

Analyzing the Non-Competition Covenant as a Category of Intellectual Property Regulation

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I. Introduction

This essay proposes a new critique of the employee non-competition covenant: When we examine such covenants as a category of intellectual property regulation, they do not meet the criteria that commonly justify intellectual property laws. Restrictive covenants are not narrowly tailored to protect only new, creative information, they provide no incentives for innovation beyond those already found in trade secret law, and they provide little balance between the needs of individual, innovative employees and the interests of their more powerful employers.

The employee non-competition covenant is a category of intellectual property regulation, but it is rarely recognized as such. This means that the rigorous criteria often seen in critiques of intellectual property law are largely absent in the commentary about non-competes—and absent in judicial decisions as well.

This is surprising. First, courts frequently justify non-competes on trade secret-like, intellectual property grounds. If courts tell us that this is why they enforce restrictive covenants, that justification should be analyzed. Second, the non-competition agreement has always been controversial. In an economy where non-unionized, at-will employment is dominant, the degree to which an employer can restrict the future job choices of a departing employee naturally generates strong—and polarized—opinions. One would expect sophisticated critique from every angle.

There is, to be sure, a mass of scholarly and practitioner commentary on the subject. The sheer volume of such material might signal that everything that can be said on the subject has been exhausted. But this is not so. Indeed, although the case law indicates that protecting intellectual property is a reason why courts so often affirm restrictive covenants, few have asked the foundational question: is the non-competition covenant a sensible way to regulate intellectual property?

To ask the question is already to be skeptical, and the skepticism is warranted. An intellectual property analysis calls for laws which promote investment in innovation subject to rational boundaries that avoid overprotection, encourage competition by skilled individuals to develop new ideas, create a zone of unprotected information so that all can benefit from a robust public domain, and match the remedies available to rights-holders to specific infringements. We have become used to debating these points as they apply to different aspects of patent, trade secret, and copyright law.

Applying these considerations to the non-compete is revealing. As an alternative form of trade secret regulation, the covenant not to compete is a blunt instrument—crude overprotection that does not pretend to the fine-grain analysis possible under trade secret and other areas of intellectual property law. Its implicit biases, its modes of rhetoric, and the unbalanced hierarchies it promotes provide few of the safeguards and balances found in trade secret law.

The restrictive covenant instead incentivizes local monopoly, restricts the use of non-secret, public domain information, and indiscriminately subjects departing employees to punitive restraints, whether or not each would later engage in trade secret misappropriation. This is a stark contrast with trade secret law, which is better balanced and has become more so in recent years as courts have tightened loopholes which gave unwarranted power to parties alleging misappropriation.

For these reasons, we should question seriously the trade secret-like justifications courts often give for non-competition covenants. This essay aims to jump-start that analysis. As a form of intellectual property law, what does the restrictive covenant do best, and when is it ineffective? What are its implicit assumptions and biases? Whose position is privileged in a dispute, and why? If there is a philosophy of the non-compete, what is it? Highlighting how the non-competition contract functions outside the courtroom—which may be distinct from what courts and litigants say about it during lawsuits—will make its implicit policy aims explicit.

To explore these questions, this essay will first analyze how non-competes operate as an alternative form of intellectual property regulation, but lack the detail-oriented, balanced approach found in trade secret law. It will then review the three major approaches to the non-competition covenant: the balancing of particular factors in the traditional “legitimate interests” test, the critique of restrictive covenants for inhibiting regional economic growth (the “regional economy” approach), and the Law and Economics approach that promotes robust enforcement of restrictive covenants.

With this background, we will use the framework of intellectual property debates—what is protectable, what is not, who can be liable, and the scope of powers information holders should receive—to develop a fifteen-point synopsis of the implicit policies of restrictive covenant law.

This approach will require those who defend non-competes—particularly from the Law and Economics perspective—to answer questions that traditionally have not been posed. Indeed, the disproportionate influence of that perspective in the commentary may be one reason that serious theorizing about the non-compete has ignored an intellectual property analysis. We will explore how the Law and Economics approach brushes past the question whether trade secret law poses a balanced alternative to the non-compete through a set of often-repeated but unconvincing arguments.

At the same time, using an intellectual property analysis to expose policies the non-competition agreement implicitly promotes can help sharpen the analysis under the other common approaches. In particular, this approach can act as a helpful supplement to the critique of the non-compete under the regional economy analysis. Exploring the shortcomings of the non-compete can provide new insights for how successful regional economies can protect trade secrets while limiting or abolishing overbroad, unbalanced restrictive covenants.

In short, this essay offers the following propositions:

- Restrictive covenants operate primarily as a crude form of trade secret law;
- Restrictive covenant law contains a set of implicit hierarchies that strongly favors anticompetitive employers over innovative departing employees;

- Restrictive covenants are immensely overbroad as intellectual property regulation, both in the information they protect and the class of individuals they restrict;

- Restrictive covenant law ignores the availability of a better-calibrated alternative, statutory trade secret law; and

- Intellectual property-based analysis of the restrictive covenant exposes shortcomings in the Law and Economics-based defense of such covenants, and can also serve as an effective supplement to critiques of the non-compete, particularly those based on theories of regional innovation.

This is a theoretical paper meant to suggest avenues for empirical research and a more careful framework for analyzing how non-compete covenants function. As such, this essay is necessarily wide-ranging and speculative. By making explicit the structure of unspoken ideas and assumptions that support restrictive covenants, we can more directly question their legitimacy.

II. The Non-Compete as Primitive Category of Trade Secret Law

Non-competition covenants—clauses in employment contracts that forbid competition by a departing employee against the former employer for some set period of time—affect skilled employees in most jurisdictions across the country.¹ They are frequently litigated, and have been the subject of innumerable law review articles. As far back as 1976, a California court bemoaned the confusing mass of commentary on the subject.²

Despite the number of published decisions and articles, covenants not to compete are strangely under-analyzed, especially as a category of intellectual property regulation. This is surprising given the American economy's shift to shorter-term, non-union employment and the ever-growing importance of intellectual property.³

Perhaps there are simple explanations. Restrictive covenants may be seen primarily as a form of contract or employment law, and thus exempt from the rigorous scrutiny and debate that exists for other types of intellectual property regulation. Similarly, covenants not to compete have such deep historical roots, and are so commonly accepted in many jurisdictions, that a fog of familiarity and rote repetition may have long settled over the subject.⁴ In any given litigation, courts and parties move directly to how best to balance multi-factor tests for enforceability without stopping to reflect on the distribution of power and underlying assumptions inherent to the non-compete. Published cases involving non-competition agreements are often routine, with little variation or complex analysis.

Above all, we generally do not think of non-competition covenants in employment contracts as a category of intellectual property regulation.⁵ In the minds of courts, practitioners, academics, and law students, the term "IP" chiefly means patent and copyright law, with trademark and trade secret law in the background. What we view as "IP" is subjected to detailed policy, economic, and empirical analyses, with spirited debate and prescriptions over how best the laws should be calibrated to encourage innovation. What we do not view as "IP," by contrast, avoids that scrutiny.

Despite this tradition, there can be little doubt that restrictive covenants are, by and large, premised on protection of trade secrets—confidential technical, business, or customer-related information. This is what the case law overwhelmingly says⁶ and commentators generally agree. Restrictive covenants are therefore a form of intellectual property regulation and should be recognized as such. Such covenants constitute an alternative category of trade secret law, separate from tort law claims for misappropriations of trade secrets and breach of contract claims for violations of nondisclosure agreements.

But restrictive covenants are not the same as trade secret law. Trade secret law is nuanced and balanced, and has become more so in recent years as courts have issued rulings to limit tactics which benefit litigants who bring weak or anticompetitive claims. A plaintiff must establish a claim to secret information, and courts increasingly require that the plaintiff identify that information with specificity to distinguish it from information in the public domain.⁷ A defendant cannot be liable for using public domain information, even if he or she uses non-secret information learned from the plaintiff to compete against it.⁸ A departing employee is free to use general skills, knowledge, and experience.⁹ Courts cannot issue injunctions unless they precisely identify the information the defendant cannot use within the order granting relief.¹⁰ In a recent, major advance, the majority of courts now block quasi-trade secret claims which seek to place restrictions on information said to be “confidential” but not secret.¹¹

None of these limitations—which can protect departing employees from overbearing claims brought by former employers—are found in the law of restrictive covenants. In other words, although courts tell us that the non-competition agreement functions as an alternative type of trade secret regulation, it is a curious alternative, seemingly free of the procedural and substantive safeguards found in the official law of that subject.¹²

If courts are providing an intellectual property-based rationale as their primary justification for enforcing restrictive covenants, it is reasonable to weigh and assess their performance as intellectual property regulation. As we will see, this approach has largely been absent from the commentary.¹³

III. Problems with the Traditional Analyses

Initiating a critique of the restrictive covenant on intellectual property grounds requires explaining why this approach is new, given that the covenants have been the subject of so many law review articles over the years.

To be sure, there are scores upon scores of journal articles on restrictive covenants by scholars specializing in employment law, business law, health policy, management, and economics, and by practicing attorneys. Deep knowledge in particular fields generates different perspectives. On a separate track, there are probably scores of litigations that involve non-competition clauses around the country, year after year.¹⁴ It is a challenge to say something new, and to add value to the existing debates.

There are three general approaches in the literature on non-competition covenants (excluding practice guides and case summaries). One, what we might call a balancing approach, seeks to work within the existing framework courts use—the “legitimate interests” test—to suggest reforms generally (but not always) for the benefit of departing employees. A second focuses on the macroeconomic effect of restrictive covenants on the growth and development of regional innovation clusters—the “regional economy” approach. The third, based on Law and Economics reasoning, seeks to justify (and sometimes strengthen) restrictive covenants primarily by arguing that they provide an incentive for employers to provide on-the-job training and to avoid the trouble of having to prove employee wrongdoing in trade secret litigation.

None of these approaches, however, directly treats the non-competition covenant as a form of intellectual property regulation, or highlights its implicit policies for regulating the flow of information—though the regional economy approach comes closest. A review of these approaches will illustrate why the intellectual property analysis is useful and—especially in the case of the Law and Economics theories—lead to different conclusions about the efficacy of the restrictive covenant.

A. Balancing Tests, Specific Problems, and Profession-Specific Reform

The most common approach to analyzing the non-competition contract is to propose reform on a particular point, usually within the existing framework of judicial analysis (the so-called “legitimate interests” test). This approach makes good sense, because convincing a judge to take action he or she can engage in without departing from precedent seems most likely to generate concrete results in real cases. Representative articles include those that examine the viability of a non-competition covenant when the employer fires or lays off the employee,¹⁵ and those that ask what law should apply to employees who work from home across state lines.¹⁶ Others analyze problems with restrictive covenants entered into after the employment has begun, and the “in terrorem” effects of overbroad form contract terms.¹⁷ Some commentators recommend that states pass statutes to provide better guidance for employees and more stringently require employers to prove irreparable harm before issuing an injunction to enforce a restrictive covenant.¹⁸ Finally, some advocate using different tests to create different results for different categories of departing employees.¹⁹

Not every writer who seeks to reform judicial analysis of the non-compete is a strong critic of the covenants; some offer proposals that would preserve them while lessening the blow on the departing employee. One such article proposed adopting England’s “garden leave” approach, where the employer pays the departed employee during the pendency of the restrictive covenant.²⁰

Scholarly and practitioner commentary proposing reform on specific issues also focuses on the applicability of non-competes to particular occupations. The special policy issues inherent in covenants aimed at departing physicians—questions of patient choice and accessibility to care—have generated intense interest, and perhaps the most articles specific to any profession.²¹ Covenants within the broadcasting industry have also generated an unusual amount of commentary.²²

B. Regional Innovation and Comparative Analysis

A second approach to the non-compete takes a more structural approach and asks how enforcement of non-competes affects regional innovation and growth of technology-based enterprises. The theory is that strict enforcement of non-competes inhibits the development of start-up companies that engage in rapid innovation and support networks of high-skilled employees who move from job to job. This approach focuses on whether non-competes offer some explanatory guidance on the relative performance of regions such as Silicon Valley, Austin, Texas, North Carolina’s Research Triangle, and Boston’s Route 128.²³ Because the regional economy approach tends to focus on high-tech innovation, its insights are not necessarily applicable to all industries.²⁴

The terms of the regional economy debate were largely set in the 1990s, but more recent scholarship continues to raise probing questions.²⁵ Some commentators have sought to test the hypothesis that employee mobility is greater in the absence of non-compete enforcement,²⁶ and another recent study found a correlation between urban areas in states that do not enforce non-competes and higher numbers for venture capital funding, patents, new companies, and overall employment.²⁷ The regional economy approach has received a great deal of scholarly attention but thus far has not been the subject of judicial discussion in the published cases.²⁸ Some have criticized the approach for failing to distinguish correlation (reduced enforceability of non-competes) from causation (of higher rates of innovation), and solely focusing on technology markets when non-competes are widely used in a variety of industries.²⁹

This body of commentary comes closest to analyzing the non-compete as a form of intellectual property regulation, because it posits that non-competes restrict the flow of tacit

skills and knowledge between technology companies. But it does not study exactly how such information is regulated or whether there is a more calibrated alternative to be found in trade secret law. For that reason, the ideas offered in this essay may provide a useful supplement for those furthering the regional economy-based critique of the non-competition covenant.

C. Law and Economics-Based Training Justifications

A third approach to non-competes, a Law and Economics-based view, also examines the non-competition covenant as a whole, and asks whether its acceptance by the courts is beneficial. This approach seeks to justify restrictive covenants on purported “efficiency” grounds. Perhaps not surprisingly, commentators in this camp often find reasons to justify and promote the use of restrictive covenants.

The Law and Economics approach minimizes the analysis of restrictive covenants as a form of intellectual property regulation, and brushes past a comparison to trade secret law by arguing that trade secret law is not a valid alternative to the non-compete. Instead of analyzing the restrictive covenant as a form of intellectual property regulation, most articles in this tradition assert that the primary purpose of the non-compete is to protect the employer’s (assumed) investment in training the employee.

Under this approach, the employer and employee are deemed to enter into a hypothetical bargain where the employee trades his or her right to compete against the employer after leaving the job in exchange for necessary job training.³⁰ One commentator argues that, for example, “[t]o induce the employer to bear the cost of developing this firm-specific human capital, the employer must be assured a return on those development costs. Long-term contracts provide a mechanism—although not the only mechanism—for assuring that return.”³¹ Another assumed that “contracts with such covenants occur almost entirely in industries and situations in which training is important.”³² Judge Posner has argued that “If covenants not to compete are forbidden, the employer will pay a lower wage, in effect charging the employee for the training.”³³ Another asserted in a similar vein that “[a] lack of protection against employee mobility acts as a ‘double hit’ to the employer, which not only loses its monetary investment in developing the employee’s skill set but also sacrifices potential market advantage to the competitor who is able to enlist the recently departed employee.”³⁴

Commentators working under this framework often pose an unrealistic view of the power imbalance between the employer and employee, and operate with a model that imagines employers and employees sitting down to calculate their respective marginal gains and losses from future activities should they enter the covenant.³⁵

At the same time, the Law and Economics approach downplays whether restrictive covenants should be analyzed as intellectual property regulation, though—somewhat inconsistently—some agree that courts frequently affirm restrictive covenants on trade secret protection grounds.³⁶

Although commentators using a Law and Economics model do not deny that restrictive covenants concern protection of trade secrets, they do not engage in an intellectual property analysis about promoting innovation. They do not ask whether narrower, more focused regimes like official trade secret law do a better job of covering the same ground.³⁷

To downplay whether the restrictive covenant is primarily a form of intellectual property regulation, and to downplay whether trade secret law might serve as a more balanced alternative, commentators from the Law and Economics perspective have developed a three-part, standardized dismissal of these issues. First, commentators make a generalized argument that restrictive covenants provide employers with an incentive to develop trade secrets,³⁸ or to efficiently share them with employees in the course of their job responsibilities.³⁹ One author

asserted that “[i]f noncompetes are not enforced, employers will lack the incentive to spend money creating trade secrets and customer lists.”⁴⁰ That trade secret law might offer a more balanced alternative is downplayed, or ignored—as if a chaotic world of self-help is the only alternative to the restrictive covenant.⁴¹

Second, Law and Economics commentators argue that a non-competition covenant is easier for an employer to enforce than detecting and litigating actual misuse of trade secrets by departing employees, and that this in itself justifies the non-compete over trade secret law.⁴² Third, they argue without evidence that trade secret litigation causes trade secrets to leak during court proceedings.⁴³ These arguments have been repeated in the Law and Economics commentary with a uniformity which suggests rote repetition rather than fresh analysis.

Following from these assumptions—that non-competes protect employer training and are a superior option to trade secret law—some proponents of the Law and Economics approach argue that restrictive covenants should be enforced more often. To that end, they propose that non-compete law should track the requirements of federal antitrust law, thereby allowing courts to find covenants unenforceable only when their operation would be illegal under antitrust law—such as when the employer has an undue amount of market power.⁴⁴

Overall, the Law and Economics theory ignores a stringent intellectual property-based analysis of the non-competition agreement, in order to promote a training-based theory to justify and extend enforceability of the covenants. When we consider the covenants as a form of intellectual property regulation and tease out their implicit hierarchies and policies towards innovation, this will allow us to highlight gaps in the Law and Economics position—gaps discussed in Section IV below.

D. Limitations of the Current Modes of Analysis

Whether commentators criticize or defend the non-compete under these three modes of analysis, few examine the covenants from a detailed intellectual property policy perspective. This is so even though courts use trade secrecy as a primary justification—if not *the* primary justification—for their enforcement. For that reason, a focus on training seems artificial, and a focus on altering a traditional balancing test may miss the mark by obscuring what really should be the first test: whether the non-compete makes sense as a category of intellectual property regulation.

Not all commentators have ignored the intellectual property angle: in 1984, one article directly argued that non-competition covenants are superfluous because trade secret law already exists to address the problem of trade secret protection.⁴⁵ Despite this effort, there appears to have been no subsequent attempt to explore the covenants as intellectual property regulation in order to highlight adverse effect on innovation, information protection, and the like.

This is important. If legislatures are ever to reconsider whether covenants not to compete should be curbed or expanded, it seems best to start with what judges say they are doing when courts enforce them.⁴⁶ And although courts assert that they are protecting intellectual property when they enforce non-competes, the case law lacks the rigor and precision seen in patent, copyright, and trade secret cases.⁴⁷ The relationship between the parties in non-compete disputes is highlighted at the expense of a precise intellectual property analysis. Courts do not analyze whether the justifications they offer satisfy the policy objections of intellectual property law.

Applying the rigorous scrutiny found in other areas of intellectual property law to non-competition agreements would be a new angle on criticizing the non-compete. An explicit discussion of whether such covenants really promote innovation, much less whether their

purported intellectual property protection goal merits the severe restraints placed on departing employees, ought to be front and center in any legislative debate over the legality of restrictive covenants. The same is true for any court willing to seriously consider whether the traditional justifications for enforceability make sense in a given case where the equities favor the departing employee.

To that end, we will now directly examine the implicit policies and hierarchies found in the law of the non-competitive covenant.

IV. The Implicit Intellectual Property Policies of Non-Competition Covenant Law

What would happen if we address the non-competition covenant as a category of intellectual property regulation, and explore its implicit biases and policy objectives? How do the three approaches discussed above fare in light of such a critique? Through the following fifteen points, we will attempt to make explicit many of the unspoken assumptions that underlie the law of the non-compete.

A. Implicit Policies of Innovation and Intellectual Property in Restrictive Covenant Law

1. *It is more important to prevent future trade secret violations by a subset of departing employees than to allow lawful conduct by all departing employees; the entire class of mobile employees will be treated as potential wrongdoers*

The fundamental unspoken premise of the non-competition covenant is that the interests of the entire class of departing employees should be subordinate to employer fears that some of those employees might misuse trade secrets in the future. No matter how many mobile employees would obey the law, their job choices can be restricted because of such speculative concerns—without any empirical evidence of the percentage of departing employees who would misuse trade secrets at the next job.

The restrictive covenant is therefore justified as a deterrent, generally without explicit recognition that the interests of one group are being subordinated to the interests of another. This is in contrast to trade secret law, which requires that an individual misuse (or threaten to misuse) a specific trade secret in order to be restrained.⁴⁸ Some courts make explicit that there need not be an actual threat to misuse trade secrets in order for a non-compete to be enforceable.⁴⁹

As a form of intellectual property regulation, then, the non-compete implicitly reflects a policy determination that the threat of trade secret misuse is so overwhelming, so pervasive, and so important to prevent that it outweighs the potential social gains obtained through innovation, and the compensation and job satisfaction of individual employees who freely join or form competing businesses. The implicit structure of the law of employee mobility in states that enforce restrictive covenants is that the non-compete comes first, and trade secret law is merely a supplement to be used either after a non-compete expires or where the former employee misuses a trade secret in a non-competitive market.

2. *The availability of a narrower scheme for trade secret protection should never displace the parallel availability of the broader non-compete; trade secret law should be superfluous except where it enables a former employer to tack on additional violations against a departing employee*

Courts do not limit the enforceability of the non-compete despite the presence of official trade secret law and its more balanced rules. The crude exists side by side with the surgical, and yet courts do not question the parallel availability of two very different means to meet the same goal.

Indeed, to the extent courts examining whether to enforce a restrictive covenant actually discuss official trade secret law, they do so in order to strengthen the former employers' position: under the official trade secret law of some states, the existence of a non-competition covenant can help the employer obtain an "inevitable disclosure" injunction against a recently departed employee.⁵⁰ But the converse is not true; there is no tradition in the case law that a departing employee can use the absence of a trade secret violation to block enforcement of the non-compete.

3. *Restricting employee competition is so important that courts should also block departing employees from using non-secret information in a given market*

Although courts enforcing non-competition covenants frequently do so in order to protect employer trade secrets, such rulings also result in implicit protection of an employer's non-secret information. A departing employee who cannot join a competitor is barred not just from using trade secrets in competition, but also public domain or generally known information that would not qualify for protection under a given state's trade secret laws.

This is distinctly different than trade secret law, which does not permit employers to bar departing employees from using non-secret information.⁵¹ This is also different from federal preemption law regarding state tort and statutory claims that seek to protect non-secret technical information—as in the well-known *Bonito Boats* case and similar decisions.⁵²

In other words, two regimes of law—state trade secret law and federal preemption law—promote the use of non-secret information in innovation and competition. A third—the law of restrictive covenants—goes in the opposite direction, and sweeps the use of non-secret information into its prohibition on individual acts of competition.⁵³

The statutes of two states governing non-competition agreements make this policy explicit, by permitting covenants that restrict use of both trade secrets and other information that seemingly is not a trade secret.⁵⁴

4. *Preventing future trade secret misuse is so important that employers should not be required to prove that they possess trade secrets, or to assess their value, before using a restrictive covenant to preclude employee competition*

There is no formal precondition in restrictive covenant law requiring that an employer prove that trade secrets exist; in fact an employer need not prove that it has created anything of great value. A former employer who owns few trade secrets, or whose secrets have little value, gets to enforce a non-competition contract just like employers that own extensive, secret inventions. There is no test in restrictive covenant law to screen out one from the other.⁵⁵ Nor is there a test to prove that the employer has engaged in any significant innovation. Those who do not innovate, or innovate poorly, can obtain the exact same protection as a highly innovative company.

- ~~5. The speed of innovation should be slowed by requiring employees to wait until the expiration of a non-compete before commencing new innovation in a given field. Creating bottlenecks in the diffusion of employee skills to prevent the possibility of trade secret misuse is acceptable~~

Restrictive covenants typically last one or two years. Their net effect may be to cordon departing employees into non-competitive positions in other industries; once at a new job, the employee may stay rather than depart once the non-competition clause expires. There appears to be no data on the degree to which mobile employees engage in competitive activities after the expiration of such clauses.

But even if only a small fraction of departing employees delay their entry into competitive positions by a year or two, this still may slow down the pace of overall innovation. Ideas may be generated a year or two after they otherwise would have been. The enforceability of restrictive covenants may thus slow the speed of innovation in a given field.

6. *Courts should take special care to restrict competition by the most highly skilled departing employees; the loss to society is subordinate to the employer's need to avoid talented competition*

In at least some states, courts have held that one policy basis for upholding non-competition covenants is to prevent competition by employees who provide services that are "special or unique."⁵⁶ In such jurisdictions, the law of restrictive covenants thus incentivizes courts to prevent the mobility of those most likely to innovate at a new job.

7. *Employers should be able to preclude a departing employee's pursuit of competitive, non-secret ideas even if the employer chooses not to pursue them*

If an employee thinks of a business idea—such as going into a certain market or trying to develop an improved line of products—that high-level idea may not be a trade secret. If the employer is uninterested, the employee may leave to pursue it on his or her own, unless he or she is unable to do so because of a restrictive covenant. The law of the non-competition covenant thus implicitly provides that an employer's decision not to pursue a potentially innovative idea may be sufficient to block the employee from departing to pursue it. The need to enforce the restrictive covenant in such cases would implicitly outweigh potential social gains from innovation in the area not pursued.⁵⁷

B. Implicit Policies of Size and Power in Restrictive Covenant Law

8. *Employers should never be required to demonstrate a need to be protected from employee competition; a party seeking enforcement of a restrictive covenant cannot be too big or too powerful*

Simply put, the employer's need is not analyzed in a non-competition covenant dispute. The most powerful company in a particular city or region can use the courts to stop a single employee from launching a competitive enterprise in his or her garage. The implicit policy is that the need for restrictive covenants is so great that competitive asymmetry, no matter how extreme, should be ignored.⁵⁸

9. *The more fields in which a company operates, and the more employees it has, the greater its ability to singlehandedly limit the development of competitive enterprises in a given city or region*

Larger companies by definition have more employees than smaller companies; larger companies are more likely to work (and innovate) in several different markets. As a result, the businesses whose restrictive covenants cover the most employees, and touch the most markets, will have a disproportionate effect on competition in such markets. A business with a large

number of engineers bound by restrictive covenants can take many people off the competitive table for a year or two; a smaller rival with few engineers can have only a small effect. The implicit policy result is that the law allows companies most able to fend off competition to have the greatest local or regional effect on limiting competition.

10. *He who arrives first has the strongest position; temporal priority is more important than relative innovation*

The non-competition covenant grants a power to the first-in-time entrant to a given competitive market: that business can restrict those it hires from starting what might be the second or third-in-time competitor. This remains true even if the first-in-time business has been slow to develop new ideas. The implicit policy seems to be that if intellectual property regulation is designed to provide incentives to innovation, rewarding temporal priority, in itself, satisfies that objective.

11. *It is so important to protect large companies from competition by departing employees that cases involving such entities should abandon the traditional requirement that non-competition agreements contain geographic limitations*

Traditional non-competition covenants usually had geographic limitations, and in small business cases courts today still sometimes reject covenants based on geographical issues.⁵⁹ Yet at the same time, the rules differ for large national or international firms: there are no geographic restrictions, and courts will affirm the non-competes used by such companies without geographic limitations.⁶⁰ Paradoxically, then, the stronger entities face fewer restrictions on enforcing their non-competes. At some point in the history of non-competition covenant law, large companies convinced courts that geographic restrictions should be lifted. Perhaps attorneys representing departing employees in such cases lacked the power or resources to argue that the opposite should be true: the larger the company, the less threat it faces from a departing individual.

The implicit policy result is that the biggest global companies have the same footing to stop a start-up founded by a former employee as the smallest local companies.

C. Implicit Policies of Markets and Economics

12. *There ought to be fewer competitive entrants in a given field of innovation*

The enforceability of non-competition covenants likely reduces new market entrants, because departing employees who might otherwise form new, competitive companies must do something else instead. Although there is no empirical means to measure the number of start-up enterprises that might otherwise be formed in the absence of the non-compete, it seems reasonable to assume that non-competes lead to the formation of fewer such companies. The implicit policy seems to be that a departing employee seeking to form a new enterprise must not do so in the area in which their skills are most developed.

13. *Customers in a given market ought to have fewer choices; employers should be able to reduce their customers' options by using restrictive covenants*

When customers sign up with a business that uses non-competes, they lose the ability to purchase goods or services from employees who might offer a better personal relationship, price, or product. The implicit policy of the law of restrictive covenants is that their interests are subordinate to those of the companies using the non-competes.⁶¹

14. *A temporary local monopoly over potential competition is preferable to allowing competition by departing*

employees

If the only potential market entrants are former employees, a temporary monopoly is permissible, and implicitly preferable to competition by such individuals.

D. The Rhetoric of the Restrictive Covenant and its Reality

15. *Courts should engage in expressions of judicial hostility to restrictive covenants only then to frequently affirm them; judicial language should operate to soften the blow figuratively, but not literally*

One of the curious aspects of non-compete litigation is the gap between seemingly dramatic expressions of judicial opposition to restrictive covenants and the general enforceability of such covenants. Courts often preface a ruling on a non-compete with a statement that such covenants are disfavored, and have a negative effect on employees.⁶² Apart from prior restraints, perhaps no other area of civil law so often invokes explicit statements of disfavor. Certainly there is no similar tradition in trade secret or other areas of intellectual property law.

The holdings in such cases, however, do not always match their rhetoric: non-competes are, of course, quite often enforced. The rhetoric of the restrictive covenant, then, seems to operate not as a literal statement of the law, but rather as a step by which the court ritually cleanses itself of the unsavory power imbalance and unfairness inherent in non-competition contracts by disavowing them. The implicit policy is that figurative language should be divorced from substantive results.

V. Applying the Intellectual Property-Based Critique of the Non-Competition Covenant

We have reviewed, in blunt fashion, the policies that underlie the non-competition covenant but usually go unspoken. We have seen that the restrictive covenant, as a category of intellectual property law, fails to distinguish between wrongdoers and those who obey the trade secret laws, fails to distinguish between secret and non-secret information, and gives rise to a host of disincentives to innovation.

With this analysis in mind, we can now return to the three most common schools of thought regarding the non-competition agreement, and ask what the intellectual property analysis adds to the debate—and whether it highlights contradictions, strengths, or weaknesses in current approaches.

A. Supplementing the Balancing Approach and the Regional Economy Approach

Treating the non-competition covenant as a category of intellectual property regulation—and thus taking courts seriously when they assert that enforcing such covenants is about trade secret protection—can provide a useful new angle for commentators critical of restrictive covenants. Whether one proposes that the “legitimate interests” balancing test be modified, that restrictive covenants be curtailed for certain professions, or that they be curtailed to promote regional innovation clusters, a focus on the failure of the non-compete as a balanced form of intellectual property regulation can sharpen the analysis.

In the first place, any argument in favor of limiting the enforceability of restrictive covenants is strengthened when we consider that there is a much better balanced means to address the question of trade secret protection—namely, official trade secret law. No party will lose its ability to allege and prove a trade secret violation if non-competition covenants are enforced less often, abolished for doctors or journalists, or prohibited. What is lost is the former employer’s ability to protect non-secret information, restrict employees who have done nothing wrong, and restrict employees in the absence of any valid trade secrets.

Second, focusing on how the restrictive covenant creates a legal regime that is not tailored to specific items of intellectual property, and to specific acts by former employees, helps those promoting a regional economy-based critique of the restrictive covenant provide a more specific account of its shortcomings for innovation policy. Highlighting the restraints imposed on productive employees and their lost contributions by a legal regime that allows employers to treat all departing employees as wrongdoers helps us understand specifically what regional economies lose when they enforce non-competition contracts. In addition, we can provide a more precise account of how non-competition agreements inhibit regional innovation by making explicit their favoritism towards already-established companies, local monopolies, and the greater anticompetitive reach of larger companies.

By emphasizing that restrictive covenants both narrow the public domain of information freely available for use and also retard the growth of new technology ventures, an intellectual property-based focus on the covenant can also bring together two strands of theory that might profit from cross-pollination. Specifically, advocates of a broad informational public domain—who usually write from a copyright- or Internet-centered perspective—might make common cause with those who analyze regional innovation. Doing so could better highlight problems with non-competition covenants, and also link those problems to debates seen in other areas of intellectual property law.⁶³

B. Exposing Flaws in the Law and Economics Approach

1. Problems with the Focus on Employee Training

Reviewing the implicit policies of the restrictive covenant and contrasting its efficacy with trade secret law helps highlight problems in the Law and Economics-based approach to such covenants.

The first problem for the Law and Economics approach is that if the case law tells us that trade secrecy is the ground on which courts most commonly justify the non-compete, we should be discussing whether that makes sense, rather than making assumptions about the value of employee training. The focus on job training diverts attention from what should be the first order of analysis.

The absence of detailed intellectual property analysis is more glaring when we consider that courts rarely address or justify non-competes on job training grounds.⁶⁴ Cases that enforce non-competes on training-based rationales alone are uncommon, as are cases where courts also cite protection of confidential information as a rationale along with training. Even in Florida, a state that lists “extraordinary or special training” among statutory grounds for affirming a restrictive covenant, cases using such training as a rationale to enforce restrictive covenants appear to be rare.⁶⁵ Around the country, cases affirming non-competition covenants on training grounds—or even delving into training-based arguments—are unusual.⁶⁶

All the same, commentators often assume, without supplying evidence, that employers who use non-competes provide meaningful training, that the employees to be restrained require such training, and that employers are not already compensated for any training provided through increased profits.⁶⁷ This line of thinking is so pervasive that even those critical of the non-compete sometimes appear to accept it.⁶⁸ The articles in this area do not recognize the possibility that increasingly contingent, short-term employment patterns leave employees “more responsible for their own training and benefits.”⁶⁹ Perhaps even more striking, commentators advocating the training theory do not discuss California law, which is seemingly an enormous problem for that approach. California law prohibits restrictive covenants against departing employees, but companies there nonetheless have not stopped innovating. There is

no evidence that California companies have suffered a special disincentive to hire because non-competes are unenforceable, whether or not such employers provide any job training.

At a minimum, the intellectual property-based critique of the restrictive covenant introduces new variables on the other side of the ledger, and thus a rote citation to employer training alone should no longer suffice to justify the non-competition agreement.

Some commentators do recognize limits to the training theory – noting that not all training is valuable to the subsequent employer, thus limiting the concept that the first employer funds training used by later employers—but still argue for general enforcement of restrictive covenants.⁷⁰ And, to be sure, some influenced by the Law and Economics-inflected tradition recognize problems with restrictive covenants, including their potential effects on regional innovation, and would favor limiting them even if empirical evidence supported the training hypothesis.⁷¹ But we need to go further, and ask whether intellectual property concerns should take precedent over hypothetical models based on assumptions of training.⁷²

2. Problems with the Dismissal of Official Trade Secret Law

When we focus on intellectual property concerns, the glib arguments made by Law and Economics proponents to dismiss the more balanced alternative presented by official trade secret law are underwhelming, and even misleading.

As described above, Law and Economics commentators argue that trade secret law is difficult to enforce, because the employer must detect wrongdoing, show up in court, and prove trade secrecy.⁷³ On that ground, they argue, non-competition covenants are superior because they eliminate the necessity for such efforts by the employer. Judge Posner provided perhaps the clearest expression of this policy preference in a dissenting opinion advocating wider use of non-competes:

Such clauses are difficult to enforce, however, as it is often difficult to determine whether the former employer is using his former employer's trade secrets or using either ideas of his own invention or ideas that are in the public domain. [citations]. A covenant not to compete is easier to enforce, [citation], and to the extent enforced prevents the employee, during the time and within the geographical scope of the covenant, from using his former employer's trade secrets.⁷⁴

Such accounts provide no explanation for why easing the burden on the employer is, in itself, a sufficient ground to favor a non-compete over the application of trade secret law. The implication seems to be that the former employer is always honest and seeks only the legitimate protection of trade secrets, and the law thus should remove any obstacles—such as having to prove that secrets really exist—to further the employer's interests. At a minimum, such commentators seem unaware that trade secret plaintiffs all too often make claims over non-secret information, and sometimes have less than salutary motives. The case law on awards to defendants for “bad faith” tactics offers perhaps the strongest evidence.⁷⁵

Worse, some even seem to suggest that non-competition clauses should be enforced because they allow employers to protect *non-secret information* from use by departing employees—in sharp contrast to the rules of official trade secret law, and without providing any justification or policy reason for that result. For example, one writer stated that “because the [trade secret] statute does not fully protect the employer from disclosure, further protection, in the form of restrictive covenants, is needed.”⁷⁶ Another, seeming to suggest that employers should forgo official trade secret route because it may protect less information than restrictive covenant, offered that “an employer may be uncertain as to whether valuable information will satisfy the definition of a trade secret for purposes of legal protection.”⁷⁷ Yet another promotes

the non-compete as a means to stop “the free flow of information” without noting any distinction between secret and non-secret information.⁷⁸

These theories come up short when we consider the imbalances and implicit hierarchies in the law of restrictive covenants discussed above. What is the policy basis, for example, for allowing former employers to protect non-secret information through restrictive covenants that are unprotected under trade secret law? With the weaknesses in the training theory, what justifies allowing restraints on employees who do not engage in wrongdoing? And why should the opportunities for innovation be reduced in the absence of such wrongdoing?

There seems to be no valid reason for a legal regime to exempt the employer from proving both that it has trade secrets and that they have been misused in order to restrain a former employee, or to allow blanket prohibitions on all persons and all information in the absence of proving secrecy and misuse. From the Law and Economics-based commentary, however, the reader would be largely unaware that there are any interests to balance against those of former employers.

The disparagement of relying on trade secret law instead of enforcing restrictive covenants because secrets supposedly will leak out during litigation is equally unconvincing.⁷⁹ No one has offered evidence to support this assertion. In fact, protective orders are ubiquitous in trade secret litigation, and statutes call upon courts to protect “an alleged trade secret” from disclosure.⁸⁰ In the very rare instances where a party accidentally discloses an alleged secret during a litigation, courts are forgiving and will not rule that the plaintiff has lost the right to protect that information unless the plaintiff has been unusually careless.⁸¹ This makes the Law and Economics-based argument favoring restrictive covenants over trade secret law seem like it was created without sufficient analysis.

In short, these often-repeated justifications for the non-compete over trade secret law are unconvincing. Worse, they fail to acknowledge the growing sophistication of trade secret law, and appear to have originated instead from a single, thirty-year-old law review article. To the extent the proponents of the Law and Economics approach propose that the restrictive covenant is the best means to regulate intellectual property governed by state law, they fail to address the important policy concerns discussed above, and fail to adequately explain why trade secret law is a suboptimal alternative. Faced with a rigorous critique of the non-compete as a form of intellectual property law, and the more calibrated balancing offered by trade secret law, we should be skeptical of the Law and Economics-inflected justifications for the restrictive covenant over trade secret law.⁸²

Overall, treating the restrictive covenant as a category of intellectual property regulation – and recognizing its implicit power imbalances, biases, and one-sided overprotection – helps highlight problems in Law and Economics theories about competition by departing employees. At a minimum, identifying these problems calls the Law and Economics-based promotion of restrictive covenants into question and demands a more exacting defense of why commentators in this camp believe that non-competition clauses should be robustly enforced, and why the alternative offered by trade secret law should be downplayed.

C. Potential Drawbacks to an Intellectual Property Critique

It is important to consider potential drawbacks to an intellectual property-based critique of the restrictive covenant – though there appear to be none which detract significantly from the analysis presented in this essay.

First, one must wonder whether a rejection of the non-competition covenant in favor of official trade secret law in a particular jurisdiction would result in more trade secret lawsuits and, if so, whether the costs to employers and the court system are justifiable. There is probably

no way to empirically assess this possibility. One would have to subtract the number of lawsuits over non-competition covenants that would no longer be filed, and substitute in their place an unknown number of trade secret lawsuits. California, for example, prohibits restrictive covenants and also has many trade secret lawsuits, but that may only reflect a high concentration of technology enterprises. The overall number of lawsuits might well be lower if restrictive covenants were unenforceable because employers would have to file colorable allegations and then establish a claim.

In any event, there seems to be no strong policy reason to be concerned that, in the absence of restrictive covenants, former employers would have to spend money to prove wrongdoing to succeed in trade secret litigation against a former employee. Avoiding costs is good policy only if the cost-avoidance measure does not cause greater problems for other relevant actors, or for other affected parties outside the litigation. Specifically, the costs to departing employees who lose job opportunities, to new employers who lose innovative, skilled employees, and to the wider society which benefits from innovation seem to provide a more than adequate rebuttal to the Law and Economics-based concern about imposing litigation costs and burdens of proof on employers. Again, the significant number of trade secret plaintiffs who fail to establish their cases or who are sanctioned for pursuing accusations without merit, tells us that we cannot assume that all employers act in good faith against departing employees.

Second, we might ask whether a potential plaintiff's inability to detect trade secret misappropriation—for example, when the ideas concern manufacturing techniques hidden inside company walls—justifies the use of restrictive covenants to rule out the possibility of misappropriation by departing employees who would otherwise join competitors. The precise question is whether the difficulty in detecting wrongdoing for some types of trade secrets, in an unknown number of cases, justifies a legal regime that allows restrictions on all departing employees, without a showing of wrongdoing, and without a showing that trade secrets exist in the first place. Put differently, do we accept an unquantifiable increase in the possibility of less detectable forms of trade secret misappropriation in exchange for employees' greater ability to take new jobs of their choosing, and for the probability of a resulting increase in innovation? The certain benefits of the latter appear to outweigh the speculative nature of the former.

Third, we should consider potential collateral benefits of restrictive covenants. For example, if non-competition agreements force employees to move into different markets and different fields, does that create any benefits for the employees, or for their regional economies, which outweigh the benefits of prohibiting restrictive covenants? There appears to be no empirical research on the effect of dispersing employee skills and knowledge into fields that differ from their former employment. In the absence of such data, the benefits from ending the enforceability of restrictive covenants seem the better policy choice.

Finally, we should consider whether employers who use restrictive covenants pay similarly-situated employees more, or otherwise disproportionately provide significant benefits to the employee. Again, there appears to be no empirical research on this question. That employers and not employees favor restrictive covenants may provide anecdotal evidence that the advantages are one-sided. In the absence of evidence suggesting that employees gain more from the enforceability of restrictive covenants than otherwise, speculation about such benefits seems to be outweighed by the likely increase in innovation were such covenants are unenforceable.

VI. Conclusion

Although the commentary on non-competition covenants is vast, very little of it examines such covenants as a category of intellectual property regulation. This is surprising, not just

because courts so often justify restrictive covenants on trade secrecy grounds, but also because commentators who offer alternative grounds for analyzing such covenants concede that this is what courts do.

Viewing the law of restrictive covenants as a type of intellectual property regulation brings to light a number of implicit policies and biases. These policies and biases are inconsistent with the goals of intellectual property law: to incentivize innovation without promoting monopoly enterprises, to promote a broad public domain of creative information alongside well-identified categories of protected information, and to balance the interests of rights-holders with those affected by the exercise of their powers (here, departing employees).

An intellectual property focus thus helps us highlight policy flaws in the enforceability of restrictive covenants—as well as flaws in the Law and Economics perspective that advocates their continued use. At the same time, this analysis can be a useful supplement to the critique of the non-compete under a balancing test approach or the regional economy approach. Most important, it can provide specific tools to state legislatures examining the continued enforceability of such covenants, and to litigants and judges interested in developing policy rationales for limiting their scope in particular cases.

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1. This essay assumes the reader's familiarity with the common law of restrictive covenants and for that reason will skip the historical background and descriptions of common law tests for enforceability that often appear at the beginning of scholarly articles on the subject. For background reading, see generally Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960); John D. Ingram, *Covenants Not to Compete*, 36 AKRON L. REV. 49 (2002); Brian M. Malsberger, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (3rd ed. 2002); James Pooley, TRADE SECRETS § 8.04 (2010); RESTATEMENT (SECOND) OF CONTRACTS §§ 187–88 (1979). For the same reason, this essay does not address statutes—like those found in Colorado, Florida, Montana, and Oregon—or common law rules that alter the specific analysis for enforceability in particular states, because the focus here is on reevaluating the criteria for restrictive covenants at a national level.

2. See *Monogram Indus. v. Sar Indus.*, 134 Cal. Rptr. 714, 718 (Cal. Ct. App. 1976) (“Covenants not to compete have been the subject of a considerable amount of attention from legal writers and courts. The number of texts, treatises, and judicial opinions that have been written in the field constitutes a ‘sea—vast and vacillating, overlapping and bewildering’ and the sheer volume can ‘drown the researcher.’” (quoting *Arthur Murray Dance Studios v. Witman*, 105 N.E.2d 685, 687 (Ohio Com. Pl. 1952))).

3. The critique of the non-compete is part of the larger debate over the relative rights of employers and employees as to intellectual property in the contemporary economic context of high mobility. See generally Catherine L. Fisk, *Reflections on the New Psychological Contract and the Ownership of Human Capital*, 34 CONN. L. REV. 765 (2002); Katherine V.W. Stone, *Human Capital and Employee Mobility: A Rejoinder*, 34 CONN. L. REV. 1233 (2002) (agreeing on the changing status of employees and employment and the importance of questioning intellectual property restrictions, but disagreeing on best legal strategies to protect employee interests); Catherine L. Fisk, *Knowledge Work: New Metaphors for the New Economy*, 80 CHI.-KENT L. REV. 839 (2005) (also describing changes in the concepts of employment held by both employers and employees under conditions of greater mobility and arguing for employee stakes in intellectual property). The severe economic downturn which began in 2007 heightens these concerns.

4. Today's non-competition and non-solicitation rules derive in part from centuries-old English law, and may share a family resemblance with unsavory aspects of England's control of free labor mobility by upper class landowners and factory owners. For the legal scholar with time and resources, there may be a substantial paper to be written illuminating these connections, to highlight the ways in which courts have helped powerful interests control employee mobility. See generally KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* 71–79, 104–107 (Cambridge Univ. Press 1991) (describing areas where centuries-old English labor relationships and hierarchies found their way into American employment law, including the non-competition and non-solicitation covenant); RAYMOND WILLIAMS, *THE COUNTRY AND THE CITY* 85 (Oxford Univ. Press 1973) (Addressing a 1662 statute that sought to limit poor farmers and laborers from moving “from one parish to another” in search of better commons, Williams writes: “There had been many such previous attempts to restrain such men and women from seeking their living. There had been license systems, since the fourteenth century, for any servant or labourer leaving his parish; certificates from employers, to show they were really ‘at liberty’; the controlling machinery of the Statute and Hiring Fairs.”). At the same time, enforcement of non-competes has by no means been uniform over the centuries. In early nineteenth century America, covenants were rare and met judicial

hostility. See CATHERINE L. FISK, *WORKING KNOWLEDGE: EMPLOYEE INNOVATION AND THE RISE OF CORPORATE INTELLECTUAL PROPERTY, 1800-1930* 29-30, 175 (Univ. N. Carolina Press 2009) (“In the nineteenth century and before, however, such contracts were not a legally permissible device to protect workplace secrets.”; “Patent law, copyright law, trade secret law, and the enforcement of non-compete agreements expanded the rights of employers dramatically between 1895 and 1930.”).

5. There are other forms of non-competition covenants outside the purview of this analysis. For example, covenants not to compete based on sale of a business are designed to preserve the intangible goodwill associated with the business being transferred. See generally *Monogram Indus.*, 134 Cal. Rptr. at 718-19 (distinguishing sale-based covenant not to compete from the employment-based covenant); see also *Cnty. Materials Corp. v. Allan Block Corp.*, 502 F.3d 730, 732 (7th Cir. 2007) (example of non-competition covenant between patent-holder and company producing goods under contract for patent-holder). Whether or not these types of restrictive covenants are sensible would require a separate analysis.

6. An immense number of non-competition cases cite protection of confidential information as a justification for restrictions. Such case can be found in every state that allows restrictive covenants. See generally Malsberger, *supra* note 1 (describing trade secret protection as a basis for restrictive covenants in every state that permits them; collecting citations); see also *Ingram*, *supra* note 1, at 78 (“Those who favor enforceability stress a legitimate need of employers to protect the trade secrets, confidential information, and goodwill develop at a considerable expense over a period of time.” (citing cases)); Pooley, *supra* note 1, at § 8.04[1] (“On the one hand, freedom of contract and the employer’s interest in avoiding the challenge and uncertainty of litigation to prove trade secrets are seen as justifications for permitting such limitations.”); Sampsa Samila & Olav Sorenson, *Non-compete Covenants: Incentives to Innovate or Impediments to Growth*, Danish Research Unit for Industrial Dynamics Working Paper No. 10-02 (Nov. 15, 2009) at 7 (“The most commonly discussed justification for enforcing non-compete agreements is to protect intellectual property rights.”).

7. See, e.g., Cal. Civ. Code § 3426.1(d) (West 2010) (Uniform Trade Secrets Act clause requiring secrecy). For recent cases requiring more specific trade secret claim identification early in a lawsuit, see *Perlan Therapeutics, Inc. v. Super. Ct.*, 101 Cal. Rptr. 3d 211, 220-221 (Cal. Ct. App. 2009), review denied (Feb. 18, 2010) (affirming trial court’s rejection of broadly-worded, pre-discovery trade secret identification statement that referred to an invention without specifically identifying it); *Ikon Office Solutions, Inc. v. Konica Minolta Bus. Solutions, U.S.A., Inc.*, 3:08-CV-539-RLV-DCK, 2009 WL 4429156, at *3-4 (W.D.N.C. Nov. 25, 2009) (requiring better identification of trade secret claims in interrogatory responses); *Giasson Aerospace Sci., Inc. v. RCO Eng’g, Inc.*, 08-13667, 2009 WL 1384179, at *2 (E.D. Mich. May 14, 2009) (requiring identification of trade secret claims with reasonable particularity before taking discovery from the defendant); *Knights Armament Co. v. Optical Sys. Tech., Inc.*, 254 F.R.D. 463, 467 (M.D. Fla. 2008), *aff’d*, 254 F.R.D. 470 (ordering identification of “all” alleged secrets in discovery response).

8. See, e.g., *Ultimax Cement Mfg. Corp. v. CTS Cement Mfg. Corp.*, 587 F.3d 1339, 1355 (Fed. Cir. 2009) (applying California UTSA; no liability if information is non-secret even if defendant first obtained it from plaintiff).

9. For a recent expression of this oft-cited principle, see *Sys. Dev. Services, Inc. v. Haarmann*, 907 N.E.2d 63, 74 (Ill. App. Ct. 2009), *appeal denied*, 919 N.E.2d 366 (2009) (products and services that are within the industry’s general skills and knowledge cannot be trade secrets).

10. For a recent case reversing an injunction under Federal Rule 65(d) for lack of specificity, see *Patriot Homes, Inc. v. Forest River Hous., Inc.*, 512 F.3d 412, 415 (7th Cir. 2008) (reversing trade secret injunction where defendant would be uncertain whether information lawfully obtained from Freedom of Information Act requests was encompassed within the scope of the order).

11. For examples of cases taking the majority position on UTSA preemption (and thus barring alternative state law claims premised on information said to be non-secret but still protectable), see *Diamond Power Int’l, Inc. v. Davidson*, 540 F. Supp. 2d 1322, 1345-46 (N.D. Ga. 2007) (Georgia UTSA); *Chatterbox, LLC v. Pulsar Ecoproducts, LLC*, CV 06-512-S-LMB, 2007 WL 1388183, at *2-5 (D. Idaho May 9, 2007) (Idaho UTSA); *Hauck Mfg. Co. v. Astec Indus., Inc.*, 375 F. Supp. 2d 649, 661 (E.D. Tenn. 2004) (Tennessee UTSA); *Silvaco Data Sys. v. Intel Corp.*, 109 Cal. Rptr. 3d 27, 48-54 (Cal. Ct. App. 2010) (California UTSA).

12. See Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OREGON L. REV. 1163, 1183, 1185 (2001) (noting that courts in non-compete cases do not apply the detailed standards found in trade secret law despite reflecting a “sister interest” in information protection.) This article draws different conclusions from this problem as will be discussed in more detail below.

13. One major exception is a 1984 article by Phillip J. Closius and Henry M. Schaffer, which critiqued the restrictive covenant for purporting to protect any legitimate interest beyond those already found in trade secret law. See Phillip J. Closius & Henry M. Schaffer, *Involuntary Nonserovitude: The Current Judicial Enforcement of Employee Covenants Not to Compete - A Proposal for Reform*, 57 S. CAL. L. REV. 531, 532 (1984) (“Under this approach, the terms of any agreement will generally be viewed as superfluous.”). This article appears to have fallen on deaf ears, perhaps because trade secret law was not nearly as coherent and well-developed in 1984 as it is today. The growing sophistication, calibration, and balance of trade secret law now provide an even more forceful argument for the authors’ conclusions.

14. The author worked on the Pooley treatise on trade secret law for three years. Updating the chapter on non-competition covenants was easy: there were always plenty of new decisions. The problem was finding cases that said

anything new. Most decisions are routine, formulaic expressions of common law tests, whether or not the court enforced the contract. Separately, counting the exact number of lawsuits over restrictive covenant lawsuits would be difficult. There are many unpublished appellate rulings, and there is an unknown number of lawsuits in state trial courts whose rulings are not available on legal databases. Some disputes may settle early, before any court ruling. Although there is an impressive recent study attempting to map published trade secret cases in federal courts, there appears to be no similar empirical effort regarding non-competition agreements. See generally David S. Almeling, Darin W. Snyder, Michael Sapiznikow, Whitney E. McCollum & Jill Winder, *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZ. L. REV. 291 (2010).

15. See Kenneth J. Vanko, *'You're Fired! And Don't Forget Your Non-Compete . . .': The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COM. L.J. 1 (2002) (fascinating, in-depth discussion of conflicting case law in different types of employee termination and separation scenarios).

16. See, e.g., Emily J. Kuo, *The Enforceability Gap of Covenants not to Compete in Telecommuting Employment Relationships*, 1996 U. CHI. LEGAL F. 565 (1996).

17. See Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 984-91 (2006) (recommending required pre-hire disclosure of restrictive covenants and looking to industry standards to encourage more narrowly-drafted contract terms to avoid employer overreaching).

18. See Angela M. Cerino, *A Talent is a Terrible Thing to Waste: Toward a Workable Solution to the Problem of Restrictive Covenants in Employment Contracts*, 24 DUQ. L. REV. 777, 802-08 (1985-86).

19. See, e.g., Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287, 317-21 (2006) (reviewing existing debates under both the regional economy and Law and Economics approaches, finding merit in both, and recommending that courts lessen restrictions on innovative employees such as engineers while maintaining restrictions for "knowledge service workers" such as investment bankers and journalists).

20. See Greg T. Lembrich, Note, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291, 2302, 2314-22 (2002) (arguing that "garden leave" reduces problems in the current law of restrictive covenants, such as unequal bargaining power and the uncertainty in how courts will treat any given covenant in a litigation).

21. See, e.g., Kevin D. Koons, Note, *Physician Employee Non-Compete Agreements on the Examining Table: The Need to Better Protect Patients' and the Public's Interests in Indiana*, 6 Ind. Health L. Rev. 253, 257 (2009); S. Elizabeth Wilborn Malloy, *Physician Restrictive Covenants: The Neglect of Incumbent Patient Interests*, 41 WAKE FOREST L. REV. 189, 191 (2006) ("Physician restrictive covenants can inhibit the formation of long-term relationships between physicians and patients and, thus, result in a lesser quality of care for the patient."); Mike J. Wyatt, Note, *Buy Out or Get Out: Why Covenants Not to Compete in Surgeon Employment Contracts are Truly Bad Medicine*, 45 WASHBURN L. J. 715 (2006) (critique of such covenants in Kansas based on analysis of surgeons' referral systems); Derek W. Loeser, *The Legal, Ethical, and Practical Implications of Noncompetition Clauses: What Physicians Should Know Before They Sign*, 31 J.L. MED. & ETHICS, 283 (2003) (advocating "physicians to carefully consider whether to accept contracts that contain [such covenants], or at the very least to negotiate for the least restrictive terms possible."); James W. Lowry, Commentary, *Covenants not to Compete in Physician Contracts*, 24 J. LEGAL MED. 215 (2003) (summary noting conflicting case law and recent trends); Paula Berg, *Judicial Enforcement of Covenants not to Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense*, 45 RUTGERS L. REV. 1, 5-6, 30-36 (1992-93) (arguing for abolition of restrictive covenants for physicians based on patients' interests).

22. See generally Cathy Packer & Joanna Cleary, *Rediscovering the Public Interest: An Analysis of the Common Law Governing Post-Employment Non-Compete Contracts for Media Employees*, 24 CARDOZO ARTS & ENT. L.J. 1073, 1110-20 (2006-07) (noting public interest in greater mobility of media employees); Cristin T. Kist, Comment, *Blocked Airwaves: Using Legislation to Make Non-Compete Clauses Unenforceable in the Broadcast Industry and the Potential Effects of Proposed Legislation in Pennsylvania*, 13 VILL. SPORTS & ENT. L.J. 391, 419-22 (advocating limits on such covenants) (2006); Marlo D. Brawer, Note, *Switching Stations: The Battle Over Noncompete Agreements in the Broadcasting Industry*, 27 OKLAHOMA CITY UNIV. L. REV. 693, 694, 708-18, 734-35 (2002) (advocating same). But see Alice J. Baker, *Legislative Prohibitions on the Enforcement of Post-Employment Covenants Not to Compete in the Broadcasting Industry*, 23 HASTINGS COMM. & ENT. L.J. 647, 648, 675-84 (2000) (advocating preservation of non-competes in broadcasting industry on unconvincing grounds that broadcasting industry is no more anticompetitive than others and thus should not be singled out, that media employees often have unions to represent their interests, and that prohibition would not be "efficient" because it would block the supposed free will of contracting parties).

23. For a useful set of critical questions about the regional economy approach written during the dot-com era, see Jason S. Wood, *A Comparison of the Enforceability of Covenants Not to Compete and Recent Economic Histories of Four High Technology Regions*, 5 VA. J.L. & TECH 14 (2000).

24. This is a question raised in Kenneth G. Dau-Schmidt, *High-Velocity Labor Economics: A Review Essay of Working in Silicon Valley: Economic and Legal Analysis of a High-Velocity Labor Market by Alan Hyde*, 6 U. PA. J. LAB. & EMPL. LAW 847, 849, 857 (2004) ("How many industries are impacted by the information transmission aspect of the employment relationship to the extent that it drives the basic terms of that relationship?").

25. For a recent commentary applying the regional economy critique of employee mobility law to the international context and the Economic Espionage Act, see Shubha Ghosh, *Open Borders, Intellectual Property & Federal Criminal Trade Secret Law*, 9 J. MARSHALL REV. INTELL. PROP. L. 24 (2009). For a collection of symposium presentations on issues relating to the regional economy approach, see 1 ENT. BUS. L. J. 231–380 (2006); see also Yuval Feldman, *Experimental Approach to the Study of Normative Failures: Divulging of Trade Secrets by Silicon Valley Employees*, 2003 U. ILL. J.L. TECH. & POL'Y 105, 124–25 (2003) (noting research on the question of the effect of non-competes or their absence on regional innovation in study regarding attitudes and practices of employees towards confidential information).

26. See Bruce Fallick, Charles A. Fleischman, & James B. Rebitzer, *Job-Hopping in Silicon Valley: Some Evidence Concerning the Micro-Foundations of a High Technology Cluster*, 88 REV. ECON. STAT. 472–81 (2006) (finding higher mobility in the “computer industry” in Silicon Valley and elsewhere in California compares to regions that enforce non-competes, but not in other industries); April M. Franco & Matthew F. Mitchell, *Covenants Not to Compete, Labor Mobility, and Industry Dynamics*, 17 J. ECON. & MGMT. STRATEGY 581 (2008) (using theoretical models for maximization of information surplus in employment contracts involving skilled employees to argue that regions that do not enforce non-competes can “overtake” those that do); see also BENJAMIN A. CAMPBELL, MARTIN GANCO, APRIL M. FRANCO & RAJSHREE AGARWAL, WHO LEAVES, WHERE TO, AND WHY WORRY? EMPLOYEE MOBILITY, EMPLOYEE ENTREPRENEURSHIP, AND EFFECTS ON SOURCE FIRM PERFORMANCE, U.S. Census Bureau for Econ. Studies Discussion Paper CES 09-32 (Sept. 2009) at 9–12, 16, 26–27, 31 (using data from legal services industry to support theory that higher-earning employees are less likely to leave a job, but more likely to join a start-up in the same industry when they do; not directly addressing non-compete enforcement).

27. See Samila & Sorenson, *supra* note 6, at 4, 12–23 (studying data from 328 urban areas; “Our results suggest that non-compete covenants strongly moderate the effect of venture capital on start-up activity, as well as on the economy as a whole.”; “our results demonstrate that not only does the enforcement of non-compete agreements limit entrepreneurship . . . but it also appears to impede innovation.”).

28. For example, Gilson’s well-known 1999 article appears to have been cited by courts only twice. See generally *Courtroom Sciences, Inc. v. Andrews*, CIV.A.3:09-CV-251-0, 2009 WL 1313274, at *9 (N.D. Tex. May 11, 2009) (citing article for proposition that California “with its volatile ‘Silicon Valley’ economy” does not enforce most non-competition covenants); *Bayer Corp v. Roche Molecular Sys., Inc.*, 72 F. Supp. 2d 1111, 1120 (N.D. Cal. 1999) (in re-affirming California’s rejection of the “inevitable disclosure” theory under trade secret law, citing Gilson for proposition that “[t]o the extent that the theory of inevitable disclosure creates a de facto covenant not to compete without a nontrivial showing of actual or threatened use or disclosure, it is inconsistent with California policy and case law.”).

29. See Wood, *supra* note 23. But see Samila & Sorenson, *supra* note 6, at 23 (disagreeing with Wood’s conclusions: “Our results strongly suggest otherwise.”); Feldman, *supra* note 25, at 128–30 (discussing potential problems with regional innovation approach, such as whether relative success of one region “was achieved at the expense of other parts of the United States,” and thus not as significant an achievement); Fallick et al., *supra* note 26, at 3, 11–20 (suggesting that higher rates of employee mobility caused by California’s lack of non-compete enforcement may be limited to the “computer industry”; “our analysis suggests that agglomeration economies observed in Silicon Valley’s IT cluster out not to be a general economic phenomenon. Rather, they should arise in settings, like computers, where the gains from new innovations are both large and uncertain.”); Franco & Mitchell, *supra* note 26, at 11 (disagreeing with Gilson that absence of non-compete enforcement largely benefits employers; arguing that non-competes “still benefit the employer” regardless of the amount of employee turnover).

30. See, e.g., Mark A. Glick, Darren Bush, & Jonathan Q. Hafen, *The Law and Economics of Post-Employment Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357, 359 (2002) (promoting enforcement of restrictive covenants to enhance their “efficiency” “by reducing the risk that the careful drafting of the contract was all for naught.”); Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 391–92, 406–07 (1993) (assuming that protection of employer investment in specialized training is a valid basis for non-competition covenants: “To induce the employer to bear the cost of developing this firm-specific human capital, the employer must be assured a return on those development costs. Long-term contracts provide a mechanism—although not the only mechanism—for assuring that return.”; asserting that enforcement of non-competition covenants is not anticompetitive because an employee could buy their way out if there were an alternative job possibility, assuming no effect on market competition without analyzing innovation theory in any way); Edward M. Schulman, *An Economic Analysis of Employee Noncompetition Agreements*, 69 DENV. U. L. REV. 97, 102, 108, 110, 115 (1992) (promoting non-competition covenants to protect purported employer investments in training); Maureen B. Callahan, Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 716–17 (1985) (in perhaps the single most extreme commentary on restrictive covenants from the Law and Economics perspective, denying almost any negative aspects of such covenants and proposing that they be voidable only when they give rise to antitrust problems or if the contract formation was unconscionable); Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 99, 102 (1981) (examining purported economic rationale for non-competition covenants without analysis of particular industries and based on “the economic logic underlying the law”; assuming without evidence that “contracts with such covenants occur almost entirely in industries and situations in which training is important”; asserting that “such contracts are needed to efficient levels of investment in training when the person receiving training is unable to pay for the human capital by accepting reduced wages.”); see also Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L.J. 49, 68–69, 71–76 (2001) (noting flaws in the standard Law and Economics analysis

promoting enforcement of restrictive covenants across the board, but downplaying the trade secret alternative and ~~cautiously advocating some forms of repayment and liquidated damages terms for restrictive covenants).~~

31. See Sterk, *supra* note 30, at 392.

32. See Rubin & Shedd, *supra* note 30, at 99.

33. See *Outsource Int'l, Inc. v. Barton*, 192 F.3d 662, 670 (7th Cir. 1999) (Posner, J. dissenting) (expressing reasons for supporting restrictive covenants in a dissenting opinion; “I can see no reason in today’s America for judicial hostility to covenants not to compete.”).

34. See Brandon S. Long, Note, *Protecting Employer Investment in Training: Noncompetes v. Repayment Agreements*, 54 DUKE L.J. 1295, 1302 (2005) (“The free-rider principle provides an additional rationale: if the employer has no way to protect its investment, competitors reluctant to invest in training can recruit well-trained employees without having to assume the cost of the training.”).

35. See, e.g., Sterk, *supra* note 30, at 406 (arguing that restrictive covenants are not really anticompetitive because “nothing prevents the employee from bargaining with his employer for release from the covenant.”; “the employee should be willing to pay the employer to release him from the covenant.”); Glick, *supra* note 30, at 381–89 (imagining a “hypothetical negotiation” between employer and employee with different amounts of information about the future value of the contract; asserting that, with sufficient information, an employee “would not enter into the contract unless the post-contract state of affairs was superior.”); Callahan, *supra* note 30, at 723 (arguing that “the fear of overreaching by employers diminishes” if “relatively sophisticated” employees have “alternative employment opportunities” — assuming that other employers don’t all use restrictive covenants as well — and “The solicitous treatment of employee assumes that they are both fungible and overabundant.” — a phrase which perhaps inadvertently gives away the implicit view that employees are cogs); Schulman, *supra* note 30, at 105 (“it is not to an individual’s advantage to restrict his mobility unless he is promised more than what he believes his MRP [marginal revenue product of labor] to be.”); Rubin & Shedd, *supra* note 30, at 95 (“Presumably, since both parties voluntarily sign the agreement, it must serve to increase the value of resources.”).

Not every training-based justification for non-competes falls within the Law and Economics framework with its artificial focus on the hypothetical rational calculations of parties at the time of contract formation. A more original and probing commentary recognizes that “it may be inappropriate to view non-compete terms at the product of reasoned reflection or as dispositive of the parties’ rights and obligations,” but nonetheless argues that employers can have an “ownership” type interest in employee’s general skills, training (both formal and informal), and information learned on the job. See Arnow-Richman, *Bargaining for Loyalty*, *supra* note 12 at 1215, 1202–06 (arguing for recognition of employer interests “regardless whether the training involves trade secrets or other proprietary information as required under existing law,” and extending to “the informal acquisition of new knowledge by more experienced workers.”).

36. See Lester, *supra* note 30, at 54–55 (“Trade secrets are the least controversial protectable interest.”); Long, *supra* note 34, at 1309 (“Many commentators agree that the two interest most in need of protection are trade secrets and customer lists.”); *Outsource Int'l*, 192 F.3d at 170 (Posner, J. dissenting) (“The clearest case for such a covenant is where the employer’s work gives him access to the employer’s trade secrets.”); Sterk, *supra* note 30, at 399 (“Courts routinely enforce restrictive covenants when convinced that enforcement is necessary to protect an employer against his former employer’s use of trade secrets or customer information acquired from the employer.”).

37. See, e.g., Eric A. Posner & George G. Triantis, *Covenants Not to Compete From an Incomplete Contracts Perspective*, U. OF CHI. JOHN M. OLIN PROGRAM L. & ECON. WORKING PAPER NO. 137 (2d Series) 16 (Sept. 26, 2001) (noting that trade secrets are a basis to enforce a restrictive covenant “subject to limits to prevent overreaching” without detailed analysis).

38. See Long, *supra* note 34 at 1303 (albeit balancing criticisms of restrictive covenants to argue for a purportedly less restrictive training repayment regime). Callahan, *supra* note 30, at 715–16, seems to argue that both trade secret law and restrictive covenants promote competition by providing an incentive for spending on research and development, but avoids analyzing whether there is really a separate incentive provided by the enforceability of non-competes above and beyond those provided by trade secret law by moving to the employee training justification.

39. See Schulman, *supra* note 30, at 102, 108, 110, 115 (assuming that benefits to employer outweigh limiting employee mobility without asking about effects on innovation and the wider economy, assuming without evidence that employers “more freely” disclose company secrets to employees when there is a non-competition covenant, assuming that the absence of non-competition covenants would deter employers from hiring employees because they will fear trade secret theft; failing to consider whether trade secret law itself reasonably allays such assumed concerns or considering whether employers disclose secrets to employees in California; also assuming without evidence that employers provide “expensive training” when there are such covenants in place).

40. See Long, *supra* note 34, at 1303.

41. For an example of this type of contrast, see Rubin & Shedd, *supra* note 30, at 97 (“If information were not protected by contract, firms might spend resources in other ways to protect the information,” such as segregating employees from learning all aspects of a secret process).

42. See *Outsource Int'l*, 192 F.3d at 170 (Posner, J. dissenting); Schulman, *supra* note 30, at 107–08; Lester, *supra* note 30, at 53; Long, *supra* note 34, at 1309 n.86.

43. See Schulman, *supra* note 30, at 107–08 (“Trade secret litigation is difficult and risky, however.”; arguing that trade secret misuse is hard to detect, and litigation creates a risk that trade secrets will be disclosed) (citing Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUD. 683, 690–91 (1980); Lester, *supra* note 30, at 53 (making the same two arguments and also noting that trade secret law does not always satisfy the employer because information it wants to restrict may not qualify for trade secret protection); Long, *supra* note 34, at 1309 n.86 (“Whereas the [UTSA] merely provides a tort remedy for an employer once trade secret disclosure occurs, a restrictive noncompete ideally prevents disclosure from occurring in the first place. Also, if charges are brought against an employee for breach of trade secret law, the employer risks disclosure of the protected asset in court.” (citing Lester)). These arguments appear to have originated in a 1980 article about trade secrecy, which argued that the difficulty in discovering a party’s trade secret misappropriation “explains the importance of restrictive covenants.” The article also discusses the potential that a trade secret could be disclosed in litigation, but notes the common practice (even in 1980) of attorneys’-eyes-only protective orders—which tends to undermine an argument that trade secret litigation poses a serious risk of disclosure. See Kitch, *supra*, at 690–91.

44. See Callahan, *supra* note 30, at 713, 716–17 (arguing that restrictive covenants protect trade secrets and an employer’s investment in training; asserting that there is no effect on competition unless the employer has “market power” in an antitrust sense, without analyzing whether that analogy is the best one or asking about other forms of anticompetitive effects, such as on innovation); Glick et al., *supra* note 30, at 358–59, 417–18 (“Under this framework, such covenants should not be enforced only when some type of market failure occurs.”; proposing that courts limit restrictions on non-competes to narrow contract defenses such as duress and unconscionability and tying the analysis to federal antitrust law).

45. See Closius & Schaffer, *supra* note 13, at 548–49 (arguing that “In applying [restrictive covenant] doctrines, courts fail to perceive that a restriction tailored to prevent misuse of protected information sufficiently safeguards the principal’s interests without unnecessarily and unfairly banning the agent from a chosen occupation.”; calling such covenants “superfluous” in most cases, except for when “the agent possesses bargaining power equal to that of the principal.”).

46. The possibility of legislative change is not hypothetical; one commentary notes that, in 2009, there were potential legislative changes to state non-competition covenant law afoot in three states. See John Zabriskie, *Top Ten Developments in Trade Secret and*

Noncompete Law in 2009, TRADE SECRET/NONCOMPETE (Jan. 10, 2010), <http://www.tradesecretnoncompete.com/top-ten-developments-in-trade-secret-and-noncompete-law-in-2009> (last visited June 1, 2010) (noting that Oregon and Massachusetts considered limitations on restrictive covenants, while Georgia considered strengthening them).

47. It is important to note that while official trade secret law is a much better balanced means of regulating the flow of information than restrictive covenant law, there are nonetheless serious inconsistencies and anomalies in the way trade secret law is theorized and adjudicated. For two contributions to the debate about the nature of trade secret law, see Mark R. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311 (2009); Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241 (1998).

48. The facts necessary to support injunctive relief on a trade secret claim differ from jurisdiction to jurisdiction, and an “inevitable disclosure”-based trade secret injunction can be almost identical to the imposition of a restrictive covenant. The Uniform Trade Secrets Act allows injunctive relief upon “actual or threatened misappropriation,” but the degree of speculation courts permit in the absence of actual misappropriation generates different results. In California, which prohibits inevitable disclosure injunctions, “threatened” misappropriation is limited to conduct by the defendant that manifestly threatens misappropriation coupled with a showing of imminent harm. See *FLIR Sys., Inc. v. Parrish*, 95 Cal. Rptr. 3d 307, 315–16 (Cal. Ct. App. 2009). In states that permit some form of inevitable disclosure-based injunctive relief, the employer’s speculation about overlapping job duties may suffice. See, e.g., *Nat’l Starch & Chem. Corp. v. Parker Chem. Corp.*, 530 A.2d 31, 33 (N.J. Super. Ct. App. Div. 1987) (affirming injunction where employee knew technical secrets for envelope adhesives and would perform the same work as part of his new job for competitor).

49. See, e.g., *CertainTeed Corp. v. Williams*, 481 F.3d 528, 529–30 (7th Cir. 2007) (a plaintiff need not show that the defendant inevitably will misuse trade secrets in order to have a non-compete enforced).

50. For examples of cases that used the existence of a restrictive covenant as a factor in an “inevitable disclosure” injunction, see *Ciena Corp. v. Jarrad*, 203 F.3d 312 (4th Cir. 2000) (injunction affirmed; enforceable non-competition agreement); *Lumex, Inc. v. Highsmith*, 919 F. Supp. 624 (E.D.N.Y. 1996) (issuing injunction).

51. See, e.g., Cal. Civ. Code § 3426.1 (West, Westlaw through all 2009 Reg. Sess. laws; all 2009–2010 1st through 5th, 7th, and 8th Extraordinary Sess. laws; urgency legis. through Ch. 711 of the 2010 Reg. Sess.; and all Propositions on 2010 ballots) (defining trade secrecy). Likewise, courts must tailor the terms of trade secret-based injunctions to avoid sweeping in non-secret information. See, e.g., *Corning Inc. v. Picvue Elec., Ltd.*, 365 F.3d 156, 158 (2d Cir. 2004) (remanding where order did not specify what information was subject of the injunction); *Am. Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1412 (11th Cir. 1998) (reversing preliminary injunction in part for non-specific prohibitions on using “any other documents that contain trade secrets that are the proprietary property of Plaintiff.”); *Roton Barrier, Inc. v. The Stanley Works*, 79 F.3d 1112, 1121–22 (Fed. Cir. 1996) (rejecting two post-judgment injunctions for failure to specify exactly what information was barred from use).

52. A number of cases have rejected state tort and statutory claims on federal preemption where plaintiffs sought to protect non-secret technical information. This line of cases stands for the proposition that public domain information cannot

be protected under state tort or statutory law—a view in considerable tension with the implicit protection of such information under restrictive covenant law. See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 157–60 (1989) (voiding state statute that prohibited the use of unpatented, public technology information under the Supremacy Clause); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964) (information not covered by a patent could not form basis for state law unfair competition claim); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 228–32 (1964) (same); *Confold Pac., Inc. v. Polaris Indus., Inc.*, 433 F.3d 952, 959–60 (7th Cir. 2006) (unjust enrichment claim based on non-secret product design information preempted; “In general, if information is not a trade secret and is not protected by patent, copyright, or some other body of law that creates a broader intellectual property right than trade secrecy does, anyone is free to use the information without liability.”); *Ultra-Precision Mfg., Ltd. v. Ford Motor Co.*, 411 F.3d 1369, 1380 (Fed. Cir. 2005) (same holding as to state law unjust enrichment claim where technology information was not alleged to be a trade secret); *Darling v. Standard Alaska Prod. Co.*, 818 P.2d 677, 680 (Alaska 1991) (same; “Whatever unfairness inheres in allowing the free exploitation of ideas must give way to the greater societal benefit of achieving the full potential of our inventive resources, unless the federal government has granted the protection of a patent.”); *Joyce v. G.M. Corp.*, 551 N.E.2d 172, 175 (Ohio 1990) (conversion claim based on non-secret technology ideas rejected at the pleading stage based on U.S. Supreme Court precedents); *Daktronics, Inc. v. McAfee*, 599 N.W.2d 358, 364 (S.D. 1999) (conversion claim based on non-secret technology concepts rejected; “Since there was no property interest, there could be no conversion.”); *Sammons & Sons v. Ladd-Fab, Inc.*, 187 Cal. Rptr. 874 (Ct. App. 1982) (relying on U.S. Supreme Court and other decisions to hold that an unfair competition claim based on defendant’s copying of non-secret product designs was preempted by federal law).

53. Federal preemption of state tort and statutory claims that grant intellectual property protection over non-secret technology concepts does not apply to state law contract claims. See generally *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979) (no preemption of contract that allowed party to obtain royalties on information after patent expired). A danger with restrictive covenants, then, is that they allow parties to bypass restrictions found elsewhere in order to control the flow of non-secret information.

At least one commentator has argued in favor of recognizing employer interests—even the possibility of an “ownership interest”—in information an employee learns on the job, whether or not it is a trade secret. See, e.g., Arnow-Richman, *supra* note 12, at 1202–07 (promoting the idea that non-competes allow employers to secure an investment in “employee development, or as enforcing a new ‘social’ contract of employment that envisions an exchange of training and experience for spot commitments to particular projects and goals.”; employers “may have an ownership interest in” employees’ “experiential knowledge.”). The dangers of this approach cannot be overstated. Theories that promote the implicit recognition of alternative tier of protectable information that is not a trade secret not only undermine official forms of intellectual property that provide for a public domain of information free for all to use, but urge courts to allow employers to restrain employees even where there is no inventive information at stake. The departing employee has no protection even when he or she deliberately avoids misuse of the former employer’s trade secrets. The employer has a litigation weapon that is more powerful than a trade secret claim because it does not require the employer to establish the secrecy of precise items of information. Indeed, the former employer seemingly would need only point to even the most general, informal knowledge acquisition on the job. This problem mirrors the debates in recent years regarding UTSA preemption, where trade secret plaintiffs have sought to evade the statutory requirements by alleging alternative tort claims for information claimed to be “confidential but not secret.”

54. See FLA. STAT. ANN. § 542.335(1)(b) (West, Westlaw through 2010 2d Reg. Sess. of 21st Legis.) (legitimate business interests can include both “trade secrets” and “valuable confidential business or professional information”); OR. REV. STAT. § 653.295(1)(c)(B) (West, Westlaw through 2010 Spec. Sess. Laws) (employers have a “protectable interest” when, among other things, an employee “[h]as access to competitively sensitive confidential business or professional information that otherwise would not qualify as a trade secret[.]”).

55. Closius & Schaffer made a similar point in their 1984 article, *supra* note 13, at 544 (“Unfortunately, courts fail to adequately scrutinize or define the protectable interest of the principal in analyzing such covenants.”; arguing that courts weigh the employer’s general interest in protecting trade secrets but do not adequately consider “an agent’s exposure to customers or possession of unique skills,” which should weigh in favor of the employee).

56. See, e.g., *Victaulic Co. v. Tieman*, 499 F.3d 227, 235 (3rd Cir. 2007) (Pennsylvania law includes unique or extraordinary skills as a legitimate basis for a non-competition covenant); *SD Prot., Inc. v. Del Rio*, 498 F. Supp. 2d 576, 585 (E.D.N.Y. 2007) (listing provision of special or unique services as one of three grounds for enforcing a non-competition covenants, along with protection of trade secrets and customer information).

57. A recent article by Michael Risch also notes this concern. *Comments on Trade Secret Sharing in High Velocity Labor Markets*, 12 EMP. RTS. & EMP. POL’Y J. 339, 346 n.63 (2009), available at <http://ssrn.com/abstract=1269039> (citing ALAN HYDE, WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH VELOCITY LABOR MARKET (2003)).

58. At least one state, Oregon, has a statute that can lead to a different result, at least for employees with lower salaries. There, a 2008 statute makes non-competition covenants unenforceable against employees who make the median income or less for a family of four. OR. REV. STAT. § 653.295(1)(d).

59. See, e.g., *Asheboro Paper & Packaging, Inc. v. Dickinson*, 599 F. Supp. 2d 664, 672 (M.D.N.C. 2009) (finding employer unlikely to succeed on enforcing territorial restriction in covenant that covered area in which it did not have an office and did not establish it had customers there); *Darugar v. Hodges*, 471 S.E.2d 33, 35–36 (Ga. Ct. App. 1996) (holding a covenant

against departing physician was unenforceable because the geographic area covered by the contract's statement was larger than the employer's area of business), *overruled by Chaichimansour v. Pets Are People Too, No. 2, Inc.*, 485 S.E.2d 248, 250 (Ga. Ct. App. 1997) (disapproving language in *Darugar* "suggesting that prohibitions on competition with respect to customers or potential customers beyond those with whom the employee dealt during his employment will always be unreasonable, even if in a specified and reasonable geographic area.").

60. See, e.g., *PrecisionIR Inc. v. Clepper*, 693 F. Supp. 2d 286, 292-93 (S.D.N.Y. 2010) (applying Virginia law and enforcing covenant covering the United States and Canada in webcasting services industry); *Natsource LLC v. Paribello*, 151 F. Supp. 2d 465, 469 (S.D.N.Y. 2001) (nationwide covenant); *Intellus Corp. v. Barton*, 7 F. Supp. 2d 635, 641-42 (D. Md. 1998) (covenant with no geographic limits enforced where plaintiff "competes for clients on a national, if not global basis"); *Branson Ultrasonics Corp. v. Stratman*, 921 F. Supp. 909, 913 (D. Conn. 1996) (affirming covenant where company engaged in "international marketing activities"); *Superior Consulting Co., Inc. v. Walling*, 851 F. Supp. 839, 847 (E.D. Mich. 1994) (plaintiff "does business in forty-three states and a number of foreign countries. The unlimited geographic scope of the non-competition provision here was therefore not unreasonable.").

61. As Bishara poses the question, *supra* note 19, at 288, "[W]hy did two entrepreneurs in Seattle get sued when they tried to open a new business, started in a parent's basement, to make it easier for small companies to meet their postal needs at the most competitive price," especially if they "provided a better, more economical service[?]" (commenting on a lawsuit brought by Pitney-Bowes against former employees).

62. See, e.g., *Victaulic Co. v. Tieman*, 499 F.3d 227, 235 (3rd Cir. 2007) (reciting that Pennsylvania law disfavors non-competition covenants, but then stating immediately afterwards that an acceptable covenant need only "be tailored to protect legitimate interests."; reversing and remanding a ruling against a restrictive covenant for further fact-finding); *SD Protection, Inc.*, 498 F. Supp. 2d at 585 (asserting that New York courts strictly construe non-competition covenants because they conflict with policies favoring competition and also harm employee's abilities to earn a livelihood, but refusing to find covenant unenforceable on a motion to dismiss in case involving company providing chaperones for schoolchildren).

63. For two contributions to public domain theorizing, see Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783 (2006); James Boyle, *The Second Enclosure Movement*, 66 LAW & CONTEMP. PROB. 33 (2003).

64. Only the rare case takes employee training into account when determining the validity and scope of a non-competition covenant. See, e.g., *7's Ent., Inc. v. Del Rosario*, 143 P.3d 23, 32 (Haw. 2006) (employer's provision of training as well as "confidential" information to low-level travel industry employee justified three-year non-competition covenant for the Honolulu area). It should also be noted that Colorado has a unique statute governing non-competition covenants which, among other things, permits such covenants "for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years." See COLO. REV. STAT. § 8-2-113 (2010).

65. See FLA. STAT. ANN. S § 542.335(1)(b)(5) (2010); Frank J. Cavico, 'Extraordinary or Specialized Training' as a 'Legitimate Business Interest' in Restrictive Covenant Employment Law: Florida and National Perspectives, 14 ST. THOMAS L. REV. 53, 65-72 (2001) (reviewing five Florida cases involving employee training arguments, where three rejected the argument).

66. See Cavico, *supra* note 65, at 72-97 (extensive review of nationwide case law on the question, including cases where confidential information was also a factor; total number of cases cited is a tiny fraction of reported non-competition covenant cases reported during the same time period, and reporting only two non-Florida cases that affirmed a restrictive covenant solely on training grounds); Long, *supra* note 34, at 1311 ("However, courts have historically disfavored covenants designed solely to protect an employer's investment in training." (citing the absence of training-based cases in Peter J. Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483, 524-25 & n.243 (1990))); Lester, *supra* note 30, at 57-58 ("Courts have been exceedingly reluctant to protect employer investments in training per se."; (citing reluctance even in Florida, Louisiana, and Colorado, where statutes allow enforceability for training in certain instances)); Sterk, *supra* note 30, at 405 ("The employer's investment in training has generally furnished a basis for enjoining competition only in those cases where the employer has shared trade secrets or customer lists with the employee.").

67. See Sterk, *supra* note 30; Long, *supra* note 34, at 1298-99 (describing the "importance of protecting an employer's investment in training," by arguing that an economy increasingly based on high-skill technology jobs means that formal job training is or will be provided in such jobs).

68. Even commentators critical of a wholesale Law and Economics approach seem sometimes to accept the theory that restrictive covenants incentivize training. See, e.g., Bishara, *supra* note 19, at 318 ("Without noncompete enforcement there is a greater likelihood that a worker will leave to work for a competitor or to start a competing enterprise before the investment in human capital is recouped by the employer."). Some, however, would require that the employer provide some evidence of "the promise of job-related training or opportunities for skills development." See, e.g., Arnow-Richman, *supra* note 12, at 1240-41.

69. See Dau-Schmidt, *supra* note 24, at 848 (noting general negative effects of labor market acceleration on American employees, with the possible exception of technology- and knowledge-based employment; "Why would an employer retrain employees whose skills have become obsolete when the average tenure at a firm is only a few years?"); see also Lester, *supra* note 30, at 50 ("In recent years, however, as we have witnessed a decline of job stability and increasing mobility of labor, firms' traditional incentives for providing training may have waned."). This is especially true in the current

recession, where there is a glut of unemployed job seekers. Employers seemingly can choose applicants who already possess the requisite skills and training over those who do not.

70. See Posner & Triantis, *supra* note 37, at 5 (noting that some forms of training may be “valuable to some other employers but not all,” and generally advocating enforcement of restrictive covenants where end-of-term renegotiation was costly or impossible, and where training is of the type more likely to be valuable to the subsequent employer).

71. See Lester, *supra* note 30, at 74–75 (noting strength of regional economy-based critique of the non-compete and noting the possibility that employers have less incentive to provide training in an economy of higher mobility; proposing that if empirical evidence showed that there is “a nontrivial subclass of situations where employers would inefficiently underinvest in their employees absent some form of protection,” there could be a “hybrid approach” where restrictive covenants are prohibited, but training repayment of liquidated damages clauses could be permitted).

72. A related issue is how long a restrictive covenant should last if it is premised on the employer’s (supposed) provision of training. Many commentators who advocate for enforcement of non-competition agreements on training grounds do so in broad brush terms, and do not address what period of time a departing employee should be sidelined as a consequence of receiving training that could vary in time, type, and rigor. One writer proposes a software tracking system to keep track of profits derived from employment training for purposes of an employee repayment scheme. See Long, *supra* note 34, at 1317–19 (making the questionable assumption that “[b]efore investing in training, employers undoubtedly will have performed a cost-benefit analysis to assess the profit potential from such an investment.”). The idea is unrealistic, not least because one would have to develop a sufficiently fair and precise methodology for determining what portion of profits are attributable to training a particular employee received.

73. See Callahan, *supra* note 30, at 713, 716–17; Glick et al., *supra* note 30, at 358–59, 417–18.

74. See *Outsource Int’l*, 192 F.3d at 170 (Posner, J. dissenting).

75. See, e.g., *Degussa Admixtures, Inc. v. Burnett*, 471 F. Supp. 2d 848, 857 (W.D. Mich. 2007) (awarding sanctions to defendant former employees for bad faith trade secret claims); *Berry v. Hawaii Express Serv., Inc.*, 2007 WL 689474, *13–15 (D. Haw. March 2, 2007) (same); *FLIR Sys., Inc. v. Parrish*, 95 Cal. Rptr. 3d 307, 313 (Cal. Ct. App. 2009) (same); see also *Brooks Automation, Inc. v. Blueshift Tech., Inc.*, 20 Mass. L. Rptr. 541, 2006 WL 307948, *5–11 (Mass. Super. Ct. 2006) (damages awarded to former trade secret defendant in tortious interference suit following a “frivolous” trade secret lawsuit).

76. See Long, *supra* note 34, at 1309 (citing Lester, *supra* note 30, at 53).

77. See Lester, *supra* note 30, at 53 (“Restrictive covenants, then, fill a gap where other legal and extra-legal mechanisms fall short. Ideally, a contract enables the employer to keep former employee away from competitors (or direct competition) in the first place.”).

78. See Callahan, *supra* note 30, at 707 (“While competition by way of product imitation and improvement requires the free flow of information, an unlimited flow of information would allow imitators to share in the benefits from information without incurring the costs necessary to produce the information.”).

79. See Callahan, *supra* note 30, at 713, 716–17; Glick et al., *supra* note 30, at 358–59, 417–18.

80. See, e.g., Cal. Civ. Code § 3426.5 (Deering 2010) (UTSA provision requiring that “a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.”); Pooley, *supra* note 1, at §§ 4.04[3], 12.02 (noting that UTSA provision is mandatory. “[I]t has long been recognized that civil trials in trade secret cases must be conducted at least in part in a closed courtroom, in order not to destroy the very property right which is at issue.”).

81. See, e.g., *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 418 (4th Cir. 1999) (“[C]ourts addressing this fact-intensive issue have regarded the unsealed filing of a document as a single non-dispositive factor to be weighed in determining whether the document’s contents remain a trade secret.” Mistaken public court filing in and of itself did not destroy trade secrecy.); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 849 (10th Cir. 1993) (party’s inadvertent disclosure and failure to seal information excused where there was no evidence any third party had accessed the information); *Wallis v. PHL Assoc., Inc.*, 86 Cal. Rptr. 3d 297, 303 (Cal. Ct. App. 2008) (court’s sealing mistake did not alter trade secret status, despite defendant’s violation of the protective order by attempting to engineer a third party’s access to the information); *Bobrow v. Bobrow*, 810 N.E.2d 726, 734 (Ind. Ct. App. 2004) (permissible to seal after delay that was not unreasonable); but see *Awards.com, LLC v. Kinko’s*, 834 N.Y.S.2d 147, 156 (N.Y. Ct. App. 2007) (party waived trade secret protection by twice failing to file document under seal); *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260, 266 (E.D. Va. 1995) (denying injunctive relief on a trade secret claim where the defendant obtained information from another case during a long period when its file was unsealed).

82. The same is true for the proposals by some in the Law and Economics camp, discussed *supra* Section III.C, that non-competition covenants should be enforced absent extreme conditions such as duress or antitrust-like market power. Such proposals take no notice of the many problems with the non-competition covenant, and would result in practice in severe restraints on employee mobility around the country.