really one rule done.

But there was a space when they were doing rules. And the average time worked out to be a little bit over five years, including some rules that they just never finished because it took just a very long time.

Whereas, if you look at some of the others, Professor Lubbers said it looks like they're closer to three years. And there's some others where the FTC has discrete rule-making power. They could do it in less than one year. So Mag-Moss slows things down.

Up here, the remarks, this is from former Chairman Leibowitz who went through and complained in a speech about Mag-Moss makes it so hard to do the consumer protection-type regulations through the process. Professor Lubbers just takes the position that they should they should amend this. Congress to change this. This is just too complicated.

Those are bigger questions that we can talk about whether that makes sense or whether it doesn't. I'm one of a few folks who is on record saying that I think there's some value in cross-examination in the rule-making context. I might be the only one. But that's the theory.

So some of you, at this point, are saying, Mag-Moss, is there a way we can not do Mag-Moss? Is there an alternate type of rule-making that we can do here that avoids a five year process?

And this is where I think things get particularly interesting. Is it always required? And the argument is, maybe we can just do this under ordinary APA rule-making.

So if you look at the statute that has Mag-Moss, it says that all of that Mag-Moss stuff I was talking about applies in the consumer protection space, but says nothing, leaves open, what do you do about competition issues.

It leaves the law as it found it. So the question is, does the law, as it exists before Mag-Moss, allow the agency to do regular APA rule-making for competition law? So now we're going to go back and we're going to look at National Petroleum Refiners, the 1973 case from the DC Circuit, which said that the agency does have substantive rule-making authority.

As we heard before my remarks, the FTC has only done one competition rule-making ever. That was in the '60s and was not enforced. The 1970s one was both consumer protection and competition. And since then, the agency has not promulgated a competition rule.

So I'm looking at the FTC treatise to say, well, what was the state of the law on this question? And I thought it was interesting the treatise says, "if, however, the FTC does promulgate rules in this area--" in other words, in competition, "it will amount to nothing less than a legal revolution. It will mean a determination before adjudication whether a particular act covered by the rule constitutes unfair method of competition under Section 5."

Debate in legal journals on both sides of this topic has been fierce. The stakes are enormous. Nothing less than a bypassing of traditional adjudicative and legislative process to allow the Commission to find unfair methods of competition for American industry. Fast forward, a question that is sure to inspire future litigation is whether the FTC presently has the power to promulgate rules with the force and effect of law which prescribe acts which are solely unfair methods of competition without being unfair or deceptive acts or practices.

So, I'm like, whoa. I guess I don't know the answer. I would have thought that we had a clear answer as to whether or not the agency has the power. We don't.

Now, here's the thing. If you read National Petroleum Refineries, it says that the FTC does. It's a 1973 case from the DC Circuit. So the question is-- and the FTC points to it. Says, we've got it. They've not used it.

So I went back and said, well, does the FTC really have that power? In other words, what would a court today say if they had to look at the question anew? Because presumably if the agency was to promulgate a rule, they would do so. And, presumably, would be subject to challenge. Somebody would challenge it.

Where does that case end up? And that I'm not sure. That's other folks out there thinking about this three steps ahead, saying, where would I seek judicial review of this rule? It's possible they seek review in the DC Circuit.

And the DC Circuit would say, well, look, we have a 1973 case. We're bound by it. So let's assume that's the fact pattern.

And probably it doesn't go to the Supreme Court because the Supreme Court doesn't take very many cases. You know, 70 cases a year. But let's assume that it did. Let's assume that National Petroleum Refineries question ends up in front of the Supreme Court. Would today's Supreme Court look at the question the same way that the 1973 DC Circuit did?

I went back and I read the opinion. It was written by Judge Skelly Wright. It was judged by Judge Bazelon and Judge Spottswood Robinson, all very talented judges. Their method of interpretation is not the same as Justice Neil Gorsuch.

As I'm reading through, they say about a particular canon of construction, well, these canons, we don't use the canons of construction. OK. Well, that's interesting. Or they say-- though they do focus on the text because there is a good textual argument. But they say, well, the fact that the FTC has-- and I'm paraphrasing here, obviously.

The fact that the FTC has said it has disavowed the power to do this, that's actually not that important because that's not what really defines an agency's authority, even though for a long time they've disavowed the power. I'm reading, well, wait a minute. There was a case in the Supreme Court called Brown & Williamson where it actually was tremendously important that the agency did not purport to have the power and then they changed their mind. And so on and so on.

I'm not here to make a final legal conclusion on this. I'm just saying that there is litigation risk. Now, let's assume that the case doesn't end up in the DC Circuit. Let's say it ends up in the 5th Circuit or the 11th Circuit. I'm not sure how that plays out.

But I think that there would be real litigation here for the folks who are thinking about how that works. But let's assume now-- let's assume that it's fine. Let's assume that that National Petroleum Refineries is good law and the agency does have authority to make rules for unfair competition under the ordinary APA process and not under Mag-Moss. Well, what is that going to entail?

Well, on paper, it looks like it's going to be pretty easy. You read the text of the APA's-- that's the original text of the APA. And it's 553, which is informal rule-making. It's super, super short. And I could even get rid of some of this text because it actually wouldn't come up.

This is what it would be. This is what the APA says you need. It says you need a general notice, including a statement of the time, place, and nature of a public rule-making proceeding if you're going to have one, a reference to the authority, and either the terms or a substance of the proposal or description.

And then the procedure is, after notice of a section, the agency shall afford interested parties an opportunity to participate through submission of written materials. They don't have to allow oral examination or anything of that sort. And then, in the final rule, it just says, a concise, general statement of their basis and purpose.

So I went through all of those steps from Mag-Moss. Almost none of those steps appear in this section of 553. So you might be thinking, well, if we are in the 553 space, it actually isn't going to be all that complicated because I'm just reading the text. It's really easy.

No. Things have become much, much more complicated than a quick glance of 553 might suggest. And some of those procedures that are associated with Mag-Moss are nonetheless also applied in ordinary APA rule-making. All right. Here you go.

So go back to this chart. One of the big conversations in administrative law is about ossification, hence the mossification joke, which is, it looks like rule-making should be quick and easy. But, nonetheless, it has become slow and hard.

And what are some of the things that have come up? There's the Portland Cement doctrine, which we will talk about. There's the material comments doctrine, which we will talk about.

There's the logical outgrowth. And then there's hard look review. Let's go ahead and go through and see how these work.

Portland Cement. Portland Cement was decided in the DC Circuit also in 1973. 1973 was a busy time in the DC Circuit. But here's the rule, which is now very much still in force. "It is not consonant with the purposes of a rule-making proceeding to promulgate rules on the basis of inadequate data or on data that, to a critical degree, is known only to the agency."

In other words, before you can go through the rule-making process, if the agency has data, it has to turn it over. And the reason for this is actually pretty commonsensical. It's hard for the regulated world or the public to know what the agency might do unless you know the basis of the data that the agency would use to do that. So how can you tell if the agency is being arbitrary or not unless they turn it over?

So this is often thought of as a good government kind of thing, that rule-making doesn't make sense unless the agency turns it over. A few years ago-- I guess a few years ago, 10 years ago now, then Judge Kavanaugh on the DC Circuit said, how does this actually sync up with the text of the APA? Whether it's good policy or not, how does it make sense textually with 553?

And the court said, essentially, look, it's stare decisis. We've done this for 50 years. And that's probably where it would be. The Supreme Court has not ever adopted this issue. Most other courts, I believe-- though we have Dick Pierce here, who will tell me if I'm wrong-- have adopted something like the Portland Cement doctrine.

But it's very much part of the process. So if the agency has data on, say, to go back, non-competes, that would be part of the rule-making process. You have to turn over all that data, turn over your information, turn over your studies, to be part of the comment process.

Next, logical outgrowth doctrine. This is the DC Circuit version. This has been adopted by the Supreme Court. Logical outgrowth says is the proposed rule and the final rule have to be a logical outgrowth from what you proposed to what you end up with. In other words, if you say in a proposed rule, we want to do X, Y, Z non-competes, you can't end up with W in the final rule.

And the reason for this also is because the folks filing comments need to have a fair shot to know what the agency is thinking so they can file informed comments. If they end up with something completely different, the theory is that the comment process just doesn't make any sense anymore. You've nullified the comment process.

Again, this makes a lot of good common sense kind of good government sense. It makes things more complicated. It means that your ability as a regulator, you have to do your work upfront, at least to a pretty good degree. Because if you change too much of the final thing, a review in court might very well say, that's not a logical outgrowth.

A regular person could not anticipate where you ended up from where you started. Go back and do it again. That makes a lot of work upfront in the process. Because, otherwise, you might end up in a place where they say, people just didn't know enough to file intelligent comments.

Next, the material comments doctrine. An agency must respond to those comments which, if true, would require a change in the proposed rule. So you're going to get a bunch of comments if you do a rule-making, especially in a rule-making of significance. Lots and lots of comments through.

Now some of these comments are not going to be material comments. They're just going to be like, I agree with X, Y, Z, or something like that. Or sometimes they do studies about like just like profane comments that come across the wire and things of that sort. You can get those out and machine learning can help, whatever.

But you're going to have some comments by smart folks, especially on a very kind of highly data specific kind of thing, where they say, this is how it works here. Have you thought about this? Have you thought about this? Have you thought about my industry? Have you thought about my industry?

And there'll be a whole bunch of different comments to the extent that they're material, in other words, that they actually are pertinent to the conversation. The agency who's doing the rule-making has to respond, explain why they did what they did in response to these comments. That can be quite long. Some of the big rules, I spend as much time, more time, than anything else responding to those comments because it's a huge part of the process.

And then finally you get to court and you're going to have hard look review. Now there's questions, how hard is hard look review? Is it really hard or whatever?

But the State Farm standard is, have you considered all the kind of important parts of the problem? And if you've consider the important parts of the problem, you're going to be OK. You're not going to arbitrary and capricious. But if there's important things you haven't thought about or things that Congress told you to think about that you haven't thought about, well, go back and do it again.

Now you'd think hard look review wouldn't be that time consuming. Some folks say that's actually the hardest part because you have to reverse engineer to say, well, what might somebody challenge in court? And then put it all in from the outset. So you've thought through all of the problems so the time you finally get to court you're bulletproof and you don't have to worry about it. That also adds to the time.

All of this leads to a fight. And it's in the literature, people, smart people, are fighting about just how ossified the process is. You know, the [INAUDIBLE], they did a study where they said it's actually not all that bad. People can do it pretty fast. Dick Pierce, who we're going to hear from in a little bit, says no, no, no, no, no. You're looking at the wrong thing.

You're looking only at the small rules. The big rules really are ossified. They take a long time to do, especially if you consider all the time that comes before the notice of proposed rule-making, which is hard to measure because you don't know how long they've been working on it. There's a whole bunch of work that goes into that process.

I don't know that who's right on the empirics of the fight. But that is the fight. Is rule-making under the ordinary APA is it fast and easy or is it not? Most people would say that for the more significant rules it's not that easy. It takes some time. It takes a lot of work, whether or not OIRA, whether or not OMB is involved.

Now, for what it's worth, some of you are saying, well, why would anybody ever do a rule-making? One nice thing about a rule is this very onerous process, just the very fact that it's hard gives regulations stickiness. It's hard to make a rule. That means it's hard to unmake a rule. And that means you lock it in and people can then plan their affairs around it.

If we had an alternate universe where you could do a rule-making instantaneously, well, that would be all well and good, except for a lot of people would say, well, if you can do it in five minutes, you can undo it in five minutes. And it changes the dynamics of how people arrange their economic affairs.

If you have stickiness, people can make a plan and say, well, this isn't going to go away because they just spent three years doing this thing. Now I need to plan my business accordingly.

The problem, of course, though is there might be too much stickiness. Stickiness makes a lot of sense for rules, say, where you want to have long-term incentives to invest in certain types of things. If it's takes 10 years to recoup your investment in the power plant, you want to change the rule in five years, for instance.

Stickiness doesn't make sense in other sorts of conduct arguably where it's more of a, I just want this to stop kind of right away. You know, take that as for what it's worth.

Last thought here is some people will say-- and here, we'll I think hear maybe a little bit about this on our panel. Well, if rule-making is so hard, can we do something quicker? How about we use a guidance document or something like that to try to tell people what we think without having to go through all of this procedural process?

And there, I'll say the FTC is an independent agency. It is not bound, but you should be aware that there's been a couple of major executive orders recently that frowned upon using guidance documents in that way or to make big major policy changes by adjudication as opposed to rule-making. But that's kind of the lay of the land.

And, with that, you are now ready to go. You're all good administrative lawyers. And that is it in exactly 30 minutes. There we are. Thank you.

[APPLAUSE]

DEREK MOORE: Thank you, Aaron. The final panel of the day is set to begin in five seconds. So if everyone would come up to the stage.

RICHARD PIERCE, JR.: Takes me 14 hours to go through that, I might as well.

AARON NIELSON: Thank you. Let me just grab my iPad here so I can [INAUDIBLE].

KRISTEN LIMARZI: Sounds sensitive. Very emphatic. That's one way of thinking of it.

DEREK MOORE: Good afternoon, everyone. This is the final panel of the day on FTC rule-making. Before I introduce our distinguished group of panelists, I want to remind all the folks in the room that if you'd like to ask a question, we will be passing around question cards so that you can write your question down. And they'll be passed up to the moderators. And we'll ask those questions.

It's important for us to do it that way so that the folks who are watching on the web can hear and understand what the questions are and then also understand what the responses to those questions are.

So my name is Derek Moore. I'm an Attorney Advisor in the Office of Policy Planning here at the FTC. And my co-moderator is Kenny Wright, who is legal counsel in the FTC's Office of General Counsel.

We have biographies of all of our panelists that contain more information than I'm about to give. So I will just identify them and let you know their current positions.

So to Kenny's left, we have Sally Katzen who is a Professor of Practice and Distinguished Scholar in Residence at the NYU School of Law. Next to her is Kristen Limarzi, who is a partner at Gibson Dunn.

Next to Kristen is Aaron, who was introduced just a few moments ago. And next to Aaron is Richard Pierce, who is the Lyle T. Alverson Professor of Law at the George Washington Law School. And, finally, to Dick's left, we have Howard Shelanski, who is a Professor at the Georgetown University Law Center and also a partner at the Davis Polk law firm.

The way we're going to structure our panel is to go right into Q&A and dispense with opening statements. And so I will turn it over to Kenny to begin the Q&A.

KENNY WRIGHT: And we'll just pick up from Professor Aaron Nielson's great presentation with a threshold question about issues agencies should consider. So, as Aaron mentioned, Congress has granted the FTC a broad range of tools to carry out its dual mandates to address unfair methods of competition and unfair or deceptive acts or practices, including enforcement and rule-making authority, as well as the authority to conduct policy studies.

In choosing among these tools, what factors should the FTC consider? And is one approach better suited to address an issue like non-compete agreements? Or can these various tools work hand-in-hand? And we can start we can start with Sally and let's move right down the group of panelists.

SALLY KATZEN: Having originally suggested that we dispense with opening comments, I now would like to change gears and comment a little bit on the opening statement of Aaron's, which was very good and very informative. But it may have caused some people in the audience to think, what the are we doing here? And this is crazy.

And I would like to say that it's not as bad as he made it appear in many respects. Part of it is that, while Mag-Moss is slightly insane-- and I'm not quite sure why it remains viable-- a lot of the pieces of that do exist in 553 rule-making. This is what he described as the easy stuff. The thing that looks so simple.

But he then said, well, it's not so simple after all because it has these other complications. Portland Cement, logical outgrowth, we can discuss each and every one of them as we go along. But, for the most part, what's in rule-making generally is virtually the same-- whether it's Mag-Moss or whether it's 553. The agency bears a very heavy burden of documenting what it wants to do, why it wants to do that, on what basis it's thinking of doing that.

And that all has to go in the record. If you listen to his presentation, you might think that it's insurmountable. Let me tell you that there are many agencies in this town that do it every day and that there are lots of rules that come out-- big, major important rules-- that are issued every single day following all of these rules.

It does take time. It is a burden that the agencies should willingly go through because you don't want to establish a rule which has the force and effect of law unless it's well-founded. But it's not, I would say, something that is so overwhelming that it's almost impossible to get through.

And I just wanted to make clear on that one point. The other one point that I do want to mention is he had a wonderful chart where he had two X's on OIRA review. OIRA is the Office of Information of Regulatory Affairs at OMB, the Office of Management and Budget. And Howard was one of the more recent administrators of OIRA. And I was also an administrator of OIRA back in the '90s.

At the current time, OIRA review is limited to executive branch agencies-- EPA, Department of Labor, Department of Transportation, Department of Commerce, Department of Agriculture, the Department of the Interior, those guys. Not the FTC, or the SEC, or the FCC, the independent regulatory commissions.

That is in flux now, I would say. And given that rule-making goes on for a period of time is something that you all should think about over time. Last year, the Trump administration hit a shot across the bow, I think would be the way of describing it, in a guidance on implementing the Congressional Review Act, which is a whole 'nother problem you don't want to think about.

They said that independent regulatory commissions have to submit their rules to OIRA to determine whether or not they're significant, whether or not they're major, whether or not they trip certain scales. That was a baby step. I can tell you that the Trump administration is currently exploring whether or not it wants to require independent regulatory commissions to submit their rules to OIRA the way executive branch agencies do.

It is not a question of whether, it's a question of when this requirement would be imposed. I think it's very clear that if President Trump is reelected, it will happen in November or December of 2020, or January of 2021. It will happen.

And this is something that should be factored in, that OIRA review is probably something that will occur at some point. So that piece I think is also something I wanted to comment on.

I forgot your question. But maybe somebody else should answer it.

KENNY WRIGHT: Actually, this brings up a good point. Because we had discussed whether we would have opening statements. So why don't I offer a chance for everyone who is here to respond to Professor Nielson's presentation or give any other opening thoughts you may have. And then we'll double back and start with our threshold questions.

KRISTEN LIMARZI: Changing the rules of the game on me.

KENNY WRIGHT: I know.

KRISTEN LIMARZI: Well, I guess I am coming at this from not being an ad law professor like everybody else here. And I think the presentation about the administrative law requirements was really well-taken. And I agree with Sally that the real question is, what is the nature of the record? And think what the FTC needs to confront is, what is the best way to develop that record? How do you sort of establish that evidence?

And I think the some of the theme of the earlier panels is, we don't know as much as we would like to know. That certainly seemed to be the theme of the economist panel, right? There's a long list of things they would like to study, data they would like to have. And a somewhat more modest list of actual conclusions that we can draw in a way that would really support robust rule-making.

I think there are those who suggest that because this is a sort of novel area that enforcement is the way to develop that record. But I think, to my mind, the challenge to think about rule-making in this area is less about the novelty of this issue and more about the nuance of it. Because that the practice is novel shouldn't be a hurdle to regulating it, right? We do that all the time where the harm from some sort of practice is clear and we can identify a reasonably clear rule that would address the problem.

We can move quite quickly. You can establish that record. I think you can overcome the hurdles. I am more optimistic about that, along the lines of what Sally was suggesting.

And, of course, even if you thought that novelty was a hurdle to regulation, these aren't novel, right? I mean, non-compete agreements have been around since, I don't know, the guilds? I mean, this is not new conduct.

The problem is not that they're new but that they are, I think it's acknowledged, at least in certain circumstances useful and in some other circumstances, potentially more circumstances depending on who you are, problematic. And the effects are situational. And they depend on a number of different factors.

And so I think the challenge in regulating in this area is, when do we understand enough about the potential harms and the potential benefits of the practice to write something that actually makes sense, that actually draws that line? And you might be able to develop that understanding through enforcement. But you might be able to develop that understanding through other means.

And I thought Bill Kovaic's comment this morning that the states really are a huge repository of learning and information in this space was well-taken. There's a lot more experience there and some potential for some natural experiments, although a number of limitations on that, as well. So I think there are other ways to develop that record. But I'm not sure that we've done it yet.

I think the other thing to think about is whether or not-- the other thing for the FTC to think about is whether or not a national standard is really beneficial here. And I guess I have two thoughts about that. The first is that there seems to be a great variety in state law and even in enforcement of that law, right? Sort of both what's on the books but then also how much of an enforcement priority this really is for state attorneys general.

And that suggests a sort of lack of-- you know, in many contexts, that would suggest a lack of national consensus that ought to give a federal regulator some pause, right? There are plenty of areas of law that we consider properly regulated state by state. So it's not crazy to think that this is something about which states should primarily concern themselves.

So I think, in other words, like, is the variation in state law a feature or a bug? And I guess my second thought on that leans on the bug side of that equation, which is, if you could develop a sensible nationwide rule, there is a benefit, potentially a huge benefit, to workers who are subject to abusive non-compete agreements.

There's also a real benefit to employers in certainty and predictability. And I think we're going to talk later about preemption issues. But I think that's really true if the FTC rule preempts state rules and what you establish is a single national standard that's transparent and known to workers and to employers.

Obviously, if it's just another standard layered on top of, then I think you're going to get into criticisms about the costs outweighing the benefits. I'll stop there.

RICHARD PIERCE, JR.: So I've never conducted a rule-making. But I've done two things. One is I've studied in considerable detail the way that the EPA issues rules. And there the pros. They're the ones who do it every day. They're responsible for more rules I think than all of the other agencies combined.

SALLY KATZEN: Not so. No.

RICHARD PIERCE, JR.: Well--

SALLY KATZEN: Look at H--

RICHARD PIERCE, JR.: --a whole lot of them, hundreds.

SALLY KATZEN: Look at HHS.

RICHARD PIERCE, JR.: Oh, HHS. I'm sorry. Yeah. Yeah. Yeah.

SALLY KATZEN: Yeah.

RICHARD PIERCE, JR.: But, well, in any event, I've looked a lot at that process. And I've also played a variety of roles-- lawyer, legal consultant, and economic consultant-- in assisting clients who didn't like proposed rules. And so in terms of the EPA experience, Wendy Wagner, who's a very good scholar at the University of Texas, has done kind of the definitive study of 90 EPA rule-makings.

And she concluded that the average EPA rule-making took approximately five years. So we're not talking about a short process. It is certainly possible to do it in less time than that if you are willing to put tremendous resources into it and necessarily reallocating resources from other functions in order to get it done quickly. That's the way-- if the agency is told by the president, for instance, I want this done in a hurry.

Well, you can do it in a hurry. You just bring people in from a whole lot of other things. I don't know whether the FTC is willing to do that in this case.

Another really important variable is whether there is somebody, some firm, or usually it's a trade association, that has a combination of resources and incentive to participate actively, shall we say, in the rule-making. If somebody comes to me and says, I want to participate in this rule-making. And I ask, what's your budget? And they say $100,000.

I'll say, yeah. Sure, I can drop them a line, tell them why you dislike it. And they'll throw it away and it'll have no effect whatsoever. If they come to me and say, I'd really like to make it as hard as possible for this agency to issue this rule, require them to do expend a lot of resources, force them to make some changes that I wanted to make in the meantime, and say, and your budget is $10 million.

Well, if I can't use-- if I can't make it last at least five years, using standard 553 procedures, I should be sued for malpractice. And, by the way, I've got the empirics. I have at least a 30% shot of getting it overturned in court at the end of that five year process.

And Magnuson-Moss, boy, well, I'm too old to handle a case like that without-- I mean, my life expires long before that rule-making never gets done. I can assure you of that. So that's a very important variable. I frankly don't know whether there is a firm, or more likely a trade association, or maybe multiple trade associations, that would have that kind of incentive to put a lot of resources into trying to make it hard to issue a rule.

But, in any event, even if it's not-- even in the best of circumstances, as Aaron's excellent presentation showed, this is a hard slog. It takes years. During that period of time, new data sources of data analysis become available. And you can't use them because of the Portland Cement doctrine.

New leadership takes over an agency and they want to do things a little bit different. And you can't change because that would jeopardize you under the adequately foreshadowed doctrine and require enormous burden of explaining why you're making the change. So it's a real hard-- s. That's why my proposed alternative for this context is issue a general statement of policy.

Now, what I have in mind is a long general statement of policy that says something like, we at the FTC believe that the vast majority of non-compete clauses in contracts are violations of the law. And I would cite both the Sherman Act, which doesn't provide the FTC with the power to issue rules, but certainly allows them to issue policy statements, and the FTC Act.

And then go into great length on why you're doing it, and on what kind of extraordinary evidence it would take to rebut the presumption that it's unlawful, and to make it clear you plan to go out and hammer people when you catch them doing things that are inconsistent with the policy that you have just announced.

So a big advantage of that is there are no applicable mandatory procedures. You can use any damn procedures you want. There's a good chance you could persuade a court that the policy statement isn't even reviewable. There's mixed case law on that.

But a lot of the cases that say, eh, we don't think this is reviewable at all. It doesn't qualify as final agency action. And it doesn't. Even if somebody can get judicial review, it's much easier to satisfy a court in that circumstance because you don't have this elaborate record of these typically-- well, some of the EPA rule-makings, you're talking about-- one of them was seven million comments, and a statement of basis and purposes in one of them that was 2,200 pages long.

So you don't have that kind of record. It's much easier to defend an action just by providing some plausible reason for what you did, even if they can get it to court. So it has enormous advantages there.

What other effects could it have? Well, you can't have a legally binding effect. That's a matter of law. It can't. A rule can and a policy statement can.

It has one legal effect though that's non-trivial. It provides notice to any firm that acts in a manner contrary to the statement of policy as to what your policy and statutory interpretation is. And that eliminates one argument that you can be sure that every individual firm will make if you try and go after them, and that's, it's nice to knock down an argument.

Another effect is to enlist involuntarily the support of thousands of lawyers in private practice. Because any competent CEO is going to go to the in-house counsel or outside counsel and say, hey, is this lawful? And in the memo that you write on that, you'll talk about state law. And you'll also say, there's this federal agency you may never have heard of. And they say this is illegal unless you-- and they say they're going to go after you, and-- now, some firms will go ahead and do it anyway.

But a lot of firms won't. A lot of firms are, oh, do we really want to do that? I don't think so. OK?

But I would supplement that that policy statement with some selective individual case enforcement actions. I'd pick situations where the adverse effect of the non-competes is real obvious and easy to establish and where there is no justification, no plausible justification.

I'd bring half a dozen of those. I'd win those. And then those lawyers that are sending all of those memos to the CEOs will be adding, and, by the way, they mean it. They do nail people. And they win. OK?

So the combination of the policy statement and half a dozen victories in these carefully selected individual cases, I think it will get you a long distance. And it's a lot easier, shorter route than trying to go down the room. I don't think you've got the evidentiary support at this point.

And if somebody-- and I don't do private consulting solving for a fee anymore. But if somebody offered me the opportunity, based on what I heard today, I got tons of ammunition I can use to make it really hard on the agency to issue a rule. And I am helpless when it comes a policy statement. So that's my pitch.

KENNY WRIGHT: Now, Howard, if you want to respond at all?

[LAUGHTER]

HOWARD SHELANSKI: Well, just a couple of very quick points. I mean, the agency obviously has a lot of experience doing guidelines. And those guidelines are very helpful to industry. They're very helpful to the practicing bar.

And you can imagine a policy statement or some kind of guidelines on non-competes. It could be extremely helpful. Obviously, there has to be a process that precedes that. And I think that the process of fact gathering and analysis that workshops like today can kick off are really valuable.

I think that the enforcement mechanism is a very imperfect, clunky, and slow way to gather the empirical data that would lead to guidelines, or that would lead to a rule-making. You're going to have a selection bias somewhere you enforce. And you're just not going to understand-- you may get the tip of the iceberg. You're not going to see what the effects are of the vast bulk of the practice that you're getting out through enforcement.

So as we've seen throughout today, there's other work that is emerging all the time. There is a robust amount of empirical work that is going on out there about the effects of non-compete. And although there's a lot of ambiguity in that, I do think that we're starting to get some definition about the conditions under which non-competes can be beneficial, and the conditions under which they're harmful, and will have negative effects.

I think, as we learn more, you could get towards a policy statement or guidelines that establish some rules for the road. And I think the real value of those is people sincerely trying to stay on the right side of the law will look at those and say, let's make sure our non-competes are going to the right kind of employees for the right purposes in the right circumstances.

Because I think if we don't-- and this is Dick's very important notice point-- maybe we'll get a light shined upon us. And I will tell you that all of the stuff that comes out of the agencies-- for example, now on no poach agreements. No poach agreements are standard kinds of things during a merger, due diligence and merger negotiation process. Everybody suddenly is very nervous about even a very limited no poach in that context, not because there is a rule but because there have been statements out of the agencies that, hey, we're starting a look here.

So the first question you get is, how far can we go with this before we get a light shined on us? I would venture to say MFN clauses, very similar kind of thing. So I do think that a lot could be done short of rule-making.

Whether you want to do rule-making or not-- and this gets to the question you actually led us off with-- is when we get that learning underway and we learn enough, I think the question about rule-making versus adjudication is really this-- how much of a particular kind of conduct can we say is presumptively harmful? And how much is contingent on case-specific facts?

If most of the impact is going to depend on the case-specific facts, rule-making is going to be of limited effect because you're going to have to have a whole proceeding on deciding whether or not the rule applies, which is not going to look a lot different from enforcement.

On the other hand, if you can find subcategories of non-competes or of any kind of conduct, that really is almost always going to be anti-competitive. Then you can say, at least in this area, we're going to put that in the per se no or presumptively no basket. Other kinds of facts, when they're present, will be in a different basket and either will go through-- it won't be subject to the rule or will get different treatment under the rule.

But I think that the learning that one needs before one even initiates rule-making is to know, is there any area in which the effects aren't going to be mostly driven by case-specific factors? Because, if so, I think the guideline-- the difference between rule and adjudication becomes very slim and it's probably not worth the candle to go through all of the rule-making.

Just one point on rule-making. rule-making can be very tough, can be very cumbersome. I'm now thinking that the office that Sally and I ran was the Ossification of Information and Regulatory Affairs Office. We were often accused of that. I think we were regulatory quality control and all for the better. But I truly believe that.

But I will just give two examples. When Congress passed the Telecom Act of 1996, that was a daunting task for the Federal Communications Commission, daunting. And I just fresh out of clerking and working at the law firm of what was then Kellogg, Huber, and Hansen, was hellbent on tying that process up forever.

Congress gave the FCC a 180-day deadline for passing a really elaborate set of regulations on unbundling the local telephone networks, pricing the access, all kinds of stuff. By gosh, they hit that deadline and those rules went into effect even while they were being fought up and down to the Supreme Court in at least half a dozen different cases.

Another example is in June of 2013, President Obama went to Georgetown University and said, I direct the EPA to enact regulations that will cut CO2 emissions from power plants. Really tall order, especially because he didn't have an EPA administrator at the time. She was, I think, nominated.

And Gina McCarthy came in maybe September, October? I don't remember exactly. And she got that final rule done inside of two years. And there were billions of dollars arrayed against her efforts to do that. And, fortunately, OIRA was there to help speed things along and really get it done right. And they got the thing done in two years.

But the point is that where it's important I think these processes can move very effectively. But that doesn't mean you don't have to allocate a lot of resources. That doesn't mean it isn't difficult.

So I would say in terms of whether or not the tool of rule-making or the tool of adjudication should be used really depends on how much lift you're going to get out of what you can specify ex ante, how much behavioral change you can effectuate by virtue of what you put in the rule.

KENNY WRIGHT: And I'd like to give Sally a chance to address this question. But, before you do, I'd like to sort of flag it in a way to say that if you were-- since you worked at OIRA, you've been giving the agency the helping hand in crafting rules that will survive judicial review and work effectively in the market. If you look at the FTC's toolkit, what kind of resources would you look at in terms of marshalling, in terms of making sure that we effectively use all of our tools, and the ways in which our tools may help with rule-making?

As people have said previously, enforcement can inform rule-making. Policy studies can inform rule-making. What should we be thinking about in looking at the toolkit?

SALLY KATZEN: Well, I think that's a good question. And the answer is, more than one. There's no single lane. I think you can do two things. You can walk and chew gum at the same time, although some people-- never mind.

Part of the process is gathering information. Part of the process is sending a signal. And that's what we heard from both Dick and Howard, is you want to tell the world this is something of concern and send the signal that you're serious about it.

And you can do that through guidelines. You can do that through an advance notice of proposed rule-making, even under Mag-Moss, where you say, we've got this issue. We've got these data. We're trying to figure out how to proceed.

We can identify-- and based on today's discussion, which was phenomenally interesting and informative-- we know that there's a difference between low-wage workers and CEOs. And I think almost everybody who addressed the issue thought that with respect to the low-wage workers, there was very little benefit and a great deal of cost involved.

You can send that signal now and say that in that area you're looking for a per se rule. And you're looking for guidance as to what the parameters should be, what the measures should be. And you can say that there are, with respect to the upper end of the scale, the CEOs, there are other considerations. And you want to learn more about what goes into it. So requests for information can work hand-in-glove with signals that this is not good.

The other thing that was so interesting about the earlier discussion was that workers in jurisdictions where they were not enforceable were nonetheless-- they didn't know the law, as one of the panelists said. They were impressed with the fact that it was in their agreement and they better not do it. Raising the bar of education is a very important tool that the FTC has had, and has used successfully in the past.

And that can be coupled with starting a rule-making, starting guidance, starting informing. And all of that will lead to your getting more information and, therefore, be in a better position to do the kinds of things you want.

HOWARD SHELANSKI: Can I add something really quick to that? You know, we've talked about the disadvantage that the agency might have with Mag-Moss. The agency has two really big advantages. One is you have statutory authority to conduct studies. OK? Which is a really nice thing and not every agency has it.

The other thing you learn when you do regulation and you review regulations in the federal government is how poor the infrastructure is in a lot of agencies for actually doing the analysis and the fact-finding that is necessary. The EPA was a big exception, as Dick said, and what has happened at the EPA in terms of the dismantling of the scientific and economic expertise is tragic and worse.

I will say the FTC has the Bureau of Economics. And, if I may say so, I don't think there is a better organization in the entire federal government in any government of the world for undertaking analysis, research, factual development, that would support competition or consumer protection rule-making. So I would take advantage of those 80-plus extraordinarily capable people to conduct the studies that you have statutory authority to do. And I think that's an advantage that the FTC has that is quite unique.

KENNY WRIGHT: And did you want to go ahead?

KRISTEN LIMARZI: Just one quick point. And this is a lot of good information being shared. One quick thing on guidelines, and I think I absolutely agree you can proceed on multiple fronts. And I think Howard made some good points about some of the salutary effects that guidelines can have. But I want to be realistic about what they're going to actually do in the market and in the legal community.

If the FTC issues guidelines that says, we think under Section 1 of the Sherman Act non-competes are presumptively unlawful, that is a credibility robbing thing to do because it's not true, right? I mean, we heard today, Eric Posner said he read the 24 or so cases on this and the plaintiff never wins.

The non-competes are almost invariably a vertical agreement. The Supreme Court could not be clearer about how Section 1 looks at vertical agreements. And it's not with a presumption of illegality.

And so, if you say, these are presumptively unlawful. We intend to proceed into the market and enforce on that basis, I think you're going to run into a brick wall. Now that's not to say that shining a light on them by highlighting the problems and the circumstances in which they have positive societal benefits and the circumstances in which they clearly don't have positive societal benefits, I think there could be huge advantage to that. But I think you need to be realistic about the fact that I think if the FTC came out and said that, it wouldn't necessarily change the way that-- I mean, I'm thinking about it from a private practitioner perspective.

I would never tell someone that the FTC is going to be effective in bringing a per se suit against a non-compete. I mean, even if you put it on your website tomorrow. And so I just wanted-- well, a little bit of a caution on that.

SALLY KATZEN: I don't think I was saying, say per se.

KRISTEN LIMARZI: No, no, no. I know.

SALLY KATZEN: OK.

KRISTEN LIMARZI: And mostly I'm just thinking about this sort of presumptively putting out something that says either shifts the burden or appears to deviate from what is already existing antitrust principles. And that's why I think-- we're talking a lot about how you would fashion a rule to get at these problems. And then we're talking a lot about the procedure that you might do to write them into and to enact them.

But I think there's a more fundamental or existential question, which is, where are you grounding them? Because if you have decided that the non-competes are anti-competitive, but somehow not reachable by the antitrust laws, why are they not reachable by the antitrust laws?

And if they're not, fine. It's acknowledged that Section 5 goes beyond the antitrust laws, although how far and in what direction is somewhat of a mystery. But let's figure out what that is. And maybe that's where you ground to this.

But saying, these are anti-competitive. But, for some reason, the antitrust laws are inadequate to get at that, I worry that you-- or that a suit under the antitrust laws we could not establish with sufficient economic rigor to prevail in an antitrust suit on this basis, so we're going to do an end run around that, I think it undermines the antitrust laws.

I think the agency would be much more effective and much more principled by identifying a related, obviously related, concern that the FTC is empowered to reach, and to address, and to say, this is the problem we're addressing. This is not a problem of market-wide competition failure. We know it's not that because we can't prove that. That's what all of this case law tells us.

But it is a problem that it contributes to wage stagnation or it is a problem that it contributes to labor mobility. And those are concerns that are within the ambit of the FTC. They're within our power to regulate. And so we're going to regulate them for that purpose. And then build the record that supports that.

KENNY WRIGHT: So Kristen had perfectly anticipate my follow up question. But I was also going to ask Aaron to weigh in on that, as well. Because you had mentioned a increased skepticism of the use of guidance by agencies. And so, to the extent that the FTC were considering this proposal from Professor Pierce that one option would be to issue an interpretive rule, or an enforcing policy statement, or a hybrid document that was some other form of guidance, do you have any reactions to that proposal as well?

AARON NIELSON: Sure. But I think I'll-- if I get a chance, I'll say this. One of the most intimidating things you can imagine is teaching 75 years of administrative law to the author of the treatise and two OIRA administrators, and a roomful of FTC experts. So I think a little bit of nuance was lost in what I was trying to say.

I wasn't trying to say that rule-making is too hard, so never do it. No, no, no, no. I think that that's a-- it's an empirical question about how hard it really is. I suspect I'm probably closer to Sally than I am to Dick on that particular question. And that goes to the point I want to make, which is, rule-making is a very good thing in the sense that it gets public participation.

It's prospective, which means that people have time to prepare their life around the rule. If you're having a big policy change based on an adjudication, that's retroactive. That means the law was unclear at the time when I did this thing. And now I am being punished for having done something.

rule-making is prospective. Everyone has a chance to prepare. You get the comments from everybody. You get all the possible views coming in. So I'm a big fan of rule-making, especially compared to adjudication. I think rule-making makes a lot of sense.

I think the worst of all of the possibilities is how about we're not going to necessarily do it by rule-making, and we're not going to do like small little adjudications, we're at issue a policy statement. And then we're going to try to have you change your behavior that way.

Because it is true. You don't have to go through all of those procedures. But I think there's a lot of value in those procedures. I think those procedures is how you get the input from the public. I think those procedures is how to make sure that you're doing the quality kind of control that you like.

So I heard Howard talk about the role of OIRA. I'm a big fan of OIRA, as well. So I suspect between Sally and there, I would say, yeah. It'd be great if we put these things in terms of policy, put them over in OIRA review because I think OIRA would make it even better.

So when you go say, I want to do a policy statement, you're cutting out all of those kind of quality checks along the way. And to the extent that you are encouraging behavior but you don't necessarily have the quality checks in place to make sure you're doing it in the right way, you might end up having kind of perverse consequences that I don't think anybody would want.

So I would say, no, rule-making is certainly something that you can do. And there's a lot of really good reasons to do it.

SALLY KATZEN: Thank you.

KENNY WRIGHT: So we have a question from the audience on this topic of guidance documents. And so it insightfully notes that guidance documents may be subject to submission to Congress under the Congressional Review Act. And that's recently been clarified by executive order by the Trump administration, as well. And so the question notes that that may suggest that poorly predicated guidance documents can even be struck down.

And that Professor Paul Larkin has argued that there may be a private right of action under the CRA. So do you all have any thoughts on the sort of CRA implications of guidance documents?

SALLY KATZEN: Oh, god.

KENNY WRIGHT: [INAUDIBLE] documents.

KRISTEN LIMARZI: Sally has thoughts.

SALLY KATZEN: Sally has thoughts. One, when CRA was negotiating, being negotiated in 1995, I actually was representing the administration. And there was no thought that it applied to guidance. And all of this recent legislative history from GAO and now from the administration in the document that you referenced is remarkable, is the only word I could use.

And if you read through what was intended in CRA, it was full rule-makings. And even though the definition was to 5531, it was not intended to be that way. Having said that, it is now being interpreted to apply. And if you're going to look at CRA, you have to look at 801(b)(2)(1), I think it is, that says that if there is motion of disapproval, then the agency is not permitted to redo that, anything substantially similar.

And that means that the agency could never do anything in that area absent an affirmative grant of authority by the Congress to have the agency redo that issue. That was a point that was put into the document, into the Act, so that the agency couldn't just take out a couple of commas and send it back.

Substantially similar was designed to be substantially similar. It has been interpreted to be anything in the ballpark. And so if you did go through guidance, and if guidance is reviewed under CRA, and if, under CRA, there is a motion for disapproval by both houses and by the president, so it doesn't have any kind of problems, then the agency would be precluded from doing anything at all ever again until there is affirmative grant of authority by the Congress.

I know that's very complicated. But you raised the issue. I didn't.

[LAUGHTER]

I would say that that's the least problem with guidance. I think a more important problem with guidance is whether you have sacrificed what Aaron correctly identified as all the benefits of rule-making, of the gathering of information, the educating of the agency, the letting people think through what should be done in a way that is informative and that is participatory, so that those regulated entities will feel they have some buy in and understand what has happened.

And logical outgrowth is not necessarily detrimental. Because you can write a notice of proposed rule-making that gives seven or eight different outs. You give a lot of different possibilities. And you say you're also considering this, that, and the next thing. And there's a way to protect against the logical outgrowth doctrine.

But there's so many benefits, as Aaron said, of a regulatory proceeding that to go the guidance route, forget CRA. You should all forget CRA anyway. But you can forget it for this purpose, I think.

RICHARD PIERCE, JR.: To cover, it just to be sure, I'd recommend you send it over to the Hill. Nobody's going to do anything with it. There's no way in hell this is going to be the subject of a CRA. So send it over. And it will get thrown in the trash. And that's that.

So I think that's all I want to say about CRA. But there's a number of other things I wanted to say. I actually disagree with Kristen. I think it's very risky to go, at least on a standalone basis, with Section 5 of the FTC Act. The courts are really quite leery of that for understandable reasons.

It's so open-ended that they tend to-- their initial thinking about anything that's coming under Section 5 is, eh, eh, real reason for skepticism. I'd go strictly under Sherman. And I think you can do it.

My starting point, it would have to be a long document with a lot of explanation. And it would have to tie-in with doctrine and Supreme Court opinions. My starting point would be California Dental Association and the four-step decision-making process that the court outlined that's appropriate in some circumstances. I'd argue this is one of those circumstances. And I go through that four-step process and show how it would support a rebuttable presumption-- not a per se prohibition, but a rebuttable presumption.

And then I'd go with Howard's point. And I'd have the really outstanding researchers at this agency do lots and lots of work to fill the holes that now exist in the research base. And you plug those into your document, along with the doctrinal analysis.

And then you make it clear that one of the things you're saying is a violation of the law and you will go after is somebody putting in a non-compete clause in a contract where they know it's not enforceable. I mean, I think that's a piece of cake to make the case that those are unlawful.

And that seems to be the biggest hole in the state proceedings. And I'm not worried about the effect of the half a dozen cases where individuals have tried this in individual cases. Because they didn't have the expertise. They didn't have the record.

So I think this agency has the capability to do a policy statement that would be effective. I grant that rule-making has a lot of advantages. But, wow. Three years? Five years? Seven years? I don't-- Wendy Wagner concluded that it took EPA an average of a little over two years just to draft a notice of proposed rule-making.

DEREK MOORE: We've been talking about rule-making in the abstract, or rule-making versus adjudication in the abstract, and I'd like to move on to some specific proposals that we heard earlier today. And I'm going to reverse the order. So Howard, Howard will go first. And Sally will go last. We'll go down the table this way.

And we've listed several in our preparation materials. But I'm going to focus on just a few to start out with. And then we'll move on to the others.

So the basic question is, are there clear benefits or drawbacks to the approaches that I'm going to propose? And what would the evidentiary requirements be to support a proposed rule? And, remember, that if we're going to adopt a rule, it would be a rule declaring something illegal or presumptively illegal under Section 5 not under the Sherman Act.

So that the first possibility would be an outright ban labeling non-compete agreements as an unfair method of competition, writ large. And this is what the Open Market Institute and several other co-signers have petitioned that we do. And related to that, or a subset of that, would be a prohibition against non-compete agreements for a subset of workers.

Earlier today, we heard a lot of evidence suggesting that non-compete agreements are particularly harmful to low-wage workers. And identifying what a low-wage worker is could be a challenge and potentially could identify a target if we say low-wage is $X an hour or $Y a year.

So I'll throw that down to Howard. And then we'll move on down the line.

HOWARD SHELANSKI: Yeah. I mean, so I think an outright ban, you know, no surprise that I'm going to say I think is deeply problematic and would be opposed to it. I think you could come down to a universe of workers for whom it's appropriate. For me, it's more an issue of low skill rather than low-wage because the primary justification for non-competes is investment in human capital.

You've got other ways of protecting against other kinds of things. And if there's no investment in human capital, what's the purpose of a non-compete? It's to shift the ex post bargaining relationship. It's not to do anything valuable.

So if one could sufficiently delineate that group of workers, I mean, I don't think you'd necessarily do harm. But I think that delineation is extraordinarily difficult. And so I would say that there is-- you run a real risk of shifting training costs onto workers if you mis-specify that line. Because if I can't have a non-compete agreement in certain segments, I might not invest in training.

Let's take a really simple example. Tech firms in Silicon Valley that tend to have several month training periods for their new software engineers, that's almost all investment at that front end. If they can then put themselves up for auction, you could imagine that some of that training would not occur.

And so what would happen is the costs of finding that training would be shifted onto the workers themselves. It would be less well-tailored. I think you'd have huge inefficiencies and barriers to entry into the labor force all around.

So you need to make sure you get that line right. And that's what I don't like about a per se ban. And even the corollary proposals for subsets, I'm sure we could find some subset where most people in this room would agree and others would agree, OK. You're not doing any harm by a per se ban there.

But that seems also a big risk for future policy. If you set the bar at so high, if you will, for finding a non-compete to be illegal, then is every other non-compete in every other context just so fact dependent that you couldn't have a rule? So I would stay away from per se rule-making.

KENNY WRIGHT: Any thoughts, Dick?

RICHARD PIERCE, JR.: I would just add one point that really follows on a point that Aaron made in his presentation about stickiness. Stickiness certainly can be an advantage. As somebody who's not been fond of some of the things that this administration has been trying to do and rule-making on, I'm kind of happy about stickiness at the moment.

But stickiness also means you can't make an amendment without going through the same process. And so you better be pretty sure you know what you want before, well, before you issue the notice of proposed rule making. Because it's hard to make changes after you issue the notice, between the time you issue a notice and the time you issue the final rule because of all the doctrines that the courts then apply.

And once you issue that final rule, the only way you can change it, the only way you can amend it, is by going through that same process. So if you, again, set the bar real low, as Howard pointed out, well, then you've got a hell of a problem of, again, a very long resource intensive process to change the bar.

If you go the policy statement route, you have to go through procedures. It's still-- it's hard work. But you choose the procedures. And it gives you a lot more flexibility. It is less sticky. That can be both an advantage and a disadvantage.

KENNY WRIGHT: Aaron, any thoughts?

AARON NIELSON: Yeah. I'll do it really fast. I confess, like I said, that I came in here as a proceduralist. And the specifics of this entire debate is-- it's edifying. I learned a lot today. But I don't claim expertise.

But I will say this. Just, as a matter of judicial review, it'll be hard to defend a per se rule because, boy, you could come up with all sorts of things that look pretty arbitrary and capricious because there's certain situations where it obviously makes a lot of good economic sense for you to have them. That's why the Commonwealth has had it for centuries, certain doctrines.

And other ones where you say, well, that's harder to defend. So if you stick a bright-line-- unless it's so narrow, like Howard is saying-- it's just going to be arbitrary and capricious. And the court's going to say, well, wait a minute. Do you think through all that hard aspects of the problem? Well, if so, what's your response to the comments? And they would say, no. No.

So I think that would be a really hard one unless it's a very, very narrow per se rule. At that point, it's beyond my expertise.

KRISTEN LIMARZI: Well, I tend to agree with what's been said, I think. And I thought I definitely agree with the sense that there's really-- it would be incredibly difficult to justify a complete per se ban, and even a ban at a wage threshold. In addition to it being difficult to figure out what that might be, I think Howard and others have made a good point which is, it's not a very good approximation for the problem we're trying to solve, right?

It would be very rough justice to set some sort of a dollar, or a wage threshold. And I think that makes it incredibly vulnerable to judicial review.

I'll toss out something, an alternative, which is in much the way that a wage threshold isn't very tailored to the problem we're trying to solve, I was interested in some of the learning that came out of the earlier panels, especially the panel with the economists, that disclosure and the time at which the non-compete is shared, and the extent to which there's negotiation and consideration has a huge impact on the effects of the non-compete, on the worker, on the--

And so if we think that non-competes are justified in circumstances in which there is some consideration, or there is some level of negotiation, or at least it's on the front end. So we know that it's not necessarily going to shift that training costs problem that Howard was mentioning.

If that's really the issue, then maybe you want a rule that that is aimed at that, that requires disclosure or, I mean, somebody-- one of the economists said today, you know, it has to be a line item in the contract, right? You get this wage if you don't sign the non-compete and this wage if you do sign the non-compete.

I don't know how realistic that is. But that's at least trying to address the problem, or a lot of the problems that I think have been identified through the day.

SALLY KATZEN: I am with Kristen on the latter points. We heard a lot about transparency, and disclosure, and maybe even compensation for signing. The timing of the revelation is very important. There are some that-- a few where you learn about a non-compete clause before they sign the contract.

There are some who learn about it when they sign the contract. There is some learn about it after they sign the contract. There are some who don't learn about it until they're about to leave, and that's the first time.

So we also did not hear a lot in the last panel about the presence or absence of trade secrets, the thing that you're worried about the employee taking forward. And what I hear is the possibility of writing a menu of things that are relevant to evaluating the legitimacy of a non-compete agreement and that these are different categories. You can check some of the boxes or none of the boxes and have the consequences flow from that.

I am less concerned about distinguishing between low-wage workers. The story of the janitor having a non-compete? I mean, what are we talking about? How much training goes into justification for that?

I understand that as you move up through middle management, let alone senior management, that there are difficulties in drawing lines. But I think putting the compensation, whether it's an hourly worker or what they're-- less than $40,000 a year annual compensation, as one of the criteria on the menu seems to me to be completely legitimate. And I would not get shell-shocked by the fact that somebody might have some discrepancy, particularly if we're not saying per se.

Particularly if we're saying, these are the factors that would go into the consideration. That I think your menu serves that purpose.

DEREK MOORE: So I'm going to jump ahead just a little bit based in part on some of the responses that we just heard. So, as we all know, the Commission has distinct mandates to address unfair methods of competition, on the one hand, and unfair or deceptive acts and practices, on the other hand. Both categories are under Section 5 of the FTC Act.

And Aaron ably described the different, or at least the plausibly different, approaches or procedural requirements that the FTC must follow to pursue a rule under unfair methods of competition versus UDAAP, Unfair or Deceptive Acts or Practices. And some of the issues that we've been discussing related to the problems associated with non-compete agreements sound more like unfair or deceptive acts or practices. And when the remedy is a notice requirement, that to me sounds very clearly like a consumer protection issue rather than an antitrust or market power issue.

And thinking about the different procedures that we would have to follow, we need to anticipate at least the possibility that if if we follow ordinary APA notice and comment rule-making and we import some consumer protection principles into our analysis, a court might come back and say, you should have followed Mag-Moss.

So the question for the panel, generally, is consumer protection-oriented principles a better fit for the concerns that we have related to non-compete agreements? Putting aside the procedural requirements, just noting that they're different, or is this a market power problem? And I'll throw it down to Howard.

HOWARD SHELANSKI: Yeah. So, I mean, this is a tricky problem. Because I think, in some way, the UDAAP issue here is empirically and intellectually easier than the competition issue. But it, unfortunately, matches up with the more cumbersome regulatory process, which is too bad. Because if you could do APA for UDAAP, you might have at least something you could do here that's very useful.

Workers going into the employment process, or into the hiring process, have heterogeneous opportunities. And, therefore, will be extracting different levels of surplus from the package they are offered by an employer. Some people might want the job so badly and find so much benefit to the job that they wouldn't need a different wage to accept a non-compete clause.

Other people might have a broader array of opportunities and be very close to the threshold. And a non-compete clause could get them to turn the job down. So I think notice to me seems easy.

It's hard to even think of a justification for not letting the employee know ahead of time, except for gaining ex post bargaining power over that employee. So I would see, for lots of reasons-- empirically, analytically, just basic ethics-- a fairly easy rule there that says you've got to give people 10 days, or whatever it is.

And, by the way, if you don't observe it, that's just going to be like lying about the benefits of your supposed vitamins or something like that. We're going to come after you through BCP and you're going to have an action against you. And only we're going to have a rule that is the baseline as opposed to a broader sort of common law type approach.

Unfortunately, you have to go through all of this Mag-Moss process to get there. And you can imagine lots of avenues on which that would be attacked. So I do think that notice is easy and somewhat distinct from the competition problem though, right?

Because whether or not-- and this is what will be very difficult. It gets a little bit to the point that Kristen made earlier. It's very possible that a small employer that ties up six employees in a non-compete has zero effect on the market. So if you're going to go into a rule of reason kind of anti-trust box, what's the effect?

And you're going to get into these balancing. And they're going to claim they're doing lots of training and things like that. So I think the consumer protection side of this, or the UDAAP side of this is in a way somewhat easier.

I would just add something else. It seems to me that there are three things that matter here, right? Like, in my own view, termination for other than cause, you could have a rule that says, well, if it's termination for other than cause, the non-compete is invalid. OK. You could make that argument.

Does that fit into sort of a UDAAP framework to have at will termination, really anti-employee arbitration provision, and a non-compete all together? Do we have to read the contract as a whole? Is it an unfair contract? Or can we just go after the non-compete?

So I would say there are two separate rules. I would actually consider doing the rules separately. I don't think you have to have just one rule. You might want to take the easier to defend UDAAP rule and carve it out and do it under the more cumbersome Mag-Moss, only because you might have a stronger case for it and actually survive Mag-Moss.

And then I would do the competition rule, recognizing that it is not yet clear whether you can do that under APA, although as Aaron's really clear presentation indicated, there's at least some support for that. Although I suspect Justice Gorsuch such might today have a somewhat different view than what the DC Circuit had in the 1970s.

But I would carve them out so, at very least, the notice provision would survive, even if your competition rule, if you chose to do one, would not succeed. But notice seems to me like a very good place to start.

RICHARD PIERCE, JR.: Let me just express my complete agreement with Aaron's analysis of the extraordinary fragility of the FTC position that National Petroleum Refiners is going to protect them. I teach National Petroleum Refiners every year. And I teach it as an object lesson in what no court, modern court, would ever do today.

The reasoning is, by today's standards, preposterous. I mean, people who don't know, I knew J. Skelly Wright quite well. And J. Skelly Wright got on the DC Circuit because he was on the district court in the 5th Circuit and people hated him so much that they pleaded with the president to get him the hell out of the 5th Circuit. And the president said, oh, OK. I'll put him on the DC Circuit.

SALLY KATZEN: Excuse me. A personal privilege, I clerked for J. Skelley Wright.

[LAUGHTER]

Number one. And number two, Kennedy brought him up because they were burning crosses on his lawn because he moved to desegregate the buses in New Orleans.

RICHARD PIERCE, JR.: So the interpretive method that was used in that case was fairly commonly used on the DC Circuit at that time. There is no justice today-- not just Gorsuch, but Kagan, Breyer-- there is no justice today that would-- the reasoning is basically-- the case against was the placement of the context in which that power to issue rules appears in the statute makes it pretty apparent that it applies only to rules of procedure, which makes sense for an agency that was believed to have only the power to adjudicate cases.

Then you've got the problem that on eight different occasions the Federal Trade Commission had testified before Congress that it did not give them the power to issue anything but procedural rules. That had been the position of the FTC from 1948 until 1967 when, for the first time, it said, oh, now we think it's OK.

Then the reasoning of the court is basically, rule-making is wonderful. Without the power to make rules an agency really can't do an effective job. I agree completely with that. But then the conclusion is, therefore, we conclude they have rule-making power.

That, by today's standards, is laughable. I teach it as an illustration of something no modern court would do.

AARON NIELSON: I don't know what to say.

[LAUGHTER]

No, it's nice to have, like I said, the author of the treatise agree with my very tentative views.

[LAUGHTER]

Yeah. But, I mean, I will say this. Obviously, there are very smart lawyers at the FTC and will can judge litigation risk. I'm not sure if the litigation risk is 100%, which I might be hearing over here, that you will definitely lose if you take the view that you have APA powers for competition rules, and you don't have to go through Mag-Moss. I'm not sure that-- and you can do substantive rules.

I'm not sure that that means that you will lose. You do have a case-- the text of 6 says you have authority to issue rules. I would have to look more at what the briefing is. But I would say that there is litigation risk.

But that goes back to the point which is, if you're going to take the litigation risk, make sure that you have something that you need that risk for. And it seems to me that there are some situations that maybe are consumer protections. Again, competition, as I hear, the discussion, but there are some that they are certainly are not.

And that goes back to Kristen's point where you say it's just like a small shop. What's the market power here? So if you're going to be really aggressive on your legal theory, you need to be very, very certain on your factual theory. And if you're aggressive on both, that is not a good place to be.

I would recommend-- I understand you have good lawyers who can do that that analysis themselves. So that suggests that the consumer protection route makes more sense. And if you're going to do the consumer protection route, it seems to me that you'd want to pick something narrow or narrower because if you're going through the massive Mag-Moss process, it's easier the more targeted your goal is.

Now what exactly that is, I don't have the substantive expertise. But just reasoning for first principles, pick something narrow that's effective. It's easier to do the Mag-Moss process. And you're not going to put yourself in a situation where you're defending a very aggressive theory on very bad facts.

KRISTEN LIMARZI: What is that trial lawyers' aphorism? When the facts are on your side, pound the facts. And when the law is on your side, pound the law. And when neither are on your side, pound the table. I think you're saying the FTC shouldn't be in a pound the table situation. Ditto.

[LAUGHTER]

SALLY KATZEN: And I agree with Howard.

KENNY WRIGHT: OK. One last rule formulation question.

SALLY KATZEN: Well, one other thing, actually.

[LAUGHTER]

The FTC ought to consider going back to Congress and revisiting Mag-Moss. It's an anachronism. If Dick Pierce can make fun of decisions in the '70s because they don't exist in real time, maybe it's worth at least raising with friends on the Hill, if you have any, that this whole process doesn't make a whole lot of sense.

HOWARD SHELANSKI: So, Sally, just one-- great suggestion. Go ahead, try.

[LAUGHTER]

I'll just point out that everything-- that every reg reform bill that I've seen since the Great Heidi Heitkamp left the Senate has gone in the direction of taking APA rule-making towards Mag-Moss rule-making. And, look, like Jim Langford very much. He's a very good person, a sincere guy, who's working hard on this, like Rob Portman, very much sincere guy, working very hard on this. They are not going to be intuitively friendly to peeling back procedure.

SALLY KATZEN: Agreed. Doesn't mean you don't start the conversation.

HOWARD SHELANSKI: Oh, I started it a few years ago. You're trying to fight back against these reg reform bills, the great battler-- the great battlers were Heidi Heitkamp and Claire McCaskill. Neither is there anymore to do that battle. They were the ones who were willing to come a little bit to the center.

And you're not going to get a meaningful conversation between Senator Blumenthal and Senator Langford on regulatory reform. So I just don't know what sort of the avenue is.

SALLY KATZEN: Agree. But I don't think we should assume that the current status remains forever, or god help us.

KENNY WRIGHT: I guess as a follow up to that, the FTC has been granted APA rule-making authority for targeted rule-makings in a number of areas like COPPA and the Telemarketing Sales Rule, and issues like that. Since we're discussing Congress, do either of you have a view on whether or not that is a potential route that, given the facts and the sort of groundswell of concern around NCAs, that that would be a potential route?

SALLY KATZEN: Can we agree on that, Howard?

HOWARD SHELANSKI: Oh, yeah.

SALLY KATZEN: All right

DEREK MOORE: OK. One final rule formulation question, and this relates to Kristen's comment earlier that we can't write a policy statement that says the Sherman Act says non-compete agreements are governed by the per se rule when the court decisions are fairly clear that they're not governed by the per se rule. However, Section 5 of the FTC Act has much less law that we can follow. So we perhaps have more degrees of freedom in that avenue.

So the rule here is non-compete agreements, rather than being banned or declared per se illegal are deemed presumptively unfair or presumptively an unfair method of competition, which would effectively require the proponent or the defender of the non-compete agreement to bear the burden to justify its use.

I'm curious what the panel thinks about that approach and what sort of evidence we would need to present to support such a rule? Presumably, we would be able to say the CEO example is not excluded by this sort of rule because it allows for a defense. So we'll start with Howard.

HOWARD SHELANSKI: Look, I think legally that's probably supportable, especially if the relief is injunctive, which is what you can do. Because that's going to spark a little bit less concern. People will give it a try. They'll get slapped down.

So I think that's probably legally supportable. What kind of evidence would you want? I think I'd just go back to saying you'd want to know that there was enough of a field of activity in which you could make that statement and have it be empirically accurate.

Look, the last panel and people here at the agency, and there's a lot of literature out there if people were looking at this empirical question, the results, as we know, are somewhat ambiguous. But they may be strong enough in a large enough zone of activity to have a rule like that.

And I think that sparks less backlash. I think you have the authority under Section 5, as I read the very limited precedent under Section 5. And I also think that it would give you, if you built enough of a record, you would get enough stickiness because you don't get the private rights of action that follow on something that's done under the Sherman Act.

And the relief would be injunctive. And it could be a good mechanism for giving guidance to workers in the agency alike.

RICHARD PIERCE, JR.: One of the advantages of the policy statement approach-- and I'm going t ride that horse continuously-- is you can rely on both statutes and every authority you've got. Because you can't issue a rule under the Sherman Act. That's too bad. I wish you could, but you can't.

And I think you're going to have to use Mag-Moss under-- none of that applies to-- you can issue a policy statement where you say, we conclude that this is presumptively a violation of both. OK? And then you're going to have a couple of hundred of pages of explanation in there.

You're going to go through the case law that that applies under the Sherman Act, and all of the evidence that you can amass in the form of studies, and findings from studies, and the case law, such that it exists under Section 5, and why not use both? And you can use both the policy statement approach.

DEREK MOORE: Aaron?

AARON NIELSON: So on the specific contents, I confess that I don't have a lot of expertise about what that would do. I mean, I will push back a little bit again on regulation by guidance document. I don't think that's how government ought to behave.

It is true that it's easy. But if you're using non-binding law to bind, I think that we've gone off the rails a little. So I would-- again, the executive orders don't apply to the FTC. But I think the principles in them are sound.

If that's not good enough for you, I would say you can look at the administrative conference. We've also done a lot of work over at ACUS on this, which I think frowns upon regulation by guidance.

HOWARD SHELANSKI: Can I just draw a distinction that I think is really important here though? I agree completely that agencies whose only enforcement authority comes by virtue of their regulations shouldn't short circuit that through guidance. And it's a battle that OIRA fights year in and year out.

On the other hand, when the agency has specific statutory enforcement authority, and the guidance is how we are going to exercise our statutory enforcement authority, I think that's very different from regulation by guidance. That's information or notification to the public of how we will use our statutory enforcement authority.

So it's not circumventing the statute, which is what I worry more with the executive branch agencies. But it is just a distinction I think is relevant to the FTC.

AARON NIELSON: That's right. If I could just one quick response. So the question is, if you're going to do this guidance document that says your enforcement policy had better be the enforcement policy and not threat of in terrorem, like we don't want you to do things. But we're not actually going to do it. Then it starts to look more like the other.

HOWARD SHELANSKI: Fair point.

RICHARD PIERCE, JR.: That's why I would supplement that with half a dozen cases where the targets are very well chosen of the indefensible-- what's the name of that sandwich company--

DEREK MOORE: Jimmy John's.

RICHARD PIERCE, JR.: --and the janitorial service. I mean, my god. Those are the-- you bring those cases and nail them to the wall. And then that memo from the lawyer to the CEO is going to say, these people are serious. They've already hammered a bunch of people. And you're off and running.

DEREK MOORE: Kristen and Sally, any thoughts on a rule that creates a presumption rather than a ban?

KRISTEN LIMARZI: Well, I agree with Howard. I think you need the record that is sufficiently robust that you can make that claim that they are, in the vast majority of cases or the vast majority of these circumstances that we're enumerating here, problematic. And I'm not sure based on the economic literature that we heard about in the prior panel that we're there yet.

I wish that the state experience were more of-- provided more of a natural experiment. But the state laws are changing regularly, right? There's a whole bunch of new states who have adjusted their laws with respect to this. So that may provide some natural experiments that would give us the sort of information that we might want to flesh that out.

SALLY KATZEN: Broken record. I agree with Howard both times he's spoken since I did.

HOWARD SHELANSKI: This is a record.

[LAUGHTER]

DEREK MOORE: OIRA administrators always agree.

[LAUGHTER]

SALLY KATZEN: No, they don't.

AARON NIELSON: Is that the rule?

[LAUGHTER]

HOWARD SHELANSKI: No. Just for the record, I've been informed by the various-- I'm the only OIRA administrator to testify against extending OIRA's review to independent agencies. So we've disagreed on that one for years.

SALLY KATZEN: We do, disagree.

[LAUGHTER]

KENNY WRIGHT: So I guess I will take it up a level of generality, away from a specific rule formulation, and ask, Congress has established the FTC as an expert administrative agency to protect consumers and competition. If the FTC were to issue a legislative or interpretive rule to address non-compete agreements, what level of deference should the agency anticipate receiving for its interpretation of either Section 5 or the other anti-trust laws it administers? And what factors would a court consider in assessing the appropriate level of deference?

For example, the FTC shared enforcement authority with the Department of Justice; the nature of Section 5's broad mandate to address unfair or deceptive actions or practices and unfair methods of competition; the level of evidence that the agency marshaled; or other factors? And if I could make it a little bit more complicated--

SALLY KATZEN: Start with Aaron.

KENNY WRIGHT: --I would like to I would like to flag something that Commissioner Phillips said in his remarks. If you could also maybe think about the nondelegation doctrine that he raised in conjunction with this. So there you go.

SALLY KATZEN: Where are you starting?

KENNY WRIGHT: You can start with deference.

SALLY KATZEN: Oh, OK. Deference. If you do a full rule-making, and you have the proper procedures, and you've documented the materials, you are entitled to Chevron deference, which is pretty powerful. There is a rumor afoot that that may not be long-lived and that the current court now may have a majority to get rid of Chevron deference.

With respect, but not deference, I don't think that you can really get rid of Chevron deference because I think most generalist courts are going to look to the expert agency and credit what it has done to a certain amount, whatever name it chooses to use for that doctrine.

If you use the Pierce route, no deference at all, as he admitted when he was describing this. Because you haven't had the necessary procedures under Mead and all the other stuff to give you the background for that. So it's depending on whether you meet the standards and you have supported what you're going to do.

As to the nondelegation doctrine, I'm not quite sure where this has come from. It has been around for 220 years, of which it had one good year, two cases-- Schechter Poultry being one of them. And I think Panama was the other. But the courts have said consistently that as long as there is an intelligible principle, that the agencies can proceed.

It's gotten a lot of press in the last couple of years. And Gorsuch, I think, is one of those who has said that it needs rethinking. Thomas before him had said it needs rethinking. And this may be the consequence of having a court that shifts and shifts and shifts to the right, right, right, that we'll go back to the 1930s and have substantive due process and other things that we thought had been resolved in the area of constitutional law.

I'm always amazed of what comes up. And the nondelegation doctrine is one that has caught me completely flatfooted.

RICHARD PIERCE, JR.: So let me start with the nondelegation doctrine because there are now five justices who are on record as saying they're open to the possibility of figuring out a new way of applying it. I'm not a fan of that, but that is reality. And if they were to do that, I would think that Section 5 of the FTC Act would be a pretty good starting point.

What is far more likely though is that the attitude that courts have I think always had toward Section 5. It's just so open-ended that they're skeptical and they want to kind of figure out ways of handling it.

And so on the deference point, I'll give you a little background there. I now believe that degrees of deference in which-- Chevron vs. Seminole Rock, you don't know how many law professors have gotten tenure by writing their article about Chevron vs.-- oh, god, it goes on and on. There's thousands of pages of debate about something that I've concluded isn't terribly important.

A little background there. Right after the court decided Chevron, I started a debate with a good friend who taught at Harvard named Steve Breyer who said, this is a horrible opinion. We should stick to what we've always done. This is a terrible, simplistic approach.

And I said, oh, no, Steve, there's this all these advantages. And about five years ago, I told him, I give up. I think you're probably right. It's too simplistic.

And what the court has done in the meantime in Kisor, which is actually an Auer case, but it is referred to as the Chevronization of Auer, is they have qualified Chevron to such a point where in his concurring opinion the Chief Justice said, I don't see any damn difference between what these four justices want and these four justices want.

So I don't think that's terribly important. What any court is going to look at is the underlying evidentiary basis for whatever the action is, the fit with the statute. Whatever the statutory authority is, does it seem to fit this? Or is the agency trying to stretch too far? And whether the agency complied with the procedures required to take the action, any court is going to look at that.

No court is going to ignore what an agency said because they know the agency put a lot of effort into it and the agency knows more about the subject matter than they do. But they're always going to look at those three. And I don't think it makes a whole lot of difference whether you label that under one doctrine or another doctrine.

KRISTEN LIMARZI: I think if I were trying to write the argument for why the Commission wouldn't get Chevron deference on the rule that you described, I would focus on the fact that deference is much, much less, the Supreme Court has said, when an agency is changing policy on which people have detrimentally relied.

And here, the FTC would be writing on a backdrop, not necessarily of agency policy, but decades of federal and state antitrust law that don't treat agreements in this fashion, the non-compete agreements in this fashion, as well as federal and state constitutions, common law, state statutes, contract law, which are all over the map, not necessarily uniform in the way that-- none of which contemplate the sort of brighter-line rules that you're talking about.

So I think that would be-- now the response might be, if I were the agency, just shift over, the response might be it's not a change in any of that policy because we're not bringing this as-- we're not passing this rule as an antitrust matter. We're not passing this rule as a contract matter, or a state constitutional matter.

This is under our Section 5 authority to define unfair methods of competition. And then I think you run into the question that Commissioner Phillips raised, which is, what is that? How well-defined is that?

And, if it's totally unbounded or undefined, then have you sort of gone beyond what is contemplated? If you can articulate what Section 5 reaches, that is, what is an unfair method of competition? What is the category of things that are an unfair method of competition that but are not an antitrust violation? And you have some conception of what that is that you can articulate and then this fits within it, that would be one thing.

But I haven't heard that yet. And so I think it would be-- I think it would be to the Commission's benefit to think about that predicate question.

AARON NIELSON: And so I speak with some trepidation because I may be mistaken. It was my understanding that it is very much an open question where the FTC would receive Chevron deference for an interpretation of Section 5. My understanding-- again, I could be wrong-- was that in the '80s in one of the dentist cases-- was it Indiana Dentists? Or California Dentists? One of the dentists--

HOWARD SHELANSKI: Cal Dental.

AARON NIELSON: Cal, in 1986 or something, the court did not afford Chevron. And they said, but we'll give some deference or respectful consideration, or something of that effect, to the considered views of the agency.

But that goes to Dick's point. Does it matter, the label? Does the label matter? I'm not sure. I just think I believe that's still very much an open question whether you would receive Chevron deference.

They would give some-- look, to the extent that you have good analysis and that you've done the homework, obviously, that gets more respect because courts can tell that you've done the work. Even under Skidmore, at this point when we start saying Skidmore and Seminole Rock, I see eyes glaze over. But this is real law that I'm saying. They would obviously give respectful consideration.

As to the question about the nondelegation, I don't anticipate the first case in 70, 85 years to strike something down on nondelegation grounds being that it's Section 5 of the FTC. That strikes me as unlikely.

But there is another way, and I think Dick alludes to it. What courts will often do for very amorphous delegations is they will try to find limiting constructions for them. So they tried to anchor, for instance, Section 5 to the interpretations of the Sherman Act. So you have maybe some wiggle room around the margins, but it's not just an open invitation to do anything you want.

And they'll do that as a matter of ordinary statutory interpretation, to say, no, we'll interpret Section 5 not to be as broad as the text might suggest. In that sense, I think that there is a role of nondelegation, even if it's not a nondelegation case.

That said, we live in times where folks are looking for that case to take to the justices because you have an invitation from five, including Justice Kavanaugh justices just a few months ago, a couple months ago. So if they can find that case-- I just don't think that this would be that that case. That strikes me as unlikely just in my sense of the legal world.

RICHARD PIERCE, JR.: Let me just bring to everyone's attention three cases that are working their way through and at least the lawyers expect to take them to the Supreme Court in the near future that are going to be interesting applications of all this. Two of them are nondelegation doctrine cases. One of them is being argued before the Federal Circuit panel next week.

And Alan Morrison, my good friend, plans to take it to the Supreme Court, if he loses there, which he most certainly will. And that involves his argument that Section 232 of the Trade Expansion Act of 1962 violates the nondelegation doctrine. That's the statute under which the president, in a single day, three times changed the tariffs applicable to products that come from Turkey.

Another one that's pending and working its way up, I think will get to the Supreme Court eventually, is a nondelegation challenge to the 1976 National Emergencies Act Provision that, without any boundaries at all, seems to confer on the president the powers that President Trump exercised to reallocate funding to fund the wall.

That's going to be an interesting case. It's going to be interesting to see whether any of the conservatives bite there or whether some of the liberals perhaps join them in an opinion. And then there's a whole series of Chevron cases that are arising out of the immigration context, where I've been filing lots of amicus briefs.

And what Attorney General Sessions did in case after case was he'd take five cases away from the Board of Immigration Appeals and say, I'm going to sign these myself. He has that power. There's no doubt about that.

But then he issued this opinion that just said, well, we used to say this and now we say that. And that's the law, Chevron. And a circuit court said that we were right when we said that what we said in the past. That's no longer the law, citing Brand X.

And he just goes through a dozen of the things that the agency had said in the past, half of them upheld by circuit courts, and just Chevron'd and Brand X'd all of them away. It's going to be interesting to see how the justices respond to the arguments about what Chevron means in the context of all of those attorney general decisions in the immigration context.

HOWARD SHELANSKI: Yeah. I mean, the only thing I would say is I do think the nondelegation sentiment is growing. And the implications for Chevron is, I think, there remains substantial sympathy for the exercise of agency expertise when the topic or the subject of regulation is reasonably clearly covered by the statute.

I think where Chevron is weakening is in the deference to the agency on the interpretation of the statutory authority. And I think that there is increasing impatience amongst some newly-appointed circuit judges, some reasonably recently-appointed Supreme Court justices for these very broad statutes that allow these agencies to then make decisions about what their authority can cover.

So I think that is really the zone of reduced deference that I'm seeing. So when it comes to Section 5, I think the focus of the case would be, is it a reasonable interpretation if you're an authority that you can go after non-competes through a rule?

I think you're likely to get standard kind of scrutiny of your record about whether your rule is well-justified by the record. Whether the sentiment against delegation is strong enough to have them say, we're not going to bother to issue a limiting interpretation, as Aaron suggested that they would, and that is what they do most of the time, I mean, they might say at a certain point, this is a really broad statute, Section 5.

There is precedent saying that your authority under Section 5 is broader than the antitrust laws but doesn't say how broad. Congress never had the authority to grant you this authority. So they could just say Section 5 is done. And that could be a way that they put down a marker on nondelegation.

And the quality of your rule will never be reached or discussed. It'll end up not being a fight about your interpretation of Section 5. It will end up not being a fight about the validity of the rule.

And then I'll give you the nightmare scenario.

SALLY KATZEN: That wasn't the nightmare scenario?

HOWARD SHELANSKI: Oh, no. Well, the nightmare scenario is you're up there defending your rule and the Solicitor General calls you and says, I've decided to go ask the Supreme Court to overrule the statute, to say the statute's unconstitutional.

So in a deregulatory, nay, anti-regulatory kind of environment, nondelegation could come in and totally-- now, whether Section 5 is the right candidate for it, I kind of share Aaron's skepticism. But it could happen.

KENNY WRIGHT: Well, on that happy note--

[LAUGHTER]

--as was discussed earlier in earlier panels, non-compete agreements are currently subject to a patchwork of state regulations and requirements. So the FTC has previously issued rules pursuant to the FTC Act and other enabling statutes that preempt inconsistent state laws.

Does rule-making present potentially benefits for establishing a nationwide standard to govern non-compete agreements? And what issues should the FTC consider in assessing whether state law preemption is appropriate, if it undertakes rule-making in this area?

So I will throw that out to-- we could start with Sally and Aaron, or anyone can jump in. Actually, Kristen, may I-- Kristen actually I think alluded to this a little bit earlier. So if you'd like to jump in, as well?

KRISTEN LIMARZI: Well, I'm not going to try to answer the preemption question. I will leave that to Sally, and Aaron, and others. The only thought I had about it is, you know, and elsewhere in the outliner, I don't think we've talked about kind of cost benefit, and all the trappings of that that you'd need to establish for the rule. And I do think this preemption question is tied into that.

Because if you are actually preempting state law and establishing a single national standard that employers could follow, and that national employers could follow, I think you have a much easier time making the argument that there's some salutary benefit in terms of efficiency.

If you're layering this on top of the existing patchwork of state and it's just one other slightly different rule, I think that gets a lot harder. But I will leave it to Sally for the hard one.

SALLY KATZEN: So much is in flux. And preemption is one of them. It had been traditional to think about it in terms of states could do more, but could not do less. In other words, the federal, the national, rule was the floor. And then states could do more.

That used to be what was the lore, if not the law, of preemption. That, too, has been challenged recently. The whole debate in the environmental area with whether California can set a higher standard with respect to automobile emissions, for example, is one where there are serious challenges to that principle.

This is a harder area to apply that general principle to because of the complete patchwork and what is the floor that you're looking for. What is the minimal level? I'm not sure not only how this would play out but how it would be perceived by the courts.

I tend to think that if the FTC were to do a rule-making, and were to focus on national trends, and include in the data that were examined companies that had facilities or offices in multiple states, that an argument could be made and based on documented evidence that there was a purpose for a single national level or at least again a floor that you could proceed.

I think it would be a difficult analytical and a difficult data process. But I tend to think, given the old-fashioned way I think of things, that it might prevail.

AARON NIELSON: So just a couple of thoughts. One thought-- and this is not a legal thought. It is just I guess a practical thought. And that is, as I hear the economists speak about these, it seems like that there are certain types of non-competes that are more defensible than others. How are they distributed geographically? The groupings of where those are useful and where they are not?

So there is some danger that you will pick a national uniform standard that actually would be a good fit for some places and a bad fit for others. That just adds another level of complexity to how you would actually do that rule.

Because it might very well end up that we have a bright-line rule that is a very poor fit for-- again, I'm just completely spit-balling it here-- like the oil fields in North Dakota might actually just be a different type of market than what's happening in California. So that adds just another level of complexity on the analytical side to make sure that you get the right rule.

Just as a legal black letter admin law, yes, it's generally thought the agencies have power to issue preemptive rules because a legislative rules is essentially a statute. There's some pushback as to whether that's OK.

Analytically, it gets hard when you start talking about Chevron in that context or other forms of deference because usually you need a clear expression of legislative authority to preempt because of the canons in favor of non-preemption. But if you already have that, then you don't really need Chevron anymore. And that's where it gets a little bit complicated.

So I think, prudentially, the question is, does it make sense to have a national rule? Legally, probably. You could probably do it. But I think it would depend on how you do it. And it can get messy kind of fast.

And some courts, I think, might be wary, unless you have pretty strong preemption authority, that they would find inferred preemption authority.

RICHARD PIERCE, JR.: I would urge the Commission to start by looking at the DC Circuit's opinion in the latest net neutrality battle. I suspect you all know the net neutrality is, in a sense, the poster child for Chevron deference. And it was the context in which the Supreme Court issued the Brand X opinion.

Because the FCC has changed its position on net neutrality four times. And every time, the court has said, uh, OK. But it takes about a hundred pages, the last one. But, all right, Chevron. Brand X. Yeah. You can do it.

But they added this time that it doesn't preempt states from regulating internet access. You think about that. You'd say, well, that's nuts. Whether you're for or against net neutrality, the idea that you will have 50 legal regimes applicable to the internet is-- so FCC then said, oh, dear.

They said that it doesn't preempt. But the court actually provided a kind of a roadmap to how FCC could preempt it. And FCC now has taken another action in which it is explicitly found that there's a conflict between its no net neutrality rule that applies nationally and any rule-- like California already has one-- that would mandate net neutrality within a state. And we'll see how that works.

But that opinion of the DC Circuit is a good illustration of how much more effort you have to take in order to go over the preemption hurdle, even if you cross all of the other hurdles.

HOWARD SHELANSKI: I don't have anything to add.

DEREK MOORE: So I want to ask a few questions from the audience and remind everyone in the audience that, if you have additional questions, flag someone, and write them down on a note card.

So this is a question for the panel, volunteers, whomever is interested can go first. So the question is, could the FTC justify a rule on the following grounds? The rule does not go beyond our enforcement authority at all. We are doing a rule solely for the practical reason that non-competes are so ubiquitous that no realistic number of cases would deter them. Any takers?

KRISTEN LIMARZI: What does that mean, "no realistic number of cases would deter them"?

DEREK MOORE: I think--

KRISTEN LIMARZI: Like enforcement is impossible? Or inefficient?

DEREK MOORE: It's not impossible but insufficient, given our remedies, that non-competes are ubiquitous. They're everywhere. All sorts of employers use them. And an injunction, employer by employer, is not realistic to solve the problem. So it's incumbent upon us to do rule-making or to attempt some sort of market-wide solution

KRISTEN LIMARZI: I think there's-- so that seems like two of what are at least three essential steps, right? They're everywhere. And we can't-- we don't have the resources to enforce them. The middle part is, they're problematic in these circumstances. Right? And we've established that with sufficient confidence that we'd fashion such and such rule that responds to that, right?

HOWARD SHELANSKI: I'm just not really sure how a rule solves that problem. I mean, that seems like the grounds for legislation with a private right of action.

DEREK MOORE: OK. That actually bleeds into another audience question which is near and dear to my heart as an attorney in the Office of Policy Planning, where it is often suggested by private parties and other entities from government that we use our 6(b) subpoena authority to study this and that. And the idea is that the tool is available and everybody wants to use it.

And so this relates to Section 5 being fairly open-ended and, therefore, a potentially useful tool to get at a number of issues. So the question is, stepping back from what the rules should say or what the rules could-- what rule could be defended in court, is the FTC the right entity to be trying to solve this problem? Might Congress be a better avenue or a more appropriate place to address these sorts of questions?

Or even another agency, like perhaps the Department of Labor, or perhaps the National Labor Relations Board, or some arm of the Department of Labor, given that the interests that are being sought to protect here are workers' interests. And sometimes workers' interests don't necessarily jibe with competition.

AARON NIELSON: I'll just take one stab at it. I mean, I always want Congress to be the one to act. A lot of these problems about legal authority, all that stuff would fall away, if Congress decided that it was the thing that it wanted to act on. So, yeah. I mean, assuming that the policy is correct, well, then I certainly think it'd be wonderful if Congress was the entity to do that. I don't think that's likely we're going get that legislation.

HOWARD SHELANSKI: I would ask where they're going to get the basis for the legislation?

SALLY KATZEN: From the FTC.

HOWARD SHELANSKI: Well, so that's where I was-- that's-- all right. I agree with Sally.

[LAUGHTER]

SALLY KATZEN: You do the study. You amass the information. You compile the extent to which it's pervasive, the various forms in which it takes, and the consequences on labor relations, on barriers to entry, on new-- we heard in the last panel new firms coming up. And you provide all that information to Congress and say, here.

DEREK MOORE: What about the issue of whether the Federal Trade Commission, as opposed to a government agency that is specifically entrusted with thinking about and protecting workers, being the entity that ought to be thinking about these sorts of issues?

And, Howard, this goes to your earlier statement about the Bureau of Economics being 80-something very talented economists who mostly study industrial organization economics, and not necessarily labor economics.

HOWARD SHELANSKI: Yeah. So, I mean, there's no reason it has to be-- you know, you could put together a group of folks from CEA, BE, the Department of Labor. You look at the Bureau of Labor Statistics, it's historically been just a first rate operation.

You've got the folks at ERS, at the Department of Agriculture on agriculture work. Yeah. I mean, there are a lot of places where you have repositories of knowledge and expertise that would be relevant to the stakeholders here.

So industrial organization microeconomics, I think that the bargaining issues and the econometrics are very much in the skill set of BE, even if the specific subject matter is not one that they're as attuned to. So, to me, it's a question of capacity.

And I just don't know that if the Department of Labor has people to contribute. I don't think it has to be one agency. But I certainly don't think it should just be the congressional hearing process that would be the input because you're going to get a lot of anecdotes, and a lot of stories.

But you're not going to get the kind of really serious analysis that would come out of statisticians and economists. And, again, if I had to pick one entity, I would pick BE for lots of reasons. I mean, it's not just because I spent three years very happily at BE. It's because I've spent a lot of time working with the expert capacity at all of the other agencies that you've mentioned.

And, look, there's some fabulous people at those agencies, at every single one of them, today and always have been. I don't see the concentration of expertise, and focus, and balancing of the interests that I would anticipate would happen here.

I mean, DOJ has a great group of economists, too. Not as good, but they're very good. Very good. Almost as good.

KRISTEN LIMARZI: Would you say, Howard, that a joint-- I mean, if you're following the model Sally laid out, right? Which is the expert agencies do all of the analysis, hand the data to Congress, and say, craft legislation, is that analysis better by virtue of being a joint venture? That is, taking the extraordinary skills of BE, but also some of the sort of specific knowledge areas of Bureau of Labor Statistics, or AG, do you get a more robust and therefore potentially more effective presentation to make to Congress?

HOWARD SHELANSKI: I think you do. And who would mediate that and assemble it? You know, whether it's CVO or whether it's Congressional Research Service, or who it is, but, I mean, I do think there's so much expertise that could be marshaled.

And I'm with Aaron. With something like this, there's real virtue to having Congress put in place the relevant legislation, rather than making an agency on questionable authority try to leverage all of that.

But we all know how hard-- look, President Obama did not want to do the Clean Power Plant Rule. He wanted Congress to legislate serious climate change legislation. Didn't happen. He fell back on regulation.

So would Congress view this as something significant enough? We actually may be at a moment where it is. But I don't know.

DEREK MOORE: So this last question-- I think we just have time for one more-- is for the antitrust lawyers or the antitrust experts on the panel. And it's about rules versus standards in antitrust. And I'm going to make an assertion that you should feel free to disagree with.

So the assertion is, modern antitrust jurisprudence, over the last 40 years, courts have determined in a number of cases that practices previously considered unlawful per se should be governed by the rule of reason. A few examples would be vertical territorial restrictions, resale price maintenance, and others.

Would competition rule-making generally run counter to that trend? And would that potentially cause some sort of problem in judicial review?

RICHARD PIERCE, JR.: My answer is yes. But, as you guys know from the excellent workshops that you've run on vertical issues, there's a whole lot of work that's been done that suggests that somebody's got to persuade the courts to be more receptive to arguments that say that this kind of vertical restraint or that kind of vertical restraint is extremely problematic.

So I think it'll be a battle, in this context or any other. But I think it's a battle that this agency has got to take on.

HOWARD SHELANSKI: Look, I think for the rule to be meaningful, so you could just move into an agency and away from courts, the fact finding and enforcement decision under the same effective standard. So if the rule is going to actually do something that is regulatory and actually cover in a more prescriptive way a field of activity, it would have to counter the trend of moving towards more case-specific, fact-bound rule of reasoned inquiry.

And I think that otherwise it's just shifting the locus of where that analysis happens. So the answer is, yes. If the rule-making is going to be meaningful, it would be contrary to that trend.

DEREK MOORE: Do you think that's a problem though?

HOWARD SHELANSKI: Look, I don't have time for the full answer on that. The answer is, not necessarily. There are some things that happen-- the thing that originally motivated the adjudicative model and that would make it look very attractive for antitrust leads over time to systematic shifts in doctrine that actually you can see ways iteratively over time it makes it harder to bring cases.

To the extent that rule-making can be a corrective reset of the doctrinal baseline that holds more firmly, that is stickier, it could really have some advantages. But let's not forget the decades of deep experience and learning with the difficulties of getting the rule right and implementing the rule properly.

I mean, regulation can always look like the thing that's greener on the other side of the fence. It has its own serious difficulties. So I think you would want to pick very carefully the areas that you did use regulation to correct that drifting doctrinal baseline.

DEREK MOORE: Kristen?

KRISTEN LIMARZI: Yeah. And I sort of alluded to this earlier, but this is where I feel like our conversation today merges with a sort of more existential question for the FTC about the scope of Section 5. And so let me back up to the shift from a rules-based approach to a standards-based approach.

To a certain extent, we have shifted in competition law over the last 50 years as a result of increased economic rigor, right? We have moved away from-- not entirely, but a lot of that shift has come from-- we moved away from the SCP, the structure conduct performance paradigm.

We have a much better understanding now of the harms of potential anti-competitive conduct but also the context in which they're justified or potentially pro-competitive. We are much better at drawing those lines in the antitrust context. We have honed that spear.

And we've honed that spear through demanding economic rigor in antitrust analysis. So I think if you say that you can't bring-- and I think there is a lot of consensus, not entirely, but a lot of consensus that it would be incredibly difficult to bring an antitrust action, an actual Section 1 action on non-compete agreements.

It hasn't been done successfully by private plaintiffs. The agencies haven't attempted it. And so I think you need to think about why would that not be successful?

Is it not successful because we cannot establish the sort of competitive effects with the economic rigor that the antitrust laws now demand? And if that's true, I don't think the answer is to say, well, in this instance, we're just going to forget about the spear we've honed and we're going to go back to the club. And never mind.

Or do you want to say, this is a different animal. This is not competitive effects in the way that we have thought about them and the way that the Sherman Act addresses them. The problems we're seeing here are different. They're not not problems. They're serious problems and we have serious concerns about them.

But they are something different. And that's why we're going to use our Section 5 authority, which we've acknowledged is broader than the antitrust laws, to get at that. And I feel like I'm a broken record. But, again, I think it's about thinking about what is that Section 5 authority?

What is the content of that? And grounding a rules-based approach in a Section 5 authority. And then there is less tension with the trend toward standards-based approaches under the antitrust laws.

DEREK MOORE: Thank you for that. And, with that, we are at the end of our two hours. And I would like to invite you guys to give the panelists a round of applause. We asked a lot of them.

[APPLAUSE]

SARAH MACKEY: So I get to give our closing remarks today. I have always found that the best closing remarks are often the briefest. So I will keep this short because it has been a long day.

I think we have all learned so much from all of our panelists that we started with at 8:30 this morning and moved through today. And I thank all of them for their very thoughtful considerations, the time that they spent today, and the time that they have spent in developing what they were going to say today.

That is a true gift to the FTC and to anybody who watches this. So thank you very much. We are in your debt.

I want to remind everyone that the public comment period is open until February 10. We want to learn from you, too. So you have time. Please look at the record.

The transcript will be up very soon, as well the video. So you can go back and cite to the transcript. It can refresh what we heard and learned today.

And to all of those who came in person, and for those who are watching, thank you so much for your time. Everybody have a great evening. And we are done.

[APPLAUSE]