CONTRACTING AWAY YOUR CAREER: AN INTERSTATE COMPARISON OF NONCOMPETE LAW AND A PROPOSAL FOR OPTIMAL LEGISLATION IN NEW YORK

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INTRODUCTION

In the late twentieth century, Silicon Valley became the epicenter of the great American technological explosion involving companies such as Apple, Hewlett Packard, and Google.[1] At the same time across the country, Route 128, a Massachusetts Corridor famous for the Massachusetts Institute of Technology, had a significant head-start in the tech race with roughly triple the number of employees in the industry; however, it began to fall behind rapidly.[2] By 1995, Silicon Valley had the highest export sales (primarily of electronics products and software) of any American metropolitan area.[3] Route 128 did not make the top five.[4] California's ban on noncompete clauses, and Route 128's embrace of

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1 Corey Protin et al., *Animated Timeline Shows How Silicon Valley Became a $2.8 Trillion Neighborhood*, BUSINESS INSIDER (May 30, 2017), https://www.businessinsider.com/silicon-valley-history-technology-industry-animated-timeline-video-2017-5 [https://perma.cc/53GD-FW36].

2 Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 587 (1999).

3 *Id.*

4 *Id.*

them, are a popular explanation for this significant disparity in each region's industrial development.[5]

Noncompete clauses are a well-known and widespread set of contracting tools used by employers to restrict what an employee can do, and who he or she can work for, after employment ends for any reason.[6] Noncompetes can be standalone contracts, or part of a larger employment agreement that an employee must sign before they can begin work.[7] Noncompetes are used in employment contracts[8] but are also tools to protect trade secrets in a sale of goodwill between businesses.[9] Additionally, state statutes and common law can have significantly disparate approaches to noncompetes.[10] A similar policy goal of protecting trade secrets underlies many of these other sources of employment restrictions.[11] "Noncompete clause" is an umbrella term for

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5 *See generally id.* Some scholars have also supported Gilson's hypothesis with empirical studies. On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833, 837–38 (2013) ("[T]he widespread market practice of using noncompetes may have the inadvertent counterproductive effect of lowering market performance. These findings contribute to a rising number of empirical studies which suggest that lesser constraints on employee mobility may increase economic growth and innovation.").

6 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, 294 (2006) [hereinafter Bishara, *Covenants Not to Compete*].

7 *Id.*

8 Employment contract noncompetes are agreements between employers and employees which concern post-employment restrictions on the employee, usually on their ability to compete with their previous employer. *Id.*; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 188 (asserting that where the distinction between a sale-of-business noncompete and employment noncompete are blurry, like if a seller agrees to work for a buyer, the sale-of-business standard applies where the contract is "attributable more to the sale of goodwill than to the employment contract").

9 Sale-of-Business noncompete restrictions apply where "the owner of a business to convey its full value on its sale, by contracting not to destroy the goodwill of that business by immediate competition." 6 WILLISTON ON CONTRACTS § 13:9 (4th ed. 1993); Bishara, *Covenants Not to Compete*, *supra* note 6, at 294 ("Noncompete agreements are a popular contractual tool used by employers to restrict an employee's post-employment ability to work for a competitor or start a competing enterprise. . . . Other forms of noncompetes address issues of refraining from competition after the sale of a business or non-solicitation agreements related to poaching clients or employees."); Annalise Perry & David Creekman, *Non-Competition Agreements in the Sale of a Business*, WYRICK ROBINS (Apr. 19, 2017), https://www.wyrick.com/news-publications/non-competes [https://perma.cc/MA2E-GWU3].

10 *See generally infra* Part I.

11 Bishara, *Covenants Not to Compete*, *supra* note 6.

a set of tools that restrict an employee's post termination job options.[12] Noncompete clauses may impose a number of restrictions including: (a) preventing the employee from working for a competitor for a given time and in a given geographic area; (b) preventing the employee from starting their own competing business for a given time and in a given geographic area; (c) preventing the poaching of clients after dismissal; and (d) non-disclosure agreements to protect trade secrets, which go beyond existing trade secret laws.[13] Given the underlying policy of protecting trade secrets, it follows that these clauses are most commonly used on employees in technical, sales, and managerial positions.[14]

This Note will conduct a comparative analysis of the varying legislative and judicial approaches towards employment-based noncompete clauses in California, Massachusetts, Texas, and New York.[15] Part I of this Note will introduce the debate surrounding noncompetes, and explain each state's historical noncompete development, current legal positioning, and the resulting policy effects. Historically, each of the selected states first employed the common law "rule of reasonableness," in which a court would only enforce a noncompete if it was reasonable in time and scope.[16] However, as time went on, states increasingly enacted statutes to foster greater predictability and rigidity in their noncompete laws, and some had more success than others.[17] Part II will compare and contrast the states' approaches and identify common legal and political issues that arose while their noncompete law developed. In doing so, this Note will make key suggestions about what future legislators should consider when codifying their state's noncompete law.[18] In particular, this Note asserts

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12 *See generally* Paul Davidson, *Feds Target Non-Compete Clauses as Unfair to Workers*, USA TODAY (Oct 25, 2016, 3:36 PM), https://www.usatoday.com/story/money/2016/10/25/white-house-new-york-target-noncompete-clauses/92733102 [https://perma.cc/9G8R-MGY5].

13 *Id.*

14 Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 625–26 (1960). However, recently employers have started using noncompetes for even low-skilled workers. *See* Stephen Mihm, *Send Noncompete Agreements Back to the Middle Ages*, BLOOMBERG (Dec. 5, 2018, 10:58 AM), https://www.bloomberg.com/opinion/articles/2018-12-05/noncompete-agreements-are-bad-for-employees-and-the-economy [https://perma.cc/5PY6-CNFW].

15 This selection of states was chosen because they provide the widest variety of approaches, most notable legal history, and latest developments in noncompete law. *See infra* Part I.

16 *See infra* Part I.

17 *See infra* Part I.

18 *See infra* Part II.

that the existing judicial and legislative approaches are inefficient methods of regulating noncompetes.[19] The common law approach has become outdated in a globalizing world, practically unworkable in everyday life, and unsatisfactory to both employers and employees.[20] Additionally, existing statutes are often imprecise and inefficient because they fail to maximize the underlying benefit of low noncompete enforceability, knowledge spillovers, while still leaving many employers without protection afforded to them with greater enforceability.[21] Such an approach can have negative side-effects that arise when employers are dissatisfied with the law's failure to adequately protect them.[22] Finally, using the information from Part II's issue analysis, Part III will (1) propose a new model framework for noncompete legislation that emphasizes the importance of sector-based regulation, and (2) suggest a legislative approach for New York, which has yet to codify its noncompete law.[23] If adopted, this Note's Proposal would result in targeted, clear legislation that would avoid many of the negative consequences and inefficiencies associated with existing statutes.[24]

I. BACKGROUND

A. *The Ongoing Debate Regarding Noncompete Clauses*

The conflict between the "fundamental interests" of the employer and the employee underlying noncompetes has remained largely unchanged over the last 300 years.[25] For employers, postemployment restraints on their employees are just one of many tools used to protect advantageous trade secrets and good faith.[26] Employers cite a number of negative policy implications which would result from greater restrictions on noncompete clauses, such as a lack of effective internal

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19 *See infra* Part II.

20 *See infra* Section II.C.

21 *See infra* Section II.B.1.

22 *See infra* Section II.C.

23 *See infra* Part III.

24 *See Infra* Part III.

25 *See* Blake, *supra* note 14, at 626–27 (summarizing the fundamental conflict between the employer and employee's interests).

26 *Id.* at 627.

communication or incentive to innovate.[27] In particular, without the protection of noncompetes, employers could no longer afford to invest in research and would limit internal communication to prevent competitors from obtaining valuable trade secrets.[28]

For example, John Hazen, a chief executive of a papermaking business in Holyoke, Massachusetts, argued that noncompetes were an essential part of his business model.[29] In particular, John spent significant sums of money training employees to operate the intricate machinery required to make lottery tickets and special packaging.[30] John considered noncompetes a crucial tool to protect his investment in the company's employees and intellectual property.[31]

Dating as far back as 1711, courts have recognized that employers may have legitimate business interests that require protection.[32] Some more recent cases have also detailed the legitimate business interests the employer has in the context of noncompetes.[33] For example, in *Marine Contractors Co. v. Hurley*,[34] a Massachusetts court explained that these interests might include trade secrets, confidential information, or good will that the employer accrued through dealing with its customer base.[35]

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[27] *Id.* ("From the point of view of the employer, postemployment restraints are regarded as perhaps the only effective method of preventing unscrupulous competitors or employees from appropriating valuable trade information and customer relationships for their own benefit. Without the protection afforded by such covenants, it is argued, businessmen could not afford to stimulate research and improvement of business methods to a desirably high level, nor could they achieve the degree of freedom of communication within a company that is necessary for efficient operation.").

[28] *Id.*

[29] Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES (June 8, 2014), https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html [https://perma.cc/2J4A-AXQH].

[30] *Id.*

[31] *Id.*

[32] *See* Mitchel v. Reynolds (1711) 24 Eng. Rep. 347; 1 P. Wms. 181. This principal has been affirmed recently as well. *See* Columbus Med. Servs., LLC v. Thomas, 308 S.W.3d 368, 384 (Tenn. Ct. App. 2009) ("[I]f there is a legitimate business interest to be protected and the time and territorial limitations are reasonable then non-compete agreements are enforceable.").

[33] *See* Marine Contractors Co. v. Hurley, 310 N.E.2d 915, 920 (Mass. 1974) ("Employee covenants not to compete generally are enforceable only to the extent that they are necessary to protect the legitimate business interests of the employer."); *see also* Nat'l Hearing Aid Centers, Inc. v. Avers, 311 N.E.2d 573, 289 (Mass. Ct. App. 1974).

[34] *Marine Contractors Co.*, 310 N.E.2d at 920.

[35] *Id.*

However, the court did not provide a blank check to employers: it asserted that "[p]rotection of the employer from ordinary competition" is not a legitimate business interest, and noncompete clauses with this sole motivation are unenforceable.[36] In *Marine Contractors*, the employer was a marine vessel repair business, and it employed defendant under a noncompete agreement that stated that he could not compete with Marine, directly or indirectly, within 100 miles of Boston for five years.[37] The court held that Marine had a legitimate business interest in protecting the goodwill that it had built up with its client base.[38] This serves as just one example of how courts view the employer's interest in having noncompetes, and enforces the notion that those interests will be carefully scrutinized by judges.

Employees have a competing interest, which they argue is infringed upon by noncompete clauses.[39] In particular, scholars critical of noncompetes argue that there are negative effects on both employees and their respective industries.[40] For employees, noncompetes can cause reduced post-termination job mobility, and can hinder their personal freedom to obtain employment that suits their interests.[41] Additionally, critics argue that noncompetes hamper innovation, [42] and reduce competition in a given sector. [43]

Take Daniel McKinnon, a hairstylist from Norwell, Massachusetts whose employment agreement contained a noncompete clause preventing him from working in any nearby salon for twelve months.[44] Shortly after being fired, Daniel started to work at a nearby salon, and his previous employer quickly brought a lawsuit against him.[45] After a judge granted an injunction enforcing the noncompete, Daniel was forced into

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36 *Id.* at 920–21.

37 *Id.* at 917–18.

38 *Id.* at 920–21.

39 *See* Blake, *supra* note 14, at 627.

40 *See generally id.*

41 *Id.*

42 *Id.* Such agreements "slow[] down the dissemination of ideas, processes, and methods." *Id.*

43 *Id.* ("They unfairly weaken the individual employee's bargaining position vis-à-vis his employer and, from the social point of view, clog the market's channeling of manpower to employments in which its productivity is greatest.").

44 Greenhouse, *supra* note 29.

45 *Id.*

a perilous financial situation.[46] Unable to travel far out of the area to work for another salon, Daniel argued that he "basically had to give up a year of working," which forced him to take jobless benefits and almost cost him his apartment.[47]

Courts have also commented on the interest employees have in the context of noncompete clauses.[48] *Mitchel v. Reynolds*, a seminal English case decided in 1711, laid out the problems that employees could face as a result of noncompetes.[49] Specifically, the court asserted that employment noncompetes are troublesome because employees could lose their livelihood and their ability to provide for loved ones.[50] In sum, both the employer and the employee have legitimate, but competing, concerns about noncompetes, and courts from various jurisdictions have been forced to balance them to reach a fair outcome.[51]

B. *California's Approach to Noncompetes*

California has a storied history in the development of its noncompete jurisprudence and legislative enactments. California has banned all noncompete agreements in the employer-employee context,[52] which some scholars believe contributed to the explosion of Silicon Valley as a technological hub in the United States.[53]

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46 *Id.*

47 *Id.*

48 Mitchel v. Reynolds (1711) 24 Eng. Rep. 347; 1 P. Wms. 181; *see also* Horner v. Graves (1831) 131 Eng. Rep. 284; 7 Bing. 735.

49 *See Reynolds*, 24 Eng. Rep. at 347.

50 *Id.* at 350. Noncompetes are problematic because of "the mischief which may arise from them, 1st, to the party, by the loss of his livelihood, and the subsistence of his family; 2dly, to the publick, by depriving it of an useful member." *Id.*

51 The negative effects that noncompetes have on the industry as a whole are also well documented. *See generally infra* Section III.C.

52 CAL. BUS. & PROF. CODE § 16600 (West 1941).

53 *See* Gilson, *supra* note 2.

1. The History of California's Approach to Noncompete Clauses

Before California Business & Professions Code section 16600 effectively banned noncompetes,[54] the law on the topic was entirely judge-made.[55] In particular, California followed the common law "rule of reasonableness," which, unlike a complete ban, allowed some noncompetes as long as the restrictions were reasonable.[56] The rule of reasonableness has its roots dating to *Reynolds*.[57] The doctrine began as a simple assertion that "general" restraints—those that prevent employees from competing with the previous employer over an unlimited geographic area and indefinite time period—were void as a matter of law.[58] However, "partial" restraints—those that prevented the employee from poaching certain employees and clients, or were limited in geographic scope—could be enforceable, so long as there was appropriate consideration supporting the promise not to compete, and the contract was fair, just, and honest.[59] Although cases applying the rule of reasonableness have since been superseded by California Business & Professions code section 16600,[60] they provide context for how California courts approached noncompete clauses before its enactment.

Wright v. Ryder,[61] a California case decided before section 16600's enactment in 1872, provides a concrete example of a court applying the "rule of reasonableness" test. In that case, the California Supreme Court addressed a situation involving the California Steam Navigation Company and its sale of a boat to another steamboat company.[62] The

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54 BUS. & PROF. § 16600.

55 *See* Phillip D. Thomas, *Would California Survive the Move Act?: A Preemption Analysis of Employee Noncompetition Law*, 2017 U. CHI. LEGAL F. 823, 832.

56 *Id.*

57 Mitchel v. Reynolds (1711) 24 Eng. Rep. 347; 1 P. Wms. 181 ("[T]he court is to judge, whether it be a reasonable and useful contract. . . . What makes this the more reasonable is, that the restraint is exactly proportioned to the consideration . . . .").

58 Blake, *supra* note 14, at 630 (citing *Reynolds*, 24 Eng. Rep. at 352.); *see also id.* at 630 n.12 (citing Rogers v. Parrey (1613) 80 Eng. Rep. 1012; 2 Bulst. 136).

59 *Id.* at 630 (asserting that such agreements were enforceable as long as there was consideration and a "just and honest contract").

60 Edwards II v. Arthur Andersen LLP, 189 P.3d 285, 290 (Cal. 2008) (emphasizing that California "rejected the common law 'rule of reasonableness,' when the Legislature enacted the Civil Code" (internal citations omitted)).

61 Wright v. Ryder, 36 Cal. 342 (1868).

62 *Id.* at 343.

parties executed a noncompete agreement which stated that after the sale, the boat could not travel on any body of water in California for ten years.[63] After a series of subsequent transactions spanning over four years,[64] Ryder purchased the boat and took possession of it without knowledge of the restriction.[65] Upon learning of the restriction, Ryder refused to pay and Wright refused to take the boat back.[66] After a lengthy description of the history behind the rule of reasonableness, the court analyzed the issue of whether the restriction was enforceable in this case.[67] The court found that the restriction on the boat was void because it was a "general" restriction on trade across the entire state of California.[68] The court analogized the restriction placed on the boat to the restrictions placed on a tradesman post-employment, [69] which courts must limit to prevent employees from contracting away their entire trade.[70] Similarly, courts will prevent a steamboat owner from contracting away his or her right to use a boat in the waters of the entire state.[71] Implicitly applying the Reynolds rule of reasonableness, the court would not allow a "general" restriction so broad in scope and time that it covered the entire "kingdom,"[72] or in this case, the state.[73] Although the court found the restriction to be unenforceable, the rule of reasonableness in California was far short of a complete ban, [74] since courts would allow some restraints of trade within "reasonable limits."[75] The rule of reasonableness would continue to develop in other states like New York, but ceased in

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63 *Id.*

64 *Id.* at 343–46.

65 *Id.* at 346.

66 *Id.*

67 *Id.* at 358 ("In such cases, the difficulty lies in determining what are reasonable and what unreasonable restrictions, in respect to the area within which the restriction is to be confined."). The court then went on to analyze the facts of this case. *See id.*

68 *Id.* at 362 ("[W]e would be bound by a long line of adjudications in England and America to hold the contract void, as in restraint of trade.").

69 *Id.*

70 *Id.* at 360–61.

71 *Id.* at 361.

72 Mitchel v. Reynolds (1711) 24 Eng. Rep. 347; 1 P. Wms. 181.

73 *Wright*, 36 Cal. at 361–62.

74 Edwards II v. Arthur Andersen LLP, 189 P.3d 285, 290 (Cal. 2008).

75 *Wright*, 36 Cal. at 357.

California when, just six years after *Wright*, the California legislature stepped in and virtually banned all noncompete clauses.[76]

Enacted in 1872, section 1673 of the California Civil Code, which would later become section 16600, stated that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[77] As the California judiciary began to grapple with section 16600's meaning, some courts did not view the statute as completely banning noncompete clauses, and still allowed for some flexibility.[78] However as the judiciary's understanding of the statute developed, noncompete clauses in the employment context were eventually held presumptively invalid.[79]

In 2008, the California Supreme Court decided *Edwards v. Arthur Andersen LLP*,[80] which some academics and one California Attorney General believe recognized a complete noncompete ban.[81] In *Edwards*, an accounting firm, Arthur Andersen LLP, hired Raymond Edwards,

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76 CAL. BUS. & PROF. CODE § 16600 (West 1941).

77 This exact language can now be found in section 16600 of the California Business and Professions Code. *Id.*

78 *See* Great W. Distillery Prod. v. John A. Wathen Distillery Co., 74 P.2d 745, 748 (Cal. 1937) ("Such a limited restriction does not appear to affect the public interests and is obviously designed only to protect the respective parties in dealing with each other. Furthermore, it does not appear that it was the intent of the parties to control by monopoly the market price of the securities or in any manner to interfere with the normal fluctuations resulting from the law of supply and demand."); *see also* Centeno v. Roseville Cmty. Hosp., 167 Cal. Rptr. 183, 188 (Ct. App. 1979) (holding a hospital's noncompete agreement with radiologists valid when performing a balancing test in light of all the circumstances).

79 Steven M. Perry & Sean F. Howell, *A Tale of Two Statutes:* Cipro*,* Edwards*, and the Rule of Reason*, COMPETITION: J. ANTITRUST, UCL & PRIVACY SECTION, Fall 2015, at 21, 32 ("Non-compete provisions in employment agreements were deemed presumptively invalid."); *see also* Muggill v. Reuben H. Donnelley Corp., 398 P.2d 147, 149 (Cal. 1965) (applying section 16600 to "invalidate" an employment agreement which made an employee give up his pension if he worked for a competitor); Metro Traffic Control, Inc. v. Shadow Traffic Network, 27 Cal. Rptr. 2d 573, 577 (Ct. App. 1994) (citing *Muggill*, 398 P.2d at 149) ("Section 16600 has specifically been held to invalidate employment contracts which prohibit an employee from working for a competitor when the employment has terminated, unless necessary to protect the employer's trade secrets.").

80 Edwards v. Arthur Andersen LLP, 189 P.3d 285 (Cal. 2008).

81 Perry & Howell, *supra* note 79, at 35 ("[A]n amicus brief submitted in *Cipro* by a group of professors contended that the *Edwards* court had 'made clear that section 16600 is not subject to a general reasonableness defense.'"); *id.* ("The California Attorney General's amicus brief in *Cipro* similarly asserted that *Edwards* had held broadly that agreements challenged under section 16600 would not be subject to a rule of reason analysis."); *cf. id.* (asserting that the reach of *Edwards* might not be as broad as many suggest).

contingent upon a noncompetition agreement which prevented him from working for or poaching any of Andersen's clients for eighteen months following his termination.[82] Edwards asserted that the agreement unduly interfered with his prospective economic advantage.[83] The court stated that section 16600 is unambiguous, and that the legislature intended to completely ban noncompete clauses.[84] It reasoned that if the legislature wanted to limit the ban only to those noncompete clauses that were unreasonable or overbroad, it could have simply codified the rule of reasonableness.[85]

2. California Law as It Stands Today

Since *Edwards*, it appears that California has continued to recognize a complete ban on all noncompete agreements.[86] The Court of Appeals for the Ninth Circuit recently explored the effect of *Edwards* and clarified that it does not just apply to noncompete agreements, but also to any contractual provision which puts a "restraint of a substantial character" on one's ability to practice a profession, trade, or business.[87] Specifically, that court held that in order to meet this standard, a restriction must "significantly or materially" hinder a person's ability to practice a profession, trade, or business.[88] Essentially, California's legislature and Supreme Court have made clear that agreements that restrain trade, including noncompetes, are unequivocally banned. This had a substantial effect on California's job market, especially in Silicon Valley.

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82 *Edwards*, 189 P.3d at 290.

83 *Id.* at 289.

84 *Id.* at 290 ("Today in California, covenants not to compete are void, subject to several exceptions discussed briefly below.").

85 *Id.* at 293.

86 *Id.* at 290.

87 Golden v. Cal. Emergency Physicians Med. Grp., 896 F.3d 1018, 1020 (9th Cir. 2018) (quoting Golden v. Cal. Emergency Physicians Med. Grp., 782 F.3d 1083, 1092 (9th Cir. 2015)).

88 *Id.* at 1024 ("To meet this standard, a provision need not completely prohibit the business or professional activity at issue, nor does it need to be sufficient to dissuade a reasonable person from engaging in that activity. But its restraining effect must be significant enough that its enforcement would implicate the policies of open competition and employee mobility . . . ." (internal citations omitted)).

3. The Effect on California

AnnaLee Saxenian famously stated that the explosive growth of Silicon Valley was due to a mobile culture, which led to a high-velocity job market and knowledge spillovers.[89] Silicon Valley has become the technology capital of the United States because employees are easily able to bring their knowledge, experience, and innovative ideas to new workplaces without restriction.[90] Professor Ronald Gilson later attributed that culture of mobility to section 16600, arguing that it provided the legal framework for firms to take advantage of knowledge spillovers while also spreading that knowledge across the entire geographic area.[91]

Some scholars have argued that section 16600 has had negative effects, despite the success of Silicon Valley.[92] One author argued that the high-mobility labor market in Silicon Valley has disincentivized employers from training their employees to the same degree that they would if they could restrict their postemployment behavior.[93] If an employer is unable to retain their talent because employees can freely come and go to a nearby competitor, then there is less incentive to spend time and money training them since the business is unlikely to reap the

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89 ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128, at 38 (1994).

90 *Id.* (asserting that Silicon Valley as a whole flourished because employees accumulated knowledge from their previous jobs that would be put to use at their new jobs, which would spread innovation).

91 Gilson, *supra* note 2, at 609 ("Business and Profession Code section 16600's prohibition of covenants not to compete, provided a pole around which Silicon Valley's characteristic business culture and structure precipitated.").

92 *See generally* Jeremy Talcott, *Desirable Restraint: Freeing Employers and Employees from the Blanket Prohibition of California Business and Professions Code Section 16600*, 19 CHAP. L. REV. 333, 342 (2016); *see also* Phillip C. Korovesis et al., *I Wish They All Could Be California: Why Noncompete Critics Are Singing the Wrong Song*, 54 FOR DEF. 41 (2012) (arguing that California's noncompete ban is not the gold standard it is made out to be: "California has the nation's second highest unemployment rate, a significant level of venture-capital flameouts, and a well-publicized budget deficit, what would lead anyone to believe that California has done it right? Nothing, as it turns out. Companies increasingly have decided not to commit resources to business operations in California due to its unfriendly business climate").

93 *See* Talcott, *supra* note 92, at 342 ("Fundamental to Gilson's argument is the idea that high-velocity employment creates an ecosystem in which the per-firm benefit of innovation and growth will exceed the per-firm cost of intellectual property dilution caused by the inability to retain employees.").

benefits of those efforts.[94] Additionally, as will be discussed in Part II, some argue that the ban on noncompetes has caused employers to search for other means of retaining their trade secrets and talent, primarily in the form of no-poach agreements.[95]

C. *Massachusetts's Approach to Noncompetes*

Massachusetts's noncompete law diverged from California's, and it consequently fell behind in the race to become the dominant tech hub of the United States.[96] The state has continued to follow the common law rule of reasonableness, with courts generally enforcing noncompetes.[97]

1. History of Noncompetes in Massachusetts

Massachusetts noncompete law was judge-made up until very recently.[98] The late twentieth-century is a useful starting point because that is when Route 128 floundered as the tech capital of the United States, while Silicon Valley flourished.[99] While Silicon Valley firms were engaged in a significant knowledge spillover economy,[100] Route 128 companies stuck with the traditional industrial structure of vertical integration, self-sufficiency, and a hierarchical leadership framework.[101] During this same

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94 *Id.*

95 Jon Xavier, *Silicon Valley Anti-Poaching Settlement: Big Money & Missed Opportunities*, SILICON VALLEY BUS. J. (May 1, 2014, 9:52 AM), http://www.bizjournals.com/sanjose/news/2014/05/01/silicon-valley-anti-poaching-settlement-ig-money.html?s [http://perma.cc/SAD8-8J3R]. No-poach agreements are employer-employer agreements in which the parties agree not to solicit each other's employees. *Infra* note 200.

96 *See generally* SAXENIAN, *supra* note 89.

97 *See infra* Section I.C; *see also* Sentry Ins. v. Firnstein, 442 N.E.2d 46, 47 (Mass. Ct. App. 1982); Marine Contractors Co. v. Hurley, 310 N.E.2d 915, 920 (Mass. 1974).

98 *See infra* note 120.

99 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, *5 (2000) (citing SAXENIAN, *supra* note 89).

100 Gilson, *supra* note 2, at 608.

101 *Id.* at 592 ("Route 128 gave rise to traditionally vertically integrated companies; in this locality, knowledge transfer took place within, rather than across firms. As a result, learning and innovation were company-specific exercises. Missing was the knowledge spillover and the corresponding second-stage agglomeration economy associated with information dissemination through employee mobility and the absence of vertical integration. To be sure, particular companies

period, firms used noncompetes to keep their employees "chained to their jobs."[102]

During the 1970s, Massachusetts courts asserted that noncompetes were enforceable only to the extent the clause at issue was reasonable based on the circumstances of each individual case.[103] In practice, though, courts tended to protect the employer's legitimate interest in safeguarding its good will.[104] For example, in *Hurley*, the Supreme Court of Massachusetts enforced an employer-employee noncompete agreement that prohibited a marine worker from competing with his previous employer within 100 miles for five years.[105] The court explicitly delineated what it considered a "legitimate business interest[] of the employer," and found that the primary purpose of the rule of reasonableness is to protect employees against agreements made solely to insulate the employer from ordinary competition.[106] However, the court found that the test was not satisfied on these facts, emphasizing the importance of the employer's interest in protecting the good will its employee built up while at the company.[107] Thus, Massachusetts historically favored the employer's legitimate business interest and found many noncompetes enforceable.

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in Route 128 created innovative products, but the performance of the district as a whole deteriorated. The district was unable to reset the product life cycle consistently, with a resulting decline across the region."); *Vertical Integration*, ECONOMIST (Mar. 30, 2009), https://www.economist.com/news/2009/03/30/vertical-integration [https://perma.cc/S6HX-W3TK] ("Vertical integration is the merging together of two businesses that are at different stages of production—for example, a food manufacturer and a chain of supermarkets."); Jeff Haden, *Traditional Leadership Hierarchies Are Dead, or Should Be*, INC. (Mar. 27, 2014), https://www.inc.com/jeff-haden/traditional-leadership-hierarchies-are-dead-or-should-be.html [https://perma.cc/KY93-HYS8] ("During the growth of large corporations many organizations adopted the military philosophy: positional authority based on hierarchy. But that no longer works well, hence the explosion in the number of organizations that aren't formal hierarchies. If you think about it, most opt-in organizations aren't hierarchical—Silicon Valley is, in a way, one big opt-in community."); Xavier, *supra* note 95.

102 Wood, *supra* note 99, at 13.

103 *See* Marine Contractors Co. v. Hurley, 310 N.E.2d 915, 920 (Mass. 1974).

104 *See generally id.*

105 *Id.* at 917–18.

106 *Id.* at 920–21.

107 *Id.*

2. Massachusetts Law as It Stands Today

Today, Massachusetts courts generally honor noncompete clauses but are more cautious about them than they were in the late twentieth century.[108] Today's courts are more skeptical of these agreements primarily because they recognize that these transactions put the employee in a position of limited bargaining power, which forces the employee to agree to something they otherwise might not.[109] Additionally, Massachusetts courts take part in "blue penciling," the practice by which a court modifies an unenforceable agreement to make it enforceable.[110] In Massachusetts, noncompetes are generally enforceable through the rule of reasonableness, which has resulted in some confusion among practitioners on how to draft such agreements.[111]

3. The Effect on Massachusetts

Massachusetts's common law approach to noncompetes has harmed its tech sector, employee welfare, and its law's predictability.[112] Notoriously, Massachusetts lost to Silicon Valley in the race to become the technology hub of the United States.[113] As ideas and employees flowed freely in California, Route 128 in Massachusetts stagnated because of its traditionalist corporate structure and emphasis on hoarding employees.[114] The confusion surrounding the rule of reasonableness also harmed the predictability of noncompete clause enforcement.[115]

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[108] Sentry Ins. v. Firnstein, 442 N.E.2d 46, 47 (Mass. Ct. App. 1982); Christine M. O'Malley, Note, *Covenants Not to Compete in the Massachusetts Hi-Tech Industry: Assessing the Need for a Legislative Solution*, 79 B.U. L. REV. 1215, 1225 (1999).

[109] *Sentry Ins.*, 442 N.E.2d at 47 ("[Such contracts] are scrutinized with particular care because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through the loss of his livelihood." (quoting RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. g)).

[110] O'Malley, *supra* note 108, at 1226.

[111] *Id.* (arguing that when the definition of a "reasonable" restraint varies from case to case, it is hard for lawyers to be sure the agreements they draft will be enforceable).

[112] *See infra* Section I.C.3.

[113] *See supra* notes 2–3.

[114] Wood, *supra* note 99, at *13 (citing Gilson, *supra* note 2).

[115] O'Malley, *supra* note 108, at 1227; *see* also Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 692 (2008)

Consequently, practitioners drafted extremely broad, blanket noncompete clauses for employers.[116] Employers choose to err on the side of overbreadth rather than under-inclusion to protect their business interests, and employees will sign since they usually have less bargaining power in hiring situations.[117] Finally, employees continue to sign these agreements because they need to maintain their livelihood, even though doing so limits their mobility and risks potential liability if they breach the contract.[118]

However, after years of common law noncompete regulation, Massachusetts reformed its noncompete law in late 2018 with "An Act Relative to Economic Development in The Commonwealth."[119] The noncompete portion of the statute codified Massachusetts's noncompete law for the first time.[120] For the most part, the new statute codified existing noncompete law, but also made several important changes.[121] For example, the statute places a time limit on noncompete clauses, twelve months, and has certain geographic restrictions.[122] However, the statute is most notable because it completely bans noncompete clauses for

(arguing that the blue pencil doctrine, a product of the rule of reasonableness, "leaves an employer guessing as to how broadly it can draft a restrictive covenant before the court will refuse to blue pencil it").

116 O'Malley, *supra* note 108, at 1227.

117 *Id.*; Sentry Ins. v. Firnstein, 442 N.E.2d 46, 47 (Mass. Ct. App. 1982); *see also* Pivateau, *supra* note 115, at 692 (asserting that the doctrine can also deprive employers of access to well-trained employees, even those subject to an otherwise enforceable employment agreement).

118 O'Malley, s*upra* note 108, at 1227.

119 Shira Schoenberg, *What Does Massachusetts' Noncompete Reform Mean for You?*, MASS LIVE (Aug. 16, 2018), https://www.masslive.com/expo/news/erry-2018/08/d4240441a67183/what-does-massachusetts-noncom.html [https://perma.cc/L7XY-QVAT]; Act of Aug. 10, 2018, ch. 228, 2018 Mass. Acts.

120 *Massachusetts Noncompete and Trade Secret Reform Has Arrived: What You Need to Know*, FAIR COMPETITION L. (Aug. 1, 2018), https://www.faircompetitionlaw.com/2018/08/01/massachusetts-noncompete-and-trade-secret-reform-has-arrived-what-you-need-to-know [https://perma.cc/DBY9-55AS].

121 *Id.*; *see also* ch. 228, 2018 Mass. Acts ("In no event may the stated restricted period exceed 12 months from the date of cessation of employment, unless the employee has breached his or her fiduciary duty to the employer or the employee has unlawfully taken, physically or electronically, property belonging to the employer, in which case the duration may not exceed 2 years from the date of cessation of employment. . . . The agreement must be reasonable in geographic reach in relation to the interests protected. A geographic reach that is limited to only the geographic areas in which the employee, during any time within the last 2 years of employment, provided services or had a material presence or influence is presumptively reasonable.").

122 *See* ch. 228, 2018 Mass. Acts.

certain types of workers.[123] In particular, the statute bans noncompetes for nonexempt employees under the Fair Labor Standards Act,[124] undergraduate and graduate students who are not working full time, anyone eighteen or younger, and employees who are terminated without cause or laid off.[125] Additionally, while Massachusetts did not ban noncompetes altogether, it instituted a "garden leave" provision, which requires the employer to pay an employee fifty percent of his or her base wages for the entire restricted post-employment period.[126]

Although it is too early to know the effects of the statute, there are a number of unresolved questions regarding how courts will interpret the statute and how it will affect the job market in Massachusetts.[127] One concern is how courts will interpret the exception to the garden leave provision, which grants employers and employees the ability to contract for "mutually agreed upon consideration" in lieu of the statute's default compensation.[128] If taken literally, employers could force employees to take any nominal consideration, such as a twenty five dollar gift card, instead of the statutory default garden leave payments.[129] It remains to be seen how courts will interpret this exception, but employers may not wait to find out before finding alternatives.[130] Instead, employers in Massachusetts may turn to nonsolicitation agreements, otherwise known as no-poach agreements, to satisfy their business needs.[131]

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123 *Id.*

124 Nonexempt employees under the FLSA include employees making below a certain income. *FLSA Coverage*, FLSA, http://www.flsa.com/coverage.html [https://perma.cc/TM7C-DHWP].

125 *Massachusetts Noncompete and Trade Secret Reform Has Arrived: What You Need to Know*, *supra* note 120.

126 *See* sources cited *supra* note 119.

127 Jon Chesto, *A New Era for Noncompetes in Mass. Begins Oct. 1*, BOS. GLOBE: CHESTO MEANS BUS. (Sept. 24, 2018, 6:15 PM), https://www.bostonglobe.com/business/talking-points/2018/09/24/new-era-begins-for-noncompetes-mass/PtoVtctQwOlI0r6lofmKhK/story.html [https://perma.cc/8TJ5-ATB2]; *see also* Jack S. Gearan, *Impact of New Massachusetts Noncompete Law on Emerging Tech Companies*, NAT'L L. REV. (Feb. 5, 2019), https://www.natlawreview.com/article/impact-new-massachusetts-noncompete-law-emerging-tech-companies [https://perma.cc/ZBK4-JRVX].

128 Chesto, *supra* note 127.

129 *Id.*

130 *Id.*; *see also* Gearan, *supra* note 127.

131 Chesto, *supra* note 127.

D. *Texas's Approach to Noncompetes*

Texas's approach to noncompetes is best described as disfavoring noncompetes but not wholly rejecting them as California does.[132] There is an ongoing disparity between the judicial and legislative branches' approach to noncompetes in Texas, which has created a confusing body of law and profoundly hampered the state's job market.[133]

1. The History of Noncompetes in Texas

Until 1989, Texas noncompete law was governed exclusively by the common law rule of reasonableness, much like Massachusetts.[134] That rule stated, as other states' common law rules have, that a noncompete agreement will be enforceable if it is a reasonable restriction on the employee's trade.[135] At the time, a Texas court would find a noncompete reasonable if (1) the promisee had a legitimate interest in protecting business goodwill or trade secrets; (2) the limitations as to time, territory and activity in the covenant were reasonable; (3) the covenant was not injurious to the public; and (4) the promisee gave consideration for the covenant.[136] During this period, Texas courts weighed each element, and would generally enforce noncompetes so long as the time span, geographic area, and scope of the agreement were fair.[137]

For example, in *Garcia v. Laredo Collections, Inc.*,[138] a Texas appeals court held that a noncompete agreement preventing a collections agency employee from competing against his employer within the county for two years was a reasonable restriction.[139] However, *in Hill v. Mobile Auto Trim, Inc.*,[140] the Texas Supreme Court began to strongly disfavor such

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132 Wood, *supra* note 114, at 30.

133 *See id.*

134 *Id.*

135 Travel Masters, Inc. v. Star Tours, Inc., 742 S.W.2d 837, 840 (Tex. App. 1987); *see* Marine Contractors Co. v. Hurley, 310 N.E.2d 915, 915 (Mass. 1974); *see infra* note 154.

136 *Travel Masters, Inc.*, 742 S.W.2d at 840 (citing Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168 (Tex. 1987)).

137 Garcia v. Laredo Collections, Inc., 601 S.W.2d 97 (Tex. Civ. App. 1980).

138 *Id.*

139 *Id.* at 99.

140 *Hill*, 725 S.W.2d at 169.

agreements by adding a new factor to the reasonableness test, making it far more difficult to enforce noncompetes.[141] The court held that noncompetes executed with the primary purpose of limiting competition or restraining the right to engage in a "common calling" were unenforceable.[142]

In response to *Hill*, Texas enacted a statute specifically overturning the "common calling" test in favor of the old reasonableness standard.[143] After the passing of Texas Business & Commerce Code section 15.50, it became clear that Texas's judiciary sought to enforce fewer noncompetes, and the legislature wanted to enforce more.[144] In a series of cases following the enactment, the Texas Supreme Court developed new rules for invalidating noncompete clauses, refusing to enforce any noncompete clause in an at-will employment agreement.[145] Essentially, the Texas legislature sought to uphold the rule of reasonableness, while the judiciary wanted to take a step beyond the common law rule by enforcing noncompetes in fewer circumstances.

2. Texas Law as It Stands Today

In *Marsh USA Inc. v. Cook*, the most recent state high-court statement on noncompetes, the Texas Supreme Court attempted to mend

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141 *Id.*

142 *Id.* at 172.

143 TEX. BUS. & COM. CODE ANN. §§ 15.50–.51 (West 2009); Christi L. Johnson, Travel Masters v. Star Tours*: A Recent Texas Supreme Court Decision Highlights the Tension Between the Court and the Texas Legislature Regarding Covenants Not to Compete*, 44 BAYLOR L. REV. 937, 947 (1992) ("The Legislature effectively deleted the court's common calling requirement from its analysis of covenants not to compete.").

144 Wood, *supra* note 114, at 30; *see* Michael Sean Quinn & Andrea Levin*, Post Employment Agreements Not to Compete: A Texas Odyssey*, 33 TEX. J. BUS. L. 7, 38 (1996) ("[T]he Supreme Court of Texas reacted to that statute. Unquestionably, the supreme court implicitly recognized the authority of the legislature, at least at first, and then it departed from legislative intent.").

145 *See* Martin v. Credit Prot. Ass'n, Inc., 793 S.W.2d 667, 670 (Tex. 1990); Travel Masters, Inc. v. Star Tours, Inc., 827 S.W.2d 830, 833 (Tex. 1991); *see also At-Will Employment—Overview*, NAT'L CONF. ST. LEGISLATORS (Apr. 15, 2008), http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx [https://perma.cc/89WR-QBQZ]. An at will employment agreement means that "an employer can terminate an employee at any time for any reason, except an illegal one, or for no reason without incurring legal liability. Likewise, an employee is free to leave a job at any time for any or no reason with no adverse legal consequences." *Id.*

the divide between the legislature and the judiciary.[146] Applying section 15.50—or the pre-Hill rule of reasonableness—the court found that an insurance company's issuance of stock options in exchange for a noncompete was reasonable, and that there was sufficient consideration to support the promise not to compete.[147] Despite attempting to bring the Judiciary in line with section 15.50, the Supreme Court has not spoken on the issue since, and consequently Texas's noncompete law is still confusing and unpredictable because of the disparate directives from these two governmental branches.[148]

3. The Effect on Texas

The history of divergence, disagreement, and discord between the Texas judiciary and legislature has created significant confusion and unpredictability in noncompete enforcement.[149] Indeed, there has been continued, widespread use of noncompete clauses by Texas employers, as evidenced by the significant amount of litigation arising over them.[150] However, until the Texas Supreme Court sets new precedent, the confusion will likely continue in the state.

E. *New York's Approach to Noncompetes*

New York is another "rule of reasonableness" state, but one that strongly disfavors noncompetes and is more cautious towards enforcing them.[151] The rule of reasonableness in New York has remained largely unchanged since the 1920s—courts evaluate the reasonableness of the restriction by measuring its geographic and temporal scope in the context

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146 Marsh USA Inc. v. Cook, 354 S.W.3d 764, 779 (Tex. 2011). *Marsh* seems to indicate that Texas's judiciary is starting to accept the legislature's view on noncompetes. Charles M.R. Vethan, *The Development of the Texas Non-Compete: A Tortured History*, 45 TEX. J. BUS. L. 169, 186 (2013) ("[T]he court unequivocally expressed its intent to bring the statute in conformity with the common law prior to Hill . . . .").

147 *Marsh USA Inc.*, 354 S.W.3d at 779; TEX. BUS. & COM. CODE ANN. §§ 15.50–.51 (West 2009).

148 Vethan, *supra* note 146, at 171.

149 *Id.* at 170–71.

150 Wood, *supra* note 114, at 31.

151 *See infra* note 155.

of the employer's and employee's interests.[152] Resultantly, New York courts rarely enforce noncompetes and the state is ripe for legislative intervention.[153]

1. History of Noncompetes in New York

In 1887, the New York Court of Appeals affirmed the rule of reasonableness standard in accordance with *Reynolds*.[154] As exemplified by the two seminal cases below, New York courts generally do not classify the employer's business interest as "legitimate" unless it includes some trade secrets or good will.[155]

In *Ticor Title Insurance Co. v. Cohen*,[156] the Court of Appeals for the Second Circuit enforced a noncompete provision that prevented a senior vice president of a title insurance company, who held some of the firm's largest clients, from practicing title insurance business for 180 days after termination.[157] That court found that the company would suffer irreparable harm if the employee breached the noncompete,[158] and that the agreement was reasonable in time and scope.[159] The court affirmed the lower courts' holding that the employee's relationship with his client base was "special," which warranted enforcement of the noncompete.[160] Additionally, in *BDO Seidman v. Hirshberg*,[161] an expert accountant agreed to a noncompete which would penalize him if he poached any

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152 *See infra* Section I.E.1.

153 *See infra* Section I.E.3.

154 Diamond Match Co. v. Roeber, 13 N.E. 419, 421 (N.Y. 1887) ("[A]n obligation of this character, limited as to time and space, if reasonable under the circumstances and supported by a good consideration . . . ."); *see also* Lumex, Inc. v. Highsmith, 919 F. Supp. 624, 628 (E.D.N.Y. 1996) ("It is clear that irreparable harm is presumed where a trade secret has been misappropriated.").

155 Clark Paper & Mfg. Co. v. Stenacher, 140 N.E. 708, 711–12 (N.Y. 1923); Ticor Title Ins. Co. v. Cohen, 173 F.3d 63, 70, 73 (2d Cir. 1999); BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1223–26 (N.Y. 1999).

156 *Ticor Title Ins. Co.*, 173 F.3d at 63.

157 *Id.* at 66–68.

158 *Id.* at 68–69.

159 *Id.* at 70.

160 *Id.* at 71–72 ("The trial court found Cohen's relationships with clients were 'special' and qualified as unique services. . . . The district court's conclusion appears correct and its issuance of an injunction based on its finding of unique services clearly does not rise to the level of an abuse of discretion.").

161 BDO Seidman v. Hirshberg, 712 N.E.2d 1220 (N.Y. 1999).

client from his previous firm for eighteen months.[162] The court found this agreement enforceable because it was reasonable in time and scope, and noted the employer had an interest in protecting good will developed at its expense; however, the court voided a clause which prevented him from poaching clients he did not previously have contact with.[163] Overall, New York courts cut out unnecessary portions of noncompetes, and will only enforce provisions that are required to protect trade secrets or good will from truly special employees.[164]

2. New York Law as It Stands Today

The New York jurisprudence has remained largely unchanged lately, with courts applying the *BDO* approach to noncompetes.[165] Courts continue to reaffirm the notion that a noncompete will only be enforced (1) to the extent required to halt the disclosure of trade secrets, good will, or other confidential information, or (2) if an employee's services are "unique or extraordinary."[166]

3. The Effect on New York

As a result of the selective, precise noncompete enforcement in New York, employers seeking to impose noncompetes have been forced to state a legitimate business interest, usually including some kind of good will or trade secret.[167] However, some scholars are concerned that as more

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[162] David L. Gregory, *Courts in New York Will Enforce Non-Compete Clauses in Contracts Only if They Are Carefully Contoured*, 72 N.Y. ST. B.J. 27, 32 (2000) ("[I]f, within 18 months following his termination, he served any former client of BDO's Buffalo office, he would compensate BDO 'for the loss and damages suffered' in an amount equal to one and one-half times the fees BDO had charged that client over the last fiscal year of the client's patronage." (citing *BDO Seidman*, 712 N.E.2d at 1222)).

[163] *BDO Seidman*, 712 N.E.2d at 1225–26.

[164] *See supra* Section I.E.

[165] *See* Long Island Minimally Invasive Surgery, P.C. v. St. John's Episcopal Hosp., 164 A.D.3d 575, 577 (N.Y. App. Div. 2018).

[166] Kanan, Corbin, Schupak & Aronow, Inc. v. FD Int'l, Ltd., 797 N.Y.S.2d 883, 887 (Sup. Ct. 2005).

[167] *New York Developments Continue Trend Against Non-Competition and Non-Solicitation Agreements*, DUANE MORRIS (Aug. 30, 2017), https://www.duanemorris.com/alerts/new_york_trend_against_noncompetition_and_nonsolicitation_agreements_0817.html [https://perma.cc/

jobs center around intellectual capital accumulation, a "reasonableness" approach as strict as New York's will be overly burdensome on employers.[168] Some local jurisdictions in New York, like New York City, have proposed legislation which would act as a partial ban on noncompetes.[169] Specifically, the proposal would ban noncompetes for "low wage employees," people who make less than $900 a week and do not work in any "executive, administrative or professional capacity." [170] The proposed ordinance would also subject employers to certain notice requirements when entering into a noncompete with an employee.[171] Despite these local attempts, targeted and clear legislative action in New York could mitigate some of the policy issues arising from issues with the rule of reasonableness.[172]

F. *Comparing and Contrasting the States' Approaches*

Among the states selected for this Note's analysis, one significant difference between them is whether the legislature has enacted a statute, or still abides by the common law rule of reasonableness.[173] Of the selected states, California, Massachusetts, and Texas have codified their noncompete law, but those legislatures took significantly different

9H2L-4R5T]; *see also* Gregory, *supra* note 162, at 35 (defining trade secret as "any formula, patter [sic], device or compilation of information which is used in one's business, and which gives [the owner] an opportunity to obtain an advantage over competitors who do not know or use it").

168 Dan Messeloff, *Giving the Green Light to Silicon Alley Employees: No-Compete Agreements Between Internet Companies and Employees Under New York Law*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 711, 728–29 (2001) ("'Intellectual capital is becoming the battleground between budding entrepreneurs and organisations. The pendulum has swung towards the creators, many of whom want to own the intellectual rights to their work, but that's being fiercely resisted by organisations of intergalactic value, which want control over the ideas.' As a result, no-compete agreements are becoming an area of increasing concern for Internet companies engaged in this struggle, since, particularly with the recent market decline, 'you're going to see a lot of employers start to try enforcing those noncompetes.'").

169 *New York Developments Continue Trend Against Non-Competition and Non-Solicitation Agreements*, *supra* note 167 (encouraging a ban on noncompetes for low wage workers).

170 *Id.*

171 *Id.*

172 *See infra* Section II.C.

173 *See generally supra* Part I.

approaches toward their statutes.[174] Since the *Edwards* case, it appears that the California statute has unambiguously banned all covenants not to compete, subject to a few statutory exceptions.[175] In his argument favoring a universal ban on noncompetes, Professor Gilson asserted that section 16600 solved an economic problem that noncompetes created.[176] According to Gilson, noncompetes inhibit the natural process of "knowledge spillovers," in which employees with specialized skills cluster into geographic areas, like Silicon Valley, and are able to share their knowledge.[177] Absent any covenants not to compete, a given employee will have the ability to freely move between jobs, bringing their accumulated knowledge with them.[178] The resulting effect is increased innovation in that industry.[179]

Massachusetts, on the other hand, only codified its noncompete law recently, decades after section 16600's enactment.[180] The state took a more tempered approach to the California method by effectively codifying the rule of reasonableness while adding a few important restrictions such as the garden leave provision.[181] It also appears that Massachusetts attempted to take a more surgical approach to their noncompete statute when compared to the blanket unenforceability that

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174 CAL. BUS. & PROF. CODE § 16600 (West 1941); TEX. BUS. & COM. CODE. ANN. §§ 15.50–.51 (West 2008); FAIR COMPETITION LAW, *supra* note 120.

175 BUS. & PROF. § 16601 (codifying that the first exception is for the sale of goodwill of a business and any covenant which involves the sale or dissolution of an LLC, partnership, or other business entity); Edwards II v. Arthur Andersen LLP, 189 P.3d 285, 290 (Cal. 2008); Gordon v. Landau, 321 P.2d 456, 459 (Cal. 1958) (explaining that the second exception is for agreements preventing the use of trade secrets that do "not restrain [a party] from engaging in a lawful profession, trade or business").

176 Gilson, *supra* note 2, at 608–09.

177 *Id.*

178 *Id.*; M. Hosein Fallah & Sherwat Ibrahim, Knowledge Spillover and Innovation in Technological Clusters 1–4 (2004) (unpublished manuscript) (prepared for thirteenth conference of the International Association for Management of Technology), http://personal.stevens.edu/~hfallah/KNOWLEDGE_SPILLOVER_AND_INNOVATION_IN_TECHNOLOGICAL_CLUSTERS.pdf [https://perma.cc/UT8S-Z2DD].

179 *See* Fallah & Ibrahim, *supra* note 178; *see also* Bishara, *Covenants Not to Compete*, *supra* note 6, at 307 ("[T]he touchstone benefit of mobility is the knowledge spillover that occurs when employees move between firms, taking tacit knowledge with them to the new employer and allowing for more rapid innovation, particularly in the high-tech sector.").

180 *See supra* note 119.

181 FAIR COMPETITION LAW, *supra* note 120; *supra* note 124; *see* sources cited *supra* note 127.

California employs.[182] The statute imposes what the legislature believes are reasonable noncompete restrictions, such as a time restriction of one year, and unenforceability where the employee was terminated without cause or where they belong to certain demographic groups.[183] This contrasts with the rule of reasonableness states, where the judiciary decides what a "reasonable" restriction is, rather than the legislature.[184]

Texas made a troublesome and confusing attempt at integrating its noncompete legislation.[185] Texas's legislature took steps to ensure that reasonable noncompete agreements were enforced, in direct contrast with the California blanket ban.[186] The Texas statute did not impose any supplemental restrictions like the Massachusetts statute, but rather kept the rule of reasonableness intact despite the Texas Supreme Court's attempts to impose greater restrictions.[187] For a number of years, the Texas Supreme Court took a stricter, California-style approach by striking down every covenant not to compete up for review, but this trend might change after the Marsh court's seeming acquiescence to the legislature's position.[188]

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182 *See supra* Section I.C.3.

183 Michael Rosen, *A New Era of MA Noncompete Law Beings on Oct 1*, FOLEY HOAG LLP (Sept. 29, 2018) http://www.massachusettsnoncompetelaw.com/2018/09/a-new-era-of-ma-noncompete-law-begins-on-oct-1/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original [https://perma.cc/M6QS-RHR3]; *see also supra* note 124 (noting that the excluded demographic groups are nonexempt employees under the FLSA, undergrads and grad students who are not working full time, and employees who are terminated without cause or laid off).

184 *See supra* Section I.D.1.

185 Crystal L. Landes, *The Story of Covenants Not to Compete in Texas Continues . . .*, 33 HOUS. L. REV. 913, 913 (1996) ("The Texas Supreme Court and the Texas Legislature have been waging a battle over whether covenants not to compete should be enforced in Texas.").

186 Act of Aug. 28, 1989, ch. 1193, 1989 Tex. Gen. Laws 4852, *amended by* Act of Sept. 1, 1993, ch. 965, 1993 Tex. Gen. Laws 4201 (codified at TEX. BUS. & COM. CODE ANN. §§ 15.50–.52 (West 2009)).

187 *Id.*; *see* Landes, *supra* note 185, at 924–25 ("The Hill court altered prior common law by adopting a new rule: '(c)ovenants not to compete which are primarily designed to limit competition or restrain the right to engage in a common calling are not enforceable.' In response to this holding, the Texas Legislature passed the 1989 statute which omitted the newly court-imposed 'common calling' . . . .").

188 *See, e.g.*, Light v. Centel Cellular Co., 883 S.W.2d 642, 648 (Tex. 1994); Travel Masters, Inc. v. Star Tours, Inc., 827 S.W.2d 830, 833 (Tex. 1991); DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 689 (Tex. 1990); Martin v. Credit Protection Ass'n, 793 S.W.2d 667, 670 (Tex. 1990); Juliette Fowler Homes, Inc. v. Welch Assocs., Inc. 793 S.W.2d 660, 667 (Tex. 1990); Bergman v. Norris of Hous., 734 S.W.2d 673, 674 (Tex. 1987); Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168, 172 (Tex. 1987); *see also* Marsh USA Inc. v. Cook, 354 S.W.3d 764, 779 (Tex. 2011).

New York is the only state this Note addresses which has not codified its noncompete law whatsoever.[189] New York has continued to use the rule of reasonableness; however, its courts generally interpret the word "reasonable" strictly, such that noncompetes are seldom enforced.[190]

II. ANALYSIS

This Part will delineate the most significant legal issues and policy concerns that arise during the development of a given state's noncompete law. By doing so, future legislators can mitigate the negative effects of those issues when codifying their noncompete law. These core issues are (1) the balance of the freedom to contract against the policy concerns around harming employees' wellbeing and employers' business interests;[191] (2) how antitrust violations, specifically "no-poach" agreements in which employers promise to abstain from poaching each other's employees, can be an unfortunate byproduct of strict noncompete laws;[192] and (3) that the rule of reasonableness is outdated and unclear, which harms practitioners' ability to effectively advise clients.[193]

A. *The Common Policy Issues Arising Across the Selected States*

Having discussed the different legal approaches amongst the states, the next step is to analyze the most important policy issues arising from those approaches. These implications include problems that arise when trying to balance the freedom to contract against employers' business interests and the wellbeing of employees, antitrust concerns linked to restriction of noncompetes, and the growing recognition that the common law approach may now be obsolete.[194]

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189 Gregory, *supra* note 162, at 27 ("The employer's ability to place post-employment restrictions on employees generally is a matter of state law. Some states have statutorily codified these matters; New York has not.").

190 *See supra* Part I.

191 *See infra* Section II.A.

192 *See infra* Section II.B.

193 *See infra* Section II.C.

194 *See generally infra* Section II.B.

1. Freedom of Contract, Employer-Employee Interests, and Innovation Policy

In the early common law days, the philosophical ideals of freedom of contract and caveat emptor were highly regarded, so English and American courts were hesitant to interfere with this principal on public policy grounds.[195] As time went on, though, courts recognized the potential danger noncompetes posed to employees,[196] and the need to balance the freedom of contract against employees' limited economic mobility.[197] As established in Part I, noncompetes can significantly limit an employee's livelihood if left unregulated.[198] For example, the Court of Appeals for the Ninth Circuit recently held that employees' interests could be hindered by anything that causes a "substantial professional restraint," which could even include agreements that allow employees to continue on in their profession but limit who they can work for.[199] Additionally, a court's interpretation of the "employer's legitimate business interest" plays a significant role in its willingness to interfere with the freedom to contract.[200] When a court's interpretation of the

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195 Printing & Numerical Registering Co. v. Sampson (1875) 32 LT 354 (Eng.) ("It must not be forgotten that you are not to extend arbitrarily the rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you must not lightly to interfere with this freedom of contract.").

196 *See supra* Part I.

197 Blake, *supra* note 14, at 638; *see also* Wright v. Ryder, 36 Cal. 342 (1868) (explaining that courts will not allow an employee to contract away their entire livelihood).

198 *See supra* Part I.

199 Keith Paul Bishop, *Ninth Circuit Finds California's Ban On Non-Compete Agreement Can Extend To Substantial Professional Restraints*, NAT'L L. REV. (July 31, 2018), https://www.natlawreview.com/article/ninth-circuit-finds-california-s-ban-non-compete-agreement-can-extend-to-substantial [https://perma.cc/Z76F-7VTM] (finding that two provisions of a physician's settlement agreement with his group which provided (1) "[t]he doctor may not work at any facility contracted by the medical group" and (2) "[t]he medical group has the right to terminate the doctor if the medical group contracts to provide services to, or acquires rights in, a facility in which the doctor is currently working as an emergency room physician or hospitalist" were unenforceable under section 16600 (citing Golden v. Cal. Emergency Physicians Med. Grp., 896 F.3d 1018 (9th Cir. 2018))).

200 Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751, 774

employer's protectable interest is broader, it is more likely to favor the employer's interest over that of the departing employee.[201] Practically speaking, the shift away from a freedom-to-contract-focused philosophy means that employees' ability to make a living has taken on greater significance in common law states such as New York.[202] While the added protection for employees is commendable, New York courts go a step too far, making it extremely difficult for employers to show that they have a legitimate business interest.[203]

Finally, one of the crucial policy concerns arising in this area of law is the impact noncompetes have on innovation within an industry.[204] As stated in Section I.F, knowledge spillovers are a popular policy argument against allowing noncompetes.[205] California facilitated knowledge spillovers, especially in Silicon Valley, by removing a substantial barrier to labor mobility with section 16600's enactment.[206] However, section 16600's total ban on noncompetes seems like an imprecise method of maximizing the desired result: labor mobility and knowledge spillovers.[207] Section 16600 paints with too broad of a regulatory brush even though it achieves the desired result, knowledge spillovers. California banned noncompetes across the entire state to facilitate knowledge spillovers in just the high-tech industry. This means that, for example, a partner at a California law firm cannot use noncompetes to protect an ex-employee from poaching his clients, even though this

(2011) [hereinafter Bishara, *Fifty Ways*] (In conducting an empirical analysis comparing the enforceability of different states noncompete law, the author noted that the question of a courts interpretation of the employer's interest "helps establish what a state's policymakers see as the permissible boundaries of employer protections and where the line is crossed into employer overreaching at the expense of the employee").

201 If a court has a broader view of employers' protectable interest, then more kinds of an employee's knowledge and/or skills warrant protection. Such a court would therefore discount an employee's interests in favor of the employer's business interest in the employee's knowledge and skills. *Id.* at 775 n.91.

202 Kanan, Corbin, Schupak & Aronow, Inc. v. FD Int'l, Ltd., 797 N.Y.S.2d 883, 887 (Sup. Ct. 2005).

203 *Id.*

204 *See supra* Section I.F.

205 *See supra* Section I.F (noting that scholars have indicated a ban on noncompetes can facilitate employee mobility, knowledge spillovers, and greater innovation).

206 *See* Gilson, *supra* note 2, at 607–09.

207 *See infra* Part III (arguing that an optimal legislative philosophy would focus on targeting the industries in which knowledge spillovers and innovation is most likely to benefit from lower noncompete enforceability).

would severely harm his business. Unlike in the high-tech industry, this outcome cannot be justified by the potential for knowledge spillovers because only the employee's new firm will benefit, rather than the entire industry.[208] Despite this disparity, California's approach treats both of these situations the same.[209]

Some scholars argue that a complete ban may actually harm industrial innovation.[210] In particular, a system of low noncompete enforceability can lead to backlash from employers in the form of harmful no-poach agreements.[211] In light of the potential problems with blanket unenforceability, Massachusetts's statute banned noncompetes only for groups of employees, particularly low-wage workers, who usually do not have high human capital that the employer would need to protect.[212] For example, low-wage fast-food employees, unlike high-wage computer engineers, do not possess the technical skill that an employer could have a legitimate interest in protecting. While the Massachusetts selective ban is a step in the right direction, it does not go quite far enough. Such a system is still imprecise because it must arbitrarily cut-off what qualifies as "low-income," and so it would necessarily be over or under inclusive. For example, if noncompetes are banned for employees making less than thirteen dollars an hour, an employer could simply raise wages to fourteen dollars an hour and force his employees into a noncompete.

B. *Antitrust Concerns & No-Poach Agreements*

In addition to the various other policy issues concerning post-employment restrictions, no-poach agreements present serious antitrust concerns.[213] As evidenced by the use of noncompetes, highly skilled employees are often among a company's most important assets, and so

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208 For further explanation and application of this phenomenon, see *infra* Section III.B.

209 *See* Gilson, *supra* note 2.

210 Bishara, *Covenants Not to Compete*, *supra* note 6, at 310 ("It is also possible, however, that knowledge sharing could be harmed by high-velocity labor markets characterized by rapid turnover. A truly mobile knowledge-based workforce can harm the interests of the firms investing in creating knowledge.").

211 *Id.*; *see supra* Section II.C.

212 *Supra* note 119.

213 *See generally* Rochella T. Davis, *Talent Can't Be Allocated: A Labor Economics Justification for No-Poaching Agreement Criminality in Antitrust Regulation*, 12 BROOK. J. CORP. FIN. & COM. L. 279, 281 (2018).

employers have an interest in protecting that asset.[214] As stated throughout this Note, a core method used to protect this asset is through enforceable noncompete agreements.[215] However, another method that has gained significant attention recently[216] is "no-poach" agreements, which bypass employees entirely.[217] Rather than an agreement between an employer and employee, no-poaches are arrangements between employers in which both sides promise to refrain from hiring each other's employees.[218] As noncompetes become increasingly unenforceable, employers will look for alternatives to protect their investment in employee development, and no-poaches become an attractive option.[219] This development is problematic from an antitrust perspective because no-poaches can be extremely harmful to competition.[220] Employers often compete for employees through offering higher wages.[221] No-poach agreements make it less likely that a given employer will compete on salary since they have already agreed with rival employers to abstain from poaching each other's employees.[222] This lack of competition for labor may tend to suppress wages.[223] No-poaches can hurt employees in a similar way noncompetes do: limiting their job mobility, making it difficult to earn higher wages, and restricting their freedom of choice.[224]

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214 *Id.*

215 *Id.*; *see supra* INTRODUCTION.

216 *See* Jackie Wattles, *7 Fast Food Chains Agree to End 'No Poach' Rules*, CNN MONEY (July 12, 2018, 5:00 PM), https://money.cnn.com/2018/07/12/news/companies/no-poach-fast-food-industry-wages-attorneys-general/index.html [https://perma.cc/FFN9-PKTD]; *see also* James Doubek, *8 Restaurant Chains Agree To End 'No-Poach' Agreements Under Threat Of Lawsuit*, NPR (Aug. 22, 2018, 3:45 AM), https://www.npr.org/2018/08/22/640776195/8-fast-food-companies-agree-to-end-no-poach-agreements-under-threat-of-lawsuit [https://perma.cc/8TJ4-NC9M].

217 Davis, *supra* note 213, at 281.

218 *Id.*

219 *See* Bishara, *Covenants Not to Compete*, *supra* note 6, at 310.

220 Davis, *supra* note 213; Rachel Abrams, *'No Poach' Deals for Fast-Food Workers Face Scrutiny by States*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/business/no-poach-fast-food-wages.html [https://perma.cc/B2E2-LA9P] ("[T]he restrictions appeared to exist chiefly to limit competition and turnover, potentially affecting pay in the process.").

221 Davis, *supra* note 213, at 305–06.

222 *Id.* ("This effect results in employees in similar positions at different companies all receiving the same or similar artificially lowered wages. This is a wage-fixing effect created by employers altering the wage-taking behavior of a competitive labor market.").

223 *Id.*

224 *Id.* at 306; *see also* Union Circulation Co. v. FTC, 241 F.2d 652, 655 (2d Cir. 1957) (citing the fact that the no-poach agreement limited the employees' ability to move between employers in the

Employers have started to use no-poach agreements in both low and high-skilled labor markets.[225] Indeed, knowing that these agreements probably violate federal antitrust law, employers tend to be somewhat secretive while entering these agreements.[226] For example in California, where noncompetes are unenforceable, a group of employers—Apple, Adobe, Google, Intel, and Pixar—entered into a series of bilateral no-poach agreements, where one company put the names of the other company's employees on a "do not cold call" list.[227] In a private class action for damages, a district court in California applied the Sherman Act,[228] which prevents "[e]very contract, combination . . . , or conspiracy, in restraint of trade," and found that the agreements entered into by these Silicon Valley companies were a per se violation of the statute.[229]

Additionally, no-poach agreements recently have been utilized even in low-skill labor markets such as fast-food chains, where the employer

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sales industry). Sheila Rafferty Wiggins, *No-Poach Agreements Are Targeted by Government, Employees and Legislators*, LAW.COM (Aug. 16, 2018, 10:00 AM), https://www.law.com/njlawjournal/2018/08/16/no-poach-agreements-are-targeted-by-government-employees-and-legislators [https://perma.cc/Q2WT-4LWG] ("Another concern is that no-poach agreements that apply to low-wage workers result in a limitation of the worker's earning potential because of the limited pool of jobs available to them.").

225 *See In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103 (N.D. Cal. 2012); *see also supra* note 14.

226 Davis, *supra* note 213, at 281; *see also In re* Animation Workers Antitrust Litig., 123 F. Supp. 3d 1175, 1209–10 (N.D. Cal. 2015).

227 *In re High Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d at 1110.

228 15 U.S.C. § 1 (2018). To state a claim under the Sherman Act a plaintiff must allege that "(1) there was an agreement, conspiracy, or combination between two or more entities; (2) the agreement was an unreasonable restraint of trade under either a per se or rule of reason analysis; and (3) the restraint affected interstate commerce." Am. Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781, 784 (9th Cir. 1996); *see also* Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001).

229 *In re High Tech Emp. Antitrust Litig.*, 856 F. Supp 2d at 1122. ("Plaintiffs allege that Defendants are high-tech companies in the market for skilled labor, where cold calling plays an important role in determining salaries and labor mobility. Plaintiffs further allege that the labor market for skilled high-tech labor is national. Finally, Plaintiffs allege that 'Defendants succeeded in lowering the compensation and mobility of their employees below what would have prevailed in a lawful and properly functioning labor market.' Thus, the Court accepts as true, as the Court must on a motion to dismiss, Plaintiffs' allegation that Defendants succeeded in distorting the market through their agreements. Accordingly, it is reasonable to infer that Defendants had the market power to do so."). Notably, there was also a separate Department of Justice suit against the defendants, which was resolved in a settlement. *See* Adobe Sys., Inc., 75 Fed. Reg. 60,820 (Oct. 1 2010) (proposed final judgment), https://www.federalregister.gov/documents/2010/10/01/2010-24624/united-states-v-adobe-systems-inc-et-al-proposed-final-judgment-and-competitive-impact-statement [https://perma.cc/D2LF-BURK].

has no legitimate business interest in protecting their employees' accumulated skills or knowledge.[230] In particular, these no-poach agreements barred workers at franchise restaurants from being hired by another franchise in the same chain, which suppressed wages.[231] In agreements as egregious as these, some state Attorneys General have considered shifting from civil to criminal antitrust litigation.[232]

Therefore, no-poach agreements must be a serious consideration when deciding the optimal approach to noncompete legislation. An ideal statute would enforce noncompetes to the point at which employers are sufficiently satisfied with their protection to forgo other means, such as no-poach agreements.

C. *The Rule of Reasonableness Shows Its Age*

As noted in Section I.E, New York is the only State in this Note's selection which has never passed any legislative solution for noncompetes, and so it still adheres to the common law rule of reasonableness.[233] As previously stated, the common law approach strives to balance the interests of the employer and employee.[234] While New York courts have doubtlessly become adept at assessing noncompetes' reasonableness, the common law approach has been criticized for its inability to adequately protect both sides and for its lack of administrability.[235] In a globalizing job market, a rule of reasonableness which assesses noncompetes' enforceability based on their geographic and temporal scope, may be outdated.[236]

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230 *See* Doubek, *supra* note 216.

231 *See* Wattles, *supra* note 216.

232 *See* Doubek, *supra* note 216. Some scholars also advocate for no poaches to be criminally prosecuted as a per se violation of the Sherman Act. *See generally* Davis, *supra* note 213.

233 *See supra* Section I.E.

234 *See supra* INTRODUCTION.

235 Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L.J. 49, 65–71 (2001) (arguing that because of the highly fact-specific nature of judicial noncompete enforcement, the common law rules may be inherently over and under inclusive in protecting against "opportunistic appropriation"); Rachel Arnow-Richman, *Noncompetes, Human Capital, and Contract Formation: What Employment Law Can Learn from Family Law*, 10 TEX. WESLEYAN L. REV. 155, 160 (2003) ("Certainly the administerability [sic] of such an approach is questionable.").

236 Arnow-Richman, *supra* note 235, at 160.

Employee mobility has risen within the national and international labor market[237] as manufacturing growth has decreased, and the number of information-dependent knowledge economies has increased.[238] On one hand, increases in mobility have created an expectation amongst employees and employers that the employment relationship is not permanent, and that they may freely use the knowledge gained during their employment at their next job.[239] This implicates the "reasonable in scope" prong of the rule of reasonableness, because as the job market becomes more fluid, it would seem unfair for an employer to limit an employee's ability to use their accumulated knowledge in the globalized job market.[240] On the other hand, an employer's interest in protecting their employees' accumulated knowledge has, for the most part, gone unrecognized as part of "protectable business interest" under the rule of reasonableness.[241]

Additionally, the fact-based analysis of the rule of reasonableness makes it difficult to predict when a noncompete is enforceable, and consequently practitioners have trouble accurately advising clients on how to draft their noncompetes.[242] In the employment context, although experienced practitioners have developed an "intuitive sense" for when courts are unlikely to enforce an noncompete—one which unduly limits an employee's livelihood over a "less than clearly legitimate business

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237 *Id.* at 157–58 ("In the last quarter century, there has been a decline in the classic 'social contract' of employment, under which work was viewed as a semi-permanent relationship of mutual dependence. In contrast to the long-term jobs of the past, many contemporary employees have 'boundaryless careers,' over the course of which they work for multiple employers or experience frequent lateral moves within a single organization." (quoting Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. Rev. 519, 553–56 (2001))).

238 *Id.* at 158; Walter W. Powell & Kaisa Snellman, *The Knowledge Economy*, 30 ANN. REV. SOC. 199 (2004) ("The key component of a knowledge economy is a greater reliance on intellectual capabilities than on physical inputs or natural resources.").

239 Stone, *supra* note 237, at 569.

240 Arnow-Richman, *supra* note 235, at 160.

241 *See, e.g.*, Kelsey-Hayes Co. v. Maleki, 765 F. Supp. 402, 407 (E.D. Mich. 1991) (holding that the noncompete was unenforceable against engineer since computer programming skills transmitted by employer to employee were not part of the protectable business interest of the employer); *see also* Hasty v. Rent-A-Driver, Inc., 671 S.W.2d 471, 473–74 (Tenn. 1984). "[T]he loss of employees to competitors is the type of injury which results from ordinary competition and which cannot be restrained by contract" even though the employer spent significant time identifying and hiring highly skilled workers. *Id.*

242 *See* O'Malley, *supra* note 108, at 1227.

interest"—there is still uncertainty.[243] Statutes, on the other hand, provide specific guidelines for parties entering noncompetes, which reduces unascertainable risk and lowers litigation costs.[244] Creating a statutory framework for states like New York, which still employ the common law, could have significant benefits.[245] However, as seen in the selected states that enacted statutes, legislators must cautiously assess the potential risks and carefully tailor the law to their state's needs, industries, and job markets.

III. PROPOSAL

As part of this Note's Proposal, it is first necessary to delineate an underlying model framework for noncompete statutes generally. This framework must consider the policy issues that have arisen in other jurisdictions and mitigate their impact when employed in New York. Then, this Note will apply that framework to New York, considering the state's specific economic environment. Although states can learn from the success of California's approach, this Note proposes that state legislatures should allow reasonable noncompetes, in contrast to California's complete ban.[246] Legislatures should vary noncompete enforceability level based on the type of industry involved. This contrasts with other jurisdictions, like Massachusetts, which use income level as their starting point.[247] This approach would allow for a significantly more nuanced approach to noncompete legislation, specifically targeting the industries that would benefit from employee mobility, and those where employers need greater protection.

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243 *Id.*

244 *Id.* at 1227–28 (1999) ("Establishing predictable rules for enforcing covenants not to compete would provide clear guidelines to parties entering into such agreements and may encourage many conflicts arising from them to settle out of court. Thus, a more predictable and well-defined position on the enforcement of covenants not to compete could positively affect the growth of the Massachusetts hi-tech industry by lessening both unassessable risks and potential litigation costs for both employers and employees. Less focus—and expenditure—on these concerns will likely result in a more efficient and profitable employment market and could foster greater industry growth.").

245 *See supra* Section I.E.

246 *See supra* Section I.B.

247 *See supra* Section I.C.

A. *The Proposed Model Framework*

This proposed framework has three core pillars: (1) there should be no complete ban on noncompetes, as California has done, but rather, reasonable noncompetes should be permitted; (2) legislatures should identify what industries their state specializes in, and whether or not that industry would benefit from knowledge spillovers; if so, then a legislature should move closer to the California approach by enforcing fewer noncompetes; and (3) a countervailing consideration legislatures must take into account is whether any of those industries are centered around human capital or knowledge protection. If so, then the employer has a greater interest in protecting that human capital and/or knowledge, and noncompetes should be more enforceable.

Indeed, the first prong of this framework rejects the California blanket-ban approach. The problems with an outright ban have been well documented over the many years since section 16600 was enacted.[248]

In particular, jurisdictions that ban noncompetes may drive employers to search for other means to protect their employees' human capital, including with no-poach agreements, which can severely harm employees and are often done covertly.[249] Therefore, as states like Massachusetts have recognized, legislatures should attempt to find a middle-ground of noncompete enforceability.

The second prong proposes a new way for legislatures to approach noncompete drafting that should allow for more targeted and precise statutes. Professor Gilson hypothesized that a ban on noncompetes created more innovation in Silicon Valley because it facilitated a high-mobility labor market and knowledge spillovers.[250] However, a statute that only banned noncompetes for such high-technology industries, where greater mobility would lead to more innovation, may preserve those benefits while allowing more flexibility than a blanket ban. Therefore, legislatures should carefully analyze their state's economy, and determine what industries might see greater innovation if employees are able to flow freely from job to job. For example, if a state finds that their semiconductor industry lends itself to knowledge spillovers, then they

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248 *See* Bishara, *Covenants Not to Compete*, *supra* note 6, at 310.

249 *Supra* Section II.C.

250 Bishara, *Covenants Not to Compete*, *supra* note 6, at 307; Davis, *supra* note 213.

might decide to enforce noncompetes less to facilitate that effect.[251] This method stands in contrast to the new Massachusetts statute, which uses income level as the benchmark for noncompete enforceability.[252] While banning noncompetes for low-income employees could be effective since they likely work at blue-collar jobs that do not center around human capital accumulation, the approach lacks the precision of targeting the specific industries where knowledge spillovers are most likely.

The final prong of the proposed framework asserts that legislatures must consider whether the industries that their state specializes in are ones in which employers are likely to have an interest in protecting their employees' accumulated training, knowledge, and skills. In states where the rule of reasonableness is employed, courts often neglect this issue.[253] However, as the United States begins to shift from a manufacturing to a services economy, human capital accumulation will take on a more centralized role in the American workplace.[254] Legislatures must now weigh the employer's interest in protecting their employees' knowledge against the potential innovation gains, if any, from the noncompete enforceability level. This will guide the legislature to a precise level of noncompete enforceability for the given sector.

B. *Applying the Framework to New York*

New York currently employs a strict rule of reasonableness analysis, only enforcing noncompetes in select situations.[255] Arguably, the rule of

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[251] In order to make this determination, the legislature could enlist economic experts in the field of geographic specialization. *See generally* Michael E. Porter, *The Competitive Advantage of Nations*, HAR. BUS. REV. (1990), https://hbr.org/1990/03/the-competitive-advantage-of-nations [https://perma.cc/8KTK-8QX4].

[252] FLSA, *supra* note 124. Also note that the proposed New York City local law which similarly bans noncompetes for low income employees would suffer from the same shortcomings. *See* sources *supra* notes 167–168.

[253] *Supra* note 241.

[254] Doug Short, *Charting the Incredible Shift from Manufacturing to Services in America*, BUS. INSIDER (Sept. 5, 2011, 11:28 AM), https://www.businessinsider.com/charting-the-incredible-shift-from-manufacturing-to-services-in-america-2011-9 [https://perma.cc/KV9R-2H92]; *see also* Cindy Elliott, *Why Manufacturers Are Shifting Their Focus from Products to Customers*, FORBES (Feb. 20, 2014, 3:56 PM), https://www.forbes.com/sites/ptc/2014/02/20/why-manufacturers-are-shifting-their-focus-from-products-to-customers/#5d1f3fe248cf [https://perma.cc/DQ7J-5X2W] ("Servitization is, in fact, becoming a major strategic driver of manufacturing innovation today.").

[255] *See supra* Section I.E.

reasonableness allows for significant flexibility for enforcing noncompetes, however, it is at the expense of predictability for employers.[256] By using this Note's proposed model framework, New York's legislature could precisely target the state's biggest industries, using bans to facilitate knowledge spillovers in some sectors while allowing employers to protect their employees' human capital with reasonable noncompetes in others.

Applying the first part of the framework, New York should not institute a complete California-style ban on noncompetes, but rather should evaluate the state's economy to find its biggest industries. New York's top three industries driving economic growth are financial services, healthcare, and professional and technical services.[257] The legislature should apply the second prong of the model framework and determine which, if any, of these industries would benefit from knowledge spillovers. If the industry would benefit from spillovers, then the legislature should adopt a "mobility maximizing public policy" by enforcing fewer noncompetes in that industry.[258] However, applying the third pillar, the legislature should weigh the employer's interest in protecting their employees' accumulated human capital. If the employer has a strong interest here, the legislature should employ "knowledge services maximizing public policy," which would favor employers' ability to protect their employees' accumulated knowledge.[259]

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256 *See supra* Section II.C.

257 Sean Ross, *New York's Economy*: *The 6 industries Driving GDP Growth*, INVESTOPEDIA, https://www.investopedia.com/articles/investing/011516/new-yorks-economy-6-industries-driving-gdp-growth.asp [https://perma.cc/Y967-P4KU] (last updated June 25, 2019).

258 Bishara, *Covenants Not to Compete*, *supra* note 6, at 318 ("Such a policy would encourage the formation of start-up companies in a knowledge economy because it would greatly lower the legal barriers to obtaining general human capital from an established firm and then using those skills to start a competing firm. It would also be, on the whole, more employee-friendly than other policies. As discussed above, this policy would most favor multi-firm industries, such as the high-tech industry, that benefit from high-velocity labor markets.").

259 *Id.* at 319 ("[A] knowledge services maximizing jurisdiction would allow strong noncompete enforcement to promote firms—like financial services companies—that require confidentiality and prefer a minimum of knowledge spillover to competitors. Strong enforcement would perhaps include extending protection specifically to training, client goodwill, and client contacts. In this way, such a jurisdiction would enact a statute that, in effect, favors employers desiring to withhold information from competitors and the marketplace. The positive outcome would be seen in increased general human capital investment because that investment would receive legal protection and employers would have the comfort of securing their investment.").

The financial services industry, New York's largest economic driver, is a perfect example of a human-capital-based industry that would not benefit from knowledge spillovers as a high-technology industry would. New York financial firms have a stated interest in protecting confidentiality and the accumulated knowledge, clients, and skills held by their employees.[260] However, unlike in Silicon Valley where an employee bringing their accumulated knowledge to a new firm would benefit the industry as a whole through greater innovation, an employee in New York's financial services industry would not create more innovation if he or she had greater mobility. Instead, such increased mobility would simply allow firms to poach employees and gain an advantage over the competition. For example, a Silicon Valley employee who worked on an innovative product at Apple can bring what he or she learned on that project to a new job at Google. When multiplied across Silicon Valley, this helps all firms in the area benefit from each other's past employees. By contrast, a Wall Street employee who moves from J.P. Morgan to Goldman Sachs primarily brings their clients with them, which only benefits the singular financial firm rather than the whole industry. This would disincentivize employers from investing in their employees, and would ultimately harm the industry.[261] For the financial services industry, New York's legislature should enforce reasonable noncompetes, which would satisfy employers and prevent negative side effects of blanket enforceability or unenforceability, such as no-poach agreements.[262] This same process could be applied to any industry in New York, including the state's largest, such as healthcare and professional services.

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260 *Id.* ("Such a policy is appropriate for a state like New York that has a stated interest in protecting the existing agglomeration economy of Wall Street investment banks and other financial service industries located in the New York City area. While certainly any state, New York included, cannot risk concentrating on only one type of industry to the exclusion of others, the importance of confidential knowledge, or alternatively the sharing of knowledge through the mechanism of employee mobility, should be a factor that policy makers seriously consider when shaping noncompete policies.").

261 *Id.*

262 *See supra* Section II.C.

C. *Counterarguments*

Although this Proposal has significant strengths, there are certainly a number of critiques one could make about it as well. One concern may revolve around the administrability of this Note's approach. Legislators might argue that this approach is overly burdensome because it would require an in-depth analysis of every job sector in their state.[263] Indeed, this Proposal does call on legislators to analyze their state's economy and identify those industries that would benefit from increased knowledge spillovers. However, if the legislature sets up administrable standards to determine what kinds of industries might benefit from knowledge spillovers, then identifying industries in their state which fit that mold should be relatively painless.

Legislators and critics might also argue that this Proposal raises significant line-drawing concerns. It is true that legislation based on such a model could be over and under inclusive. What if a specific firm does not cleanly fall into one of the enumerated industries? This is a real concern, but one that is properly addressed by the courts in as-applied challenges. Judges will need to consider the underlying purpose of the proposed framework to determine whether or not the firm is one that should be allowed to employ noncompetes. However, those situations are likely to be very sparse, since most firms can easily be categorized into existing sector-based distinctions. In sum, although these concerns are legitimate, they are likely to be marginal issues which will not dramatically impact the overall efficiency gains this Proposal would produce.

CONCLUSION

The history of noncompete law can be confusing and is marked by a series of changes as each state developed its common law jurisprudence.[264] However, as a seemingly growing number of states recognize, a lot of the issues that come along with the common law rule of reasonableness approach can be resolved by sound legislation.[265] One

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263 *See supra* Sections III.A–B.

264 *See supra* Sections I.B–D.

265 *See id.*

benefit of federalism is that each state can serve as a laboratory to test the effectiveness of new legislative ideas.[266] By studying previous legislative attempts, future legislators can maximize the benefits and minimize the problems associated with differing levels of noncompete enforceability.[267] This Note contends that the previous legislative attempts at crafting an ideal noncompete statute have been imprecise, and future legislation instead should target the industries that are most likely to benefit from stronger noncompete enforcement.[268] If this Proposal were utilized, it would be a step towards modernizing noncompete law in recognition of the changing job market, employer needs, and industrial diversity.

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[266] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[267] *See supra* Part III.

[268] *See supra* Part III.