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ARE EMPLOYEE NONCOMPETE AGREEMENTS COERCIVE? WHY THE FTC'S WRONG ANSWER DISQUALIFIES IT FROM RULEMAKING (FOR NOW)

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ABSTRACT

The Federal Trade Commission recently proposed a rule banning nearly all employee noncompete agreements ("NCAs") as unfair methods of competition under Section 5 of the Federal Trade Commission Act. The proposed rule reflects two complementary pillars of an aggressive new enforcement agenda championed by Commission Chair Lina Khan, a leading voice in the Neo-Brandeisian antitrust movement. First, such a rule depends on the assumption, rejected by most prior Commissions, that the Act empowers the Commission to issue legislative rules. Proceeding by rulemaking is essential, the Commission has said, to fight a "hyperconcentrated economy" that injures employees and consumers alike. Second, the content of the rule reflects the Commission's repudiation of consumer welfare and the Sherman Act's Rule of Reason as guides to implementing Section 5.

Affected parties will no doubt challenge the Commission's assertion of authority to issue legislative rules. This article assumes for the sake of argument that the Commission possesses the authority to issue such rules enforcing Section 5. Still, prudence can counsel that an agency refrain from issuing rules before it has fully educated itself about the nature of the economic phenomena it hopes to regulate. Such prudence seems particularly appropriate when the Commission has very recently adopted an entirely new substantive standard governing such conduct. Deferring a rulemaking does not mean inaction. The Commission could develop competition policy regarding NCAs the old-fashioned way, investigating and challenging such agreements on a case-by-case basis.

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The Commission rejected these prudential concerns and proceeded to ban nearly all NCAs, assuring the public that it had educated itself sufficiently about the origin and impact of NCAs to conduct a global assessment of such agreements. The Notice of Proposed Rulemaking ("NPRM") offered three rationales for the proposed rule, drawn from a late 2022 Statement of Section 5 Enforcement Policy. First, the Commission opined that NCAs are "restrictive" because they prevent employees from selling their labor to other employers or starting their own business in competition with their employer. Second, NCAs result from procedural coercion, because employers use a "particularly acute bargaining advantage" to impose such agreements. Third, NCAs are substantively coercive, because they burden the employee's right to quit and pursue a more lucrative opportunity.

The first rationale applied to all NCAs. The second and third applied to all NCAs except those binding senior executives. Such executives, the Commission said, bargain for such agreements with the assistance of counsel and presumably receive higher salaries and/or more generous severances in return for entering such NCAs. Because NCAs also have a "negative impact on competitive conditions," the NPRM also concluded that they are presumptively unfair methods of competition.

The Commission conceded that NCAs can create cognizable benefits. Nonetheless, the Commission concluded that such benefits do not justify NCAs, for two reasons. First, less restrictive means can "reasonably achieve" such benefits. Second, such benefits do not exceed the harms that NCAs produce.

The Commission also rejected the alternative remedy of mandatory precontractual disclosure of NCAs for two interrelated reasons. First, such disclosure would not prevent employers from using overwhelming bargaining power to impose such restraints. Second, disclosure would not alter the number or scope of NCAs and thus would not reduce their aggregate negative economic impact.

The procedural coercion rationale played an outsized role in the Commission's Section 5 analysis, informing the findings that NCAs are also "restrictive" and substantively coercive. Moreover, the outsized emphasis on procedural coercion dovetailed nicely with the Neo-Brandeisian claim that ordinary Americans are routinely helpless before large concentrations of private economic power. Indeed, when the Commission released the NPRM, Chair Khan separately tweeted that NCAs reduced core economic liberties.

Still, the Commission offered no definition of "coercion" or explanation of how to determine whether employers have used coercion to impose NCAs on employees. Instead, the Commission articulated several subsidiary determinations regarding the characteristics of employers and employees that, taken together, established that employers always possess and use an acutely overwhelming bargaining advantage to impose nonexecutive NCAs. Thus, the Commission emphasized that labor market power is widespread, due in part to labor market concentration, most employees are unaware of NCAs before they enter such agreements, NCAs generally appear in standard form contracts, employees rarely bargain over such agreements, many employees live paycheck-to-paycheck and thus have no choice but to accept NCAs, and individuals negotiating over terms of employment discount or ignore the possibility that they will depart from the job they are about to accept and thus downplay the potential impact of an NCA on their future employment autonomy.

This article contends that the Commission's procedural coercion rationale for condemning nonexecutive NCAs does not withstand analysis. In particular, the Commission's various subsidiary determinations that support the procedural coercion rationale have no basis in the evidence before the Commission, contradict such evidence and/or disregard modern economic theory regarding contract formation. For instance, a recent study by two Department of Labor economists finds that the average Herfindahl-Hirschman Index in American labor markets is 333, the equivalent of thirty equally-sized firms, each with a 3.33 percent market share, competing for labor in the same market. A previous version of the study was published on the Department of Labor's website several months before the Commission issued the proposed rule. The NPRM offers no contrary evidence regarding the proportion of labor markets that are concentrated. "Hyperconcentration of labor markets" is apparently a myth.

Moreover, the NPRM ignores record evidence that sixty-one percent of employees know of NCAs before they accept the offer of employment. The NPRM's failure to address these data is particularly strange, insofar as the NPRM cites the very same page of the academic article where these data appear three different times for other propositions. The Commission also erred when it assumed that employers with labor market power would use such power coercively to impose even beneficial NCAs. This assumption would have made perfect sense in 1965. However, since the 1980s, scholars practicing Transaction Cost Economics have explained how firms with market power, including labor market power, will not use

that power to impose beneficial nonstandard agreements, including NCAs. The Commission was apparently unaware of this literature.

Nor does the lack of individualized bargaining and reliance on form contracts suggest that employers use power coercively to impose NCAs. Form contracts often arise in competitive markets and reduce transaction costs. Background rules governing contract formation, robust state court review of NCAs, and exit by potential employees can constrain employers' ability to obtain unreasonable provisions and induce employers to pay premium wages to compensate employees for agreeing to NCAs. These considerations may explain why a majority of employees who had advanced knowledge of NCAs considered the agreements reasonable, a finding the NPRM ignores.

Nor does it matter that many employees work paycheck-to-paycheck. The Commission ignored the possibility that such individuals may be employed when seeking a new job, bargain from a position of relative security, and can thus "walk away" from onerous NCAs. The Commission also ignored economic literature establishing that the presence of some such individuals in a labor market can ensure that employers offer reasonable terms to all potential employees, including unemployed job seekers.

Refutation of the procedural coercion rationale for banning nonexecutive NCAs requires reconsideration of the other two rationales as well. For instance, nonexecutive NCAs are the result of voluntary integration and thus not procedurally coercive or substantively coercive, either. Moreover, because some nonexecutive NCAs are voluntary, the Commission must abandon its erroneous assumption that the beneficial impacts of NCAs necessarily coexist with coercive harms. Proper assessment of business justifications requires the Commission to ascertain the proportion of NCAs that constitute voluntary integration, revise downward its estimate of coercive harms, and reassess NCAs' relative harms and benefits. This revision could result in a determination that NCAs' benefits in fact exceed their harms. Finally, recognition that beneficial NCAs are the result of voluntary integration requires the Commission to reconsider the mandatory disclosure remedy, which the Commission rejected based on the erroneous belief that employers use bargaining power to impose even fully disclosed and beneficial NCAs. Such reconsideration could of course lead to revising the scope of the proposed ban or rejection of any ban.

The Commission may well be entirely capable of assessing the global impact of NCAs on economic variables such as price, output, and wages. However, the Commission rejected such a rule of reason approach in favor of a standard that turns in part on the process of contract formation.

> *Thus, the Commission necessarily took on the task of gathering information regarding the process of forming NCAs and assessing that data in light of applicable economic theory. The Commission's demonstrably poor execution of this task reveals that it lacks the capacity to conduct a generalized assessment of NCAs under a governing standard that treats procedural coercion as legally significant.*
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> *Because it lacks the capacity to assess the process of forming nonexecutive NCAs, the Commission should withdraw the NPRM and start over. There are two alternative paths the Commission may take to develop well-considered competition policy governing NCAs. First, the Commission could revert to the rule of reason approach it rejected in 2021. The Commission could draw upon its considerable study of the impact of NCAs on wages, prices, and employee training and promulgate a rule that bans those agreements the Commission believes produce net harm, after reconsidering regulatory alternatives such as mandatory disclosure.*
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> *Second, the Commission could continue to embrace its new Section 5 standard but take an "adjudication only" approach to implementation. The Commission could simultaneously take other steps through various forms of public engagement to educate itself about contract formation in general and the formation of NCAs in particular. The Commission could build on data it has to this point ignored regarding various attributes of employers, employees, and labor markets more generally. Adjudication and self-education could be mutually reinforcing. Self-education could inform the Commission's determination of which NCAs to challenge, while information generated in adjudication could improve the Commission's knowledge base about NCAs. Ultimately this two-track approach could generate sufficient information to justify a well-considered rule governing NCAs.*

INTRODUCTION

THE Federal Trade Commission has an ambitious agenda to reform the American economy. The centerpiece of this effort is more robust enforcement of Section 5 of the Federal Trade Commission Act which bans "unfair methods of competition." This newly aggressive approach entails two complementary departures from prior Commission policy.

First, the Commission has embraced a greatly expanded definition of "unfair." Echoing Chair Lina Khan's Neo-Brandeisian antitrust ideology, the Commission has rejected its 2015 pronouncement that the standard governing application of Section 5 replicates the Sherman Act's Rule of Reason and thus only condemns conduct reducing consumer welfare. Second, the Commission has claimed the power—rejected by most prior Commissions—to issue legislative rules. Such rules would implement the Commission's more expansive definition of "unfair," condemning as unlawful *per se* entire categories of conduct previously deemed reasonable and thus lawful under Section 5. Such

rules, the Commission says, will combat a "hyperconcentrated economy" that is imposing economic and non-economic harms on employees and consumers.

The Commission has been implementing these new principles. In July 2021, without first seeking public comment, the Commission abruptly withdrew its bipartisan 2015 statement that had read the Rule of Reason into Section 5. Shortly thereafter, the Commission sought public comment on a 2019 Petition seeking to ban employee noncompete agreements (NCAs). Such agreements, which bind about thirty million Americans, prevent employees from departing for rival employers or starting competing businesses. For over a century, federal courts and enforcement agencies have steered clear of such restraints. State courts, however, subject such agreements to robust substantive review, declining to enforce NCAs that are broader than necessary to achieve legitimate benefits or unduly hamper employees' occupational autonomy.

In November 2022, again without public comment, the Commission announced a new Statement of Section 5 Enforcement Policy, articulating its new definition of "unfair methods of competition." Among other things, the Statement declared conduct that is "coercive," a term it did not define, to be presumptively unfair—regardless of any impact on prices, wages, output, or quality—whenever such conduct disadvantages competitors or reduces rivalry. While the Statement recognized a business justification defense, the articulation of the defense was more hostile to justifications than the Rule of Reason, internally inconsistent and contrary to Supreme Court precedent.

The Statement of Enforcement Policy spoke to case-by-case adjudication and did not explain how the Commission would determine the content of legislative rules, such as a rule governing NCAs. Under analogous Sherman Act caselaw, courts only ban agreements as unlawful *per se* after "experience with a particular kind of restraint enables the Court to predict with confidence that the Rule of Reason will condemn it."[1] The Commission has almost no experience with NCAs, having never conducted an adjudication assessing such a restraint.

Of course, federal courts lack delegated rulemaking power the Commission believes it possesses. Even if it possesses this authority, prudence dictates that the Commission only exercise such power if it has the capacity to determine the origins and impact of NCAs. Such prudence seems particularly warranted when the Commission has adopted an entirely new substantive standard governing such conduct.

Deferring a rulemaking does not mean inaction. The Commission could develop competition policy regarding NCAs the old-fashioned way,

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[1] State Oil v. Khan, 522 U.S. 3, 10 (1997) (citation omitted).

investigating and challenging such agreements on a case-by-case basis. This approach would decouple and shelter the policy governing NCAs from the inevitable challenge to the Commission's authority to issue legislative rules. Adjudication would also allow the Commission to develop expertise regarding topics about which it has very little experience, including the nation's more than 130,000 labor markets and NCAs themselves.

While the Commission has been evaluating NCAs since 2018, such study focused on whether these restraints offended the Rule of Reason by producing economic harm such as higher prices or reduced wages. A 2019 Commission staff report concluded that evidence regarding the net impact of NCAs was "mixed," a result that would not support *per se* condemnation. Of course, the Commission has since announced a more intrusive standard that, for instance, condemns "coercion." However, the Commission has had almost no occasion to assess NCAs under this new standard. By starting slow and proceeding via adjudication, the Commission could develop the expertise necessary to evaluate NCAs under its newly expansive reading of Section 5.

In January 2023 the Commission "went big." Ignoring calls to proceed incrementally, the Commission proposed to ban NCAs, with one minor exception. The Notice of Proposed Rulemaking ("NPRM") articulated three rationales supporting the proposed rule. First, NCAs are "restrictive" because they limit the autonomy of employees to start their own businesses or accept offers from other firms. Second, NCAs result from procedural coercion, because employers use "acutely superior bargaining power" to impose such agreements. Third, NCAs are substantively coercive, because they burden the employee's right to quit and pursue a more lucrative opportunity. Because NCAs also have a "negative impact on competitive conditions," they are presumptively unfair methods of competition.

The first rationale applied to all NCAs. The second and third applied to all except those binding senior executives. Unlike other employees, the Commission said, senior executives are represented by counsel when bargaining and receive compensation in return for entering NCAs. Because such agreements do not result from procedural coercion, they are also not substantively coercive.

The Commission rejected claims that NCAs are nonetheless justified because they sometimes produce cognizable benefits, for two reasons. First, NCAs are not "narrowly tailored" because alternative, less harmful means can "reasonably achieve" such benefits. Second, NCAs' benefits do not exceed their harms. The Commission emphasized that the coercive nature of nearly all NCAs ensured that any justification would have to satisfy a heavy burden, assuming as it did that such benefits coexist with harms.

The Commission also rejected the alternative remedy of mandatory precontractual disclosure of NCAs for two interrelated reasons. First, such disclosure would not prevent employers from using overwhelming bargaining power to impose such restraints. Second, disclosure would not alter the number or scope of NCAs and thus would not alter their aggregate negative economic impact.

The Commission's finding of near universal "acutely superior" employer bargaining power and resulting procedural coercion echoed its previous assertion that a "hyperconcentrated economy" imposes severe harm on employees. The finding also echoed the Neo-Brandeisian concern, previously expressed by Chair Khan, that corporate power restricts individual autonomy. Indeed, Chair Khan took to Twitter to claim that NCAs "undermine core economic liberties," implying that the proposed ban would expand such liberty for thirty million Americans.

The procedural coercion rationale played an outsized role in the Commission's Section 5 analysis, informing the findings that NCAs are also "restrictive" and substantively coercive. For instance, the NPRM treated procedural coercion as a necessary condition for substantive coercion. Moreover, rejection of the mandatory disclosure alternative followed from the belief that employers would use superior bargaining power coercively to impose even fully disclosed and beneficial agreements. Finally, the Commission treated procedural coercion as one of the harms that it compared to benefits of NCAs, even though coercion has no independent economic effect. Refutation of the procedural coercion rationale would thus require reconsideration of the other two rationales as well.

Despite heavy reliance on supposed procedural coercion, the NPRM offered no definition of the concept or account of how employers "use" bargaining power to obtain NCAs. Instead, the NPRM articulated several subsidiary determinations regarding the characteristics of employers and employees that, taken together, established that employers possess and use an overwhelming bargaining advantage to impose nonexecutive NCAs. For instance, the NPRM claimed that employers generally possess sizeable labor market power due to concentration in labor markets. The NPRM also claimed that employees generally learn of NCAs *after* accepting the offer of employment. Moreover, the NPRM emphasized that many employees work paycheck-to-paycheck, implying that job seekers have no choice but to accept NCAs. The NPRM also claimed that potential employees generally discount the possibility of departing for a new job and thus ignore NCAs. Finally, the NPRM observed that NCAs are generally part of standard form contracts, that employers are often represented by counsel (unlike potential employees), and

that potential employees rarely negotiate over such agreements. The NPRM did not explain the relative importance of these factors or which were necessary or sufficient to establish that employers always use acutely superior bargaining power to impose nonexecutive NCAs.

This article contends that the Commission's procedural coercion rationale for condemning nonexecutive NCAs does not withstand analysis. Moreover, close consideration of this rationale establishes that the Commission lacks the capacity to gather and assess the information necessary to evaluate NCAs under its expansive definition of unfair competition. The Commission may be able to assess such agreements under a Rule of Reason that would determine NCAs' net economic harm. However, having adopted a standard based on other factors, such as coercion, it was incumbent upon the Commission to develop an understanding of the economics of contract formation and to obtain information relevant to whether such agreements are the result of coercion, including the status of the thousands of labor markets where NCAs arise.

The Commission was apparently not up to this task. Each subsidiary finding described above lacks foundation in the information before the Commission, contradicts evidence the Commission ignored, and/or disregards economic theory relating to contract formation. For instance, "hyperconcentration" of labor markets is a myth. A recent comprehensive study by two Department of Labor Economists finds that ninety-four percent of American private sector employees work in unconcentrated markets, with an average Herfindahl-Hirschman index of 333. This is equivalent to thirty potential employers, each with a 3.33 percent share of the relevant labor market, competing for labor.

The Commission also erred when assuming that employers use bargaining power to impose beneficial NCAs. This assumption would have made perfect sense in 1965. However, for more than four decades, economists and others applying Transaction Cost Economics ("TCE") have understood that firms need not employ bargaining power to impose beneficial nonstandard agreements, including beneficial NCAs. If fully disclosed, such agreements result from a voluntary process of contract formation, with employers sharing the benefits of NCAs with employees by paying higher wages. Even if, contrary to fact, all employers *do* possess labor market power, TCE refutes any assertion that beneficial NCAs result from such power.

Information before the Commission also contradicted the claim that employees rarely have precontractual knowledge of NCAs. The best survey on the question found that sixty-one percent of employees knew of their NCAs before accepting the offer of employment. The NPRM cited this article over a dozen times, including the page reporting these data, but nonetheless ignored

this figure. If 61 percent is somehow insufficient, the Commission itself could require mandatory precontractual disclosure of NCAs, as do several states. The Commission's unconvincing rejection of such a requirement rested upon its erroneous finding that employers use bargaining power to impose even fully disclosed, beneficial agreements.

The appearance of NCAs in form contracts and lack of individual bargaining does not suggest coercive imposition of such agreements. Form contracts often arise in competitive markets, and parties rely upon them to reduce transaction costs and facilitate economic activity. Background rules governing contract formation and robust state court review of NCAs constrain employers' ability to obtain enforceable agreements to unreasonable provisions. Market mechanisms can force employers to internalize the impact of NCAs on employees and thereby ensure employees receive compensation for such restraints. These considerations, which the Commission did not mention, may help explain why a majority of employees who received advance notice of NCAs declined to negotiate because they considered the agreements reasonable, another finding the NPRM ignores.

The NPRM offers no evidence that potential employees ignore fully disclosed NCAs because they discount the prospect of departure from the job they are about to accept. A recent report by the Bureau of Labor Statistics finds that, by the time they reach age fifty-four, average employees have held over a dozen jobs. The NPRM does not mention this evidence and offers no reason to believe that potential employees ignore such personal history when assessing the chance of departure. If anything, older employees may *overestimate* the prospect of such departures, given that the probability of departure falls with age.

The fact that many Americans work paycheck-to-paycheck does not imply that individuals accept whatever terms a potential employer might offer. The NPRM's argument in this regard implies that no employee will ever receive more than a subsistence salary, a prediction contrary to the observed wages and benefits that most Americans earn. This disconnect between theory and evidence requires some explanation. Simply put, many who work paycheck-to-paycheck presumably seek new jobs while currently employed and thus bargain from a position of relative security. As the NPRM notes elsewhere, such individuals can walk away from job offers that include onerous NCAs. Employers who persist in offering such provisions will be forced to pay higher wages to attract talent from a smaller pool of labor. Unless employers can discriminate between employed and unemployed individuals, employed individuals who bargain from a position of relative security will help protect those who are unemployed when seeking employment.

Finally, recognition that fully disclosed and beneficial NCAs are the result of voluntary contracting falsifies the assumption that benefits of NCAs coexist with harms and thus undermines the Commission's evaluation of such agreements' net harms. A valid assessment of such justifications requires the Commission to estimate what proportion of NCAs are both fully disclosed and produce such benefits and are thus not the result of a coercive contracting process. This reassessment will ensure a more accurate calculation of the harms that NCAs produce and thus a more accurate determination of the net harm (or benefits) or NCAs.

Part I describes the origin of the proposed ban on NCAs, both for its own sake and as an exemplar of the Commission's new agenda. Part II describes the Commission's newly minted Section 5 standard, announced without prior public comment in late 2022. Part III recounts the Commission's choice of rulemaking over adjudication and release of the proposed ban. Part IV describes the NPRM and the Commission's three-fold rationale for condemning NCAs. This part also explains how the finding that nearly all NCAs are the result of procedural coercion played an outsized role in the Commission's overall analysis, informing its findings that all such agreements were unlawfully restrictive and nearly all are substantively coercive. Parts V-XIII demonstrate that the NPRM's finding that nonexecutive NCAs are the result of procedural coercion has no basis in the evidence before the Commission, contradicts such evidence and/or disregards modern economic theory regarding contract formation. Having adopted a standard that turns on the process of contract formation, the Commission necessarily took on the task of gathering information regarding the process of forming NCAs and assessing that data in light of applicable economic theory. The Commission's demonstrably poor execution of this task reveals that it lacks the capacity to conduct a generalized assessment of NCAs under a governing standard that treats procedural coercion as legally significant.

Part XIV briefly describes two alternative paths the Commission may nonetheless take to develop well-considered policy governing NCAs that inspires public confidence and is more likely to survive judicial review. First, the Commission could revert to the rule of reason approach it rejected in 2021 without first seeking public comment. Having revived the Rule of Reason, the Commission could draw upon its considerable study of the impact of NCAs on wages, prices, and employee training and promulgate a rule that bans those agreements the Commission believes produce net harm. The Commission could also revisit the question of a mandatory disclosure remedy, having revised the erroneous belief that employers always use bargaining power to impose

even fully disclosed nonexecutive NCAs that produce significant cognizable benefits.

Second, the Commission could continue to embrace its new Section 5 standard but take an "adjudication only" approach to implementation. The Commission could simultaneously take other steps through various forms of public engagement to educate itself about contract formation in general and the formation of NCAs in particular. In so doing, the Commission could build on data it has to this point ignored regarding labor market concentration (more precisely, lack thereof), pre-contractual disclosure, state-generated background rules that induce disclosure and protect employees from overbroad NCAs, survey data suggesting that more than half of employees with pre-contractual knowledge of NCAs believe them to be reasonable, among other data. These two courses of action could be mutually reinforcing. Self-education could inform the Commission's determination of which NCAs to challenge, while information generated in adjudication could improve the Commission's knowledge regarding NCAs. Ultimately this two-track approach could generate sufficient information to justify a well-considered rule governing NCAs.

I. ORIGIN STORY OF A REGULATION

In March 2019, the Open Markets Institute ("OMI") filed a petition requesting that the Federal Trade Commission ("FTC" or "Commission") initiate a rulemaking and announce a legislative rule banning all NCAs as "Unfair Methods of Competition" under Section 5 of the FTC Act.[2] OMI was at the time a leading exponent of "Neo-Brandeisian" antitrust, which contends that courts and agencies should read the antitrust laws to ban practices that reflect or encourage undue market concentration, regardless of the conduct's impact on consumer welfare.[3] Consistent with this ideology, the Petition claimed that all such agreements were "contracts of adhesion" and that employers used overwhelming bargaining power to foist NCAs on employees.[4] The Petition also claimed that such agreements produced no cognizable benefits and that there were less restrictive means of achieving any benefits.[5]

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2 Open Markets Institute et al., Petition for Rulemaking to Prohibit Worker NonCompete Clauses 17, 21 (Mar. 20, 2019) [hereinafter 2019 Petition]. *See* Robert A. Anthony, *A Taxonomy of Federal Agency Rules*, 52 ADMIN. L. REV. 1045, 1049 (2000) (defining "legislative rules" as rules that are "binding upon private persons" and result from "statutorily delegated lawmaking authority.").

3 *See* Thomas A. Lambert & Tate Cooper, *Democracy Paradox*, 49 J. CORP. L. 347, 355-59 (2023) (describing Neo-Brandeisian antitrust philosophy).

4 2019 Petition at 13-25.

5 *Id.* at 3, 49.

The Petition was ambitious in three respects. First, NCAs are largely the province of state Contract Law, and state courts subject such agreements to scrutiny that is more searching than the assessment of covenants ancillary to the sale of a business or the Sherman Act's Rule of Reason.[6] It is thus no surprise that the antitrust enforcement agencies have focused their attention elsewhere. In 1960, one scholar opined that the Department of Justice had never challenged such a restraint, and there has been only one post-1960 challenge.[7] The FTC has been equally passive. Established in 1914, the Commission challenged no such restraints until December 2022.[8] A sudden declaration that all such agreements—including those deemed reasonable by state courts—violate Section 5 would be a sea change in federal treatment of NCAs.

Second, the Commission announced in 2015 that the relevant standard for determining whether conduct constitutes "unfair competition" was the Rule of Reason, informed by the goal of consumer welfare, the standard that Congress mandated courts implement under the Sherman Act.[9] Invocation of the Rule of Reason to implement Section 5 echoed the Supreme Court's earliest interpretations of the Act and some (but not all) accounts of the statute's legislative history.[10] The gravamen of an offense under the Sherman Act entails

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6 *See infra* notes 88-90 and accompanying text.

7 *See* Harlan Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 628 n.8 (1960) (noting absence of such challenges by the Department of Justice); Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3496 n.183 (proposed Jan. 19, 2023) [hereinafter NPRM] (listing United States v. Empire Gas Co., 537 F.2d 296 (8th Cir. 1976) as the only post-1911 Department of Justice Sherman Act challenge to NCAs).

8 *See infra* notes 63-64 and accompanying text (describing these two challenges and their status in Jan. 2023).

9 *See* FED. TRADE COMM'N, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (Aug. 13, 2015) [hereinafter 2015 Section 5 Statement] ("[T]he Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare"); *see also* NCAA v. Alston, 141 S. Ct. 2141, 2151 (2022) (unanimous) ("[T]he goal [of Rule of Reason analysis] is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.") (quoting Ohio v. American Express Co., 138 S. Ct. 2274, 2284 (2018)); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 52, 57-60 (1911) (explaining that the Sherman Act bans only those agreements that increase prices, reduce production and/or reduce quality); Cline v. Frink Dairy Co., 275 U.S. 445, 461 (1927) (Taft, C.J.) (1927) (endorsing *Standard Oil*'s account of Section 1); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust*: *The Efficiency Interpretation Challenged*, 34 HAST. L. J. 65, 68-69 (1982) (Congress "subordinate[d] all other concerns to the basic purpose of preventing firms with market power from directly harming consumers.").

10 *See* FTC. v. Sinclair Refin. Co., 261 U.S. 463 (1923); FTC. v. Curtis Publ'g Co., 260 U.S. 568, 582 (1923); FTC. v. Gratz, 253 U.S. 421 (1920); United States v. Am. Linseed Oil Co.,

the exercise of market power to produce noncompetitive prices, output, or quality, including noncompetitive wages (prices for labor), without offsetting benefits.[11] *Per se* condemnation of NCAs would thus require the Agency to conclude that all or nearly all such agreements produce such harm, without producing countervailing benefits.[12]

A late 2019 Commission review of the economic literature concluded that NCAs could reduce wages and thus harm employees or increase wages by enhancing employee productivity, and that "the empirical evidence on which channel tends to dominate is mixed."[13] Even the Petition did not claim that the Sherman Act condemned such restraints as unlawful *per se* but instead claimed that they should "arguably" trigger a truncated and thus plaintiff-friendly rule of reason analysis.[14] The Petition thus recognized that outright condemnation of NCAs required the Commission to interpret Section 5's ban on unfair methods of competition to condemn conduct the Sherman Act's does not prohibit.

Third and finally, the Commission's authority to issue legislative rules was itself in doubt. The 2015 Section 5 Statement spoke of implementing its approach to Section 5 on a "case-by-case" basis.[15] This approach echoed the view of some commentators that the Commission lacks the authority to issue legislative rules defining unfair methods of competition.[16] Instead, these critics say, the Commission can only proceed by means of individual challenges to particular conduct.[17]

The Commission's only possible source of authority to promulgate legislative rules is Section 6(g) of the FTC Act.[18] This Section grants the

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262 U.S. 371, 388-89 (1923) (treating *Sinclair* as exemplar of Section 1's Rule of Reason); *see also* William E. Kovacic & Marc Winerman, *Outpost Years for a Start-up Agency: The FTC from 1921-1925*, 77 ANTITRUST L. J. 145, 179 (2010) (concluding that, according to *Gratz* and *Curtis Publishing*, "Section 5 added nothing to other antitrust laws"); *id.* at 179-80 (discussing *Sinclair*); Lande, *supra* note 9, at 126 (FTC Act's "ultimate goals were identical to those of the Sherman Act.").

11 *See Alston*, 141 S. Ct. at 2160-66 (condemning horizontal restraint reducing compensation received by student athletes after articulating consumer-centric standard).

12 *See infra* notes 123-26 (describing two-part standard governing *per se* liability).

13 John M. McAdams, *Non-Compete Agreements: A Review of the Literature* 17 (FTC Working Paper, 2019).

14 *See* 2019 Petition, *supra* note 2, at 51 n.217 (citing *In re* Polygram Holding, Inc., 136 FTC 310, 344 (2003), petition denied, 416 F.3d 29 (D.C. Cir. 2005)).

15 *See* 2015 Section 5 Statement, *supra* note 9, at 1.

16 *See* Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit,* 75 ADMIN. L. REV. 277, 296-315 (2023) (contending that Commission lacks such authority, "as a matter of ordinary statutory interpretation").

17 *Id.*

18 *See* 15 U.S.C. § 46(g).

Commission authority to: "make rules and regulations for the purpose of carrying out the provisions of this [Act]."[19] For five decades, the Commission rejected contentions that this provision grants authority to issue legislative rules, finding instead that Section 6(g) "refer[red] to procedural rules and other housekeeping matters."[20] During the 1960s, however, the Commission reversed course and ultimately convinced one appellate court that Section 6(g) confers such power, authorizing the Commission to determine whether to proceed by rule or adjudication to address allegedly unfair methods of competition.[21] The Petition invoked this decision, without addressing any counterarguments.[22]

The Petition languished until the summer of 2021, when President Biden appointed Lina Khan to Chair the FTC.[23] Chair Khan had previously served as the Petitioner's Director of Legal Policy and shared the organization's Neo-Brandeisian ideology. She had also recently co-authored an essay with then-Commissioner Rohit Chopra, contending that the Commission possessed rulemaking authority, albeit without mentioning that early Commissions had disagreed.[24] Moreover, one year before the petition was filed, Chair Khan had endorsed Justice Brandeis's belief that most individuals' "experience of power comes not from interacting with public officials, but through relationships in their economic lives—negotiating pay with an employer, for example [.]"[25] She also opined that the antitrust laws should ban practices that reflect "autocratic structures in the commercial sphere," and "preclude the experience of liberty," regardless of a practice's impact on prices, wages, output, or quality.[26]

Two weeks after Chair Khan joined the FTC, a sharply divided Commission withdrew the 2015 Statement.[27] There was no prior request for

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19 *Id.*

20 *See*, *e.g.*, Merrill, *supra* note 16, at 295, 301; Lambert & Cooper, *supra* note 3 (manuscript at 25 n.122) (recounting portions of this history).

21 *See* Nat'l Petroleum Refiners Assn. v. FTC., 482 F.2d 672 (D.C. Cir. 1973).

22 *See* 2019 Petition, *supra* note 2, at 4 n.5.

23 *See* Press Release, Fed. Trade Comm'n, Lina M. Khan Sworn in as Chair of the FTC (June 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/06/lina-m-khan-sworn-chair-ftc.

24 Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020).

25 *See* Lina M. Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 EUR. J. COMPETITION L. & PRAC. 131 (2018); *see also* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 40 (2018) (making the identical claim, without empirical support).

26 *See* Khan, *The New Brandeis Movement*, *supra* note 25, at 131.

27 *See* Public Statement from Lina M. Khan, Chair, Rohit Chopra, Comm'r, and Rebecca Kelly Slaughter, Comm'r, Fed. Trade. Comm'n, Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act

public comment, and Commissioners received one week's notice of the vote.[28] The statement explaining the withdrawal repudiated the 2015 Statement's reliance upon consumer welfare and the Rule of Reason.[29] In so doing, the Commission ignored evidence supporting the consumer welfare approach, including the most widely-cited assessment of the antitrust laws' legislative history.[30] Moreover, the statement repudiated the 2015 Statement's suggestion that the Commission could only proceed by individual adjudication.[31]

Withdrawal of the 2015 Statement by Commissioners committed to issuing legislative rules boded well for the Petition. Just over a month later, the Commission sought public comment on "Contract Terms That May Harm Fair Competition," including a copy of the Petition with the announcement.[32] The window for such comments closed on September 30, 2021. The Commission seemed poised to issue a legislative rule governing NCAs based on an expansive reading of Section 5.

II. THE NEW SECTION 5 STANDARD

The assertion of authority to promulgate legislative rules presumes a substantive standard drawn from the statute that informs the rulemaking process. The Commission's withdrawal of the 2015 Statement did not articulate any definition of "unfair methods of competition," except to say that the category included conduct that, when "full blown," violates the Sherman Act.[33]

Finally, in November 2022, again without seeking public comment, the Commission issued a statement articulating its Section 5 enforcement policy.[34] The Statement left much to be desired as a coherent standard to guide

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(July 1, 2021) [hereinafter 2021 Withdrawal Statement] https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf [https://perma.cc/B39D-78RL].

28 *See* Dissenting Statement of Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Open Commission Meeting (July 1, 2021) ("I only learned [June 24] of the Chair's intention to hold this meeting . . . [and] . . . to hold votes to rescind the Section 5 Policy Statement.") [https://perma.cc/FGP9-UGLF].

29 *See* 2021 Withdrawal Statement, *supra* note 27, at 5-6.

30 *See* Lande, *supra* note 9, at 126. Google Scholar reports that this article has been cited 1081 times (last visited Aug. 5, 2023).

31 *See* 2021 Withdrawal Statement, *supra* note 27, at 7.

32 *See* FED. TRADE COMM'N, REQUEST FOR PUBLIC COMMENTS ON CONTRACT TERMS THAT MAY HARM COMPETITION, https://www.regulations.gov/docket/FTC-2021-0036 (last visited Aug. 11, 2022) [hereinafter Request for Public Comment].

33 *See* 2021 Withdrawal Statement, *supra* note 27, at 6.

34 *See* FED. TRADE COMM'N, COMM'N FILE NO. P221202, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT (2022) [hereinafter Section 5 Statement].

implementation of Section 5. The Statement opined that Section 5 presumptively bans any conduct that "goes beyond competition on the merits."[35] However, the Statement did not define the term, citing two cases that did not mention the phrase[36] and ignoring authorities that did.[37] Instead, the Statement provided a partial list of conduct that "may" constitute such competition.[38] The qualification "may" implied that the conduct listed might sometimes *not* constitute competition on the merits.

Still, the Statement does not seem to contemplate an independent assessment of whether conduct constitutes competition on the merits. Instead, the Statement articulated a two-part standard for "evaluating whether conduct goes beyond competition on the merits."[39] The first part focuses on the content of the conduct itself and identifies two different categories of conduct that may exceed competition on the merits. First, conduct that is: "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power of a similar nature"[40] Second, conduct that is: "otherwise restrictive or exclusionary, depending on the circumstances, as discussed below."[41]

"Collusive," "deceptive," and "predatory" are long-used terms of art, providing some notice to regulated parties about what is prohibited. "coercive," "exploitative" and "abusive" are another story. For instance, there is no jurisprudence defining "coercive" conduct or "exploitative" conduct. The only possible exception would be the Sherman Act's tying doctrine, which condemns ties as unlawful *per se* if the seller has market power it uses to "force"

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35 *Id.* at 8.

36 *See id.* at 9 n.50 (citing United States v. Grinnell Corp., 384 U.S. 563, 571 (1966); United States v. Alum. Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) ("ALCOA")). Indeed, *ALCOA* condemned quintessential competition on the merits, namely, expanding output to meet consumer demand. *Id.* at 431.

37 *See e.g.* PHILLIP E. AREEDA & DONALD F. TURNER, 3 ANTITRUST LAW 83, ¶ 626G(3) (1978) (defining "competition on the merits" in great detail); Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Ac*t, 88 HARV. L. REV. 697 (1975) (characterizing above-cost pricing as "competition on the merits" and lawful *per se* under the Sherman Act); Brook Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993) (explaining that prices that reflect "lower cost structure of the alleged predator represent[] competition on the merits.").

38 *See* Section 5 Statement, *supra* note 34, at 8-9 ("Competition on the merits may include, for example, superior products or services, superior business acumen, truthful marketing and advertising practices, investment in research and development that leads to innovative outputs, or attracting employees and workers through the offering of better employment terms.").

39 *Id.* at 9.

40 *Id.*

41 *Id.*

counterparties to purchase a tied product.[42] As a result, the existence of such power is an element of the offense.[43] By contrast, the Section 5 Statement refuses to treat market power as an element of a Section 5 violation.[44]

The Statement cites four cases that supposedly involved a "use of power" to illustrate this concept. However, three such decisions involved the same, idiosyncratic fact pattern, whereby large manufacturers induced franchisors to coerce the latter's dealers into carrying the manufacturers' goods.[45] The fourth did not mention "power," "coercion" or any synonym thereof.[46] The defendant possessed a small share of an unconcentrated market, and the challenged practice governed one percent of the market's sales.[47] The Statement contains no hint of what methodology the Commission will employ to determine whether conduct is coercive.

What about the second category of conduct, that is, conduct that is "otherwise restrictive, depending on the circumstances as explained below?" Unfortunately, there is no "explanation below." Perhaps the drafters forgot to include such an explanation. Whatever the reason, this second category is basically an ink blot, providing no guidance regarding its content.

Assuming challenged conduct satisfies the first part of the standard and "goes beyond competition on the merits," the second part requires the Commission also to ask whether the conduct "tend[s] to negatively affect competitive conditions."[48] This part inadvertently drew from canonical expressions of the Rule of Reason, directing courts to assess the "challenged restraint's impact on competitive conditions."[49] The Statement offered no definition of "competitive conditions." Instead, the Statement lists a few attributes of conduct that has such an impact, including: "forclos[ing] or impair[ing] the opportunities of market participants, reduc[ing] competition

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42 *See* Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 (1984).

43 *Id.* at 26-29 (rejecting *per se* condemnation because defendant's thirty percent market share did not establish sufficient economic power).

44 *See* Section 5 Statement, *supra* note 34, at 10.

45 *Id.* at 12 (citing FTC v. Texaco, 393 U.S. 223 (1968); Atl. Ref. Co. v. FTC, 381 U.S. 357 (1965); Shell Oil Co. v. FTC, 360 F.2d 470 (5th Cir. 1966)).

46 FTC v. Brown Shoe, 384 U.S. 316 (1968).

47 *See In re* Brown Shoe Co., 62 FTC 679, 716, 718 (1963), *aff'd* 384 U.S. 316 (1966) (reporting that agreements bound dealers "constitute[ing] less than one percent of shoe stores nationally" and noting Brown's five percent market share).

48 Section 5 Statement, *supra* note 34, at 9.

49 National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 687, 689 (1978)] ("The test prescribed in *Standard Oil* is whether the challenged contracts or acts 'were unreasonably restrictive of competitive conditions.'") (quoting Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 58 (1911)).

between rivals, limit[ing] choice, or otherwise harm[ing] consumers."[50] This description would seem to reach exceedingly far, insofar as all manner of beneficial conduct "impairs opportunities of rivals" or reduces competition between rivals.[51]

The Statement also recognizes the possibility of an "affirmative defense" or "justification" for conduct that satisfies this two-part standard and is presumptively unfair. The Statement includes conflicting statements about how to assess such justifications. On the one hand, the Statement asserts that the defendant must show that "asserted benefits outweigh the harm and are of the kind that courts have recognized as cognizable in standalone Section 5 cases."[52] On the other hand, the Statement asserts that the "inquiry would *not* be a net efficiencies test or a numerical cost-benefit analysis."[53] The Statement does not reconcile these two descriptions. Nor does the Statement explain the procedural import of such proof. Does such proof undermine the *prima facie* case that conduct is unfair, thereby establishing that the conduct only produces benefits?[54] Or will the Commission assume that any benefits coexist with harms? The two-paragraph discussion of justifications does not address these questions.

Moreover, unlike traditional rule of reason analysis, in which challengers bear the burden of proving the existence of "less restrictive alternatives," the Statement provides that *defendants* bear the burden of showing that the conduct is "narrowly tailored" to achieve legitimate objectives.[55] This shift in the burden of proof contradicts the only relevant decision the Statement cites, a unanimous opinion by the Supreme Court,[56] which does not mention "narrow tailoring" and assigns the burden of proof regarding less restrictive alternatives to the plaintiff.[57]

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50 Section 5 Statement, *supra* note 34, at 9.

51 Product improvements will disadvantage rivals, while formation of a partnership reduces competition.

52 Section 5 Statement, *supra* note 34, at 12.

53 *Id.* at 11.

54 *See infra* notes 415-17 and accompanying text (explaining how proof that a restraint produces benefits should sometimes undermine the *prima facie* case of harm).

55 Section 5 Statement, *supra* note 34, at 11-12.

56 *Id.* (citing NCAA v. Alston, 141 S. Ct. 2141, 2162-64 (2022)).

57 *See Alston*, 141 S. Ct. at 2160 (holding that after the defendant produces evidence of procompetitive benefits, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."). The Statement also invokes Polygram Holding, Inc. v. FTC., 416 F.3d 29, 38 (D.C. Cir. 2005), which never discusses narrow tailoring or less restrictive alternatives. The Commission's own *Polygram* opinion assigned this burden to the Commission. *See* 136 F.T.C. 310, 476 (2003).

Finally, the Statement contemplates case-by-case, adjudicatory assessments of challenged practices.[58] The Statement nowhere describes a methodology for determining whether to ban an entire category of conduct. Put in familiar antitrust terms, the Statement does not explain how the Commission will determine if a particular method of competition is always unfair, thereby warranting *per se* condemnation.[59] Of course, if conduct always produces harm, *e.g.*, is always coercive, but can never produce cognizable benefits, it makes sense to condemn the entire category.[60] But what if conduct is necessary to produce benefits in a significant proportion of cases? The Statement does not address this question.

III. THE COMMISSION CHOOSES RULEMAKING OVER ADJUDICATION

As noted above, some contend that the Commission lacks authority to issue legislative rules.[61] Indeed, the Chamber of Commerce has already expressed its intent to challenge the Commission's assertion of such authority.[62] This article assumes the Commission *does* have such power and may thus choose between adjudication and rulemaking to address NCAs. Still, prudence may counsel that the Commission rely solely upon adjudication to develop policy regarding NCAs, at least in the short run. The Commission has almost no experience assessing NCAs, particularly under its new unfairness standard, and it first challenged an NCA when it challenged two in December 2022.[63] Both challenges resulted in consent decrees; neither entailed adversarial adjudication producing a factual record.[64] Judicial experience with such restraints under the Sherman Act is also minimal.[65]

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58 For instance, the Statement repeatedly refers to "the respondent," "respondent's conduct," or "conduct of the respondent" as the focus of inquiry. *See* Section 5 Statement*, supra* note 34*,* at 8-12.

59 *Cf.* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("*NPR*") (articulating standards governing *per se* condemnation under Section 1 of the Sherman Act).

60 *Id.*

61 *See supra* notes 16-20 and accompanying text.

62 Suzanne P. Clark, *The Chamber of Commerce Will Fight the FTC,* WALL ST. J. (Jan. 22, 2023), https://www.wsj.com/articles/chamber-of-commerce-will-fight-ftc-lina-khan-noncompete-agreements-free-markets-overregulation-authority-11674410656 (announcing that the Chamber will challenge Commission's assertion of such authority).

63 *See* NPRM, *supra* note 7, at 3496 (describing both challenges).

64 *Id.* at 3498 (explaining the status of these decrees).

65 *See* NPRM, *supra* note 7, at 3496, n.183 (collecting twelve Sherman Act decisions involving NCAs, announced between 1890 and 2022).

State courts *do* subject such agreements to searching scrutiny, often declining to enforce NCAs.[66] The standard applied, however, bears little resemblance to the standard articulated in the Section 5 Statement.[67] There is no reason to expect the abundant state caselaw to provide guidance regarding the application of Section 5.

Finally, NCAs are complex phenomena. They arise in innumerable industries and cover employees in all income brackets.[68] Some injure consumers; others injure employees.[69] Some protect trade secrets, encourage employee training, and/or facilitate investments in capital equipment.[70] Some might produce harms and benefits simultaneously. Data consistent with harm can be equally consistent with a beneficial interpretation and *vice versa*.[71] Attempting to generate a global rule to govern all such restraints is ambitious at best, foolhardy at worst. Congress grants agencies authority to develop policy through case-by-case adjudication precisely because an agency sometimes lacks the experience necessary to justify "rigidifying its tentative judgment into a hard and fast rule."[72]

Case-by-case investigations and challenges to NCAs would provide the Commission an opportunity to clarify, within the adversarial context, the meaning of "coercion" and "exploitation," for instance. Such adjudication would also force the Commission to clarify the self-contradictory and sometimes erroneous articulations of standards governing business justifications. Like rule of reason analysis, fact-intensive assessment under

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66 *See infra* notes 88-90 and accompanying text.

67 *See supra* notes 35-57 and accompanying text (describing 2022 Section 5 Statement's definition of "unfair method of competition").

68 *See* NPRM, *supra* note 7 (describing NCAs arising in several disparate industries); Evan Starr et al., *Noncompete Agreements in the U.S. Labor Forc*e, 64 J. L. & ECON. 53, 66-68 (2021) (reporting distribution of NCAs among various occupations and income brackets).

69 *See infra* notes 260-62 accompanying text (articulating how NCAs can injure consumers and employees).

70 *See infra* notes 118-21 and accompanying text.

71 For instance, proof that NCAs increase wages can indicate that such agreements encourage productivity-enhancing investments or that they raise rivals' costs and injure consumers. *See infra* notes 244-46, 266-69 and accompanying text. Moreover, proof that NCAs reduce the mobility of employees is equally consistent with the hypothesis that such agreements produce benefits and with the hypothesis that they reduce wages. *See* McAdams, *Non-Compete Agreements*, *supra* note 13, at 6 ("[D]eclines in worker mobility are not necessarily informative about whether non-compete clauses are harmful.").

72 *See* SEC v. Chenery, 332 U.S. 194, 202-03 (1947) (explaining that agencies may develop policy via adjudication because "the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule.").

Section 5 would generate records that facilitate global assessment of NCAs under the Commission's new definition of "unfair methods of competition."[73]

Logically, the content of an eventual rule would turn on a prediction of how the diverse universe of NCAs would fare when assessed case-by-case under the new Section 5 standard.[74] By analogy, under Section 1 of the Sherman Act, *per se* condemnation is only appropriate "once experience with a particular kind of restraint enables the Court to predict with confidence that the Rule of Reason will condemn it."[75] The Court has also opined that, over time, case-by-case assessment can clarify the overall impact of agreements in a particular category, informing the ultimate treatment of such restraints.[76]

Nonetheless, a bare majority of the Commission chose instead to propose a ban on all NCAs, with one trivial exception. That is, the ban would not apply to those NCAs that accompany the sale of a business where the employee restricted by the clause had owned at least twenty-five percent of the enterprise.[77] Thus, the proposed rule would ban all NCAs accepted by employees as a condition of employment, whether CEOs or employees of fast-food franchisees.[78]

Absent experience, the NPRM relied largely upon recent academic literature, some unpublished, two consent decrees then still open for public comment, and a few state law decisions, mostly *dicta*, about the relative bargaining power of parties to NCAs. None of these sources asked the question mandated by the newly minted Section 5 Statement, *e.g.,* are NCAs "coercive," "exploitative," or "abusive." Instead, the academic studies the NPRM invokes assess the impact of such agreements on various measures of economic welfare,

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73 *See* Jonathan Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953, 1045 (2020) (contending that case-by-case assessment of NCAs provides policymakers opportunity to "adjust permitted scope of noncompetes" informed by such assessments); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 436-37 (1999) ("[P]olicymakers and courts learn a great deal from studying the records of business litigation.").

74 *See* Nat'l Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 692 (1978) ("There are two complementary categories of antitrust analysis. . . . In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.").

75 State Oil v. Khan, 522 U.S. 1, 10 (1997) (quoting Ariz. v. Maricopa Med. Soc'y, 457 U.S. 332 (1982)).

76 *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 778 (1999).

77 NPRM, *supra* note 7, at 3535.

78 The NPRM exempts "franchisees" from the proposed ban. *See id.* at 3511. However, franchisees are not "employees," and the exemption is only necessary because the NPRM proposes also to ban NCAs entered by independent contractors. *See id.* (defining "worker" to include employees and independent contractors). This article focuses on the NPRM's treatment of employee noncompete agreements and defines NCA accordingly.

e.g., wages, prices, and employee training, ironically, the questions mandated by the (withdrawn) 2015 Section 5 Statement.

The Commission majority felt it necessary to explain why it embraced rulemaking instead of adjudication, albeit in a statement separate from the NPRM.[79] The majority claimed that the Commission had "deepen[ed] its work" on NCAs since 2018 and held workshops on the matter.[80] The Commission also claimed that staff had "closely studied the available economic research and reviewed hundreds of comments from employers, advocates, trade associations, members of Congress, state and local officials, unions, and workers."[81] Congress, the majority claimed, charged the Commission with using its expertise to enforce Section 5 via adjudication or rulemaking.[82] The majority might also have mentioned that the Commission's report on its 2022 enforcement priorities had asserted that the "case-by-case approach to promoting competition . . . had proved insufficient," resulting in a "hyperconcentrated economy whose harms to American workers," and others "demand new approaches."[83]

The majority did not mention that nearly all staff activity and public engagement had taken place either: (1) before the abrupt 2021 withdrawal of the 2015 Section 5 Statement, which had mandated assessment of such restraints under the Rule of Reason; or (2) after such withdrawal but before the Commission released the new Section 5 Statement explaining the Commission's new standard. Nor did the Commission identify any staff efforts or literature assessing whether NCAs violated this novel Section 5 Standard, *e.g.*, were "coercive," "abusive," or "exploitative."

Moreover, any rationale for choosing rulemaking over adjudication rests critically upon certain assumptions about the Commission and its capabilities. As explained above, NCAs are complex phenomena arising in innumerable markets and binding employees in vastly disparate occupations. Development of a well-considered rule governing NCAs would depend upon the Commission's willingness and capacity to generate and consider sufficient information bearing upon a global assessment of such restraints under the

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79 *See* Public Statement from Lina M. Khan, Chair, Rebecca Kelly Slaughter, Comm'r, and Alvaro M. Bedoya, Comm'r, Fed. Trade. Comm'n, Regarding the Notice of Proposed Rulemaking to Restrict Employers' Use of Noncompete Clauses (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/statement-of-chair-lina-m-khan-joined-by-commrs-slaughter-and-bedoya-on-noncompete-nprm.pdf.

80 *Id.*

81 *Id.*

82 *Id.*

83 *See* FED. TRADE COMM'N, STATEMENT OF REGULATORY PRIORITIES 1 (2021) [https://perma.cc/GF2J-H6DF].

newly minted Section 5 standard. Such information includes public comments, academic interventions, modern theoretical developments bearing upon the origin and impact of NCAs, and information generated by Commission workshops exploring such agreements.

Development of a legislative rule could also require the Commission to, *inter alia*, draw conclusions about the structure of the thousands of labor markets where NCAs arise. Implementation of the Section 5 Statement's presumptive condemnation of restraints resulting from "coercion" would require the Commission to develop a standard to assess the relative bargaining positions of parties to NCAs, including whether employees have advance knowledge of such agreements. The Commission would also have to be well-versed in theoretical developments regarding the economics of contract formation, particularly those associated with Transaction Cost Economics, to understand the types of benefits such agreements might produce and whether employers with labor market power coercively impose beneficial NCAs on employees.

The article now turns to the NPRM and describes the Commission's three professed rationales for condemning NCAs. As explained, one such rationale, the supposed use of procedural coercion to impose nearly all NCAs, informs the other two rationales as well. The article then evaluates the various subsidiary findings the NPRM invokes to support its determination of near-universal procedural coercion, all to assess whether the Commission is capable of evaluating the global impact of complex economic phenomena such as NCAs under the Commission's newly minted Section 5 standard.

IV. SUMMARY OF THE NPRM

This part summarizes the NPRM. The part pays particular attention to the NPRM's finding that nearly all NCAs are the result of employers' exercise of acutely superior bargaining power, *i.e.*, procedural coercion, to impose such agreements. This part also shows that the procedural coercion rationale played an outsized role in the Commission's overall assessment of NCAs.

A. Background on NCAs, Empirical Studies, Governing Law, and the Commission's Process

The NPRM estimated that one in five American employees—about thirty million—are covered by NCAs.[84] For illustrative purposes, the NPRM noted

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84 NPRM, *supra* note 7, at 3485.

that employees with NCAs ranged from ophthalmological surgeons and steel company executives to those working for fast-food restaurants, a payday loan company, a firm providing security services, and a glass manufacturer.[85] The NPRM then proceeded to assess NCAs. The assessment began by noting that such agreements depart from a "perfectly competitive labor market," by constraining employees' post-employment autonomy.[86]

The NPRM then canvassed numerous empirical studies, some unpublished, that attempted to determine the impact of NCAs upon various indicators of economic welfare, including wages, new entry, employee training, and consumer prices.[87] No such study assessed whether NCAs were "coercive."

The NPRM then summarized the law governing NCAs, including Sherman Act caselaw, state statutes, and the common law standards state courts employ when determining whether to enforce such agreements.[88] As the NPRM explained, employees seeking to avoid enforcement of NCAs need not establish any *prima facie* case of harm. Instead, employers bear the initial burden to show that: (1) the restraint serves a legitimate interest and (2) is no broader than necessary to further that purpose.[89] Even if the employer satisfies these burdens, the employee may still prevail by showing that the NCA's negative impact on the employee or the public exceeds the restraint's benefits.[90]

The NPRM then recounted the process the Commission had undertaken to assess the impact of NCAs, including workshops and a request for public comment on the 2019 Petition.[91] Finally, the Commission reviewed its sparse and very recent enforcement experience with NCAs, none of which entailed adjudicatory assessment of such agreements.[92]

The Commission then briefly described the source of its authority and the basic contours of Section 5.[93] This terse discussion did not mention "competition on the merits" or the Section 5 Statement's two-part standard. Instead, the Commission simply stated that Section 5 bans some conduct that would not violate the Sherman Act, if such conduct "left unrestrained, would grow into an antitrust violation in the foreseeable future."[94]

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85 *Id.* at 3484.
86 *Id.* at 3485.
87 *Id.* at 3484-93.
88 *Id.* at 3493-97.
89 RESTATEMENT (SECOND) OF CONTRACTS, § 188(1) (AM. L. INST. 1981).
90 NPRM, *supra* note 7, at 3495.
91 *Id.* at 3497-98.
92 *Id.* at 3498.
93 *Id.* at 3499.
94 *Id.*

B. All NCAs Are Restrictive and Have a Negative Impact on Competitive Conditions

The NPRM devoted five sentences to explaining that all NCAs are "restrictive."[95] Like the Section 5 Statement, however, the five sentences did not define "restrictive." Instead, the NPRM concluded that NCAs are "restrictive" because they "restrict a worker's ability to work for a competitor of the employer" and also "restrict" the ability of competing firms to hire employees subject to NCAs.[96] The NPRM also noted that NCAs are "restraints of trade" and thus "subject to assessment under the antitrust laws."[97] The NPRM finally invoked evidence that such agreements "negatively affect competition in labor markets and product and service markets," promising to "summarize this evidence below."[98]

This conclusory discussion regarding why NCAs are "restrictive" may have been harmless error. For, the NPRM then discussed whether NCAs "negatively affect competitive conditions."[99] The NPRM's assessment of this question seemed akin to a global rule of reason inquiry consistent with the 2015 Section 5 Statement. The NPRM invoked findings that NCAs tended to reduce wages, slow competitive entry, and perhaps raise consumer prices.[100] This discussion of effects seemed more robust than contemplated by the Section 5 Statement.[101]

The Commission could have stopped there and concluded that NCAs produce negative impacts on wages and other variables and are therefore presumptively unfair. Instead, the Commission identified two additional reasons that NCAs were presumptively unfair, albeit only when entered by employees who are not "senior executives." Both additional rationales seemed to reflect the sort of Neo-Brandeisian concerns regarding how overbearing

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95 *Id.* at 3500.

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.* at 3500-01.

100 *Id.* at 3485 (finding that, "in the aggregate," such agreements "materially reduce[] wages for workers").

101 *See* Lambert & Cooper, *supra* note 3, at 30 n.148 (noting that the Section 5 Statement does not require such a searching assessment of "impact on competitive conditions").

corporate power "preclude[s] the [individuals'] experience of liberty[,]" as Chair Khan had put it when serving as the Petitioner's Director of Legal Policy.[102]

C. All Nonexecutive NCAs Result from Procedural Coercion

The NPRM found that nonexecutive NCAs are "exploitative and coercive at the time of contracting."[103] This finding of such widespread coercion and exploitation impacting the process of contract formation rested upon numerous subsidiary findings regarding the relative positions and behavior of employers and employees that established that employers possess and use a "particularly acute" bargaining advantage to impose NCAs:[104] Here are the most salient such factors:

1. A few state courts and the Second Restatement of Contracts have purportedly asserted that employers always enjoy a bargaining advantage over employees;
2. Employers "generally" have labor market power because of "concentration" and "difficulty of searching for a job;"
3. Employees rarely read NCAs before accepting employment offers;
4. Many employees work paycheck-to-paycheck and have difficulty obtaining a job, with the result that they have little choice but to accept whatever terms of employment the employer offers;
5. Employees rarely engage in individualized negotiation over such provisions, which are often part of standard form contracts;
6. Employers generally have the assistance of counsel in preparing such agreements, while potential employees generally review such terms without such assistance ;
7. Because of cognitive biases, potential employees purportedly ignore or discount so-called "contingent terms," terms concerning scenarios that "may or may not come to pass;"

The NPRM characterized factors 1-5 as sources of bargaining power, but also treated factor 3, like factors 6 and 7, as evidence that employers use such power coercively to impose NCAs.[105]

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102 Lina M. Khan, *The New Brandeis Movement*, *supra* note 25; *see also id.* at 10-11 (describing Neo-Brandeisian concern regarding impact of concentrated economic power on individual liberty).

103 NPRM, *supra* note 7*,* at 3500.

104 *Id.* at 3503.

105 The NPRM also noted that most employees do not belong to unions that can counteract employer bargaining power. *Id.* at 83. However, if employers lack significant labor market power, there is no bargaining power for unions to counteract. As explained below, the

D. Nonexecutive NCAs Are Coercive in Substance

The NPRM also concluded that nonexecutive NCAs are coercive and exploitive in *substance,* because they place post-employment restrictions on the autonomy of employees.[106] Thus, such agreements always "burden the ability [of employees] to quit," by "forcing" such employees to remain in their current jobs or "take an action" that would "affect their livelihood," such as "leaving the labor force for a period of time or taking a job in a different field."[107] While the NPRM did not mention it, the two distinct types of coercion it identified correspond to the categories of procedural and substantive unconscionability recognized by Contract Law.[108] This article employs this distinction to describe the two categories of coercion (procedural and substantive) the NPRM identified. Because the NPRM does not attribute separate meanings to "coercive" and "exploitative," the balance of this article will employ "coercive" to refer to both concepts.

E. Senior Executive NCAs Are Not Coercive

As suggested above, the NPRM's finding that NCAs are both procedurally and substantively coercive did not apply to contracts entered by "senior executives."[109] The NPRM invoked three factors to justify this exception. First, senior executives are generally represented by counsel.[110] Second, such individuals engage in individualized negotiation over NCAs.[111] Third, such employees presumably receive additional compensation in return for NCAs.[112] Thus, the NPRM concluded, the process of contract formation was not coercive.[113]

The noncoercive manner of forming senior executive NCAs also informed assessment of their substance. The NPRM did not determine

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NPRM provides no evidence regarding what proportion of employers that obtain NCAs possess such power.

106 NPRM, *supra* note 7, at 3504.

107 *Id.*

108 *See* JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 541-42 (5th ed. 2011) (discussing the distinction between procedural and substantive unconscionability).

109 NPRM, *supra* note 7, at 3503 ("[NCAs] for senior executives are unlikely to be exploitative or coercive at the time of contracting, because senior executives are likely to negotiate the terms of their employment and may often do so with the assistance of counsel.").

110 *Id.* at 3504.

111 *Id.* (finding that senior executives "are likely to have bargained for a higher wage or more generous severance package in exchange for agreeing to [an NCA]").

112 *Id.*

113 *Id.*

whether senior executive NCAs are onerous at the time of enforcement. Instead, the NPRM concluded that such restraints are not coercive as a matter of *substance* because the *process* of bargaining that produces them is not coercive.[114] Thus, the NPRM's conclusion that *non*executive NCAs *are* substantively coercive depended on both the *substance* of such agreements and also the Commission's determination that the *process* of obtaining NCAs was coercive. Proof of procedural coercion was necessary, but insufficient, to establish substantive coercion.[115]

The NPRM did not define "senior executive," inviting public comment on the definition. However, the NPRM suggested several possible definitions, most tethered to categories of corporate officers defined under the Securities laws. Each such definition would refer to a tiny or very small subset of the thirty million employees subject to NCAs.[116]

F. Rejection of Business Justifications

The Section 5 Statement provided that presumptively unfair conduct was nonetheless justified when "the benefits outweigh the harm and are of the kind that courts have recognized as cognizable[.]"[117] The NPRM recognized that NCAs could help protect trade secrets, incentivizing employers to create and share knowledge with employees, and improving productivity and/or the quality of a firm's product.[118] The NPRM also recognized that NCAs could protect employers' training investments that enhance employees' general human capital, by preventing free-riding by other employers who might bid

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114 *Id.* at 3503.

115 The NPRM incorporated by reference previous discussion regarding the impact of NCAs on "competitive conditions." *See id.* at 3504. The NPRM did not distinguish the impact of all NCAs from the impact of that (large) subset entered by non-executives.

116 *Id.* at 3520 (describing various possible definitions, including "cross-referenc[ing] a definition in an existing federal regulation, such as the definition of 'named executive officer' in Securities and Exchange Commission (SEC) Regulation S-K or the definition of 'executive officers' in SEC Rule 3b-7"); 17 CFR § 229.402(a)(3) (defining "named executive officer" under Regulation S-K to include between five and seven executives of public companies); Nicole Goodkind, *America Has Lost Half Its Public Companies Since the 1990s: Here's Why*, CNN (June 9, 2023) (reporting that there are about 3,700 public companies). Equating "senior executives" with "named executive officers" would thus identify fewer than 26,000 Americans as senior executives, less than one percent of the 30 million Americans covered by NCAs.

117 *See* Section 5 Statement, *supra* note 34, at 11-12. *But see id.* at 11 (business justification inquiry is not "a net efficiencies test or a numerical cost-benefit analysis").

118 NPRM, *supra* note 7 at 3505.

away employees after they receive such training.[119] Finally, the NPRM recognized that NCAs can encourage investments in capital equipment, by retaining employees whose skills are complementary to such investments.[120] While the Commission did not refer to "cognizability," it apparently considered these benefits cognizable under Section 5.[121] The NPRM did not, however, estimate what proportion of NCAs produce such benefits.

Ordinarily, the recognition that NCAs sometimes produce cognizable benefits would preclude *per se* condemnation.[122] Courts and agencies applying the Sherman Act have declined to condemn an entire class of restraints when a subset may produce "redeeming virtues," a synonym for "cognizable efficiencies."[123] Moreover, common law courts treated NCAs as "ancillary" to a legitimate activity (employment), and thus not unlawful *per se*, because they might enhance that activity's productivity.[124] Such productivity enhancement constitutes a redeeming virtue.[125]

The NPRM did not articulate any methodology for determining whether to ban an entire category of conduct.[126] Nonetheless, the NPRM condemned

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119 *Id.* (explaining how NCAs can ensure that employers capture the benefits of such investments); Alan J. Meese, *Don't Abolish Employee Noncompete Agreements,* 57 WAKE FOREST L. REV. 631, 687 n.286 (2022) (collecting numerous state law decisions recognizing that protection of such training investments is a legitimate interest that can justify enforcement of NCAs).

120 NPRM, *supra* note 7 at 3539 (discussing Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship*, 37 REV. FIN. STUD. 1, 22 (2024)).

121 *See* Meese, *Don't Abolish Employee Noncompete Agreements*, *supra* note 119, at 684-91 (describing precedent and theory suggesting that such agreements can produce significant cognizable benefits).

122 *See, e.g.*, Meese, *Rule of Reason*, 2003 ILL. L. REV. at 97; *see also* Leegin Creative Leather Prods. v. PSKS, 551 U.S. 886 (2007) (rejecting *per se* condemnation of minimum rpm because such agreements often produce redeeming virtues).

123 *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (agreements are unlawful *per se* "because of their pernicious effect on competition and lack of any redeeming virtue"); Catalano, Inc. v. Target Sales, 446 U.S. 643, 645-46 n.9 (1980) (quoting the *NPR* test as a definitive statement of the *per se* rule).

124 *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898) (Taft, J.); Orkin Exterminating Co. v. Mills, 127 S.E.2d 796, 797-98 (Ga. 1962) (enforcing the NCA's preclusion of defendant from working for rival); Hitchcock v. Coker (1837) 112 Eng. Rep. 167 (KB) (enforcing the NCA's preclusion of defendant from opening a competing business); *see also* Polk Bros. v. Forest City Enters., 776 F.2d 185, 189 (7th Cir. 1985).

125 *See* Nat'l Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 689 (1978) (explaining that covenants ancillary to sale of a business can be reasonable because they "enhanc[e] the marketability of the business itself—and thereby provid[e] incentives to develop such an enterprise"); *Polk Brothers*, 776 F.2d at 189 (restraints are ancillary if they "arguably promoted enterprise and productivity at the time [they were] adopted").

126 *Cf. N. Pac. Ry. Co.,* 356 U.S. at 5 (describing the two-part standard governing *per se* condemnation).

all such agreements that did not accompany the sale of a business as *per se* unfair methods of competition. The Commission invoked two alternative findings to support this determination. First, the NPRM invoked the supposed existence of alternative means of "reasonably achieving" the beneficial purposes of NCAs.[127] The NPRM ignored precedent requiring the Commission to prove that proffered alternatives produce "the same" benefits as the challenged restraint.[128] Instead, the Commission conceded that NCAs would result in increased capital investment and employee training compared to the alternatives the Commission advanced.[129] Moreover, the NPRM asserted that alternatives "reasonably accomplish the same purposes" as NCAs,[130] claiming that the superiority of NCAs over alternatives was merely "marginal."[131]

In short, the NPRM's invocation of alternatives entailed an implicit comparison between the net effect of NCAs and the net effects of alternatives.[132] Because NCAs purportedly produce far more harms (including procedural and substantive coercion) than alternatives, and alternatives are only "marginally" less effective, the net effect of a ban would be positive.[133] Unfortunately, the Commission did not explain how it determined the difference between the benefits NCAs produce and the (reduced) benefits of alternatives. The assertion that differences were "marginal" was *ipse dixit*.

Second, the NPRM purported to find that the benefits of NCAs did not exceed the harms.[134] The NPRM invoked all three harms it had identified: (1) the restrictive nature of NCAs; (2) procedural coercion afflicting nonexecutive NCAs, and (3) substantive coercion afflicting nonexecutive NCAs.[135] Without estimating how often NCAs produce benefits, the Commission concluded that the benefits did not outweigh these harms.[136] Both invocation of alternatives and comparison of benefits with harms assumed that all three harms and benefits coexist, even if the NCA produces more benefits than alternative

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127 *See* NPRM, *supra* note 7, at 3505-08.

128 *See* NCAA v. Alston, 142 S. Ct. 2111, 2162 (2021).

129 *See* NPRM, *supra* note 7, at 3508.

130 *Id.* at 3505.

131 *Id.* at 3508 (NCAs' harms are not outweighed "because an employer has some marginally greater ability to protect trade secrets, customer lists, and other firm investments, or because the worker is receiving increased training, or because the firm has increased capital investments").

132 *See* C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust*, 116 COLUM. L. REV. 927, 955-59 (2016) (describing such an approach as assessing "balanced alternatives").

133 The Commission articulated this assessment when explaining why the benefits of NCAs did not outweigh the harms. *See* NPRM, *supra* note 7, at 3508.

134 *Id.* at 3508.

135 *Id.* at 3507-08.

136 *Id.* at 3508.

means of achieving benefits. Thus, the NPRM's treatment of benefits rested upon an irrebuttable presumption that employers coercively impose even those nonexecutive NCAs that produce more benefits than alternatives.

G. The Outsized Role of Procedural Coercion

The NPRM purports to identify three distinct ways that NCAs unfairly impact competition. First, all NCAs are "restrictive." Second, nearly all result from a coercive process of contract formation. Third, nearly all are substantively coercive.

However, both the first and third rationales depend partly on the second. That is, both rely in part on the NPRM's finding that nonexecutive NCAs result from procedural coercion. For instance, the determination that nonexecutive NCAs are substantively coercive rested partly on the antecedent finding that all such agreements are the result of a coercive *process* of contract formation, a finding necessary to the determination of substantive coercion.

Condemnation of NCAs because of their aggregate restrictive impact depends on the finding of procedural coercion in two different ways. First, this finding turned on the rejection of the alternative of mandatory pre-contractual disclosure of NCAs.[137] Such disclosure would force employers to internalize the costs that restraints impose on employees, who would demand higher wages in return for NCAs.[138] This demand for higher compensation would to that extent induce employers to abandon NCAs or narrow their scope.[139]

The Commission rejected the mandatory disclosure alternative for two related reasons. First, it opined that, despite disclosure, employers could still employ superior bargaining power to impose NCAs.[140] This assertion echoed the finding that nearly all NCAs resulted from procedural coercion. Second, the Commission asserted that such disclosure would not alter NCAs' aggregate impact.[141] This second assertion seemed to depend upon the first, namely, that employers will obtain the same number and type of NCAs, even if they universally disclose such agreements in advance. Absent the finding of procedural coercion, the Commission would have been forced to consider the possibility that universal disclosure would reduce the number of NCAs,

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137 *See infra* notes 301-03 and accompanying text (describing NPRM's rationale for rejecting alternative of mandatory disclosure).

138 *See infra* notes 244-48, 376-87 and accompanying text.

139 *Cf.* Barnett & Sichelman, *supra* note 73, at 1037-38 (explaining that employers may be unwilling to pay employees sufficient compensation to induce acceptance of an NCA).

140 *See* NPRM, *supra* note 7, at 3521.

141 *Id.*

increase wages, and render some remaining agreements less onerous. Both results would reduce the aggregate negative impact of such restraints, perhaps altering the balance of harms and benefits.

Second, the NPRM's finding that all NCAs are unfair because they are "restrictive" turned partly on the two-fold rationale for rejecting business justifications. First, NCAs' benefits did not outweigh their harms. Second, alternatives could sufficiently advance legitimate objectives.

Comparison of benefits with harms required specification of the harms. The Commission did not rely solely upon NCAs' restrictive impacts but also invoked the two coercion-based harms.[142] Indeed, the Commission asserted that its finding that nonexecutive NCAs are doubly coercive meant that business justifications must "overcome a high bar to alter the [presumption] that [NCAs] are an unfair method of competition."[143] The NPRM thus found that NCAs' benefits did not outweigh the sum of all three harms. Absent the findings that nearly all NCAs are procedurally and substantively coercive, only one source of harm would have remained. The Commission would then have to reassess NCAs' relative harms and benefits.

The finding of procedural coercion also informed the application of the narrow tailoring test. To be sure, the alternatives proffered by the Commission had a less restrictive impact on "competitive conditions" than NCAs. This finding would establish liability under conventional rule of reason analysis. However, the NPRM departed from conventional analysis, relaxing the requirement that proffered alternatives produce "the same"[144] benefits as the challenged restraint, conceding that alternatives were less effective.[145] The Commission nonetheless condemned all NCAs, after comparing the net impacts of alternatives with the net impacts of NCAs.[146] This assessment, however, did not distinguish between the three harms the NPRM attributed to NCAs. Indeed, as noted above, when balancing harms against benefits, the Commission included procedural and substantive coercion and assumed that such harms coincided with the benefits that some NCAs produce.[147] Here again, we cannot know how the Commission would have resolved this comparison absent its consideration of coercive harms.

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142 *Id.* at 3508.

143 *Id.*

144 *See* NCAA v. Alston, 142 S. Ct. 2111, 2162 (2021).

145 *See supra* notes 129-31 and accompanying text.

146 *See supra* notes 129-33 and accompanying text (describing this aspect of the NPRM's analysis).

147 *See supra* note 135 and accompanying text.

H. Missing Definition of Procedural Coercion

The finding that nonexecutive NCAs result from procedural coercion also informed the first and third unfairness rationales. Moreover, the outsized emphasis on procedural coercion dovetailed nicely with the Neo-Brandeisian claim that ordinary Americans are routinely helpless before large concentrations of private economic power, and that the Commission should read Section 5 to combat manifestations of such concentration.[148] The Commission itself recently contended that issuance of legislative rules was necessary to combat the "hyperconcentrated economy."[149] While the NPRM did not refer to "liberty" or "freedom," Chair Khan claimed on Twitter that the ban would enhance employees' "economic liberties."[150]

One might therefore expect some definition of procedural coercion. Like the Section 5 Statement, however, the NPRM offers no definition. Nor does the NPRM articulate any intelligible standard for determining whether employers in a particular market possess bargaining power or have exercised power to impose NCAs. Nor does the NPRM explain how an employer "uses" such power coercively to impose NCAs as opposed to, say, reducing wages below the competitive level.

As noted above, the NPRM does identify several factors that, taken together, purportedly establish that every employer possesses an acute bargaining advantage over nonexecutive employees.[151] However, the NPRM does not explain which of these factors was necessary to or sufficient for this determination. Imagine, for instance, that a labor market is moderately competitive, most employees have advanced knowledge of NCAs, but many also work paycheck-to-paycheck and do not bargain individually. Do the market's employers possess bargaining power? If so, do they possess enough to impose NCAs? Or, do they lack such power altogether?

The NPRM provides no hint regarding how to answer these questions. In any event, as explained in parts V-XIII below, none of the NPRM's subsidiary findings withstand analysis. Instead, each such finding lacks foundation in the record, contradicts evidence the Commission ignored, and/or disregards economic theory relating to contract formation. Even if only one such finding was sufficient to establish procedural coercion, the NPRM's conclusion that

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148 *See supra* notes 25-26 and accompanying text.

149 *See supra* note 83 and accompanying text.

150 *See* @linakhanftc, X (Jan. 5, 2023, 10:44 AM), https://twitter.com/linakhanFTC/status/1611025897481453568 ("Noncompetes undermine core economic liberties.").

151 *See supra* notes 103-05 and accompanying text.

employers always use coercion to impose nonexecutive NCAs does not survive scrutiny.

V. NEITHER THE SECOND RESTATEMENT NOR THE CASELAW ASSERTS THAT EMPLOYERS ALWAYS POSSESS SUPERIOR BARGAINING POWER

The NPRM cites the Restatement (Second) of Contracts and four state cases to support its claim that employers always possess overwhelming bargaining power over nonexecutive employees.[152] Taken together, these sources actually contradict this claim.

For instance, the NPRM quotes a sentence from commentary to the Restatement provision governing NCAs.[153] This sentence merely states that employers "often" use power to impose NCAs.[154] Even if "often" means "usually," it does not mean "always" or "nearly always." Finally, the Restatement does not ban such agreements, but admonishes courts to scrutinize them more carefully than other ancillary restraints.[155] Numerous courts have cited this provision when opining that courts should enforce reasonable NCAs.[156]

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152 *See* NPRM, *supra* note 7, at 3502 n.262 (citing Arthur Murray Dance Studios v. Witter, 62 OHIO L. ABS. 17, 105 N.E.2d 685, 703-04 (Ohio Ct. Com. Pl. 1952); RESTATEMENT (SECOND) OF CONTRACTS, § 188 cmt. g (AM. L. INST. 1981)); *id.* at n.263 (citing, *e.g.*, Alexander & Alexander, Inc. v. Danahy, 488 N.E.2d 22, 29 (Mass. App. Ct. 1986); Diepholz v. Rutledge, 659 N.E. 989, 991 (Ill. Ct. App. 1995); Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc., 818 S.E.2d 724, 731 (S.C. 2018)).

153 *See* NPRM, *supra* note 7 at 3502.

154 *See* RESTATEMENT (SECOND) OF CONTRACTS, § 188 cmt. g (AM. L. INST. 1981) ("Postemployment restraints are scrutinized with particular care because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through loss of his livelihood."); Harlan M. Blake, *supra* note 7 at 647-48 (summarizing then-current judicial view that "parties to an employee covenant are *often* of unequal bargaining power[.]"); *id.* at 661-63 (discussing circumstances in which an employee is "in a position to bargain as an individual about the terms of his employment" and resulting agreement is "thus less subject to skeptical review as a contract of adhesion.").

155 RESTATEMENT (SECOND) OF CONTRACTS, § 188(2)(b) (AM. L. INST. 1981) (treating promise by an employee not to compete with employer as "ancillary to a . . . valid relationship").

156 Recent examples include CVS Pharmacy, Inc. v. Lavin, 951 F.3d 50, 56-57 (1st Cir. 2020) (invoking § 188 and finding NCA reasonable and enforceable under Rhode Island law); Pam's Acad. of Dance/Forte Arts Ctr. v. Marik, 128 N.E. 2d 321, 327 (Ill. App. 2018) (invoking §§ 187-88 for the proposition that courts should assess NCAs under fact-intensive Rule of Reason); Junkemier, Clark, Campanella, Stevens, P.C. v. Alborn, Uithoven, Riekenberg, P.C., 380 P.3d 747, 759 (Mont. 2016).

Nor do the four decisions support any claim of universal unequal bargaining power. Three such decisions involved covenants ancillary to the sale of a business and are thus *dicta* regarding NCAs.[157] Two of these assert that unequal bargaining power is "less likely" in sale of business cases than when employees enter NCAs.[158] Neither asserts that employers "likely" possess such power, let alone always do. Another does not mention "power" but opines that parties negotiate over the sale of a business "at arm's length," such that courts view such agreements more favorably than NCAs.[159]

Only a fourth decision, from the Ohio Court of Common Pleas, asserted that employees "seldom" possess equal bargaining power and are thus "more likely" than sellers of a business "to be coerced into an oppressive agreement."[160] Even this decision did not claim that employers *always* possess overwhelming power. Moreover, like the three decisions discussed above, the opinion concluded that courts should scrutinize NCAs more carefully than other ancillary restraints.[161] The court described numerous factors judges should consider when determining whether an NCA is reasonable.[162] The court emphasized that "every case must be decided on its own peculiar facts" and denied the requested injunction on equitable grounds, without declaring the agreement invalid.[163] A state Supreme Court had recently reached the opposite

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157 *See* Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc., 818 S.E.2d 724 (S.C. 2018); Diepholz v. Rutledge, 659 N.E.2d 989 (Ill. Ct. App. 1995*)*; Alexander & Alexander, Inc. v. Danahy, 488 N.E.2d 22, 29 (Mass. App. Ct. 1986).

158 *See Alexander & Alexander*, 21 N.E.2d at 496 ("[T]here are considerations which dictate that noncompetition covenants arising out of the sale of a business be enforced more liberally than [NCAs]. In the former situation there is more likely to be equal bargaining power between the parties; the proceeds of the sale generally enable the seller to support himself temporarily without the immediate practical need to enter into competition with his former business; and a seller is usually paid a premium for agreeing not to compete with the buyer."); Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc., 818 S.E.2d 724, 731 (S.C. 2018)) ("The probability of unequal bargaining power that may exist between an employer and employee is significantly reduced . . . in the context of a sale of a business.").

159 *See Diepholz*, 659 N.E.2d at 1016 ("Restrictive covenants accompanying the purchase of assets are more favorably viewed than those connected with employer-employee arrangements because of the arm's-length bargaining position of the parties.").

160 *See* Arthur Murray Dance Studios, Inc. v. Witter, 62 OHIO L. ABS. 17, 45 (C.P. 1952) ("[The employee's] individual bargaining power is seldom equal to that of his employer. Moreover, an employee ordinarily is not on the same plane with the seller of an established business. He is more apt than the seller [of a business] to be coerced into an oppressive agreement.").

161 *Id.* at 45-46.

162 *Id.* at 32-41.

163 *Id.* at 57-58.

result, enjoining a former employee from breaching the same type of agreement.[164]

The overall message of these decisions and the Restatement is that bargaining power is "more likely" in the employer/employee context than in other contexts or is "usually" present. This heightened prospect of bargaining power justifies robust scrutiny of NCAs. The negative implication is that bargaining power is sometimes absent and that courts *will*, after such scrutiny, sometimes enforce NCAs as reasonable.[165] Moreover, as explained below, the prospect of nonenforcement may deter employer proposals of unduly onerous NCAs and to that extent protect employees from unreasonable agreements.[166]

VI. THE VAST MAJORITY OF AMERICANS BARGAIN AND WORK IN UNCONCENTRATED LABOR MARKETS

The NPRM asserts that: "[E]mployers generally have considerable labor market power, due to factors such as concentration and the difficulty of searching for a job. The considerable labor market power of employers has significantly diminished the bargaining power of U.S. workers."[167]

The assertion that "employers generally" possess power and that employees lack such power is unqualified and thus not limited to markets where NCAs arise. The assertion also echoes the Commission's late 2021 assertion that a "hyperconcentrated economy" imposes serious harm on employees.[168] Moreover, the NPRM found that such agreements are present in a wide variety of markets.[169]

The Commission has no general authority to regulate labor markets and no special expertise regarding labor markets. One scholar has even recommended that the Commission and Department of Justice collaborate with the Department of Labor when assessing the impact of mergers on labor markets,

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164 *See* Worrie v. Christine, 62 S.E.2d 876, 881 (Va. 1951) (enforcing a two-year restraint within a twenty-five-mile radius of studio against former Arthur Murray dance instructor).

165 *See supra* note 156 (collecting cases holding that courts should enforce reasonable NCAs); s*ee also Assurance Data, Inc. v. Malleyvac,* 747 S.E.2d 804*,* 808-809 (Va. 2013) (courts should enforce reasonable NCAs after fact-intensive assessment); Gundermann v. James, 46 A.D.3d 615 (N.Y. App. Div. 2007) (affirming injunction enforcing NCA after finding that employer had "incurred significant costs in training employees, in overhead expenses, and in developing its client base and . . . built up significant business goodwill as it developed its client base.").

166 *See infra* notes 373-75 and accompanying text.

167 *See* NPRM, *supra* note 7, at 3503.

168 *See* FTC, *supra* note 83 and accompanying text (describing the Commission's assertion), at 1.

169 *See* NPRM, *supra* note 7, at 3484.

because neither antitrust agency has sufficient expertise to assess such transactions.[170] The Commission's assertion that it had developed sufficient expertise to conduct such a rulemaking did not mention this argument or identify any effort the Commission has made to ascertain the state of competition in labor markets, of which there are over 130,000.[171]

One might expect an inexperienced Commission to "overcompensate" by developing a strong record supporting its claim that employees generally bargain at a disadvantage in concentrated labor markets. Principles of administrative law require the Commission to produce evidence to support factual assumptions on which a rule is based, and reviewing courts must consider contrary evidence when assessing whether the Agency's determinations are based on "substantial evidence."[172] However, as explained below, the evidence before the Commission contradicts any claim that all or even most employees bargain in concentrated markets. Other evidence produced by Department of Labor economists reinforces this contradiction. Labor market "hyperconcentration" is apparently a myth.

A. The NPRM Cites No Evidence That Most or All Employees Bargain in Concentrated Markets

The NPRM cites no evidence regarding the proportion of Americans who bargain in concentrated labor markets.[173] Nor does the NPRM offer any evidence regarding concentration in labor markets where NCAs arise. Indeed, at least one of the NCAs the NPRM treats as "illustrative" was obtained by

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170 *See* Hiba Hafiz, *Interagency Merger Review in Labor Markets*, 95 CHI-KENT L. REV. 37, 50 (2020) ("[T]he antitrust agencies have insufficient expertise in labor market regulation and labor law enforcement's role in reinforcing merger policy, contributing to long-term labor market health and preempting employer buyer power by ensuring employees' countervailing power.").

171 *See* Elizabeth Weber Handwerker & Matthew Dey, *Some Facts About Concentrated Labor Markets in the United States*, INDUS. RELS. (July 2023) (discussing study examining concentration in over 133,000 labor markets); *see also infra* note 213 (describing number of labor markets examined by this study); *see also infra* note 210 (explaining that study did not include labor markets in rural areas).

172 *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951) ("[E]vidence [must] appear substantial when viewed on the record as a whole.").

173 The NPRM does not elaborate on the claim that the difficulty of job searches confers power on employers. Nor does it offer any evidence that such difficulties afflict all or nearly all markets. It is thus not possible to assess whether record evidence supports the assertion that this factor confers market power on all or even most employers, let alone those what have obtained NCAs.

employers with tiny shares of an unconcentrated labor market, namely, "Fast Food and Counter Workers."[174]

The NPRM cites one source to support its claim about widespread employer labor market power: two pages from the introduction to a recent Department of the Treasury report, published after the window for comments on the 2019 Petition closed.[175] The report makes no claim regarding the *proportion* of employees who bargain in concentrated markets.

Instead, these pages report the summary of several recent studies, some unpublished working papers, that attempt to measure the labor market power of the *average* employer in certain subsets of the economy. Such subsets include construction, the State of Oregon, and manufacturing.[176] Moreover, these studies generally assess, by means of indirect evidence, labor market power on an industry-by-industry basis.[177] Thus, the studies do not observe concentration or wage impacts in actual labor markets, which are defined occupation-by-

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174 *See* NPRM, *supra* note 7, at 3483 n.28 (citing an example of NCAs between Jimmy John's franchises and their employees). One source reports that Jimmy John's franchisees employ about 45,000 individuals, while another estimates the figure at 75,000. *See Jimmy John's-Company Overview*, IBISWORLD (2002), https://www.ibisworld.com/us/company/jimmy-johns/409367/ (estimating 45,000 employees); Craig Smith, *Jimmy John's Statistics and Facts for 2024*, DMR, https://expandedramblings.com/index.php/jimmy-johns-statistics-facts/?expand_article=1 (last updated Jan. 6, 2024) (estimating 75,000 employees). These estimates range between 1.4% and 2.3% of the nation's 3,325,000 "Fast Food and Counter Workers." Bureau Lab. Stats., *Occupational Employment and Wages: 35-3023 Fast Food and Counter Workers* (May 2022), https://www.bls.gov/oes/current/oes353023.htm. As noted in the text, some scholars employ the six-digit Standard Occupational Codes as proxies for the occupational component of labor markets. *See* Bureau Lab. Stats., *Occupational Employment and Wage Statistics: National Occupational Employment and Wage Estimates* (May 2022), https://www.bls.gov/oes/current/oes_nat.htm.

175 *See* NPRM, *supra* note 7, at 3484 n.41 (citing DEP'T OF THE TREASURY, THE STATE OF LABOR MARKET COMPETITION i-ii. (Mar. 7, 2022)).

176 *See* DEP'T OF THE TREASURY, *supra* note 175, at 22-27. (Mar. 7, 2022) (discussing Ihsaan Bassier et al., *Monopsony in Movers: The Elasticity of Labor Supply to Firm Wage Policies*, 57 J. HUM. RES. S50 (2022) (Oregon); Azar et al., Estimating Labor Market Power 8 (Nat'l Bureau Econ. Rsch., Working Paper No. 30365, 2022) (twenty-six common occupations); Efraim Benmelech et al*., Strong Employers and Weak Employees*: *How Does Employer Concentration Affect Wages*?, 57 J. HUM. RES. S200, S204 (2020) (manufacturing); Chen Yeh et al., *Monopsony in the U.S. Labor Market*, 112 AM. ECON. REV. 2099 (2022); Kory Krof et al., Imperfect Competition and Rents in Labor and Product Markets: The Case of the Construction Industry (Nat'l Bureau Econ. Rsch., Working Paper No. 27325, 2023). Just under thirteen million Americans work in the manufacturing industry, barely eight percent of employed individuals. *See All Employees, Manufacturing*, FRED, https://fred.stlouisfed.org/series/MANEMP (last updated Feb. 2, 2024).

177 *See* Handwerker & Dey*, supra* note 171, at 2 and accompanying text (describing distinction between industries and the numerous occupations from which industries hire). It should be noted that Azar, Berry, and Iona Marinescu do focus on twenty-six occupations.

occupation on a local basis and thus rarely coextensive with any particular industry.[178] It should be noted that a page of the report that the NPRM does not mention cites a 2022 article for the proposition that the average HHI in labor markets, this time defined by occupation, is 3,157, highly concentrated by any standard.[179]

Notably, the Report warns against extrapolating from particular industries to the entire economy.[180] Moreover, the Report does not claim that the industries studied by the articles it cites are representative. Nonetheless, the Report estimates that average wage losses due to labor market power are at least fifteen percent.[181] The Report does not speak to the distribution of such power among the innumerable local markets throughout the country.

B. Record Evidence Contradicts the NPRM's Assertion of Widespread Labor Market Concentration

The NPRM cites Treasury Department estimates regarding the *average* firm's labor market power. However, the NPRM declares *all* nonexecutive NCAs coercive, not just the "average" nonexecutive NCA. Moreover, the NPRM nowhere explains how much power an employer must possess to impose NCAs. Presumably, the quantum of required power would be substantial given the Commission's conclusion that such agreements are uniformly so onerous as to be substantively coercive.

The proposal to ban all nonexecutive NCAs as procedurally coercive thus depends upon the assumption that all or nearly all employers who obtain such agreements possess sufficient labor market power to impose such agreements. Evidence before the Commission, unmentioned by the NPRM, contradicts any claim that all or even most Americans bargain in concentrated labor markets. The Commission simply ignored a 2020 study by Professors Azar, Marinescu, Steinbaum, and Taska ("Azar *et al.*") finding that just over seventy-five percent of employees work in *un*concentrated markets.[182] The study employed the

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178 *See* José Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, 66 LABOUR ECON. (2020) [hereinafter Azar et al.] (defining labor markets in this manner).

179 *See* DEP'T OF THE TREASURY, *supra* note 176, at 25 (citing José Azar et al., *Labor Market Concentration*, 57 J. HUM. RES. S167, S168 & S179 (2022)). The Herfindahl-Hirschman Index ("HHI") is calculated by "summing the squares of the individual firms' market shares." *See* DOJ & FTC, HORIZONTAL MERGER GUIDELINES, at § 5.3 (2010) [hereinafter MERGER GUIDELINES].

180 DEP'T OF THE TREASURY, *supra* note 176, at 24-25.

181 *Id.*

182 *See* Azar et al., *supra* note 178, at 8 ("Overall, 23% of employment is in moderately or highly concentrated markets,").

Department of Labor's six digit occupational codes to define the occupational component.[183] The study assumed that labor markets are local and thus used the Department of Agriculture's commuting zones to define such markets' geographic component.[184] Following the 2010 Department of Justice and FTC Horizontal Merger Guidelines, the study defined as "highly concentrated" any labor market with an HHI over 2,500. The study defines as "moderately concentrated" labor markets with an HHI between 1500 and 2499.[185] By implication, HHIs below 1500 indicate "low concentration."[186]

The authors found that the average labor market HHI in the United States is 4378, well above the "highly concentrated" benchmark.[187] The paper also found that 60% of American labor *markets* are highly concentrated.[188] However, the authors also concluded that 77% of *employees* work in *unconcentrated* labor

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183 *See* Bureau Lab. Stats., *supra* note 174, at 1.

184 *See* Azar et al., *Labor Market Concentration*, *supra* note 179, at S179 ("[Eighty-one] percent of applications on Careerbuilder.com are within the commuting zone.") (citing Ioana Marinescu & Roland Rathelot, *Mismatch Unemployment and the Geography of Job Search*, 10 AM. ECON. J.: MACROECON. 42 (2018)). As the study explains: "[c]ommuting zones are geographic area definitions based on clusters of counties that were developed by the United States Department of Agriculture using data from the 2000 Census on commuting patterns across counties to capture local economies and local labor markets in a way that is more economically meaningful than county boundaries." *See id.*

185 *See* Azar et al., *supra* note 178, at 2; MERGER GUIDELINES, *supra* note 179, at § 5.3.

186 *See* MERGER GUIDELINES, *supra* note 179, at § 5.3 (describing markets with HHI below 1500 as "unconcentrated"). This article will employ the adjective "unconcentrated" to refer to markets with HHIs below 1500.

The enforcement agencies recently released new Merger Guidelines that purport to return to concentration thresholds applied between 1982 and 2010. *See* DEP'T OF JUST. & FED. TRADE COMM'N, 2023 MERGER GUIDELINES (2023), at 6 n.15. During that period, markets with HHIs between 1000 and 1800 were nominally deemed "moderately concentrated." *Id.* However, it appears that neither agency challenged any merger producing an HHI less than 1400 during this era. *See* David Scheffman, Malcolm Coate and Louis Silvia, *20 Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective* (2002) (finding that the lowest HHI resulting in an FTC challenge between 1982 and 2000 was 1562*)*; William J. Baer, Deborah L. Feinstein, and Randal M. Shaheen, *Taking Stock: Recent Trends in U.S. Merger Enforcement*, (finding that lowest HHI resulting in a DOJ challenge between 1989 and 2000 was 1800); DEP'T OF JUST. & FED. TRADE COMM'N, MERGER CHALLENGES DATA, FISCAL YEARS 1999-2003 (2003)*,* at 2 (reporting that lowest post-merger HHI of challenged merger was "slightly above 1400"). Thus, the treatment of markets with HHIs below 1500 as "unconcentrated" appears broadly consistent with actual merger enforcement policy between 1982 and December 2023. In any event, as explained below, an important study concludes that the mean HHI in U.S. labor markets is well below 1,000. *See infra* notes 207-229 and accompanying text.

187 *See* Azar et al., *supra* note 178, at tbl.1.

188 *Id.*

markets.[189] The authors explain this apparent discrepancy by offering that most commuting zones—their proxy for geographic labor markets—have small populations, while a much smaller number of zones are highly populated.[190] The authors find that highly populated commuting zones are generally less concentrated than those with smaller populations.[191] Moreover, as the authors explain, most employees work in the latter, high population/low concentration zones, thereby explaining how most employees can work in *un*concentrated

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189 *Id.* at 2 ("When we weight markets by BLS total employment, we find that 16[%] of workers work in highly concentrated labor markets, and a further 7[%] work in moderately concentrated markets.").

190 *See id.* at 2 ("Concentration is lower in large commuting zones, which explains why weighting by employment lowers the prevalence of high concentration.").

191 *See id.* at 2; *see also* Bassier et al., *supra* note 176, at S82 (finding that average labor market concentration in Portland, Oregon is 1200, less than half that outside the Portland metropolitan area). The Department of Agriculture has published the list of all 709 commuting zones, including a link to a spreadsheet reporting the population of each zone. *See* DEP'T OF AGRIC., COMMUTING ZONES AND LABOR MARKET AREAS, https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas/ (last updated Mar. 26, 2019). Azar et al. include a color-coded map indicating the levels of concentration in each commuting zone. *See* Azar et al., *supra* note 178, at tbl.1. Based on the author's visual inspection of this map, here is a non-exhaustive list of markets that the Azar et al. find to be unconcentrated, with their respective populations in 2000:

- Chicago-Joliet-Napierville Metro Division (Commuting Zone 58): 8.7 million
- Washington-Arlington-Alexandria DC-VA-MD-WV Metro Division (Zone 74): 4.4 million
- Trenton-Ewing New Jersey Metropolitan Statistical Area (Zone 316): 4.2 million
- Newark-Union-PA New Jersey Statistical Area (Zone 250): 5.2 million
- Miami-Miami Beach-Kendall, FL Metro Division (Zone 410): 3.96 million
- Houston-Baytown-Sugarland (Zone 588) (Zone 9): 4.8 million
- Phoenix-Mesa-Scottsdale- AZ Metro Statistical Area (Zone 158): 3.3 million
- Connecticut Metropolitan Statistical Area (Zone 78): 3.4 million
- New York-Wayne-White Plains (Zone 134): 5.184 million
- Boston-Quincy MA Metropolitan Division (Zone 76): 5 million
- Detroit-Livonia-Dearborn MI Metropolitan Division (Zone 32): 4.5 million
- Baltimore-Towson-Maryland Statistical Area (Zone 36): 2.5 million
- San Antonio, TX Metropolitan Statistical Area (Zone 69): 1.7 million
- Indianapolis Metropolitan Statistical Area (Zone 25): 1.7 million
- Virginia Beach-Norfolk-Newport News (Zone 39): 1.6 million
- Dayton Ohio Metropolitan Statistical Area (Zone 38): 1.3 million
- Richmond VA Metropolitan Statistical Area (Zone 14): 1 million

Some commuting zones have much smaller populations. For instance, Childress County, Texas (Commuting Zone 99), has a population of 9,948, and there are several commuting zones with even smaller populations.

markets even while most markets are highly concentrated.[192] Moreover, when labor markets are weighted by population, the average HHI falls drastically, to the unconcentrated zone.[193] In a subsequent paper focused on fewer occupations, three of the authors also explain that population-weighted assessments of concentration are more relevant "to understand the experience of the average worker."[194]

The 2019 Petition accurately cited the unpublished version of the Azar *et al.* study to report that most labor *markets* are highly concentrated.[195] The Petition also helpfully observed that many highly concentrated markets are sparsely populated, whereas many unconcentrated markets are highly populated.[196] Finally, the Petition quoted the unpublished study's finding that only 17% of employees work in highly concentrated labor markets; this figure fell to 16% in the published version.[197]

At least one respondent to the request for comment on the 2019 Petition discussed the published version of the study, explained the distinction between rural and urban markets, the impact of weighting results by population, and the estimate that about three-quarters of employees work in unconcentrated labor markets.[198] Still, the NPRM does not mention this evidence, which tends to show that only a modest proportion of employees bargain and work in concentrated labor markets.

The authors of the Treasury Report were unaware that weighting labor markets by population can vastly alter estimates of average labor market concentration. As noted earlier, that Report accurately cited an article published

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192 Azar et al., *supra* note 178, at 8 ("This relatively low level of [employment-weighted] concentration is due to the fact that, as mentioned above, concentration is lower in commuting zones with higher population.").

193 *Id.* at 13 ("Employment-weighted average concentration is lower at 1361, reflecting lower concentration in more populated areas.").

194 *See* Azar et. al., *supra* note 184, at S179.

195 *See* 2019 Petition, *supra* note 2, at 17.

196 *Id.* ("Labor markets in smaller cities and rural areas are most likely to be concentrated.") (citing José Azar et al., Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data (IZA Discussion Papers No. 11379, 2018) [hereinafter 2018 Azar et al.]).

197 2019 Petition, *supra* note 2, at 17 ("When we weight markets by [Bureau of Labor Statistics] total employment, we find that [seventeen] percent of workers work in highly concentrated labor markets.") (quoting 2018 Azar et al.)); Azar et al., *supra* note 178 at 8 (finding that sixteen percent of employees work in highly concentrated markets).

198 *See* Alan J. Meese, Response to Request for Public Comments on Contracts That May Harm Competition 15 (Sept. 30, 2021) [hereinafter Meese 2021 Comments] (About "three quarters of American employees work in labor markets that are unconcentrated as defined by the Merger Guidelines. There would thus seem to be no basis for the Commission to conclude that most American workers sell their labor in concentrated markets.") (citing Azar et al., *supra* note 178).

by Professors Azar, Marinescu, and Steinbaum for the proposition that the average labor market HHI of twenty-six occupations is over 3,100.[199] However, these three authors reiterated that: "Commuting zones around large cities tend to have lower levels of labor market concentration than smaller cities or rural areas."[200] The authors again observed that weighting the "average concentration" results by population produces a vastly different result, namely, an average HHI of 1691.[201]

It is theoretically possible that NCAs only arise in labor markets that are moderately or highly concentrated, although there is evidence to the contrary.[202] The NPRM makes no effort to document such a correlation, despite suggestions that it ascertain whether such a correlation exists.[203] Indeed, it seems possible that the correlation between labor market concentration and NCAs is *negative*. NCAs are most prevalent among highly paid individuals, and such individuals disproportionately work in large urban areas,[204] which account for a disproportionate share of the nation's economic output.[205] In short, the "record as a whole" appears to refute any claim that all or most employees work in concentrated labor markets.[206]

C. Additional Evidence Confirms That Labor Market Concentration Is Rare

Perhaps the findings of Azar *et al.* understate the extent of labor market concentration. A recent article by Department of Labor economists suggests

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199 DEP'T OF THE TREASURY, *supra* note 176, at 25 (citing Azar et al., *Labor Market Concentration*, *supra* note 184).

200 Azar et al., *Labor Market Concentration*, *supra* note 184, at S179.

201 *Id.* at S175 tbl.2 (reporting mean population weighted HHI of 1690.74).

202 *See* NPRM, *supra* note 7, at 3483 n.28 (discussing example of Jimmy John's franchisees who obtained NCAs in unconcentrated labor markets).

203 Meese 2021 Comments, *supra* note 198, at 26 (suggesting that "the Commission examine the relationship between labor market concentration, on the one hand, and [NCAs], on the other").

204 *See* Starr et al., *Noncompete Agreements*, *supra* note 68, at 66; Joel Kotkin, *Where America's Highest Earners Live*, FORBES (Oct. 3, 2017) (reporting that highest earners are concentrated in larger urban areas and their suburbs).

205 According to the Department of Labor, U.S. nominal GDP was $25.46 trillion in 2022. *See* Bureau Econ. Analysis, *Gross Domestic Product, Fourth Quarter and Year 2022 (Third Estimate), GDP by Industry, and Corporate Profits* (2023), https://www.bea.gov/news/2023/gross-domestic-product-fourth-quarter-and-year-2022-third-estimate-gdp-industry-and. Ten U.S. metro areas accounted for over $7 trillion. *See* Avery Koop, *Mapped: The Fifteen Largest U.S. Cities by GDP*, VISUAL CAPITALIST (Mar. 9, 2023), https://www.visualcapitalist.com/us-cities-by-gdp-map/.

206 *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

the opposite, further refuting any claim that all or most employees bargain in concentrated markets.[207] The paper employs a different dataset than Azar *et al.* or papers cited by the Treasury Report. Most such papers focus on particular industries or geographic areas and assess market power by industry. The papers by Azar *et al.* do focus on occupations (26 in one paper and 200 in another). However, the authors measure concentration by observing online job postings.[208]

By contrast, this most recent paper relies on non-public data regarding the entire workforce, including public employees, for each *occupation*, a proxy for actual labor markets.[209] The paper also uses metropolitan statistical areas as proxies for the geographic component of such markets.[210] While other studies focusing on occupations assess the *flow* of job postings during a discrete time period, this paper uses the *stock* of employment at each employer to measure concentration and any changes over fifteen years.[211] The paper also identifies so-called "superstar firms," to explore any link between the rise of such firms and labor market concentration.[212]

The article identifies over 130,000 labor markets in non-rural areas, each defined by occupational and geographical components.[213] The paper estimates employer concentration in each market, in six years from 2003 to 2018, inclusive.[214] The paper defines "oligopsonists" as firms with HHIs above 1500 in such a market, including monopsonists.[215]

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207 *See* Handwerker & Dey, *supra* note 171.

208 Azar et al., *supra* note 178, at 1-2.

209 *See* Handwerker & Dey, *supra* note 171, at 1.

210 *Id.* The authors exclude rural areas from their study because they do not believe that metropolitan statistical areas are valid proxies for actual labor markets in such regions. *See id.* at 4-5.

211 *Id.* at 1 ("We bring near universal data on current employment by occupation and geographic area in the United States to the study of labor market concentration to document concentration in employment 'stocks' rather than the concentration of employment 'flows.'"); *id.* at 3 ("[N]one of these authors have had the data to study concentration in labor markets defined by occupation rather than by industry."); *id.* at 6 ("This expands on the [twenty-six] occupations of Azar et al[.] (2022) and the 200 occupations of Azar et al[.] (2020). It also differs substantially from both Azar et al[.] papers in estimating this measure for current payroll (the 'stock' of employment), rather than for new job postings (the 'flow' of new employment).").

212 *Id.* at 2.

213 *Id.* at 4 (explaining that authors observed concentration in "802,052 occupation-area-year markets" in 2003, 2006, 2009, 2012, 2015 and 2018); *id.* at 5 (Table 1) (reporting these data). Note that 802,052/6 = 133,750; *see also supra* note 210 (describing article's non-inclusion of rural markets).

214 *Id.* at 4.

215 *See id.* at 41 tbl.4a (describing this methodology).

Like previous research, described in the Treasury Report, the paper finds that labor market concentration fell between 2003 and 2018.[216] Moreover, 99.7% of employers were neither "megafirms" nor oligopsonists in any labor market in 2018.[217] These firms employed 67% of employees.[218] Seven-hundred and thirty-four of the remaining firms were megafirms that were oligopsonists in some or all of their labor markets.[219] Another 17,993 smaller employers were local oligopsonists with respect to some or all employees.[220] Taken together, the megafirms and smaller firms that participate in one or more oligopsonistic markets employ 24.9% of American employees, although only a subset of such individuals bargain in oligopsonistic markets.[221] How large is this subset? Quite small in the private sector. The authors find that only 2.9% of private sector employees work in "highly concentrated" labor markets, compared to 17.3% of public sector employees.[222] The paper also estimates that another 10.3 percent of public employees work in moderately concentrated markets, compared to 2.9% of private sector employees.[223] Overall, about 94% of private sector employees work in unconcentrated labor markets.[224] The NPRM, it should be noted, defines "employer" to exclude non-profit organizations, thereby only banning NCAs in the for-profit sector.[225]

Moreover, the paper estimates a much lower HHI among employment-weighted labor markets than Azar *et al.*[226] The paper concludes that the average HHI for population-weighted private sector labor markets is a mere 333, which is exceedingly unconcentrated.[227] This figure is the equivalent of thirty employers with equal shares of the labor market, *i.e.*, 3.33 percent, all vying for the same potential employees in the relevant market.[228] The Department of

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216 *Id.* at 6 (describing previous research); *see also* DEP'T OF THE TREASURY, *supra* note 176, at 25 ("[A]t the local level, which is the relevant level for most workers, concentration has consistently decreased" over past fifty years).

217 Handwerker & Dey, *supra* note 171, at 8.

218 *Id.*

219 *Id.*

220 *Id.* For instance, hospitals may possess oligopsony power in the nursing market but not in the market for custodians. *See id.*

221 *Id.* at 28-29 tbl.4.

222 *Id.* at 9.

223 *Id.*

224 *Id.*

225 NPRM, *supra* note 7, at 3510 (defining "employer" and explaining that the proposed rule would not govern nonprofit entities).

226 Handwerker & Dey, *supra* note 171, at 4.

227 *Id. Cf. supra* notes 185-201 (discussing results reported by Azar et al., finding greater levels of concentration).

228 *See supra* note 179 (defining HHI). The authors note that this result is consistent with that recently obtained by two scholars who estimate an average HHI of employment-weighted

Labor posted an unpublished version of this paper several months before the Commission released the NPRM.[229] Had the Commission sought the Department's input, the Department would have presumably forwarded the study to the Commission.

The Commission recently invoked a "hyperconcentrated economy" as partial justification for choosing rules over adjudication. When it comes to labor markets, however, hyperconcentration is apparently a myth. The NPRM's unsupported invocation of "concentration" as a source of widespread labor market power calls into question the Commission's capacity to gather information regarding facts that are critical to assessing whether NCAs are coercive and thus violate the Commission's new unfairness standard.

VII. THE NPRM INCORRECTLY ASSUMES THAT EMPLOYERS WITH BARGAINING POWER ALWAYS USE SUCH POWER TO IMPOSE NCAS

Neither the Section 5 Statement nor the NPRM articulates any methodology for assessing whether NCAs are the result of coercion. Nor does the NPRM articulate any theoretical account of the connection between labor market power and the negotiation of NCAs or explain how much such power an employer must possess to impose agreements the Commission deems so onerous.

The Commission's account, such as it is, of the formation of nonexecutive NCAs seems pre-modern.[230] During the "inhospitality era" of antitrust law, courts concluded that firms used bargaining power coercively to foist nonstandard agreements, such as exclusive territories and tying contracts, on unwilling counterparties.[231] This conclusion followed courts' belief that such

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labor markets of 660. YUE QIU & AARON SOJOURNER, LABOR-MARKET CONCENTRATION AND LABOR COMPENSATION 10 (2022).

229 Handwerker & Dey, *Some Facts About Concentrated Labor Markets in the United States* (U.S. Bureau Lab. Stat., Working Paper No. 550, 2022).

230 *See* Meese, *Don't Abolish Employee Noncompete Agreements*, *supra* note 119, at 663-68 (explaining that the claim that employers always use bargaining power to impose NCAs echoes the inhospitality era's account of contract formation).

231 *See* Alan J. Meese, *The Market Power Model of Contract Formation: How Outmoded Economic Theory Still Distorts Antitrust Doctrine*, 88 NOTRE DAME L. REV. 1291 (2013) [hereinafter Meese, *Market Power and Contract Formation*]; *see also, e.g.*, Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968) (rejecting defendants' claim that plaintiffs were equally at fault for such agreements because franchisees' "participation was not voluntary in any meaningful sense"); *id.* at 143 (White, J., concurring) (ascribing agreements to "defendant's superior bargaining power").

agreements disadvantaged dealers and consumers and rarely produced cognizable benefits.[232]

NCAs were partially exempt from such hostility. State courts often enforced such agreements, believing they could create cognizable benefits.[233] However, some courts and the Second Restatement invoked the possibility that employers used bargaining power to impose NCAs to justify scrutinizing such restraints more carefully than covenants ancillary to the sale of a business.[234]

Subsequent developments in economic theory, *i.e.*, Transaction Cost Economics ("TCE") established that nonstandard agreements often produce efficiencies.[235] These developments also bolstered the common law's assumption that NCAs can produce cognizable benefits.[236] Indeed, these developments suggested that some courts and the Second Restatement had improperly declined to treat facilitating the development of employees' "general skills and knowledge of the trade" as a legitimate interest that can justify enforcement of NCAs.[237]

These developments also undermined claims that parties must use "bargaining power" to impose nonstandard agreements. For instance, the late Nobel Laureate Oliver Williamson, once TCE's leading modern exponent, explained that a manufacturer can offer dealers or other firms that purchase its product and agree to nonstandard clauses a discount, thereby inducing acceptance of such provisions.[238] This approach entails the threat of charging

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232 *See, e.g.*, Meese, *Market Power and Contract Formation*, *supra* note 231, at 1322-26.

233 *See, e.g.*, Alonso-Llamazares v. Int'l Dermatology Rsch., 339 So. 3d 385 (Fla. Dist. Ct. App. 2022); Marine Contractors Co. v. Hurley, 310 N.E.2d 915 (Mass. 1974); Orkin Exterminating Co. v. Mills, 127 S.E.2d 796 (Ga. 1962); Plunkett Chem. Co. v. Reeve, 95 A.2d 925 (Pa. 1953); Seligman & Latz of Pittsburgh, Inc. v. Vernillo, 114 A.2d 672 (Pa. 1955).

234 *See supra* notes 155, 159-61 and accompanying text.

235 *See* Meese, *Market Power and Contract Formation*, *supra* note 231, at 1336-40.

236 *See* Meese, *Don't Abolish Employee Noncompete Agreements*, *supra* note 119, at 685-89 (explaining how TCE buttressed and expanded common law's account of NCAs' benefits).

237 RESTATEMENT (SECOND) OF CONTS. § 188 cmt. G (AM. L. INST. 1981) (treating enhancement of such skills as noncognizable). *See* Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L.J. 49, 57-59 (2001) (asserting that state courts generally do not recognize this benefit as cognizable while noting some cases to the contrary). *But see* Meese, *Don't Abolish Employee Noncompete Agreements*, *supra* note 119, at 687 n.286 (collecting several additional decisions holding or stating that encouraging investments in general human capital is a cognizable benefit).

238 *See* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 32-35 (1985) (describing "contracting schema" whereby seller offers product for two different prices depending on whether buyer accepts a contractual safeguard); *see also* Alan J. Meese, *Price Theory and Vertical Restraints: A Misunderstood Relation*, 45 UCLA L. REV. 143, 187-89 (1997) (explaining how price differential induces formation of agreement creating efficient exclusive territories) [hereinafter Meese, *Vertical Restraints*].

higher prices to those who reject such provisions. However, this price differential reflects additional costs, in the form of dealer opportunism (such as suboptimal investments in local promotion), that the manufacturer would bear if dealers purchased its products without the contractual restriction and thus does not reflect any exercise of market power.[239] Instead, a manufacturer without market power could use such a differential to induce acceptance of a beneficial agreement.[240] This process of contract formation is no more coercive than the process that offers consumers several warranty options at different cost-based prices, inducing most to choose a particular combination of price and coverage.[241] Firms will instead employ any market power to raise prices on the underlying product while adopting the same contractual terms that would arise in competitive markets.[242]

In the same way, employers with labor market power will not use such power coercively to impose fully disclosed NCAs that produce benefits.[243] In a competitive market, employers who believe NCAs will produce efficiencies that enhance firm productivity will offer potential employees wage premia as compensation for entering such agreements.[244] These premia will reflect the

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239 *See* Meese, *Market Power and Contract Formation*, *supra* note 231, at 1361-62 (noting that cost-based price differential that induces formation of exclusive dealing contract does not require or reflect market power).

240 *See* Meese, *Vertical Restraints*, *supra* note 238, at 189 ("No market power is necessary to the negotiation of any of these provisions . . . [and] the presence of such power is simply coincidental.").

241 *See* George Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1313 (1981) (explaining that well-informed consumers will choose warranties that minimize the sum of warranty price and cost of consumer investments in maintaining the product).

242 *See* Richard Craswell, *Freedom of Contract*, *in* CHICAGO LECTURES IN LAW AND ECONOMICS 81, 84-87 (Eric A. Posner ed., 2000) (explaining why monopolists will offer same contractual terms that would arise in a competitive market, assuming consumers understand alternatives); *id.* at 83-84 (arguing that competitive markets will produce efficient (*i.e.*, cost-justified) contractual terms when consumers understand alternatives and sellers can alter their prices to reflect terms' costs); Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1072 (1977) (explaining that monopolists will offer same warranty terms to well-informed consumers as firms in competitive markets); Priest, *supra* note 241, at 1321 (same). Indeed, an article cited by the NPRM for other propositions reaches the same result. *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1211-12 (2003). Professor Korobkin cites several sources supporting this assertion. *See id.* at 1212 n.33.

243 The Commission ignored evidence that employers disclose most NCAs before employees accept employment offers. *See infra* notes 306-10 and accompanying text. The Commission could require such disclosure, as several commenters suggested. The Commission's reasons for declining to mandate disclosure do not withstand analysis. *See infra* notes 301-03.

244 *See* Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not To Compete*, 10 J. LEGAL STUD. 93, 100 (1981).

benefits the employer will derive from enhanced productivity.[245] Employees who consider the premium sufficient compensation for the restriction will accept the offer.[246] Employees who reject the NCA will receive non-premium wages or obtain employment elsewhere.

Employers with labor market power will use that power to reduce the non-premium wage below the competitive level. Such employers will also rely upon wage premia to induce acceptance of beneficial NCAs, although such premia will supplement the reduced non-premium wages reflecting employers' market power.[247] Thus, employers with and without labor market power will employ wage differentials to induce acceptance of beneficial NCAs; the possession of such power will not impact whether the parties reach such an agreement.[248] However, employers with no such power will pay higher premium and non-premium wages, respectively, than those with such power. While employers' exercise of monopsony power to reduce wages certainly constitutes economic harm, this exercise does not impose beneficial NCAs.

This model of bargaining that results in beneficial NCAs posits employers offering potential employees two options: a reduced wage but no NCA or a higher wage plus such an agreement. This offer and subsequent employee acceptance (or not) may approximate the sort of individualized bargaining the NPRM contemplates. However, such voluntary integration can occur without case-by-case dual offers. Even if the employer offers only one option—the employment agreement including the NCA—advance disclosure will induce some potential employees to exit from negotiations. Such withdrawals will reduce the pool of potential employees. The result will be higher wages for potential employees who *do not* withdraw, thereby replicating the premium wage of a two-option offer. The result would also replicate what the NPRM contemplates for senior executives—namely, additional compensation for agreeing to NCAs.

The NPRM reflects TCE's account of NCAs in two ways. First, the NPRM recognizes that NCAs can produce cognizable benefits.[249] Second, the NPRM assumes there is a (small) category of such agreements resulting from voluntary bargaining between employers and senior executives. Unfortunately, the

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245 Instead of an immediate wage premium, the employer may make "credible assurance that . . . [it] will allocate internal rewards for strong performance that mimic the rewards . . . [of an] external labor market." *See* Barnett & Sichelman, *supra* note 73, at 1036-37.

246 *See supra* notes 138-40 (explaining that employers may sometimes be unwilling to pay a sufficient premium to induce employees to accept such restrictions).

247 *See* Meese, *Don't Abolish Employee Noncompete Agreements*, *supra* note 119, at 690.

248 *See* Rubin & Shedd, *supra* note 244, at 100 ("[B]oth parties must prospectively expect to benefit from the agreement, independently of their respective bargaining power.").

249 *See supra* notes 119-22.

NPRM does not "connect the dots" between these assumptions and its account of how parties form nonexecutive NCAs. The benefits the NPRM describes—*i.e.,* enhanced training, additional information, and greater capital investment—are captured by one or both parties, who potentially operate in low transaction cost settings.[250] TCE's model of voluntary contract formation would predict that those employers with labor market power would not exercise it to impose efficient NCAs. In short, the Commission ignored well-established economic literature explaining that firms with market power need not employ such power to "impose" fully disclosed, wealth-creating agreements.

Several sources before the Commission also referred to such beneficial voluntary integration. One article the NPRM cites over a dozen times assessed, *inter alia*, the relationship between pre-agreement disclosure and wages.[251] The authors concluded that this relationship was positive and statistically significant.[252] Another found a positive relationship between the enforceability of such agreements and physician salaries.[253]

The 2019 Petition cited unpublished versions of these two articles as evidence that employers sometimes pay "compensating wage premium[s] for workers who accept [NCAs]."[254] Comments explained that these findings were consistent with the voluntary contract formation process described above.[255] Another submission asserted that pre-agreement disclosure of NCAs mandated by state statutes could result in employees receiving compensation (*i.e.,* higher wages) in return for such restrictions.[256] Another study the NPRM invokes for other purposes asserts that NCAs disclosed in advance create "pressure" for employees to "receive compensation for their postemployment concessions."[257] The authors then assert that, under one bargaining model, "a

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250 I have added the qualification "potentially" because the magnitude of such costs could depend upon whether background rules, including rules promulgated by the Commission, induce advanced disclosure of NCAs.

251 *See* Starr et al., *Noncompete Agreements*, *supra* note 68, at 57, 75.

252 *See id.* at 57, 75 (reporting eleven percent wage premium for employees with NCAs). *But see id.* at 75 n.33 (cautioning that unobserved variables may influence these estimates).

253 *See* Kurt Lavetti et al., *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J. HUM. RES. 1025, 1042, 1048-49 (2020).

254 *See* 2019 Petition, *supra* note 2, at 34.

255 *See* Meese, Response to Request for Public Comments, *supra* note 198, at 18 (explaining that employers could induce acceptance of NCAs by "offer[ing] higher wages to employees that assented to [NCAs] and lower wages to those that refused"); *id.* ("[E]mpirical evidence that the Petition helpfully cites strongly suggests that some [NCAs] arise in this manner.").

256 *See* Russell Beck et al., Written Submission of Practicing Attorneys Concerning Potential Federal Regulation of Noncompetition Agreements 22-23 (July 14, 2021).

257 Donna Rothstein & Evan Starr, *Noncompete Agreements, Bargaining, and Wages: Evidence from the National Longitudinal Survey of Youth 1997*, MONTHLY LAB. REV. (June 2022); NPRM, *supra* note 8, at 3485 (discussing this study).

compensating differential may be built into the posted wages, *rendering bargaining unnecessary*."[258]

This is not to say that all or most NCAs are voluntary efficient integration. In some states, employers need not disclose NCAs in advance. The resulting agreement will produce the same benefits as one in which the parties share the benefits of resulting efficiencies, but without the wage premia and thus without meaningful employee consent. However, as explained below, employees usually have advanced knowledge of NCAs.[259]

Moreover, the NPRM also articulates two other categories of NCAs, one harmful to consumers and another harmful to employees. First, some NCAs raise the costs of the employer's rivals, by depriving such competitors of access to scarce talent that could enhance rivals' competitiveness.[260] This impact can confer product market power on the employer or preserve pre-existing power, either way injuring consumers.[261] Second, some agreements can depress employees' wages by precluding some competing employers from bidding for employees bound by such agreements, weakening employees' post-acceptance bargaining power.[262]

Both types of agreements seem to result from the employer's coercive use of labor market power. Indeed, some opinions describe discounting to induce acceptance of a contractual provision that raises rivals' costs as a "use" of such power.[263] But the Commission is an expert agency that will seek deference for its conclusions regarding the process of negotiating NCAs. Closer analysis establishes that fully disclosed NCAs that raise rivals' costs are entirely voluntary. Moreover, such agreements will raise the employee's wages above the non-NCA level.

The scholars who first articulated the raising rivals' costs paradigm explained that proponents of harmful exclusionary rights contracts need not

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258 *Id.* (emphasis added).

259 *See infra* notes 307-10 and accompanying text.

260 NPRM, *supra* note 7, at 3514-15; Meese, *Don't Abolish Employee Noncompete Agreements*, *supra* note 119, at 705 ("[E]mployers could pay employees a wage premium to prevent them from accepting outside bids or starting competing firms.").

261 *See* NPRM, *supra* note 7, at 3490 (discussing studies exploring this possible effect).

262 *Id.* at 3486-88 (discussing studies assessing whether NCAs "reduce the earnings of workers" but giving "minimal weight" to some).

263 *See, e.g.*, ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 277 (3d Cir. 2012) (characterizing so-called "de facto exclusive dealing" as resulting from defendant's "use" of monopoly power to impose such (*de facto*) "agreement"); In re McCormick & Co., No. 961-0050, 2000 WL 264190, at *3 (F.T.C. 2000) (characterizing differential pricing that induced retailers to exclude rivals' products from store shelves as exercise of market power).

possess preexisting market power to obtain such agreements.[264] Instead, firms without such power could employ NCAs to obtain it.[265] Of course, employees who are possibly subject to NCAs place a positive value on their autonomy and thus resist entering such agreements at the ordinary market wage, whether or not that wage reflects employers' market power.[266] Thus, employers will presumably "purchase exclusionary rights" by paying premium wages to induce agreement. This premium would not constitute an exercise of market power. Instead, the premium will reflect the opportunity cost, in the form of forgone future market power, the employer will incur if employees remain free immediately to depart the firm to work for rivals.[267] The resulting agreement will be perfectly voluntary, like a firm's sale of assets to a firm that pays a premium because it believes the assets will subsequently help it exercise market power.[268] Moreover, such premia will share the benefits of expected market power.[269] In short, if fully disclosed, neither beneficial NCAs nor those that raise rivals' costs result from the exercise of labor market power, even if employers happen to possess such power.[270]

The Commission did not consider the possibility that a substantial portion of NCAs result from voluntary integration between the parties that would occur even if employers lacked labor market power. This oversight is particularly damning given the Commission's own choice to incorporate procedural coercion within its new definition of "unfair." Having unilaterally made preventing coercive contract formation an element of its new agenda, the Commission should have reviewed the academic literature regarding the process of forming nonstandard agreements such as NCAs and considered the

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264 *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price*, 96 YALE L.J. 209, 248-49 (1986); *id.* at 251 ("[A] firm need not enjoy or acquire traditional market power to gain the ability to price above pre-exclusionary-rights competitive levels.").

265 *See* Thomas G. Krattenmaker & Steven C. Salop, *Analyzing Anticompetitive Exclusion*, 56 ANTITRUST L.J. 71, 79 (1987) (dividing market power into: Bainian power, *viz.*, power that a restraint creates by raising rivals' costs, and Stiglerian power, *i.e.*, preexisting power a firm might possess independent of any restraints).

266 *See* Barnett & Sichelman, *supra* note 73, at 1036.

267 *See* Meese, *Don't Abolish Employee Noncompete Agreements*, *supra* note 119, at 705 ("such exclusionary rights agreements could be entirely voluntary, like a cartel agreement").

268 *See* Meese, *Market Power and Contract Formation*, *supra* note 231, at 1362. *Cf.* Bon-Ton Stores, Inc. v. May Dep't Stores Co., 881 F. Supp. 860, 875-76 (W.D.N.Y. 1994) (evaluating failed bidder's challenge to dominant firm's purchase of rival that allegedly fortified market power).

269 *See* Meese, *Market Power and Contract Formation*, *supra* note 231, at 1364.

270 By contrast, it seems likely that employers use market power to impose fully disclosed NCAs that neither produce benefits nor raise rivals' costs but reduce employees' future bargaining power by preventing them from entertaining some outside offers.

record evidence bearing on whether the process resulting in nonexecutive NCAs is always coercive. The NPRM's failure to recognize that some such nonexecutive NCAs may be voluntary is additional evidence that the Commission lacks the capacity to assess whether NCAs are procedurally coercive without first employing the tools of investigation and adjudication to develop the relevant institutional knowledge regarding how parties form such agreements.

VIII. THE COMMISSION ESSENTIALLY TREATS DISCLOSURE AS EXOGENOUS, COULD ITSELF MANDATE DISCLOSURE, AND MISHANDLES THE ASSESSMENT OF MANDATED DISCLOSURE

The NPRM asserts that *consumers* "rarely" read standard form contracts.[271] The NPRM then asserts, without citation, that potential employees behave in this manner when negotiating employment terms.[272] The NPRM also asserts that employers "often" present NCAs after employees have accepted employment offers, without defining "often."[273] The only evidence adduced to support this assertion is a survey of "Electrical and Electronics Engineers," a sliver of the workforce.[274] The NPRM treats these factors as evidence that employers possess and use bargaining power coercively to impose NCAs.[275]

A. The Importance of Precontractual Disclosure

The absence of precontractual disclosure could have important implications for the treatment of NCAs, for reasons unrelated to bargaining power. Absent disclosure, some employees will accept offers they would not have accepted had they known about such provisions. Others will accept such offers without seeking compensation for such restrictions.[276] Employers would thus obtain enforceable NCAs without internalizing the negative impact of such agreements on employees' autonomy.[277] The result would be a market

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271 NPRM, *supra* note 7, at 3503 n.272 (citing Russell Korobkin, *supra* note 242, at 1206).

272 *Id.* at 3503 ("Workers likely display similar cognitive biases in the way they consider employment terms."); *id.* (finding that potential employees "are not likely to read" noncompete agreements).

273 NPRM, *supra* note 7, at 3521 (citing Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOCIO. REV. 695, 706 (2011)).

274 *See* Marx, *The Firm Strikes Back*, *supra* note 273, at 706.

275 *See* NPRM, *supra* note 7, at 3507.

276 *See* Eric Posner, *Antitrust Treatment of Noncompete Agreements*, 83 ANTITRUST L. J. 165, 190 (2020) ("It is possible that noncompetes suppress wages because workers who sign [noncompetes] do not demand a wage premium—because of ignorance.").

277 *See e.g.*, Meese, *Don't Abolish Employee Noncompete Agreements*, *supra* note 119, at 676.

failure manifested as too many NCAs, unduly onerous NCAs, and reduced wages.[278]

Such a failure is unrelated to bargaining power, resulting instead from the transaction costs of acquiring information about the bargain, combined with state enforcement of such "agreements."[279] Even firms operating in otherwise competitive labor markets would hope to hide such terms from potential employees, minimizing wages and maximizing the number and scope of restrictive agreements.[280] The NPRM does not mention this possible source of market failure.

B. Non-Disclosure Is Not Exogenous

Unlike (apparently rare) labor market concentration, which may be resistant to ordinary policy tools, employees' supposed ignorance of NCAs is not exogenous to legal policy. Such ignorance, like other transaction costs, is partly the function of background legal rules that determine the institutional framework within which parties conduct economic activity, including the allocation of labor via employment contracts.[281] As Ronald Coase noted more than three decades ago, the State can reduce transaction costs by "altering the requirements for making a legally binding contract," thereby changing the number and content of transactions and impacting the allocation of resources.[282]

With respect to NCAs, states have done so in various ways. A growing number require employers to disclose NCAs, sometimes several days before

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278 *Id.* ("The resulting equilibrium would reflect too many [NCAs] and/or agreements with unduly onerous terms.").

279 *See* R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 15 (1960) (defining transaction costs to include searching for and locating trading partners, negotiating over the terms of the bargain and monitoring compliance with such terms).

280 Meese, *Don't Abolish Employee Noncompete Agreements*, *supra* note 119, at 675-76 (explaining that such a failure could occur despite "substantial competition in the relevant labor market"); Craswell, *supra* note 242, at 87 ("[I]f buyers don't realize what clauses are hidden away in the fine print, then even markets with lots of competitors may still generate inefficient contract terms.").

281 *See* R. H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713 (1992).

282 *See* R. H. COASE, THE FIRM, THE MARKET & THE LAW 27-28 (1988) (explaining that government may alter economic conduct through "a change in the law or its administration" and that: "[t]he forms such changes may take are many. They may . . . make transactions more or less costly by altering the requirements for making a legally binding contract.").

the employee accepts the offer.[283] At least one requires the employer to encourage potential employees to seek legal advice before acceptance.[284]

Aside from statutes, background rules governing contract formation can combat this failure. The "market failure" account just described assumes that courts enforce NCAs even if the employees have no pre-agreement knowledge of them. This assumption would be accurate in states that still embrace the "duty to read" articulated by the First Restatement of Contracts.[285] Under that regime, employees are bound by agreements' terms, even if they do not read the agreement, regardless of whether the contested terms were within employees' reasonable expectations.[286] This background rule would facilitate employers' efforts to enforce terms employees would have rejected, at least without a wage premium.[287]

More than forty years ago, the Second Restatement of Contracts modified this "duty to read."[288] Section 211 governs the formation of standard form contracts, in which the NPRM finds most NCAs are embedded.[289] Subsection 211(3) creates an important exception to enforcement of standard terms. An unknown term is not "part of the agreement" if the term's proponent had "reason to believe" that the party to be bound would not have assented to the agreement "if he knew that the writing contained a particular term."[290] Proponents have "reason to believe" when, *inter alia*, the term is "beyond the range of reasonable expectation" of the parties.[291] In such a case, the proponent

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283 Some states require pre-acceptance written disclosure. *See, e.g.*, WASH. REV. CODE § 49.62.020 (2019); MASS. GEN. LAWS ch. 149, § 24L (2023); 820 ILL. COMP. STAT. 90/20 (2022); OR. REV. STAT. § 653.295 (2022). Some states require written disclosure "[three] business days" before acceptance. *See* ME. STAT. tit. 24, § 599 (2022); *see also* OR. REV. STAT. § 653.295 (2022); COLO. REV. STAT. § 8-2-113 (2023); N.H. REV. STAT. ANN. § 275:70 (2014).

284 *See, e.g.*, 820 ILL. COMP. STAT. 90/20 (requiring that employer "advise[] the employee in writing to consult with an attorney before" signing an NCA).

285 *See* RESTATEMENT (FIRST) OF CONTRACTS § 70 (AM. L. INST. 1932) (party who accepts offer "is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation.").

286 *See id.*

287 *Cf.* Alan J. Meese, *Regulation of Franchisor Opportunism and Production of the Institutional Framework: Federal Monopoly or Competition Between the States*, 23 HARV. J. L. & PUB. POL'Y 61, 70-71 (2000) (explaining how First Restatement's duty to read could facilitate franchisor's opportunistic efforts to impose onerous but enforceable clauses on unknowing franchisees).

288 *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 (AM. L. INST. 1981).

289 *See* NPRM, *supra* note 7, at 3503.

290 *See* RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. L. INST. 1981).

291 *Id.* ("Terms excluded") (parties "are not bound to unknown terms which are beyond the range of reasonable expectation" of the parties).

can only enforce the provision if it discloses the term and obtains subjective assent.[292] Lawyers sometimes treat such disclosure as a "good practice" and advise clients to disclose NCAs.[293] Such disclosure can overcome the informational market failure described earlier. Indeed, the requirement to disclose may deter employers from adopting NCAs in the first place or cause them to adopt less restrictive agreements, eliminating or reducing the magnitude of wage premia employers must pay to induce acceptance of such agreements.

C. The Commission Mishandled the Assessment of a Mandatory Disclosure Remedy

If nondisclosure threatens to produce suboptimal contractual terms, the Commission could itself require such disclosure.[294] Comments submitted in 2021 suggested that the Commission mandate such pre-contractual disclosure.[295] The Commission could also require a waiting period, as some states require.[296] If non-disclosure confers bargaining power on employers, it is because the Commission itself has chosen not to supplement state statutes and common law doctrines that require such disclosure.

One would expect the Commission to be receptive to this argument. Five years earlier, while an officer of the Petitioner, now-Chair Khan rejected the belief, supposedly held by the Chicago School of Antitrust, that "market structures emerge in large part through 'natural forces.'"[297] She also described

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292 John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735, 764-65 (1982) (discussing drafting history providing that proponent of "oppressive" terms must "flag" them for the counterparty as a condition of enforcement).

293 *See* Susan M. Guerette, *Do You Need To Give Notice to Employees About Signing a Non-Compete or Other Restrictive Covenant?*, FISHER PHILLIPS (July 6, 2023), https://www.fisherphillips.com/en/news-insights/do-you-need-to-give-notice-to-employees.html (treating precontractual disclosure as a "good practice that may be viewed favorably by a court considering the restriction").

294 *See* Meese, *Don't Abolish Employee Noncompete Agreements*, *supra* note 119, at 639 (asserting that Commission could "prohibit [NCA] agreements obtained without advanced disclosure").

295 *See* Beck, *supra* note 256, at 32 (recommending that "employers provide advance notice that a noncompete will be required."); Camila Ringeling et al., *Noncompete Clauses Used in Employment Contracts* 4, 26 (Geo. Mason Univ. L. & Econ. Rsch. Paper Series No. 20-04, 2020) (suggesting "disclosure-based consumer protection type remedy" in lieu of ban); Meese 2021 Comments, *supra* note 201, at 19 ("[R]equired pre-transaction disclosure of such terms, for instance, would perhaps reduce the aggregate number of [NCAs] while increasing the proportion of those that arise from voluntary price-based bargaining.").

296 *See* Beck, *supra* note 256, at attach. B.

297 Khan, *The New Brandeis Movement*, *supra* note 25, at 132.

and endorsed the Neo-Brandeisian belief that "the political economy is structured only through law and policy."[298] Mandatory pre-contractual disclosure and waiting periods for NCAs would "structure the political economy," eliminating one of the putative sources and consequences of bargaining power the NPRM identified.[299]

The NPRM devoted two paragraphs to considering mandatory pre-agreement disclosure as an alternative to a ban, albeit without mentioning a waiting period.[300] The Commission rejected the proposal for two reasons. First, employers may use their purported bargaining power coercively to impose even fully disclosed agreements.[301] This conclusion assumed, apparently contrary to fact, that employers generally possess such power and employ it to coerce acceptance even of beneficial agreements. Second, the NPRM asserted that universal disclosure would not alter the supposed aggregate, economy-wide impact of such agreements.[302]

In sum, the Commission invoked a state of affairs—precontractual ignorance of NCAs—entirely within its control to inform its determination that all nonexecutive NCAs are procedurally and substantively coercive. The Commission thus effectively treated non-disclosure as exogenous, downplaying how a national mandatory disclosure regime, perhaps with waiting periods, could impact the timing and content of disclosure.[303] The Commission's negative assessment of this alternative followed from its erroneous belief that: (1) labor markets are generally concentrated and (2) employers use bargaining power to impose efficient NCAs. Absent these two errors, the Commission would have understood that disclosure would alter the number and content of NCAs, even in markets where employers possessed significant labor market power.

Put another way, one cannot assess alternate methods of "structuring the political economy" with respect to NCAs without some understanding of the extent of labor market concentration and the economics of contract formation.

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298 *Id. But see* Coase, *The Institutional Structure of Production*, *supra* note 281, at 714 (explaining how a state's manipulation of background rules can impact the content of economic activity and thus the allocation of resources).

299 *See* Khan, *The New Brandeis Movement*, *supra* note 25, at 132 (describing how a state can "structure the political economy" by altering background legal rules).

300 *See* NPRM, *supra* note 7, at 3521.

301 *Id.*

302 *Id.*

303 Evidence before the Commission indicated that some states impose waiting periods. *See* Beck, *supra* note 256, at attach. B (describing waiting periods required by Maine, Illinois, and Massachusetts**)**; NPRM, *supra* note 7, at 3486 n.62 (citing a subsequent version of this document).

The Commission's failure to obtain and apply these tools when considering nondisclosure is further evidence that it is not up to the task of navigating the empirical and policy questions necessary to develop a rule governing NCAs under its new and more robust definition of unfair competition.

IX. DATA IN THE RECORD CONTRADICT ANY CLAIM THAT POTENTIAL EMPLOYEES ARE GENERALLY UNAWARE OF NCAS BEFORE ACCEPTING EMPLOYMENT OFFERS

The best evidence before the Commission contradicts the claim that nonexecutive employees rarely have pre-acceptance knowledge of NCAs. The NPRM properly treats a survey by Professors Starr, Prescott, and Bishara, as "likely the most representative coverage of the U.S. labor force."[304] The NPRM relies upon the survey results several times, including for facts about negotiations over NCAs.[305]

The survey asked respondents with NCAs whether they knew of the agreement before accepting the employment offer.[306] Sixty-one percent of such respondents replied yes.[307] Despite the comprehensive nature of this survey, it seems possible that sixty-one percent may *understate* the proportion of potential employees who know of NCAs when considering the offer of employment. First, the 2014 survey predated the enactment of some state laws *requiring* pre-agreement disclosure of NCAs.[308] Second, this question only queried employees who had entered NCAs, *i.e.,* accepted the employer's offer.[309] The results do not capture individuals who learned of such clauses during negotiations but declined to accept the employer's offer, perhaps because of the clause.[310] As explained below, "exit" of such individuals from the

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304 NPRM, *supra* note 7, at 3485; *see also* Evan Starr et al., *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2 MICH. ST. L. REV. 369, 396-455 (2016) (describing survey methodology).

305 *See* NPRM, *supra* note 7, at 3503 n.277.

306 Starr et al*., Understanding Noncompetition Agreements, supra* note 304, at 401 (reproducing survey questions regarding process of entering NCAs).

307 *See* Starr et al., *Noncompete Agreements*, *supra* note 68, at 8 ("[Sixty-one percent] of individuals with a noncompete first learn [of it] before accepting their job offer[s] while more than 30% first learn . . . only *after* they have already accepted.").

308 In particular, Washington, Colorado, Maine, Oregon, and Illinois enacted statutes requiring such disclosure after 2014, and New Hampshire enacted its requirement in 2012. *See* statutes cited *supra* note 283.

309 *Id.*

310 *Id.*

bargaining process can cause upward pressure on wages and influence the presence and content of NCAs.[311]

The NPRM's discussion of pre-agreement disclosure does not mention these results. This omission is strange for two reasons. First, the sixty-one percent figure appears on a page the NPRM cites three different times for other propositions related to the NCA bargaining process. In particular, the NPRM cites page 72 to establish that potential employees rarely bargain over NCAs, rarely consult counsel, and that NCAs are usually part of standard contracts.[312] Page 72 includes a table reproducing the results of several survey questions about the "Noncompete Contracting Process".[313] The questions included whether the individual consulted a lawyer and/or family or friends.[314] The very first question reported is: "When did you first learn you would be asked to sign a noncompete?"[315]

The table reports that 60.8% responded: "Before Accepting Job Offer."[316] This is not the only page of this study reporting these data. Here is a quotation from page 69, discussing the table on page 72:

> Table 7 presents descriptive statistics regarding the noncompete contracting process . . . ***61% of individuals with a noncompete first learn they will be asked to agree not to compete before accepting their job offer***, while more than 30% first learn they will be asked to agree only *after* they have already accepted their offer[.][317]

Second, at least one commentator expressly invoked this finding in response to the Commission's request for public comment on the Petition.[318] The NPRM claimed that the Commission considered all comments before generating the proposed rule.[319]

Perhaps a sixty-one percent rate of pre-contractual disclosure is still insufficient to ensure that potential employees bargain with employers on an

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311 *See* discussion *infra* Section XI.C.

312 *See* NPRM, *supra* note 7, at 3486, 3486 n.59, 3503, 3503 n.271, n.277-79.

313 Starr et. al., *Noncompete Agreements*, *supra* note 68, at 72 tbl.7.

314 *See id.*

315 *Id.* at 72 tbl.7.

316 *See id.* (reporting that only seven percent of employees signed such agreements without reading them).

317 *Id.* at 69 (emphasis added).

318 *See* Meese, Response to Request for Public Comments, *supra* note 198, at 29 ("[One study] concludes that, among all workers in the sample studied, about three fifths of employees learned of the [NCA] *before* accepting the offer of employment."); *id.* at 29 n.116 (citing Starr et al., *Noncompete Agreements*, *supra* note 68).

319 *See* NPRM, *supra* note 7, at 3498 (describing the Commission's purported close consideration of such comments).

equal footing. However, the NPRM does not explain what proportion of employees must have advanced knowledge of NCAs to militate against a finding of universal coercion. Nor does the NPRM articulate any bargaining model from which one could derive this proportion. The NPRM also does not mention the possibility—long recognized in the academic literature—that markets can achieve optimal results even if only a subset of participants are informed regarding transactional terms, so long as proponents of the agreement offer the same terms to all.[320] Indeed, Section 211 establishes mutual assent to terms in *standard* contracts, and such enforcement is premised on the presence of the contested term in all such agreements.[321] Otherwise, the employer's representation that the agreement is "standard" would be fraudulent, undermining enforcement of the clause.[322]

The NPRM failed even to mention the evidence that a sizable majority of employees had pre-agreement knowledge of NCAs.[323] Nor did the Commission consider the possibility that recently enacted state statutes have rendered disclosure even more prevalent. Finally, the Commission did not consider the possible link between background state rules, both common law and statutory, and the prevalence of disclosure. These shortcomings are further indications that the Commission lacks the capacity necessary to conduct a generalized assessment of NCAs under a governing standard that treats procedural coercion as legally significant.

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320 *See* Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 638-39 (1979) (demonstrating that search and comparison of prices by some consumers can ensure competitive prices for all); *see also id.* at 659-61 (describing similar result for contract terms); *id.* at 662-63 (explaining how contract term discrimination can allow firms to impose inefficient terms on unsophisticated consumers); Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J. L. & ECON. 461, 485 (1974).

At least one comment referenced this result of the academic literature. *See* Meese, Response to Request for Public Comments, *supra* note 198, at 16 n.67 ("[A]s two scholars recently noted, attention by *some* market participants to such terms may suffice to ensure a well-functioning market, 'even in the absence of transaction-specific negotiation.'") (citing Barnett & Sichelman, *supra* note 73, at 1038-39). Barnett & Sichelman, in turn, cited Schwartz & Wilde, *supra* note 320. The Schartz and Wilde article is not obscure, having been cited 963 times according to Google Scholar (last visited on August 12, 2023).

321 *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. e (AM. L. INST. 1981) ("*Equality of treatment.* One who assents to standard contract terms normally assumes that others are doing likewise and that all who do so are on an equal footing.").

322 *See* Nw. Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 377-78 (7th Cir. 1990) (Posner, J.) (analogizing hidden oppressive contractual terms to fraud).

323 *See* NPRM, *supra* note 7.

X. THE FACT THAT MANY EMPLOYEES WORK PAYCHECK-TO PAYCHECK DOES NOT CONFER UNIVERSAL BARGAINING POWER ON EMPLOYERS

The NPRM also invokes the claim that, for most individuals, the "loss of a job or employment opportunity" will have "serious financial consequences." The NPRM's statement is worth quoting in full:

> Most workers depend on income from their jobs to get by—to pay their rent or mortgage, pay their bills, and keep food on the table. For these workers, particularly the many workers who live paycheck to paycheck, loss of a job or a job opportunity can severely damage their finances. For these reasons, the loss of a job or an employment opportunity is far more likely to have serious financial consequences for a worker than the loss of a worker or a job candidate would have for most employers.[324]

The NPRM does not specify the connection between these economic facts and the supposed use of bargaining power coercively to impose every nonexecutive NCA. The implication seems to be that all job seekers desperately need employment and will thus accept onerous terms, including NCAs, to obtain employment. The Petition for Rulemaking made such an argument, albeit more precisely.[325]

This argument ultimately lacks any basis in the record and contradicts basic economic facts and theory. Assume for the sake of argument that many Americans work paycheck-to-paycheck and will accept whatever terms a potential employer offers. Assume further that such propensity determines employment terms in labor markets. This characterization of the bargaining process generates the prediction that no employee would earn more than subsistence wages. Moreover, no employee would receive fringe benefits greater than necessary to subsist, unless such benefits are legally mandated.[326]

Nonetheless, most employees earn well above the subsistence level and often receive benefits greater than those legally mandated. According to the Census Bureau, the median individual income was $56,473 in 2021, a drop from well over $58,000 the prior year, presumably due to Covid-related

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324 *See id.* at 3503.

325 *See* 2019 Petition, at 14-16.

326 *See, e.g.*, Meese, *Don't Abolish Employee Noncompete Agreements*, *supra* note 119, at 674 (asking "[w]hy [] labor markets with substantial proportions of subsistence employees nonetheless produce wages well above the level predicted by the Abolitionist account?").

restrictions.[327] These figures were well above the subsistence level.[328] Moreover, even before Congress required many companies to provide health insurance, employers voluntarily provided this benefit to a majority of employees.[329]

What explains this sizeable deviation from the results predicted by the NPRM's characterization of employee bargaining incentives? Simply put, some individuals, including some working paycheck-to-paycheck, are not as economically desperate as the NPRM imagines. These non-desperate individuals likely fall into two categories. First, some individuals are employed but voluntarily seeking new jobs. For these individuals, refusal to accept a job offer simply means remaining in their current position. The failure to obtain the new position may be disappointing, but the NPRM offers no evidence that such a failure is equivalent to outright unemployment. These individuals are thus able to consider terms of possible new employment from a position of relative economic security.

The NPRM itself recognizes that current employment enhances potential employees' bargaining power. Recall the NPRM's assertion that employers sometimes defer notice of NCAs until *after* employees accept offers.[330] The NPRM opined that, when employees receive late notice, their "negotiating power is at its weakest, since the [employee] may have turned down other job offers or left their previous job."[331] By parity of reasoning, individuals who *are* employed when considering a job offer are in a much better bargaining position than unemployed individuals.

Second, there are individuals who *are* unemployed, but also live in multiple-earner households. Most low-wage employees occupy households in the three highest income quintiles, and one-third of households with a low-income

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327 *See* Jessica Semega & Melissa Kollar, *Income in the United States*: *2021 U.S. Census Current Population Reports*, U.S. CENSUS BUREAU (Sept. 2022), at 8, https://www.census.gov/content/dam/Census/library/publications/2022/demo/p60-276.pdf. The figure was over $58,700 in 2020. *See id.*

328 *See e.g.* Amy K. Glasmeier, *New Data Posted: 2023 Living Wage Calculator*, LIVING WAGE CALCULATOR (Feb. 1, 2023), https://livingwage.mit.edu/articles/103-new-data-posted-2023-living-wage-calculator (fig.1) (reporting that the individual "living wage" in the United States was less than $40,000 in 2022).

329 *See* U.S. CENSUS BUREAU, HEALTH INSURANCE 2000 (Sept. 2021), https://www2.census.gov/library/publications/2001/demographics/p60-215.pdf (reporting that 64.1% of Americans were covered by an employment-related health insurance plan for some or all of 2000).

330 *See* NPRM, *supra* note 7, at 3503.

331 *Id.*

employee earned $90,750 in current dollars.[332] If such individuals become unemployed, they may well subsist, temporarily at least, on part of the income of other household members, *e.g.,* a spouse. Like employed individuals, such individuals are not so economically desperate that they must accept any terms a potential employer might offer.

Put another way, the premise of the NPRM's "paycheck-to-paycheck" argument is that nonexecutive individuals are unemployed and the sole potential household earner when conducting job searches. It may well be that this assumption accurately describes *some* labor markets, where all or nearly all employees have no choice but to accept NCAs. However, the NPRM offers no evidence that this assumption describes all or even most labor markets where NCAs arise.

As explained above, the presence of a sufficient number of informed market participants can protect other participants from overreaching contractual terms. Unlike desperate individuals, potential employees in the other two categories can "walk away" from unacceptable offers. An employer who proposes the same unduly onerous but disclosed NCA to all potential employees without increasing the wage will experience a reduction in the number of individuals willing to accept its offer.[333] The reduced supply of potential employees will increase wages, as the employer bids for fewer suppliers of labor.[334] Assuming the employer pays such enhanced wages to obtain the NCA, instead of dropping the clause, employees, desperate or not, who accept the offer will receive compensation for the restraint.[335] Thus,

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332 *See* Johnathan Meer, *Who Benefits from a Higher Minimum Wage?*, ECONOFACT (Nov. 27, 2018), https://econofact.org/who-benefits-from-a-higher-minimum-wage.

333 *See* Blake, *supra* note 7, at 627 (describing anecdotal evidence that in some markets "hard-to-get, qualified [individuals] are refusing to agree to the impairment of mobility that [NRAs] entail or are demanding other concessions because of them."). An employer that does not offer the same terms to all risks losing the ability to enforce such terms in court. *See supra* notes 321-22 and accompanying text (describing this implication of § 211). The NPRM does not claim that employers engage in such "term discrimination." Moreover, employers that adopt and disclose onerous provisions may lose several potential employees, and not merely one potential employee, as the NPRM seems to assume. *See* NPRM, *supra* note 7, at 3503 (assuming that adoption of NCA would only result in "the loss of [an employee] or a job candidate").

334 *See* Rubin & Shedd, *supra* note 244, at 100.

335 *Cf. id.* ("Employers will not put clauses in contracts unless the gain to the employer from including the clause is greater than the cost in higher wages which the contract will entail."); Barnett & Sichelman, *supra* note 73, at 1036-37 (explaining that employers may be unwilling to pay employees sufficient compensation to induce acceptance of an NCA).

employees who are not economically desperate will protect those who are, ensuring that all receive compensation for entering NCAs.[336]

The NPRM's effective assumption that all potential employees bargain from a position of economic desperation suggests that the Commission does not understand the characteristics of labor market participants. Moreover, the NPRM displays no understanding of the implications of participation by individuals who bargain from a position of relative security. The Department of Labor could help ascertain the proportion of job seekers who are currently employed, perhaps as amicus curiae in adjudication.[337] However, the Commission chose to "go it alone" and propose an ambitious rule based on incomplete information about employee characteristics. The disconnect between the Commission's assumptions and the reality of actual labor markets further confirms that the Commission lacks the capacity to gather and assess the information necessary to generate a well-considered legislative rule governing NCAs.

XI. RELIANCE ON FORM CONTRACTS AND LACK OF INDIVIDUALIZED BARGAINING DOES NOT INDICATE THE POSSESSION OR USE OF BARGAINING POWER

The NPRM also invokes the lack of individualized bargaining and reliance on form contracts as a significant proportion of "considerable evidence" that employers always use acutely superior bargaining power to impose NCAs on nonexecutive employees.[338] However, as shown below, form contracts often arise in competitive markets, and parties rely upon these documents to reduce transaction costs and facilitate economic activity. Background rules governing contract formation and robust state court review of such restraints constrain employers' ability to obtain enforceable agreement to unreasonable provisions. Ironically, the Commission declined to supplement these background rules by mandating pre-contractual disclosure of NCAs. Other market mechanisms can force employers to internalize the impact of NCAs on employees and thereby ensure they receive compensation for such restraints. These considerations may

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336 *See supra* note 320 and accompanying text (describing how a comparison of contractual terms by a subset of market participants can generate optimal contractual terms).

337 *See* Hiba Hafiz, *Interagency Merger Review in Labor Markets*, 95 CHI-KENT L. REV. 37, 50 (2020) (explaining that the antitrust agencies lack Department of Labor expertise regarding how labor markets function).

338 *See* NPRM, *supra* note 7, at 3503 (treating employers' reliance on form contracts, lack of bargaining and general failure of employees to obtain advice of counsel as "considerable evidence" that employers use bargaining power to impose NCAs).

help explain why a majority of employees who received advance notice of NCAs considered them reasonable, a finding the NPRM ignores.

A. Lack of Individual Bargaining Does Not Indicate the Exercise of Bargaining Power

To support its claim that employees "rarely bargain over" NCAs, the NPRM cites the 2014 survey by Professors Starr, Prescott, and Bishara.[339] The study found that ten percent of respondents with NCAs had bargained over them, while 7.6% had consulted an attorney.[340]

I do not question these findings, at least regarding individuals with NCAs. However, the proportion of employees who *do* negotiate over such agreements is not exogenous to legal rules and would increase if the Commission mandated pre-agreement disclosure of such restraints. Such notice doubles or triples the extent of individualized negotiation.[341] Perhaps mandatory waiting periods would further increase such negotiation.

The NPRM does not explain the analytical connection between lack of individualized bargaining and bargaining power. Nor does the NPRM articulate any methodology for determining how much "individualized bargaining" would rebut the assertion that employers uniformly wield such power to impose nonexecutive NCAs. Imagine that, say, forty-two percent of employees bargain over NCAs. Would that suffice to refute assertions that employers used bargaining power to coerce acceptance of NCAs? The NPRM provides no methodology for answering this question.

The NPRM also likely overstates the utility of individualized bargaining. The lack of bargaining is entirely consistent with a well-functioning market brimming with voluntary transactions improving the joint welfare of transacting parties. Indeed, the NPRM twice treats a "perfectly competitive labor market" as the baseline for assessing NCAs.[342] In perfect competition employers and employees are "wage takers," *i.e.*, neither has any power over wages or other employment terms. There is no bargaining range and thus no

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339 *See* NPRM, *supra* note 7, at 3503 (citing Starr et al., *Noncompete Agreements*, *supra* note 68, at 72).

340 *See id.*

341 *See* Starr et al., *Noncompete Agreements*, *supra* note 68, at 69 (finding that pre-contractual disclosure almost doubles such negotiation); Marx, *supra* note 273, at 706 (finding that such disclosure tripled individual negotiation).

342 *See* NPRM, *supra* note 7, at 3501, 3503.

"contested exchange."[343] Individual bargaining is pointless.[344] Potential employees who hold out for slightly higher wages than those set by perfect competition would remain forever unemployed. Employers that offer pay slightly below market wages would hire no one.

Of course, the real world very often departs from perfect competition in numerous ways, including the presence of various costs that accompany transactions, *i.e.,* transaction costs. Moreover, some firms undoubtedly possess power in certain labor markets. Still, at most twenty-three percent of employees work in moderately or highly concentrated labor markets, and the NPRM contains no evidence that NCAs only arise in such markets.[345] Nor does the NPRM explain how much power an employer must possess to impose such substantively onerous agreements or offer any evidence that bargaining is more prevalent in unconcentrated markets. Something more pervasive than bargaining power may explain the lack of bargaining and reliance on form contracts. The next subsections offer such an alternative explanation.

B. Form Contracts Sometimes Arise in Competitive Markets and Avoid the Transaction Costs of Individualized Bargaining

What, though, about standard form contracts? Conventional wisdom once held that proponents of such agreements "typically" possessed overwhelming power.[346] Still, fifty years ago, one influential scholar asserted that "standard form contracts probably account for more than ninety-nine percent of contracts now made."[347] Others have since invoked this claim.[348] The ninety-nine percent figure may be an exaggeration, but it captures the fact,

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343 *See* Samuel Bowles & Herbert Gintis, *The Revenge of Homo Economicus: Contested Exchange and the Revival of Political Economy*, 7 J. ECON. PERSP. 83 (1993). Of course, employers will have market power in some labor markets. However, where such power is modest and there is little to be gained from bargaining, employees may rationally choose not to invest resources in such negotiation.

344 *Id.*

345 *See supra* note 189 and accompanying text (discussing evidence that seventy-seven percent of employees work in markets that are unconcentrated).

346 *See* Friedrich Kessler, *Contracts of Adhesion–Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943) ("Standard contracts are typically used by enterprises with strong bargaining power.").

347 W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971).

348 *See, e.g.,* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability,* 70 U. CHI. L. REV. 1203, 1203; Murray, *The Standardized Agreement Phenomena*, *supra* note 292, at 739.

unmentioned by the NPRM, that such forms are in widespread use, including in unconcentrated markets.[349]

What could account for the presence of such agreements in unconcentrated markets? One possible explanation is that standard forms respond to various departures from perfect competition by reducing the cost of conducting economic activity. Such activity, including hiring employees, takes place within an institutional framework that impacts the costs of transactions and thus the content of economic activity.[350] Individual bargaining consumes scarce resources, including the opportunity cost of time spent gathering information, haggling over terms, and memorializing terms in writing.

Various institutions, including background default rules of Contract Law, reduce such costs and facilitate transactions. Merchants sell products pursuant to numerous standardized terms, implied by the Uniform Commercial Code.[351] An employee working "at will" for the local hardware store or multinational conglomerate does so subject to background state law, much judge-made, defining the duties of agents, including employees, to principals. For instance, agency law precludes employees from competing with the employer for the duration of employment.[352] Parties can of course alter default rules. Purchasers can pay for more generous warranties than implied by the UCC.[353] Employees can accept reduced wages for the right to compete with employers.[354]

The classic justification for default rules, of course, is reducing transaction costs, including the cost of bargaining over individual terms.[355] This rationale implies that such rules should mimic what most parties *would* choose after

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349 *See* John J. A. Burke*, Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 291 n.29 (2000) (listing fifty form contracts, including "Mazda lease agreement," "Nissan Retail Buyer Order," "First USA Titanium Mastercard," and "Radio Shack Limited Warranty"); Priest, *supra* note 241, at 1325 (describing standard warranty terms adopted in industries with HHIs ranging from 270 to 3590 and including 1501, 1250, 990, 780, 530, and 340); Slawson, *supra* note 347, at 553 ("Contracts of adhesion commonly occur even in competitive situations."); *see also* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1189 n.57 (1983) (taking issue with ninety-nine percent figure but conceding "that such contracts are now in the majority.").

350 *See* Coase, *The Institutional Structure of Production*, *supra* note 281, at *passim* (1992).

351 *See e.g.* U.C.C. § 2-314 (AM. L. INST. & UNIF. L. COMM'N 1977) (subjecting all merchants to implied warranty of merchantability).

352 *See* RESTATEMENT (THIRD) AGENCY § 8.04 (AM. L. INST. 2006) (describing this duty).

353 *See* U.C.C. § 2-313 (AM. L. INST. & UNIF. L. COMM'N 1977) (express warranties).

354 RESTATEMENT (THIRD) AGENCY § 8.06 (AM. L. INST. 2006) (providing for principal's consent to conduct that would otherwise violate § 8.04).

355 Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines,* 60 U. CHI. L. REV. 1, 13-14 (1993). *Cf.* Coase, *The Problem of Social Cost*, *supra* note 279, at 15 (defining transaction costs to include individual bargaining).

bargaining.[356] Different defaults imply different costs of performance that sellers will pass on to buyers in the price term.[357] For instance, the implied warranty of merchantability will induce sellers to incur higher costs and charge higher prices than a regime of *caveat emptor*, because sellers must ensure that products are "merchantable."[358] Default rules chosen in this manner will minimize the costs of consummating transactions, costs the parties would otherwise bear. If courts and legislatures set defaults properly, bargaining may be rare.

Terms in standard forms are also defaults and starting points for potential individualized bargaining. Of course, one party drafts such forms, and courts construe such agreements against the drafter.[359] Like the State, drafting parties have an interest in setting default rules to maximize the net value of products sold (including rights and obligations such as warranties) and minimize transaction costs the parties would otherwise jointly incur when bargaining around standard terms.[360] According to Section 211 of the Second Restatement, standardized forms can "eliminate bargaining over details of individual transactions" reducing the need for reliance on counsel.[361] As one state supreme court applying Section 211 put it more colorfully, the economy would "slow to a crawl" if courts declined generally to enforce standardized contracts.[362]

Or, as Judge Posner put it:

> "Ours is not a bazaar economy in which the terms of every transaction, or even of most transactions, are individually dickered . . . Form contracts, and standard clauses in individually negotiated contracts, enable enormous savings in

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356 *See* Craswell, *Property Rules*, *supra* note 355, at 13-14 (describing such "majoritarian" default rules as responsive to high transaction costs).

357 Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 369-71 (1991).

358 *See id.* at 368-72 (employing warranties as example of default provisions that increase costs that sellers pass along to buyers). U.C.C. § 2-314(2) (AM. L. INST. & UNIF. L. COMM'N 1977) (describing detailed definition of "merchantability").

359 *See* RESTATEMENT (SECOND) CONTRACTS § 206 (AM. L. INST. 1981).

360 *See, e.g.*, Burke, *supra* note 349, at 287 ("A standard form contract . . . is tantamount to a commodity. The contract is embedded in the product and constitutes part of its identity.").

361 RESTATEMENT (SECOND) CONTRACTS § 211 cmt. b (AM. L. INST. 1981) ("One of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms.").

362 Nationstar Mort. LLC. v. West, 785 S.E. 2d 634, 639 (W.V. 2016) (recognizing "the attendant unworkability of individualized bargaining"); *id.* ("[T]hese agreements are most often enforced, at least as long as they comport with the reasonable expectations of the parties. A contrary rule would slow commerce to a crawl.").

> transaction costs, and the abuses to which they occasionally give rise can be controlled without altering traditional doctrines, provided those doctrines are interpreted flexibly, realistically."[363]

Section 211, is one "traditional doctrine" that courts could "interpret flexibly" to minimize transaction costs, by refusing to enforce unknown NCAs that fall outside employees' reasonable expectations.[364]

Section 211's commentary contemplates that non-drafting employees "trust to the good faith of the party using the form."[365] The commentary also provides that "particular forms of bad faith *in bargaining* are the subjects of rules as to the capacity to contract, *mutual assent* and consideration . . ."[366] Section 211, of course, deals with mutual assent, more precisely, "Assent to Unknown Terms," the title of Comment b.[367] That comment also provides that non-drafting parties assent only to lawful terms.[368]

As explained earlier, state courts have developed detailed standards governing the enforceability of NCAs.[369] The requirement of good faith thus presumably contemplates that drafting parties comply with the standards governing legality and enforceability of NCAs.[370] Put another way, such standards can help inform the assessment of whether an NCA is "oppressive" and thus falls outside the employee's "reasonable expectations."

Here, employers' reliance upon counsel to draft NCAs is a feature, not a bug.[371] Assuming an employer's counsel understands the law, potential employees can rely on standard forms to comply with states' robust standards

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363 Nw. Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 377 (7th Cir. 1990).

364 *See supra* notes 288-92 and accompanying text (discussing the standards governing the enforcement of standard terms in RESTATEMENT (SECOND) CONTRACTS § 211 (AM. L. INST. 1981)).

365 *See* RESTATEMENT (SECOND) CONTRACTS § 211, cmt. b (AM. L. INST. 1981) (explaining assumption that non-drafting party will "trust to the good faith of the party using the form").

366 *See id.* at cmt. c (emphasis added) (citing "for example" §§ 90 (Promissory Estoppel), 208 (unconscionability)). *Cf. id.* at § 205 (general good faith obligation applies to performance and enforcement of contractual obligations). § 211 thus generates a distinct duty of good faith in connection with form contracting.

367 *Id.* at cmt. b ("[a]ssent to unknown terms").

368 *Id.* (Nondrafting parties "understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose.").

369 *See supra* notes 88-90 and accompanying text.

370 *Cf.* Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006) (corporate director that acts "with the intent to violate applicable positive law" violates fiduciary duty of good faith).

371 *See* NPRM, *supra* note 7, at 3503 ("[E]mployers are more likely to seek the assistance of counsel in drafting [NCAs].").

governing assessment of such agreements.[372] Thus, the background institutional framework constrains the range within which employers and employees bargain, protecting employees from overreaching agreements and reducing employees' incentives to invest resources in bargaining over such terms.[373] The NPRM did not mention this alternative explanation for reliance on standard forms and lack of bargaining and offers no evidence to refute it.

C. Voice v. Exit

The institutional framework described above does not always prevent employers from obtaining nominal agreement to oppressive NCAs. However, individualized bargaining and protective rules of contract law are not the only mechanisms for policing oppressive terms.[374] Negotiation is a form of "voice," whereby potential employees articulate a desire not to enter NCAs and/or receive additional consideration in return.[375] However, "voice" is not the only way to influence contractual terms. Markets often function well with little or no voice. At the extreme, in perfect competition there is no "voice," as market participants are price and term takers. Even outside perfect competition, exit or the threat thereof can substitute for "voice" and individualized bargaining, driving markets toward optimal results.

Indeed, one early articulation of the transaction cost explanation of NCAs treated such exit as the sole driver of increased wages that compensate employees for entering such restrictions.[376] As explained earlier, inclusion of an NCA within an employment agreement will, if disclosed in advance, cause some potential employees to reject the employer's offer, presumably because the restriction would reduce their expected future income.[377] These rejections, in turn, will reduce the supply of labor and induce the employer to increase wages.[378] The result will be higher wages than the firm would pay in a market with no NCAs or with undisclosed agreements.[379] This is so even if the

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372 *See supra* notes 155-56, 160-62 and accompanying text (noting decisions asserting that courts scrutinize NCAs more intrusively than covenants ancillary to sale of a business).

373 *Cf.* Hafiz, *supra* note 337, at 51 (explaining how "institutions—like labor unions and government workplace interventions" can serve "as a prophylactic to the rise of employer buyer power").

374 *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE & LOYALTY (1970).

375 *See, e.g.,* GEORGE J. STIGLER, THE THEORY OF COMPETITIVE PRICE 87 (1966).

376 *See* Rubin & Shedd, *supra* note 244, at 100.

377 *Id.* (employer that proposes NCA "will reduce the supply of potential employees and thus pay a higher wage to those persons who nonetheless choose to work for him.").

378 *Id.*

379 *See* Alan Manning, *Monoposony in Labor Markets: A Review*, 74 INDUS. & LAB. REL. REV. 3, 12-13 (2020) ("In a monopsonistic labor market: [a] fall in the supply of labor would lead to

employer possesses monopsony power. Presumably, employers are willing to pay such additional compensation because they believe the NCA will generate benefits, perhaps by encouraging productivity-enhancing investments.[380] Regardless of the source of these benefits, wage premia will share a portion of such benefits and compensate employees for the (voluntary) reduction in future autonomy.[381] Those who exit or threaten exit thereby protect individuals who remain in the market and accept employers' terms.

This exit-driven account implies that the proportion of individuals who report bargaining over their NCAs understates the economic conduct that influences the existence and content of NCAs. That is, this proportion excludes: (1) those who simply exit the negotiation process upon learning of the proposed NCA; and (2) those who attempt to bargain but withdraw if bargaining fails. The survey data on which the NPRM relies does not capture responses by either type of individual and will thus invariably understate both the extent of actual bargaining (by ignoring individuals in the second category) and the impact of exit by individuals in both categories on employers' incentives to include such agreements and their scope.

The process just described is not costless. The employer must communicate the offer to potential employees, including the scope of the NCA. Such an offer could entail two options plus a wage differential.[382] Or, the employer could rely upon an iterated process, whereby it offers a single option, namely, an agreement with the NCA at a particular wage, gauging the response by potential employees and adjusting the wage and/or agreement accordingly.

In a recent article invoked by the NPRM, two co-authors describe what one might consider the end state of such a wage-setting process.[383] They observe that, if potential employees know of an NCA, they will seek compensation.[384] They also note that labor market models "differ in how they consider bargaining."[385] Under one "wage-posting model," "employers post a take-it-or-leave-it offer, precluding bargaining."[386] The authors also note that "a compensating differential may be built into the posted wages, *rendering*

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lower employment and, to the extent that there is a diminishing marginal product of labor, a higher wage.").

380 *See* Rubin & Shedd, *supra* note 244, at 95-100.

381 *Id.* at 99-100; Barnett & Sichelman, *supra* note 73, at 1036-38.

382 *See supra* notes 245-51 (describing this potential process of contract formation).

383 *See* Donna S. Rothstein & Evan Starr, *NCAs, Bargaining, and Wages*, MONTHLY LAB. REV. (June 2022).

384 *Id.* (describing how NCAs create "pressure" for employees to receive compensation).

385 *Id.*

386 *Id.*

bargaining unnecessary."[387] In the real world, of course, employers likely set any "take it or leave it" wage via trial and error, finally settling (more or less) on a particular wage/NCA combination when they believe they have maximized the net benefits of various possible combinations. Exogenous shocks (*e.g.*, new entry, inflation/deflation, and/or technological change) may force reconsideration. Firms that find the right combination will to that extent outcompete others.[388] Scholars seeking to understand NCA bargaining may only capture "snapshots" of a process in continuous motion from one possible equilibrium to another. The process just described, of course, is unrelated to the possession or exercise of labor market power.

D. Evidence Supporting the Beneficial Account of Standard Forms and Lack of Bargaining

There is intriguing evidence that is consistent with this alternative account of form contracts and lack of individualized bargaining. The survey the NPRM invoked also asked respondents *why* they did not bargain individually.[389] Forty-six percent of respondents who learned of the NCA *after* they accepted the offer replied that they believed the provision to be reasonable, the most prevalent reply.[390] For those with advanced knowledge of NCAs, the figure was fifty-five percent.[391]

The NPRM ignored this finding, which again appeared on the same page that the NPRM cited three times, and thus did not attempt to reconcile this finding with its determination that all respondents were victims of labor market coercion.[392] Why is it, then, that numerous respondents believed such agreements to be reasonable despite the lack of bargaining? The previous discussion suggests two related reasons. First, the quasi-legal incentives for counsel to draft agreements that comply with common law standards governing NCA enforcement presumably induce some employers to prepare and offer agreements that are less restrictive and more reasonable than they otherwise might. Second, employers that still persist in drafting overbroad agreements

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387 *Id.*

388 Armen Alchian, *Uncertainty, Evolution and Economic Theory,* 58 J. POL. ECON. 211, 217 (1950); *see also* Giuseppe Dari-Mattiacci & Florencia Marotta-Wurgler, *Learning in Standard-Form Contracts: Theory and Evidence*, 14 J. LEG. ANALYSIS 244, 247 (2023).

389 *See* Starr et al., *Noncompete Agreements*, *supra* note 68, at 72.

390 *Id.*

391 *Id.*

392 *See supra* note 315.

will suffer in the marketplace, as potential employees exit, driving up the wages that employers must pay to attract talent.

The Commission did not mention alternative explanations for parties' reliance on form contracts and the relative lack of individualized bargaining. The Commission also ignored evidence that is consistent with the more charitable explanation of the NCA bargaining process. The failure to identify this alternative explanation and lack of awareness of evidence supporting it further confirms that the Commission lacks the capacity to assess NCAs under a Section 5 standard that requires assessment of the process of contract formation.

XII. THE NPRM OFFERS NO EVIDENCE THAT POTENTIAL EMPLOYEES TREAT NCAS AS "CONTINGENT TERMS" AND THUS IGNORE OR DISCOUNT THEM

The NPRM also contends that potential employees (except senior executives) ignore what it calls "contingent terms," that is, "terms concerning scenarios that may or may not come to pass."[393] The NPRM does not explain the relevance of this assumption. The implication seems to be that, even if employers fully disclose NCAs, potential employees will act as if such agreements will never take effect, because they will never leave their job.[394] Absent such a departure, the NCA will not be enforced.

The NPRM cites no evidence that employees unduly discount the prospect of departure. Instead, the NPRM cites a single page of a law review article, the same page that the 2019 Petition cited for the same proposition.[395] The relevant language in the article asserts:

> [B]oth [NCAs and arbitration clauses] waive rights that will become operative only upon the occurrence of a future event that is remote, uncertain, and often undesirable (the right to work for a competitor after the current job ends, and the right to litigate a future dispute with the employer, usually in connection with discharge). That is unlike most contractual terms of the employment relationship—such as wages, hours, job duties, or working conditions—which take effect more or

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393 *See* NPRM, *supra* note 7, at 3503.

394 The NPRM apparently asserts that employees will discount the chance of such departures independent of any deterrent impact of the NCA.

395 *See* 2019 Petition, *supra* note 2, at 20 (citing Cynthia Estlund, *Between Rights and Contract: Arbitration Agreements and Noncompete Covenants as a Hybrid Form of Employment Law*, 155 U. PENN. L. REV. 379, 413 (2006)).

> less immediately. . . . . non-compete agreements constrain employees only in a fairly remote and uncertain future event; and we may expect employees to overdiscount the likelihood of these events or the importance of the rights at stake.[396]

The article cites no evidence that potential employees consider departure from a prospective job "remote, uncertain and undesirable."[397] Nor does it cite any evidence that employees: "overdiscount the likelihood of these events or the importance of the rights at stake."[398] The assertion that individuals consider departure "undesirable" seems particularly odd. After all, the NPRM repeatedly asserts that NCAs coercively thwart employees' autonomy to depart for *a more desirable* employment opportunity.[399]

What about the assertion that potential employees believe departure for a different job is "remote" and "uncertain?" The Commission was apparently unaware of evidence produced by the Department of Labor regarding employees' actual experience. These data show that most employees experience frequent departures from any given job. Thus, the average employee in the "latter years (1957-1964) of the baby boom" worked an average of 12.4 jobs between ages eighteen and fifty-four.[400] Turnover is more rapid earlier in life.[401] At the same time, the mean age of individuals who report being bound by an NCA is 40, and the age range at which such agreements are most prevalent is 36-40.[402] According to the Department of Labor, 26% of individuals in this age group left their jobs within one year or less, while 61% left within five years, though again the departure rate is higher for younger individuals.[403]

The NPRM does not mention these data that undermine the assertion that employees entering NCAs believe they will otherwise remain in the new job

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396 *See* Estlund, *supra* note 395, at 413 (emphasis added).

397 *Id.*

398 *Id.*

399 *See supra* notes 107-08 and accompanying text (discussing NPRM's conclusions in this regard).

400 *See* U.S. DEP'T OF LAB., NUMBER OF JOBS, LABOR MARKET EXPERIENCE, MARITAL STATUS AND HEALTH RESULTS FROM A NATIONAL LONGITUDINAL SURVEY (Aug. 31, 2021) ("Individuals born from 1957 to 1964 held an average of 12.4 jobs from ages 18 to 54.").

401 *See id.* ("These baby boomers held an average of 5.6 jobs while ages 18 to 24. The average fell to 4.5 jobs from ages 25 to 34; to 2.9 jobs from ages 35 to 44; and to 2.1 jobs from ages 45 to 54."); *id.* ("Jobs that span more than one age group were counted once in each age group, so the overall average number of jobs held from ages 18 to 54 is less than the sum of the number of jobs across the individual age groups.").

402 *See* Starr et al., *Noncompete Agreements*, *supra* note 68, at 62 tbl.4 (reporting mean age of those with NCAs to be 40.22); *id.* at 65 (reporting that 24% of individuals aged 36-40 have entered such agreements).

403 U.S. DEP'T OF LAB., *supra* note 400.

indefinitely. Indeed, a middle-aged individual who has experienced rapid job turnover to that point in life may *overstate* the probability of continued future turnover. Scholars have documented a cognitive bias known as the "availability heuristic," under which a negotiator will "evaluate the likelihood of the various possible outcomes based on the ease with which the possible outcomes come to mind."[404] Most middle-aged employees may thus overestimate the prospect of such turnover, *overestimating* the chances that a proposed NCA will impact future employment choices. The NPRM does not mention this cognitive bias or the Department of Labor's evidence-based conclusions regarding employees' actual experience. The Commission could have improved its work product by consulting the Agency with real expertise and knowledge about employees' experience instead of simply citing a law review article.

In any event, this tentative finding does not address scholarly literature concluding that actual and potential employees in numerous walks of life take seriously and act upon the prospect of events with a much smaller probability than changing jobs. An industrial accident, for instance, is certainly an event that may or may not come to pass.[405] Such accidents are, "remote, uncertain and often [indeed, always] undesirable."[406] Nonetheless, actual and potential employees apparently alter their labor supply choices in response to the perceived risk of different occupations. For instance, other things being equal, employers in dangerous industries must pay higher wages to attract employees than employers in less dangerous industries. The result, of course, is various risk premiums (or lack thereof) built into wages.[407] This is so even *without* mandatory disclosure of risks that an employee will encounter in any particular industry. These data directly contradict the NPRM's unsupported assertion that potential employees ignore or undervalue events that are "remote, uncertain and undesirable."

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404 *See, e.g.*, Christopher Guthrie & Russell Korobkin, *Heuristics and Biases at the Bargaining Table*, 87 MARQ. L. REV. 795, 800 (2004).

405 *See* Estlund, *supra* note 395, at 413.

406 *Id.*

407 W. KIP VISCUSI, RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE (1983) (finding that "the observed [risk] premium per unit of risk [in high risk occupations] is quite substantial, with the implicit value of life being on the order of $2 million or more" and concluding these labor supply decisions imposed a $69 billion risk premium on employers, "almost 3,000 times the total annual penalties [then] levied by OSHA."); *id.* ("Whereas OSHA penalties are only 34 cents per worker, market risk premiums per worker are $925 annually."); *see also* Thomas J. Kniesner et al., *The Value of a Statistical Life: Evidence from Panel Data*, 94 REV. ECON. & STAT. 74, 74-75 (2012) (using employee behavior in labor markets and resulting wages to estimate value that employees place on their own lives).

The "contingent terms" argument lacks any factual basis and contradicts publicly available data about employees' work history and thus expectations regarding potential departure. Moreover, the argument ignores well-known literature establishing that employees alter their labor supply decisions in response to very low probability, undesirable events. Here again, the NPRM's subsidiary finding suggests that the Commission lacks sufficient understanding of the characteristics and behavior of potential employees to undertake a general assessment of NCAs.

XIII. RECOGNITION THAT EMPLOYERS CAN OBTAIN BENEFICIAL NCAS THROUGH VOLUNTARY AGREEMENT UNDERMINES THE NPRM'S ASSESSMENT OF BUSINESS JUSTIFICATIONS

The NPRM conceded that NCAs may sometimes produce more benefits than alternatives.[408] Still, the NPRM rejected any business justification based on such benefits, for two independent reasons: (1) NCAs are not narrowly tailored to achieve these benefits and (2) these benefits do not exceed the harms NCAs impose.[409] The harms included not just impacts on wages and prices, but also the harms of procedural and substantive coercion.[410]

Both rationales for rejecting NCAs' business justifications assume that any benefits coexist with the harms supposedly produced by such restraints. Absent this assumption, it would make no sense to "weigh" benefits against harms because there would be no harms to include in the balance. Nor would it make sense to ask whether a restraint is "narrowly tailored" to achieve its objectives. The whole point of such an analysis is to determine if there is some *less harmful* way to achieve a restraint's legitimate objectives.[411] If there is no harm in the first place, asking whether there is a "*less* harmful" alternative makes no sense.[412]

The assumption that harms and benefits coexist makes perfect sense in some antitrust contexts. For instance, the Commission might establish that a horizontal merger will likely result in reduced output and higher prices,

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408 *See supra* notes 130-32.

409 *See supra* notes 127-37 and accompanying text (describing the NPRM's reasoning on this score).

410 *See id.*

411 *See* C. Scott Hemphill, *supra* note 132, at 929, 937 (Courts ask "whether the alternative action is less harmful in the particular sense that it is 'less restrictive" and "whether an alternative exists that serves the same beneficial goal with less anticompetitive effect.").

412 *See* Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 ILL. L. REV. 77, 170 (2003) (Absent anticompetitive harm there "is no reason to require the defendants to achieve their objectives via a less anticompetitive means.").

establishing a *prima facie* case against the transaction. The merging parties might prove that the transaction will produce significant economies of scale. It makes perfect sense for the tribunal to compare these two effects, assessing whether the latter will offset the former.[413] Moreover, courts and agencies thus properly inquire into whether there is a less restrictive means of achieving such efficiencies.[414]

In some cases, however, proof that an agreement produces benefits undermines the *prima facie* case of harm.[415] Indeed, two leading scholars have asserted that, in rule of reason adjudication, proof that a restraint produces efficiencies mainly results in "subjecting assertions of anticompetitive effects to close scrutiny."[416] Unlike the Rule of Reason, which assesses the impact of restraints on price, wages, output or quality, the Commission's coercion standard assesses the *process* of contract formation. Even if, contrary to fact, the Commission has made a *prima facie* case of procedural coercion, proof that some fully disclosed NCAs produce cognizable benefits establishes that some such agreements constitute voluntary contractual integration. Such proof thus undermines any presumption that all such agreements result from coercion and any presumption that such agreements are coercive as a matter of substance, given the Commission's determination that procedural coercion is a necessary condition for the existence of substantive coercion.[417]

In short, the Commission's unsurprising conclusion that some nonexecutive NCAs produce benefits establishes that some such agreements entail no procedural or substantive coercion. There is thus no reason to assume that the benefits of nonexecutive NCAs always coexist with harms. The Commission must therefore estimate what proportion of NCAs are fully disclosed and produce such benefits to determine what proportion constitute voluntary integration and thus are not the result of procedural coercion. The result of this assessment would inform the Commission's revised calculation of the magnitude of harm that NCAs produce overall. This revision could result in a determination that NCAs' benefits in fact exceed their harms.[418]

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413 *See* Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 34 (1968).

414 *See* Meese, *Price Theory, Competition, and the Rule of Reason*, *supra* note 412, at 166-67 (explaining why benefits and harms coexist in this context).

415 *Id.* at 162 (contending that, where *prima facie* case is based on proof that restraint resulted in higher prices, proof that a restraint overcomes a market failure undermines that case).

416 Krattenmaker & Salop, *supra* note 264, at 278.

417 *See supra* notes 115-16 and accompanying text.

418 *See supra* notes 134-37 and accompanying text (describing NPRM's finding that benefits of NCAs do not exceed their harms).

Such a conclusion could also require reconsideration of the finding that NCAs are narrowly tailored to produce such benefits. To be sure, proof that some NCAs are voluntary does not undermine a *prima facie* case that all are "restrictive" and thus presumptively unfair if they have the requisite impact on competitive conditions. If so, proof that an alternative will produce the same benefits as NCAs would establish that such agreements are not "narrowly tailored" to achieve such benefits. However, as noted earlier, the Commission did not conclude that the alternatives it identified produced *the same* results as NCAs. Instead, under the guise of "narrowly tailoring," the Commission compared the net impacts of NCAs with the net impact of alternatives.[419] This comparison, in turn, depended in part upon the assumed magnitude of harms, including coercion, attributable to NCAs.[420] Recognition that some such harms are in fact illusory thus requires a revised comparison of NCAs with the alternatives identified by the Commission.

The Commission's failure to recognize that some nonexecutive NCAs constitute voluntary integration led it to erroneously assume that the benefits produced by fully disclosed NCAs coexist with harms. This assumption in turn led the Commission to overstate the magnitude of harm that NCAs produce as a class and thus biased the process of considering business justifications against such restraints. This error is further evidence that the Commission lacks the capacity to assess the universe of NCAs under its newly minted Section 5 standard.

XIV. BETTER PATHS TO WELL-CONSIDERED POLICY GOVERNING NCAS

The Commission was not up to the task of assessing NCAs under its newly minted Section 5 standard, which treats the presence of procedural coercion as legally significant. Because it lacks the capacity to assess the process of forming nonexecutive NCAs, the Commission should withdraw the NPRM and start over.[421] There are two alternative paths the Commission could take to develop

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419 *See supra* notes 130-34 and accompanying text.

420 *See supra* notes 133-34 and accompanying text.

421 The Commission could correct the numerous errors and oversights described above and revise its proposed rule accordingly. Moreover, I have no doubt that numerous members of the Commission staff, for instance, are fully capable of assessing whether NCAs result from procedural coercion. However, this article focuses on the final output of the Commission as an institution. The NPRM's repeated failure to mention evidence that the Petition or commenters tendered in 2021 or before does not inspire confidence that the Commission will in fact correct such errors and oversights.

well-considered competition policy governing NCAs that would inspire public confidence and more likely survive judicial review.

First, the Commission could revert to the rule of reason approach it rejected in 2021. Having revived the Rule of Reason, the Commission could draw upon its considerable study of the impact of NCAs on wages, prices, and employee training and promulgate a rule that bans those agreements the Commission believes produce net harm. The Commission could also revisit the question of a mandatory disclosure remedy, after revising the incorrect belief that employers always use bargaining power to impose even fully disclosed nonexecutive NCAs that produce significant benefits.

Second, the Commission could continue to embrace its new Section 5 standard but take an "adjudication only" approach to implementation. The Commission could simultaneously initiate various forms of public engagement to educate itself about contract formation in general and the formation of NCAs in particular. Such engagement could build on data the Commission has thus far ignored regarding labor market concentration, pre-contractual disclosure, state-generated background rules that induce disclosure and protect employees from overbroad NCAs, and survey data suggesting that employees with pre-contractual knowledge of NCAs usually believe them to be reasonable, among other data.

The adjudication and public engagement courses of action could be mutually reinforcing. Information gleaned from public engagement could inform the Commission's determination of which NCAs to challenge, while information generated in adjudication could improve the Commission's knowledge base about NCAs. The Commission could also invite the Department of Labor to participate as *amicus curiae* in those adjudications where the Department's expertise would contribute to a proper evaluation of the challenged NCAs. Ultimately this two-track approach could generate sufficient information to justify a well-considered rule governing NCAs under the Commission's new Section 5 vision.