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MAKING NON-COMPETES UNENFORCEABLE

Viva R. Moffat[†]

Abstract

The law of employee non-competition agreements is a mess. Differing standards, unpredictability, and uncertainty within and between jurisdictions is the norm. The variability in state law provides a significant incentive on both sides to forum shop when a dispute over a non-compete arises. This forum shopping leads to conflicts of law, and choice of law doctrine does not resolve these disputes in a satisfactory way. Because non-compete law is often a matter of fundamental public policy, the use of escape valves from the operation of conflicts principles means that there is no predictability or certainty in non-compete litigation. The search for favorable law results in races to the courthouse and parallel litigation in different jurisdictions that can lead to standoffs between the courts, and neither comity principles nor abstention doctrine provide a satisfactory resolution. Uniformity in non-compete law, whether achieved through the uniform act process, a model act, or otherwise, is thus desirable. Moreover, a uniform rule of unenforceability would do the most to reduce the disadvantages of the diversity of state law and to facilitate the flow of commercial transactions because such a rule is discrete, easily applied, the least likely to be subject to interpretive changes over time, and promotes a free market in labor.

INTRODUCTION

In California, non-competition agreements – agreements by employees not to compete with their employers following the termination of employment – are unenforceable. As a result, a software engineer working, for example, for Google in Silicon Valley can go work for Microsoft immediately after leaving Google. A software engineer working for Google in Virginia, on the other hand, may well be subject to enforceable post-employment restrictions that prohibit her from working for Microsoft (or any other competitor of Google) for some period of time.¹ The

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¹ This is purely a hypothetical. I have no information about Google's practice concerning non-competes. There is, however, one notable case between Google and Microsoft involving an em-

California employee thus will have jobs and opportunities not available to the Virginia employee. Indeed, the Virginia employee may be unable to accept a job in her chosen profession for the period of the restriction.

As this example suggests, the state-to-state variation in the law governing non-competition agreements is considerable. Although no jurisdiction follows an unfettered private ordering approach, some states will enforce all “reasonable” non-competition agreements. Other states subject such agreements to more rigorous scrutiny, balancing the employer’s protectable interest against the employee’s interest, and also evaluating the public interest. A number of states prohibit non-competition agreements with a set of exceptions. A few states, including California, refuse to enforce the agreements entirely.

Now imagine Google’s in-house counsel, attempting to draft employment agreements for Google’s employees in its many offices, including California and Virginia. The agreements for the two software engineers, even if they occupy the same position, with the same title and the same benefits, perhaps ought to be different. The content of the different states’ laws must be determined, and then some decisions must be made: should the agreements be tailored to each state’s law? Should a non-competition provision be included in the California employee’s agreement, notwithstanding its unenforceability? Should a choice of law clause be included, and, if so, what state’s law should be selected? This gives rise to the possibility of strategic selection of state law on the part of employers (who nearly always draft the employment agreements), and there is evidence that this is occurring, leading to concerns about a “race to the bottom” in state employment law.²

Google’s corporate headquarters are in California, and it is incorporated in California. It therefore might make sense for the company to select California law for all of its agreements, but it may decide that it does not like California’s rule concerning non-competition agreements. Suppose that the Virginia employee’s contract contains a non-competition provision prohibiting employment with any other search

ployee non-compete. *Google, Inc. v. Microsoft*, 415 F.Supp.2d 1018 (N.D. Cal. 2005) (Google contesting validity of non-compete drafted by Microsoft and imposed on a Microsoft employee).

² Timothy Glynn has argued that the conditions are ripe for just such a race to the bottom, with the possibility of states putting forth law favorable to employers in the hopes of attracting their law business. Timothy Glynn, *Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381, 1384 (2008) (“These developments are important because law-as-commodity competition, if it takes hold in the employment context, could have dangerous implications for workers – frustrating state-level employment law reform efforts, and, in some instances, speeding the race to the regulatory bottom.”). Larry Ribstein and Erin O’Hara are more sanguine, describing the situation as a “market for law” and advocating for courts to enforce choice of law clauses in order to “enhance jurisdictional competition and help restore predictability to the conflict of laws problem.” Larry E. Ribstein & Erin Ann O’Hara, “Conflict of Laws and Choice of Law, in *ENCYCLOPEDIA OF LAW AND ECONOMICS*, at 633 (2009). See also Larry E. Ribstein and Erin A. O’Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661 (2008).

engine entity for two years and a Virginia choice of law clause, and further suppose that the employee wishes to join Microsoft's search engine team in California. What state's law of non-competes ought to apply? Should the employee file a declaratory judgment action in California, seeking the application of California law (and thus attempting to void the non-compete)? What if Google simultaneously files a breach of contract action in Virginia?

This is a hypothetical, though a very plausible one: these considerations and the resulting legal maneuvering are commonplace. Indeed, there has been a "rise of inter-jurisdictional disputes involving [non-compete] enforcement."³ Disparity in state law is not, of itself, a bad thing of course, but the variation in the law of non-competes, along with the increasingly national employment market, have led to intractable conflicts problems and to inter-state concerns when the parties forum shop and commence parallel litigation in more than one state. Under those circumstances, courts have adverted to conflicts doctrine to determine what state's law should apply and to abstention and comity principles to ease the inter-state disputes. None of these doctrines produces satisfying, predictable, or certain outcomes, however.

Presented with a dispute flowing out of a scenario like the one described above, a court faces some difficult decisions: determining the content and intent of the contract, determining the content of various states' laws, and resolving both the conflicts of law issues and the substantive question of the enforceability of the agreement (which can often be a close call). The result is unpredictability on every level, for employees, employers, and courts. This unpredictability has only increased as more entities operate on a nationwide basis and employees are increasingly mobile and willing to move across state boundaries.

This unpredictability, with its accompanying costs, has become enough of a problem that a uniform approach ought to be adopted. And the benefits of uniformity in the law are much more likely to accrue with a straightforward rule of unenforceability. This rule could be adopted through the uniform act process, by reference to a model act, or simply as a result of the dissemination of information about the advantages of uniformity and the benefits of a rule of unenforceability.⁴ However,

³ Glynn, *supra* note 2, at 1385.

⁴ A rule passed at the national level would, obviously, achieve the same result I suggest here and I would welcome it. I do not, however, propose it as a potential solution simply because it is almost certainly politically, if not constitutionally, untenable. Even if a Congressional ban on non-compete enforcement were adopted, it would apply only to interstate commerce and would thus not address the many intrastate non-compete disputes. It would thus be only a partial solution to the problems that exist. It should be noted that there have been some proposals for nationalizing workplace law entirely. See, e.g., Jeffrey M. Hirsch, *Revolution in Pragmatist Clothing: Nationalizing Workplace Law*, 61 ALA. L. REV. 1025, 1028 (2010) ("[R]ather than continuing to view the workplace as it used to exist, we should instead recognize that the federal government is the best entity to regulate the workplace as it now exists.").

achieved, a rule of unenforceability would virtually eliminate the myriad disadvantages of diversity in state law in this context.

In Part I, I describe the first problem outlined above: the vast disparities in the state law treatment of non-competition agreements. In Part II, I discuss the conflicts and state-to-state problems that have arisen because of the diversity of state law. In Part III of the article, I explain why the current doctrinal tools – conflicts law, comity principles, and abstention doctrine – fail to address the concerns identified in Parts I and II. Finally, in Part IV, I address some of the possible objections to uniformity in this area of the law, and I then conclude that uniform state law is the best of the imperfect solutions.

I. THE DIVERSITY OF STATE LAW ON NON-COMPETES

The law governing non-competition agreements is a mess.⁵ There is wide state-to-state variation in the treatment of non-compete provisions. Some states routinely enforce “reasonable” non-competition agreements while other states refuse to enforce virtually all such provisions. Many others are somewhere in the middle: more closely scrutinizing non-competition agreements than other contracts, but allowing enforcement of many.⁶ Some states have statutes governing the enforceability of non-competes, while others have left the question of enforceability to common law development. These differences are substantial and result in significantly different legal rights and obligations in different states.⁷ Notably, however, not a single state takes a pure private ordering approach; the extra scrutiny given to these agreements reflects the public policy tensions that inhere in attempts to impose post-employment restrictions on employees.

⁵ Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Non-compete Agreements*, 86 NEB. L. REV. 672, 705 (2008) (“Academics and practitioners alike have examined the subject. The reason for such interest is obvious: many can see an upcoming disaster. The non-compete agreement, which was born centuries ago against a very different social backdrop, fails to comport with modern notions of employment. Employees today are highly mobile: across employers, across careers, and across the world. . . . Although its weaknesses have been apparent for some time, surprisingly few courts have attempted to reform the analytical frameworks through which non-competes are examined. Instead, repeated attempts to salvage the covenant have only managed to produce a morass of laws, doctrines, and analyses.”).

⁶ See Gillian Lester & Elizabeth Ryan, *Choice of Law and Employee Restrictive Covenants: An American Perspective*, 31 COMP. LAB. L. & POL’Y J. 389, 392 (“A key point is that states vary widely in their friendliness to employee non-compete agreements. A few states, such as California, have such a strong policy favoring employee mobility that they either prohibit or very strictly limit such agreements.”).

⁷ Glynn, *supra* note 2, at 1420 (describing the variety of state approaches and concluding that “in practice, state treatment lies along a wide spectrum from near-certain nonenforcement to frequent enforcement.”). *But see* Norman D. Bishara, 13 U. PA. J. BUS. L. 751, 754 (describing variation in the law of non-competes but stating that “most states will moderately enforce non-competes using the standard reasonableness test.”).

*A. One End of the Spectrum: Non-Competition Agreements
Unenforceable*

A few states provide a strong rule against enforceability of non-competes. California and North Dakota both have statutes rendering virtually all non-competition agreements unenforceable.⁸ Montana and Oklahoma have statutes similar to those in California and North Dakota, but the courts in Montana and Oklahoma have interpreted the statutes to permit enforcement of non-competes in some instances.⁹

The California statute has garnered a great deal of attention and generated significant scholarly debate.¹⁰ The California rule against the enforceability of non-competes is codified in Section 16600 of the Business & Professions Code, which states 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.”¹¹ The California courts “have consistently affirmed that section 16600 evinces a settled legislative policy in favor of open competition and employee mobility.”¹² In *Edwards v. Arthur Andersen*, the California Supreme Court emphatically reaffirmed the rule in its strong form, rejecting a “narrow restraint” exception developed by the Ninth Circuit. The Ninth Circuit had discussed two cases that it believed carved out an exception to the broad rule in Section 16600 prohibiting enforcement of the agreements.¹³ The California Supreme Court made clear its interpretation of the statute and its view of the statute’s role: “We reject Andersen’s contention that we should adopt a narrow-restraint exception to section 16600 and leave it to the Legislature, if it chooses, either to relax the statutory restrictions or adopt additional exceptions to the prohibition-against-restraint rule under section 16600.”¹⁴ Thus the California Supreme Court has made it clear that the rule against the enforceability of non-competes in that state takes the strong form.

This rule is expressed in public policy terms, and even before the *Edwards* decision the rule against enforcement of non-competes was

⁸ GA. CONST. art. III, § 6, para. V(c) (prohibiting the general assembly from authorizing contracts that inhibit competition); CAL. BUS. & PROF. CODE § 16600 (West 2011) (statute voids contracts that prohibit anyone “from engaging in a lawful profession, trade, or business of any kind...”); See *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 296 (2008) (reaffirming the strong version of the California rule); OKLA. STAT. tit. 15, § 217 (2011); MONT. CODE ANN. § 28-2-703 (2011).

⁹ See *Dobbins, Deguire & Tucker, PC v. Rutherford, MacDonald & Olson*, 708 P.2d 577 (Mont. 1985).

¹⁰ See *infra* Part III.C.

¹¹ CAL. BUS. & PROF. CODE § 16600 (West 2011). The Code contains exceptions for non-competition agreements in the sale or dissolution of corporations (See § 16601), partnerships (See § 16602), and limited liability companies (See § 16602.5).

¹² *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 285 (Cal. 2008) (concluding “that section 16600 prohibits employee non-competition agreements unless the agreement falls within a statutory exception...”).

¹³ *Id.* at 290-91, citing *Campbell v. Trustees of Leland Stanford Jr. Univ.*, 817 F.2d 499 (9th Cir. 1987).

¹⁴ *Id.* at 292.

deemed strong.¹⁵ Historically, non-competition agreements, as restraints on trade, were upheld under the common law, if reasonable.¹⁶ The California statute abrogates the common law rule.¹⁷ In *Edwards*, the court described this as a “settled legislative policy in favor of open competition and employee mobility.”¹⁸ According to the court, the “law protects Californians and ensures ‘that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice.’” It protects “‘the important legal right of persons to engage in businesses and occupations of their choosing.’”¹⁹ The *Edwards* court emphasized the fundamental nature of California’s policy voiding non-competition agreements.²⁰

North Dakota has taken a similarly strong position against the enforceability of non-competes, and its statute and policy derive from the same source as California’s, the Field Code.²¹ Other than in connection with the sale of a business or the dissolution of a partnership, non-competition agreements are void in North Dakota: “Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void . . .”²² This statute reflects North Dakota’s “long-standing public policy against restraints upon free trade.”²³ This policy is directed at the public interest: “Although the statute may appear to protect the party against whom a contract not to compete is sought to be enforced, statutes making void contracts in restraint of trade are based upon consideration of public policy and not necessarily upon consideration for the party against whom relief is sought.”²⁴ The public interest involves the public’s ability to access the services of the employee unencumbered by contractual restrictions,²⁵ and

¹⁵ 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, 607 (1999) (“Other than two statutory exceptions, . . . the statute’s prohibition is essentially unqualified.”).

¹⁶ *Hill Med. Corp. v. Wycoff*, 86 Cal. App. 4th 895, 900 (Cal. Ct. App. 2001).

¹⁷ *Id.* (“In contrast, however, California has settled public policy in favor of open competition.”).

¹⁸ 189 P.3d at 288. *See also* *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 27 Cal. Rptr. 2d 573, 577 (Cal. Ct. App. 1994) (noting that the California policy is based upon the desire to encourage competition and permit “every citizen [to] retain the right to pursue any lawful employment and enterprise of their choice.”)

¹⁹ 189 P.3d at 288.

²⁰ *Id.* at 291-92 (“Section 16600 is unambiguous, and if the Legislature intended the statute to apply only restraints that were unreasonable or overbroad, it could have included language to that effect. We reject Andersen’s contention that we should adopt a narrow-restraint exception to section 16600 and leave it to the Legislature, if it chooses, either to relax the statutory restrictions or adopt additional exceptions to the prohibition-against-restraint rule under section 16600.”).

²¹ *See* *Warner & Co. v. Solberg*, 634 N.W.2d 65, 70 n. 1 (N.D. 2001) (“Section 9-08-06, N.D.C.C., is derived from the Field Code, the same source as Section 16600 of the California Business and Professional Code, and the language of the California statute is nearly identical to N.D.C.C. § 9-08-06.”).

²² N.D. CENT. CODE § 9-08-06 (2011).

²³ *Warner & Co. v. Solberg*, 634 N.W.2d at 70.

²⁴ *Id.*

²⁵ *Id.* *See also* *CDI Energy Svcs. v. West River Pumps, Inc.*, 567 F.3d 398, 404 (8th Cir. 2009) (applying North Dakota law) (stating that “North Dakota deems the public’s access to services to be a more pressing policy concern than the details of the relationship between a particular employee and employer.”).

the policy rests on the belief that that the absence of restrictions on the free flow of labor will promote commercial activity.²⁶ The North Dakota courts have applied the strong form of this rule and have rejected exceptions for relatively narrow non-solicitation agreements, for example.²⁷

Thus, employers and employees in both California and North Dakota, along with a few other states, have operated for a long period of time under a legal regime in which virtually no non-competition agreements are enforceable.²⁸

B. *The Other End of the Spectrum: Reasonable Non-Competition Agreements Enforceable*

At the other end of the spectrum of enforceability, many states leave the evaluation of non-competition agreements to common law development. While the particulars differ to some extent, most of these states apply a rule of reason (the same common law rule of reason rejected by California and some of the states described in the previous section) and regularly enforce non-competition agreements. All states, however, scrutinize non-competes more closely than ordinary commercial contracts by requiring slightly different standards of assent, applying a balancing test, requiring the employer to prove that it has a “protectable interest,”²⁹ or requiring more than a “peppercorn” of consideration.³⁰ That is, no state takes a pure private ordering approach. This additional judicial scrutiny reflects the tensions inherent in the imposition of non-

²⁶ *Herman v. Newman Signs, Inc.*, 417 N.W.2d 179, 181 (N.D. 1987) (“The intention of Section 9-08-06, N.D.C.C., is to promote commercial activity by restricting the ability of individuals to form agreements which limit commercial exchange or more specifically limit agreements not to compete.”).

²⁷ *Warner & Co. v. Solberg*, 634 N.W.2d at 70-71 (rejecting the Eighth Circuit’s conclusion that less burdensome restrictions may survive, referring to *Kovarik v. American Family Ins. Grp.*, 108 F.3d 962, 965 (8th Cir. 1997)).

²⁸ Of course, this does not prevent employers from including non-competition provisions in employment agreements in California or North Dakota. Litigation over the validity and enforceability of non-competes in both states indicates that employers still attempt to impose such restrictions, perhaps for the *in terrorem* effects, or perhaps in conjunction with a choice-of-law provision selecting the law of another state. (See Matt Marx, Deborah Strumsky & Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 *Mgmt. Sci.* 875, 875-889 (2009).) The facts in *Edwards v. Arthur Andersen*, for example, do not indicate why Arthur Andersen included a covenant not to compete in Edwards’ employment agreement, but the provision was included in the contract, which was presented to Edwards by the Los Angeles office of the company. 189 P.3d 285, 285 (Cal. 2008). The rule against the enforceability of non-competes has been in force in California since 1872, when the predecessor sections to the current statute were enacted. *Bosley Med. Grp. v. Abramson*, 161 Cal.App.3d 284, 291 (1984) (holding a non-compete provision in a stock purchase agreement unenforceable because it was a “sham” agreement “devised to permit plaintiffs to accomplish that which the law otherwise prohibited: an agreement to prevent defendant from leaving plaintiff medical group and opening a competitive practice.”).

²⁹ Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 395 (“Across the country, however, postemployment covenants not to compete are subject not merely to the ordinary requirements of contract law but to additional substantive conditions that external law imposes on these agreements in particular.”).

³⁰ See, e.g., *Lucht’s Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058, 1061 (Colo. 2011).

competes, and the result is an ad hoc balancing test that creates a great deal of uncertainty.

The Restatement of Contracts sets forth a test for the enforceability of non-competes that reflects the general common law rule of reason approach. Under this approach, a court must consider: (1) whether “the restraint to greater than is needed to protect the [employer’s] legitimate interest;” (2) the hardship to the employee; and (3) “the likely injury to the public.”³¹ The recently drafted Restatement of Employment law also contains a set of provisions concerning non-competes, and it sets forth a similar balancing approach.³² Both are putatively restatements of the law; however, as demonstrated in this section, there is hardly a law of non-competes to be restated or summarized.³³

Although there is no single approach, many jurisdictions do employ the reasonableness balancing formulation. For example, the Virginia Supreme Court described the test for enforceability as follows:

This Court evaluates the validity and enforceability of restrictive covenants in employment agreements using well settled principles. First, covenants in restraint of trade are not favored, will be strictly construed, and, in the event of an ambiguity, will be construed in favor of the employee. Second, the employer bears the burden to show that the restraint is no greater than necessary to protect a legitimate business interest, is not unduly harsh or oppressive in curtailing an employee’s ability to earn a livelihood, and is reasonable in light of sound public policy.³⁴

In New York, “the Court of Appeals set forth the ‘modern, prevailing common-law standards of reasonableness’ for the enforceability of employee non-compete agreements. ‘A restraint is reasonable only if it is: (1) is no greater than is required for the protection of the legitimate

³¹ RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981). The language of the Restatement is quite awkward, and many states use a variation on the approach.

³² Restatement (Third) Employment Law (draft), on file with the author.

³³ In addition, the entire project of restating the law of employment has been the subject of a great deal of controversy. See, e.g., Michael J. Zimmer, *The Restatement of Employment Law is the Wrong Project*, 13 EMPLOYEE RIGHTS & EMPLOYMENT POL’Y J. 205, 205 (2009) (“As the project has progressed, I am only further convinced that a *Restatement* of the common law was the wrong place for the ALI to start work in the labor and employment law area.”).

³⁴ *Modern Env’ts, Inc. v. Stinnett*, 561 S.E.2d 694, 696 (Va. 2002) (internal citations omitted) (holding that the employer did not carry “its burden of showing that the restrictive covenant at issue is reasonable and no greater than necessary to protect a legitimate business interest.”). See also *Roanoke Eng’g Sales Co., Inc. v. Rosenbaum*, 290 S.E.2d 882, 884 (Va. 1982) (stating that the court should ask whether the restraint is reasonable (1) “from the standpoint of the employer . . . in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest . . . (2) . . . from the standpoint of the employee . . . in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood; [and] (3) . . . from the standpoint of a sound public policy.”

interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.’ A non-compete agreement must also be reasonably limited temporally and geographically.”³⁵ Some states have non-compete statutes that essentially restate the common law rule of reason. The Texas statute, for example, provides that “... a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.”³⁶

Notwithstanding the fact that a majority of states apply a similar approach, there is hardly uniformity or predictability even among those states. This is a result of applying a rule of reason standard³⁷ and of the variability of the specifics of the rule and its exceptions in each state.³⁸ For example, in some states the courts will apply the “blue pencil” doctrine, reforming the contract to bring it within the rule of reason.³⁹ Other

³⁵ *Natural Organics, Inc. v. Kirkendall*, 52 A.D.3d 488, 489 (N.Y. App. Div. 2008) (internal citations omitted) (holding that because there was “no legitimate employer interest to protect, the non-compete agreement is unenforceable . . .”).

³⁶ TEX. BUS. & COM. CODE ANN. § 15.50 (West 2011). The Texas Supreme Court recently modified its interpretation of the non-compete statute to “hold that an at-will employee’s non-compete covenant becomes enforceable when the employer performs the promises it made in exchange for the covenant. In so holding, we disagree with [our earlier language] stating that the Covenants Not to Compete Act requires the agreement containing the covenant to be enforceable the instant the agreement is made.” *Alex Sheshunoff Mgmt. Svcs., L.P. v. Johnson*, 209 S.W.3d 644, 646 (Tex. 2006). Texas is considering proposed legislation to place physicians under the requirements of § 15.50 (2011 SB 894), and it recently passed legislation banning non-competes for physicians employed by the state (2011 SB 1303).

³⁷ One court described the difficulty of applying a reasonableness standard to non-competes as follows: “Reasonableness, in the context of restrictive covenants, is a term of art, although it is not a term lending itself to crisp, exact definition. Reasonableness, as a juridical term, is generally used to define the limits of acceptability and thus concerns the perimeter and not the structure of the area it is used to describe. This general observation is nowhere more particularly true than with respect to a restrictive covenant. Once a contract falls within the rule of reason, the rule operates only as a conclusive observation and provides no further guidance. A court’s manipulation of the terms of an anticompetitive covenant, where none of its provisions standing alone is an inherently unreasonable one, cannot be accomplished with reasonableness as the standards. It is like being in the jungle – you’re either in or you’re out, and once you’re in the distinction is worthless for establishing your exact location.” *Reddy v. Cmty. Health Found. of Man*, 298 S.E.2d 906, 911 (W.Va. 1982).

³⁸ See, e.g., *Lester & Ryan*, *supra* note 6, at 392-93 (“Moreover, even among states more willing to enforce reasonable agreements, the ease of creating and enforcing restrictive covenants varies widely. Some states operate under constitutional limitations that impose strict limits on enforcement, some require consideration, some statutorily limit duration, some limit protectable interests (other than trade secrets) to an employer’s well-established customer relationships, some distinguish between high-level employees and others, some permit, and others prohibit, reformation or blue-penciling.”). Norman Bishara describes a “national status quo where . . . state law and human capital policy related to non-competes varies such that enforceability of a post-employment restraint on an employee’s mobility will be uncertain.” Bishara, *supra* note 7, at 756.

³⁹ See *Pivateau*, *supra* note 5, at 687-88 (citing Minnesota, Illinois, New Jersey, and Pennsylvania as examples of states in which courts use a “liberal” blue pencil doctrine “enforce [non-competes] to the extent that it is reasonable under the circumstances” “rather than deem the covenant void *ab initio*”). Some states will apply the blue pencil doctrine only under certain circumstances. See

states applying the common law approach refuse to modify non-competes after the fact.⁴⁰ The First Circuit summarized the different approaches:

Courts presented with restrictive covenants containing unenforceable provisions have taken three approaches: (1) the “all or nothing” approach, which would void the restrictive covenant entirely if any part is unenforceable, (2) the “blue pencil” approach, which enables the court to enforce the reasonable terms provided the covenant remains grammatically coherent once its unreasonable provisions are excised, and (3) the “partial enforcement” approach, which reforms and enforces the restrictive covenant to *the extent it is reasonable*, unless the “circumstances indicate bad faith or deliberate overreaching” on the part of the employer.⁴¹

Another example is the split on whether continued employment constitutes consideration for a non-compete entered into once the employment relationship has begun. In Colorado, for instance, the Supreme Court recently reversed a Court of Appeals decision requiring additional consideration, above and beyond continued employment, for a non-compete entered into after the commencement of employment.⁴² The Court of Appeals had held that “when an employee continues his or her job without receiving additional pay or benefits when a non-compete is signed, the agreement lacks consideration.”⁴³ The Supreme Court, however, held on more traditional contract grounds that continued employment (in an at will situation) was sufficient consideration.⁴⁴ These two different opinions reflect the difficulties in enforcing non-competes and mirror the variations in state law on this point.⁴⁵

Pivateau, *supra* note 5, at 683-87 (describing this approach in a variety of states, including Indiana, Arizona, and West Virginia).

⁴⁰ *Id.* at 682-83 (discussing the “no modification” approach to non-competes taken by Georgia, Virginia, and Wisconsin). Wisconsin has codified this rule. WIS. STAT. § 103.465 (2011) ([a]ny covenant [not to compete] ... imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.”).

⁴¹ *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1469 (1st Cir. 1992) (*citing* *Durapin, Inc. v. American Products Inc.*, 559 A.2d 1051, 1058 (R.I. 1989)).

⁴² *Lucht's Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058, 1058 (Colo. 2011).

⁴³ *Id.* at 358.

⁴⁴ *Lucht's Concrete*, 255 P.3d at 1061 (“Because an employer may terminate an at-will employee at any time during the employment relationship as a matter of right, its forbearance from terminating that employee is the forbearance of a legal right. As such, we find that such forbearance constitutes adequate consideration to support a noncompetition agreement with an existing at-will employee.”).

⁴⁵ A number of states require additional consideration, consistent with the Colorado Court of Appeals’ approach, while others take the more classical contract view of consideration in this context. *Compare, e.g.,* *Labriola v. Pollard Grp., Inc.*, 100 P.3d 791 (Wash. 2004), *Poole v. Incentives Unlimited, Inc.*, 548 S.E.2d 207 (S.C. 2001), *Nat’l Recruiters v. Cashman*, 323 N.W.2d 736, 741 (Minn. 1982), *Access Organics, Inc. v. Hernandez*, 175 P.3d 899, 903 (Mont. 2008), *Stevenson v. Parsons*, 384 S.E.2d 291, 293 (N.C. Ct. App. 1989), *George W. Kistler, Inc. v. O’Brien*, 347 A.2d 311, 316 (Pa. 1975), *Martin v. Credit Prot. Ass’n*, 793 S.W.2d 667, 670 (Tex. 1990), *PEMCO Corp.*

Another difference arises in the treatment of specific professions. New York courts, for example, examine non-compete agreements closely, but are less skeptical of agreements not to compete between professionals. For those agreements, New York courts “have given greater weight to the interests of the employer in restricting competition within a confined geographical area.”⁴⁶

C. *The Middle of the Road: Varying Restrictions on the Enforceability of Non-Competes*

Another variation in state law entails statutes with detailed requirements for the enforceability of non-competition agreements. In these jurisdictions, the statutes set forth a strong public policy against the enforcement of non-competition agreements, yet permit enforcement under some circumstances.

Colorado Revised Code § 8-2-113, for example, provides that “[a]ny covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void . . .”⁴⁷ The statute then goes on, however, to carve out exceptions for (1) contracts for the purchase and sale of a business or its assets;⁴⁸ (2) contracts for the protection of trade secrets;⁴⁹ (3) contracts providing for training or education expenses for an employee;⁵⁰ and (4) “[e]xecutive and management personnel and officers and employees who constitute professional staff to executive and management personnel.”⁵¹ The statute makes Colorado’s public policy stance clear, but the case law concerning these exceptions is limited, and thus the requirements are not fully explicated. Accordingly, notwithstanding the relatively detailed statute, Colorado law concerning the enforceability of non-competition agreements is unclear, and the result of a dispute over an agreement is unpredictable.⁵²

v. Rose, 257 S.E.2d 885, 890 (W. Va. 1979), and *Worley v. Wyo. Bottling Co.*, 1 P.3d 615, 621 (Wyo. 2000) (all requiring additional consideration for “mid-stream” non-competes), with *Ackerman v. Kimball Int’l, Inc.*, 652 N.E.2d 507, 509 (Ind. 1995), *Sherman v. Pfefferkorn*, 135 N.E. 568, 569 (Mass. 1922), *Brignull v. Albert*, 666 A.2d 82, 84 (Me. 1995), *Camco, Inc. v. Baker*, 936 P.2d 829, 831-32 (Nev. 1997), *Lake Land Emp’t Grp. of Akron, LLC v. Columer*, 804 N.E.2d 27, 31-32 (Ohio 2004), *Summits 7, Inc. v. Kelly*, 886 A.2d 365, 373 (Vt. 2005), and *Research & Trading Corp. v. Powell*, 468 A.2d 1301, 1305 (Del. Ch. 1983) (all consistent with the newly announced Colorado rule, not requiring additional consideration).

⁴⁶ *BDO Seidman v. Hirshberg*, 712 N.E.2d 1220, 1223 (N.Y. 1999).

⁴⁷ COLO. REV. STAT. § 8-2-113(2) (2011).

⁴⁸ COLO. REV. STAT. § 8-2-113(2)(a) (2011). Note that this is similar to the exceptions under California and Montana law.

⁴⁹ COLO. REV. STAT. § 8-2-113(2)(b) (2011).

⁵⁰ COLO. REV. STAT. § 8-2-113(2)(c) (2011).

⁵¹ COLO. REV. STAT. § 8-2-113(2)(d) (2011).

⁵² See generally Colorado Non-Compete Law Blog, available at <http://www.coloradononcompetelaw.com/> (last visited February 28, 2012) (discussing recent cases and issues in Colorado non-compete law).

Louisiana also has a fairly detailed statute and somewhat inconclusive case law.⁵³ Louisiana has “a strong public policy . . . disfavoring non-competition agreements between employers and employees . . . based on the state’s desire to prevent an individual from contractually depriving himself of the ability to support himself and consequently becoming a public burden.”⁵⁴ Both the statute concerning non-competes and the agreements themselves are strictly construed because of the public policy concerns.⁵⁵

Some commentators describe non-compete law as being relatively consistent,⁵⁶ but the approaches taken by various jurisdictions in fact vary greatly. It should be clear from this summary of non-compete law that the requirements for enforceability – and, indeed, enforceability itself – vary dramatically from state to state. In some states, non-competes are flatly unenforceable, while in others they are regularly upheld; in others, a statutory scheme governs enforceability. With the exception of California and Montana, nearly all states apply some version of an inherently unpredictable, ad hoc, and fact-intensive standard of reasonableness.

II. THE DISADVANTAGES ARISING FROM THE DIVERSITY IN STATE LAW

Diversity in state law is not necessarily a problem. Indeed, federalism principles celebrate such diversity as central to our constitutional structure. Diversity in state law provides a “laboratory” in which different doctrines can be tested and in which local mores can reign.⁵⁷ But there may be times when the diversity of state law becomes a problem, and there may be times when the experiments conducted in the “laboratories” yield results. The law of non-competes is one such area. In this section, I describe the significant disadvantages caused by diversity in the law of non-competition agreements: conflicts – conflicts that challenge the interstate system – that have arisen in the context of litigating non-competition agreements.

Given the wide variation between the states in their treatment of non-competition agreements, it is hardly surprising that conflicts have arisen. As firms operate in more than one state and as employees be-

⁵³ LA. REV. STAT. ANN. § 23:921 (2010).

⁵⁴ *Bell v. Rimkus Consulting Grp., Inc.*, 8 So.3d 64, 67 (La. Ct. App. 2009).

⁵⁵ *Id.* at 929-30 (“Louisiana has long had a strong public policy of disfavoring non-competition agreements between employers and employees. Thus, the longstanding public policy of Louisiana has been to prohibit or severely restrict such agreements.”). *See also* *McCray v. Cole*, 251 So.2d 161 (La. 1971).

⁵⁶ *See* Bishara, *supra* note 7, at 754.

⁵⁷ This metaphor was coined by Justice Brandeis: “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.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

come increasingly mobile, firms have begun using choice of law provisions to select favorable state law. Also unsurprisingly, forum-shopping, races to the courthouse, and litigation over choice of law have all increased.⁵⁸ Firms expend substantial resources planning and drafting non-competition agreements, a particularly difficult task when a company operates in multiple jurisdictions. Employees might need or want to retain counsel to review non-competition agreements. Most often, employees likely do not seek advice of counsel and do not really understand the content and enforceability of a non-compete provision. When there is a dispute about a former employee's activities, the decision concerning the applicable law can make a dispositive difference in the outcome of the dispute. The state of the law of conflicts only adds to the existing uncertainty concerning the enforceability of non-competes in various jurisdictions.

A. *Conflicts of Law Principles and Choice of Law Problems*

The conflict over the choice of law applicable to a non-compete may arise in two ways. The first is when the non-compete agreement (or the non-compete provision within an employment agreement) contains a choice of law clause but the employee argues that another state's law should apply. This might occur when the employer seeks to have all of its contracts governed by the law of the state of incorporation, but employees work in a number of different states. This might also give rise a conflict when an employee seeks to move to a different state and wants the law of that state to govern the enforceability of the non-compete. The other way in which a conflict might arise is when the employment agreement is silent as to choice of law, but the law of more than one state might plausibly govern the agreement under choice of law rules. This occurs, for example, when a company's headquarters and legal department are in one state, the employee works in another state, and – perhaps – seeks to move to a third state.

Just as the law concerning non-compete enforceability is varied and unpredictable, the law of conflicts is itself somewhat unsettled.⁵⁹ The Restatement (Second) of Conflicts of Law has not been universally adopted, but it is the dominant framework in conflicts law.⁶⁰ Some jurisdictions continue to apply the Restatement (First), while others follow a

⁵⁸ See Lester & Ryan, *supra* note 6, at 393 (“It is this variation among states in their willingness to enforce non-compete agreements that creates the conditions for conflict of law and strategic litigation.”).

⁵⁹ Indeed, this is, perhaps, a charitable description. Lester and Ryan describe the law of conflicts (and, in particular, as applied to non-competes, as follows: “The state of the law is perhaps characterized more by inconsistency than anything else, so much so that commentators lament the ‘disarray’ and ‘mish-mash’ of the law, and criticize courts for their ‘post-hoc rationalizing of intuitions’ their use of a ‘hodgepodge of factors, often with insignificant explanation of how they decide what weight to give each.” Lester & Ryan, *supra* note 6, at 395.

⁶⁰ PETER HAY, PATRICK BORCHERS & SYMEON SYMEONIDES, *CONFLICT OF LAWS* 72 (5th ed. 2010).

common law approach.⁶¹ A plurality of states, 23, apply the Restatement (Second) approach to choice of law issues and to the resolution of conflicts.⁶² The basic principle is one of federalism: “[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.”⁶³ When the parties have not made an effective choice of law agreement, the courts will apply the principles of the Section 188 of the second Restatement of Conflicts of Law; when the parties have entered into a choice of law agreement, the courts apply Section 187.

In the absence of a choice of law clause, section 188 applies and provides that generally the law of the state with “the most significant relationship to the transaction and the parties” will apply.⁶⁴ The “contacts to be taken into account” in determining what state has the “most significant relationship to the transaction and the parties” are “(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.”⁶⁵ Section 188 goes on to state that “if the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied . . .”⁶⁶ In a dispute concerning the enforceability of a non-compete, it is possible that the contract could be drafted in one state, executed in another, performed in yet another state, and that still other states might have an interest in the outcome by virtue of the domicil, residence, nationality, place of incorporation and place of business of the parties. Thus, the Restatement approach will not regularly provide a simple resolution.⁶⁷

Even in the presence of a choice of law clause, the potential for a conflict exists. In general, the parties’ choice of law will be respected.⁶⁸ Section 187(1) provides that the “law of the state chosen by the parties to

⁶¹ *Id.* at 94.

⁶² *Id.* at 72.

⁶³ RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 6 (1971). Section 6 goes on to list seven factors to be applied when “there is no such directive,” including “(b) the relevant policies of the forum,” “(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,” “(e) the basic policies underlying the particular field of law,” and (f) “certainty, predictability and uniformity of result.”

⁶⁴ *Id.* at § 188(1).

⁶⁵ *Id.* at § 188(2).

⁶⁶ *Id.* at § 188(3).

⁶⁷ See Lester & Ryan, *supra* note 6, at 396 (discussing the conflicts rules in the absence of a choice of law provision and concluding that “in most states applying the Restatement there is not clear-cut rule and courts will sometimes apply the law of the place of contracting, particularly if any part of the performance occurred there. Notably, courts will disregard the foregoing rules and apply the substantive law of the forum if applying another state’s law would undermine the public policy of the forum.”).

⁶⁸ *Id.* at 397 (“In general, courts defer to choice of law clauses because they are presumed to represent the express intention of the parties.”).

govern their contractual rights and duties will be applied . . .”⁶⁹ Subsection 2, however, sets forth the circumstances in which a court may refuse to apply the chosen law. A court may employ these “escape valves” when “either (a) the chosen state has no substantial relationship to the parties of the transaction and there is no other reasonable basis for the parties’ choice, or (b) *the application of the law of the chosen state would be contrary to a fundamental policy of a state* which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.”⁷⁰ The italicized language has given rise to a great deal of litigation in the non-compete context.

Parties have attempted to use the second prong of this escape valve from a choice of law provision, arguing that a state – such as California – has a materially greater interest in the outcome of a non-compete dispute based on its very strong public policy against enforcement of non-competes.⁷¹ Such arguments are only sometimes successful, but are powerful enough, and the stakes are high enough, to give rise to a great deal of litigation around the choice of law issue.

1. When there is no choice of law clause

As we might expect given the variation in non-compete law, choice of law disputes arise when the employer operates in more than one state and the parties have not made a choice of law selection in their agreement.⁷² *Dresser Industries v. Sandvick* provides a good example.⁷³ In that case, the employer, Dresser, sued three former employees in an attempt to enforce a covenant not to compete. The agreement in question was a standard agreement presented to the employees, who worked as

⁶⁹ RESTATEMENT (SECOND) OF CONFLICTS OF LAW, *supra* note 63, at § 187(1) (The full text of subsection (1) reads: “The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.”).

⁷⁰ *Id.* at § 187(2).

⁷¹ Lester & Ryan, *supra* note 6, at 398 (“Although the second question – whether application of the chosen law would offend the public policy of the states with a materially greater interest – should ordinarily follow, some courts conflate the two inquiries and conclude that another state has a materially greater interest *because* its public policy would be offended if the chosen law were applied. When this happens, the interest balancing test is reduced to a starker contest among competing public policies.”).

⁷² There are many such cases. *See, e.g.,* McGough v. Nalco Co., 496 F.Supp.2d 729, 743 (N.D.W.Va. 2007) (applying conflicts principles in holding that West Virginia had “most significant relationship” concerning enforceability of non-compete (but applying Alabama law to other portions of the contract), [see other portions of this opinion – confusing but interesting case]). *See also* Fort Smith Paper Co., Inc. v. Sadler Paper Co., 482 F.Supp. 355 (E. D. Okla. 1979) (court sitting in diversity applying the conflict rules of the forum state; holding non-compete unenforceable: “The law in Oklahoma has long been that contracts which are contrary to the public policy of Oklahoma will not be enforced by Oklahoma courts regardless of their validity in the state where made.”).

⁷³ 732 F.2d 783 (10th Cir. 1984).

mud engineers.⁷⁴ The non-compete was the same for all three employee-defendants, but the place of contracting was different for each employee (North Dakota, Colorado, and Wyoming).⁷⁵ The place of performance was potentially a ten-state area, but most of the work was performed by the three employees in North Dakota (two employees) and Montana (the third employee). Dresser, the employer, was a Delaware corporation with its principal place of business in Texas.⁷⁶ The trial court found that the “location of the subject matter of the contract” was “difficult to determine, but if subject matter is identified as an interest in the employment relationship, that interest existed in Texas and the states where the employees actually lived and performed.”⁷⁷

As described above, the law governing non-competes varies substantially among the interested jurisdictions, and this fact made the court’s decision more difficult here. The trial court held that the covenants likely would be enforced under Texas law but would be unenforceable in Colorado, North Dakota, and Montana.⁷⁸ Therefore, “because of the interests of those states in contracts entered into by their citizens, North Dakota law applies to Sandvick’s employment agreement, Colorado law applies to Petty’s employment agreement, and either Colorado or Wyoming law governs the validity of Eide’s covenant.”⁷⁹ Note that the court had to grapple with the unpredictability of each state’s law concerning non-competes along with the added twist of a choice of law determination.

Considering Dresser’s appeal, the Tenth Circuit applied sections 6 and 188 of the Restatement⁸⁰ and sought to determine which state had the “most significant relationship to the transaction and the parties.”⁸¹ In applying the Restatement approach, the Court stated that the most important factors were the relevant policies of the forum and the other interested states. With respect to employment agreements and to covenants not to compete in particular, the Tenth Circuit concluded that “a state in which a party is domiciled has an interest in rules it promulgates to protect its residents against the unfair use of superior bargaining power and to protect their freedom to use their employable skills to support them-

⁷⁴ *Id.* at 784 (explaining that a “mud engineer” for Dresser was “an employee with limited technical training who, by using standard tests and calculations, determines the additives necessary to maintain the consistency of the drilling mud formulated for the well.”).

⁷⁵ *Id.* at 785.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* (“If Texas law applies, the covenants not to compete may be enforceable. If Texas law does not apply, the covenants are unenforceable under the laws of any of the other potentially interested states. The court noted that the statutes of Colorado, North Dakota, and Montana express a strong public policy against covenants not to compete.”).

⁷⁹ *Id.*

⁸⁰ *Id.* (“A federal court in a diversity case must apply the choice of law principles of the forum state. Thus, we must follow Colorado law, which resolves conflicts under the principles set forth in Restatement (Second) of Conflict of Laws §§ 6 and 188.”) (internal citations omitted).

⁸¹ *Id.*

selves and their families.”⁸² As this statement indicates, the court put a great deal of weight on the public policy aspects of state law concerning non-competes. Indeed, the court concluded that the “states where the parties entered into the employment relationships . . . have a substantial interest in invalidating covenants not to compete signed within their borders.”⁸³ The court characterized the law of the states of Colorado, North Dakota, and Montana, where the various defendants resided, as being strongly averse to the enforcement of non-competes as a matter of public policy. The court also looked to the policy of the forum state – in this case, Colorado – and examined the strength of the policy.⁸⁴ According to the court, the “substantive law of another jurisdiction should not apply if application of that law would violate a fundamental policy of the forum.”⁸⁵

The court’s consideration of the law of the forum state as a factor separate from the other factors described above is significant because it is likely to encourage forum-shopping for favorable law by both employees and employers.⁸⁶ In *Dresser*, the Tenth Circuit acknowledged the potential for incentivizing forum-shopping but stated that the price of discouraging forum-shopping in this instance was too high in terms of its restrictions on employee mobility.⁸⁷ Opinions such as this have no doubt given hope to employees (and their lawyers) that choice of forum may well make a difference in the outcome of a non-compete dispute.⁸⁸

2. When there is a choice of law clause

The Seventh Circuit’s opinion in *Curtis1000 Inc. v. Suess*⁸⁹ provides an example of a court’s conflict of law dispute revolving around the choice of law provision. In that case, Roy Suess had been employed by Curtis 1000 in Illinois for 24 years when, believing his employment was about to be terminated, he quit. Five days later he accepted a job

⁸² *Id.* at 786.

⁸³ *Id.*

⁸⁴ *Id.* at 787.

⁸⁵ *Id.* (The court concluded that “[b]ecause we agree with the trial court that the forum state and the states with the most significant contacts all invalidate the type of covenant not compete at issue here, we hold that Dresser is not entitled to damages for any alleged breach of that covenant.”).

⁸⁶ *Id.* (noting the “tendency of the courts to apply the policy of the forum state when parties are litigating covenants not to compete.”).

⁸⁷ *Id.* at 786 (quoting the Restatement, the court indicated that “the factors of certainty, predictability, and uniformity ‘are important values in all areas of the law. To the extent that they are attained . . . , forum shopping will be discouraged. These values can, however, be purchased at too great a price.’”).

⁸⁸ It is impossible to generalize about the outcome of these kinds of disputes except to say that they are unpredictable. *See, e.g.,* Transperfect Translations, Inc. v. Leslie, 594 F.Supp.2d 742, 750-51 (S.D. Tex. 2009) (Texas court applying Texas law even though it would violate the public policy of another interested state); Maxxim Med., Inc. v. Michelson, 51 F.Supp.2d 773, 780-81 (S.D. Tex. 1999), rev’d on other grounds, 182 F.3d 915 (5th Cir. 1999) (Texas court applying California law, in part because of California’s strong public policy stance on non-competes); Extracorporeal Alliance, L.L.C. v. Rosteck, 285 F.Supp.2d 1028, 1037, 1039 (N.D. Ohio 2003) (Ohio court applying Florida law).

⁸⁹ 24 F.3d 941 (7th Cir. 1994).

with ABF, a competitor of Curtis 1000.⁹⁰ During his employment with Curtis 1000, Suess had signed three separate non-competition agreements. The most recent agreement contained a provision selecting Delaware law to govern the agreement.⁹¹ (Curtis 1000 was incorporated in Delaware but otherwise had “no significant contacts with that state.”⁹²) Curtis 1000 brought a breach of contract action against Suess, alleging that he had violated the non-competition agreement.⁹³

The federal district court in Illinois, sitting in diversity, refused to enforce the non-compete, holding (according to the Seventh Circuit) that “the covenant had an insufficient connection to Delaware” and that “an Illinois court would consider the Delaware law of covenants not to compete repugnant to the public policy of Illinois.”⁹⁴ Curtis 1000 appealed, and the Seventh Circuit considered the question in terms of the differences between Illinois and Delaware non-compete law. After considering in some detail the differences between the two states’ consideration requirement, as well as the difference between Illinois’ “protectable interest” requirement and Delaware’s “legitimate interest” requirement for the enforceability of a non-compete, the Court of Appeals concluded the differences are “too slight to induce an Illinois court to take the rather drastic step of invalidating a consensual choice of law clause.”⁹⁵ The court ultimately upheld the district court’s result, however, because it concluded that there was an “insufficient connection between the contract [selected Delaware law] and the State of Delaware.”⁹⁶ Thus, Illinois law applied to the evaluation of the non-compete between Suess and Curtis 1000. The Seventh Circuit believed that an Illinois court would refuse to enforce the covenant not to compete under Illinois law and therefore affirmed the denial of Curtis 1000’s request for a preliminary injunction.⁹⁷

Similar conflicts issues have arisen regularly, and they appear to be on the rise as more employers ask employees to sign non-competes. In *Pro Edge, L.P. v. Gue*,⁹⁸ a federal district court, hearing a case (filed by the employer) removed from state court, considered whether to apply

⁹⁰ *Id.* at 943.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 944.

⁹⁵ *Id.* at 947.

⁹⁶ *Id.* at 948-49. (“Businesses incorporate in Delaware in order to take advantage of that state’s corporation law, and its judicial expertise concerning corporate governance, rather than to conduct business there. Curtis’s headquarters are in Georgia, and it has no offices or operations in Delaware. Suess of course has no contacts with Delaware. Curtis and Suess are operating in Illinois, so Illinois has an interest in applying its law to their relations. If the choice of law provision in the covenant not to compete had designated Georgia law we assume the Illinois courts would defer to that designation, recognizing that Georgia has as much interest in regulating the out of state operations of ‘its’ firm as Illinois does in protecting its citizen, Mr. Suess. But that is not the case here.”).

⁹⁷ *Id.* at 949.

⁹⁸ 374 F.Supp.2d 711 (N.D. Iowa 2005).

Iowa law (as indicated by a choice of law provision in the employment agreement) or Montana law (the place where the employee had most recently worked for Pro Edge and where he competed with Pro Edge).⁹⁹ A conflict existed because, according to the court, non-compete “covenants are routinely upheld in Iowa, whereas Montana’s extremely narrow view of such covenants routinely results in their unenforceability.”¹⁰⁰ The court applied Restatement Section 187 and concluded that “‘a substantial relationship’ within the meaning of § 187(2)(a), does exist between the parties, the transaction, and Iowa.”¹⁰¹ Given that conclusion, the court then applied subsection (2)(b) and determined that there was essentially a tie between Iowa law and Montana law in terms of what state’s law would apply in the absence of a contractual provision and what state had a materially greater interest. Thus, the court applied the law selected by the parties in the contract,¹⁰² and held the covenant not to compete enforceable under Iowa law.¹⁰³

Because many states express their approach to non-competition agreements in terms of the “strong” or “fundamental” public policy of the state, and because those public policy issues are deemed to affect employees, employers, and the public, disputes concerning non-competes are particularly apt to create difficult conflicts problems.¹⁰⁴ This is so because the conflicts rules take into account “fundamental” public policies in the discussion of what state has a “materially greater interest” in the dispute.¹⁰⁵

B. *Diversity in State Law and Races to the Courthouse*

The state-to-state disparities in the law provide an incentive for employers to use choice of law clauses to take advantage of favorable state law and an incentive for both parties to race to the courthouse in an effort to have the jurisdiction with the more favorable law hear the

⁹⁹ *Id.* at 735-36.

¹⁰⁰ *Id.* at 736 n.10.

¹⁰¹ *Id.* at 737.

¹⁰² *Id.* at 737-39 (“In sum, the choice of law analysis has resulted in the application of Iowa law in conformance with the choice of law provision in the 1996 Agreement.”).

¹⁰³ *Id.* at 740-41.

¹⁰⁴ See, e.g., *Keener v. Convergys Corp.*, 342 F.3d 1264, 1266 (11th Cir. 2003) (applying the traditional approach to conflicts rather than the restatement and overriding the parties’ choice of Ohio law because of its conflict with Georgia policy); *DCS Sanitation Mgmt., Inc. v. Castillo*, 435 F.3d 892, 897 (8th Cir. 2006) (applying the Restatement (Second) and overriding the parties’ choice of Ohio law because of its conflict with Nebraska public policy); *Kelly Services, Inc. v. Marzulla*, 591 F.Supp.2d 924, 938 (E.D. Mich. 2008) (applying the Restatement approach and enforcing parties’ choice of Michigan law).

¹⁰⁵ RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187(2)(b) (1971). See *Lester & Ryan, supra* note 6, at 399 (“Some courts find it virtually impossible to apply the law of another state that permits enforcement of non-compete covenants. The Georgia Supreme Court, for example, has held that the same public policies that underlie Georgia’s firm prohibition against non-compete agreements inform its choice of law analysis, implying that choice of law clauses selecting law favorable to non-competes will be regularly invalidated.”)

case.¹⁰⁶ There is evidence that these kinds of disputes are on the rise.¹⁰⁷ The conflicts rules, along with the strong public policy pronouncements by many states and courts concerning non-competes, provide an opening for both employers and employees to make arguments about which state's law should apply. This, in turn, creates another layer of unpredictability on top of the already fluid and difficult non-compete law within each state and the conflicts issues to be resolved by the courts. It also sets up conflicts between the states in exercising jurisdiction over non-compete disputes, as there may well be parallel actions in two different states.

The most notable case in this genre is *Advanced Bionics Corp. v. Medtronic, Inc.*,¹⁰⁸ in which the California and Minnesota state courts simultaneously considered the validity of the same non-compete. The procedural history is tortuous, demonstrating the problems that may arise because of the vast disparities between state non-compete law.¹⁰⁹ The dispute concerned a non-compete provision in an employment contract between Medtronic, a Minnesota corporation, and Mark Stultz, an employee hired by Medtronic as a "senior product specialist."¹¹⁰ The non-compete provided "that for two years after employment termination, Stultz would not" work for any entity or person competing with Medtronic "'in any geographic area in which Medtronic actively markets a Medtronic product or intends to actively market a Medtronic Product of the same general type or function.'"¹¹¹ The agreement also included a choice of law provision, stating that the Agreement would be governed

¹⁰⁶ Scott Hovanyetz, *Non-Compete Agreements and the Equity Conflict: Applying Baker v. General Motors Through the Lens of History*, 38 SETON HALL L. REV. 253, 256 (2008) ("Employers seeking to avoid these state policies to enforce non-competes are likely to craft choice-of-law clauses in the agreements to obtain favorable law; conversely, employees seeking to escape non-competes are likely to seek declaratory relief in a state that is unlikely to uphold non-competes."); See *Google, Inc. v. Microsoft Corp.*, 415 F.Supp.2d 1018 (N.D. Cal. 2005); *Biosense Webster, Inc. v. Superior Court*, 135 Cal.App.4th 827 (2006); *LeFebvre v. Syngenta Biotechnology, Inc.*, No. C 08-02732 JW, 2008 WL 5245056 (N.D. Cal. Dec. 15, 2008); *West Pub'g Corp. v. Stanley*, No. Civ. 03-5832(JRT/FLN), 2004 WL 73590 (D. Minn. Jan. 7, 2004); *Park-Ohio Industries, Inc. v. Carter*, No. 06-15652, 2007 US Dist. Lexis 9095 (E.D. Mich. Feb. 8, 2007) (court addressing thirty-year old non-compete provision with an Ohio choice of law provision; the plaintiff sought the application of Michigan law which would have invalidated the non-compete at the time that it was drafted but not at the time of the litigation).

¹⁰⁷ See, e.g., Glynn, *supra* note 2, at 1385-86 (summarizing some of the cases and describing a "changing dynamic"); Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 376 (2003).

¹⁰⁸ 59 P.3d 231 (Cal. 2002).

¹⁰⁹ *Advanced Bionics v. Medtronic* provides an excellent example, but other examples abound. See, e.g., *King v. PA Consulting Grp.*, 78 F. App'x. 645, 649 (10th Cir. 2003) (Court remanded non-compete dispute after holding that a forum selection clause in former employee's employment contract "effected only a permissive selection of venue in New Jersey."); see *infra* note 133 and cases cited therein. See also, e.g., Gilson, *supra* note 15, at 612 n.111 (describing a dispute concerning a non-compete, the application of California, New Hampshire, and Massachusetts law, and races to the courthouse). See also *EMC Corp. v. Donatelli*, No. 091727BLS2, 2009 WL 1663651 (Mass. Super. May 5, 2009) (former employee filed suit in California, prompting former employer to file suit in Massachusetts the following day).

¹¹⁰ *Advanced Bionics*, 59 P.3d at 233.

¹¹¹ *Id.*

by “the laws of the state in which the Employee was last employed by Medtronic.”¹¹² Throughout his employment with Medtronic, Stultz worked in Minnesota, but in June 2000, Stultz resigned from Medtronic and began to work for Advanced Bionics Corporation in California, thus setting up a dispute between the parties and a conflict between California law (which refuses to enforce non-competes) and Minnesota law (which regularly enforces such agreements).

Racing to the courthouse in an effort to take advantage of California law, Stultz and Advanced Bionics sued Medtronic for declaratory relief in California state court on the day Stultz was hired by his new employer.¹¹³ They sought a TRO, asserting that “Medtronic would use the time to ‘race to court’ in Minnesota.”¹¹⁴ Medtronic removed the California state action to federal court before the hearing on the TRO occurred, and did indeed race to court in Minnesota, filing an action in Minnesota state court against Stultz (for breach of contract) and Advanced Bionics (for tortious interference with contract). Medtronic sought and obtained a TRO from the Minnesota court, “enjoining Advanced Bionics from hiring Stultz in any competitive role. The order also barred both parties” from, in essence, taking any steps that would interfere with the resolution of the dispute by the Minnesota court.¹¹⁵ Shortly thereafter, the federal court in California remanded that action, finding that Medtronic had improperly sought removal in order to avoid an unfavorable ruling in the California state court.¹¹⁶

Advanced Bionics and Stultz then sought to halt the litigation in Minnesota, and Medtronic attempted to halt the litigation in California. The California state trial court refused to dismiss the California lawsuit and the Minnesota state court issued a preliminary injunction that prevented Stultz from working for a Medtronic competitor.¹¹⁷ A few weeks later, the California court enjoined Medtronic “from taking any further steps in the Minnesota action . . . , finding there was a ‘substantial chance’ that Medtronic would ‘go to Minnesota court [and] attempt to undercut the California court’s jurisdiction.’”¹¹⁸ Medtronic appealed.

¹¹² *Id.*

¹¹³ *Id.* (“On the same day, in Los Angeles County Superior Court, Stultz and Advanced Bionics sued Medtronic for declaratory relief, alleging the Medtronic’s covenant not to compete and choice-of-law provision violate California’s law and public policy and are void under Business and Professions Code section 16600.”).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 234 (“The order also barred both parties ‘from making any motion or taking any action or obtaining any order or direction from any court that [would] prevent or interfere in any way with [the Minnesota court’s] determining whether it should determine all or any part of the claims alleged in [the Minnesota] lawsuit, including claims for temporary, preliminary or permanent relief.’”).

¹¹⁶ *Id.* (“The federal court order stated that removal was improper because Medtronic, a Minnesota company, purported to rely on diversity jurisdiction, even though it knew Stultz was still a Minnesota resident. The federal court also noted that Medtronic had removed the California action ‘not to have the matter heard in this court, but to interfere with [the TRO] matter being heard.’”).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

Then the Minnesota court amended its earlier order, enjoining Stultz and Advanced Bionics from seeking relief in any other court “that would effectively stay, limit or restrain [the Minnesota] action” and ordering them to “move to vacate and rescind” the California TRO.¹¹⁹ Thus there was an impasse, with both the California and Minnesota courts asserting their authority to resolve the dispute.

As a matter of comity, courts often employ the “first-filed rule” to limit the problematic results flowing from parallel litigation.¹²⁰ In Stultz’s case, however, the Minnesota court rejected “rigid or inflexible” application of the first-filed rule and retained jurisdiction of the matter.¹²¹ At roughly the same time, the California Court of Appeals rejected Medtronic’s appeal, holding that “notwithstanding the choice-of-law provision in the Agreement, the case would be decided under California law; and . . . because California law would apply and the California action was filed first, California courts should decide the dispute.”¹²² Medtronic appealed, and the California Supreme Court blinked:

We agree that California has a strong interest in protecting its employees from non-competition agreements under section 16600. But even assuming a California court might reasonably conclude that the contractual provision at issue here is void in this state, this policy interest does not, under these facts, justify issuance of a TRO against the parties in the Minnesota court proceedings. A parallel action in a different state presents sovereignty concerns that compel California courts to use judicial restraint when determining whether they may properly issue a TRO against parties pursuing an action in a foreign jurisdiction.¹²³

¹¹⁹ *Id.*

¹²⁰ *See, e.g.,* Northwest Airlines, Inc. v. American Airlines, Inc., 989 F.2d 1002, 1004 (8th Cir. 1993) (upholding Minnesota court’s decision to enjoin parallel litigation in Texas because Minnesota suit was filed first.)

¹²¹ Advanced Bionics, 59 P.3d at 234 n. 4. The Minnesota court concluded that “‘Minnesota . . . has a strong interest in having contracts executed in this state enforced in accordance with the parties’ expectations.’”

¹²² *Id.* at 235.

¹²³ *Id.* at 237. In this case, the court did not find that California’s public interest in voiding non-compete agreements outweighed the comity and other considerations, but the California courts have regularly given great weight to that public policy. Ronald Gilson believes that is the standard approach, in fact. “Even if the employment agreement which contains a postemployment covenant not to compete explicitly designates the law of another state, under which the covenant would be enforceable, as controlling, and even if that state has contacts with the contract, California courts nonetheless will apply section 16600 on behalf of California residents to invalidate the covenant.” Gilson, *supra* note 15, at 608 (*citing* Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 97 Cal. Rptr. 811, 814 (Ct. App. 1971) (applying California law to invalidate [non-compete] despite [agreement’s] validity under New York law and contractual designation of New York law as controlling). It may be that if Stultz had been deemed a resident of California, rather than a Minnesota resident, the result of the California litigation would have been different.

Thus the California court dissolved the injunction restricting the parties from litigating in Minnesota.¹²⁴ The court did not, however, dismiss the California action, stating that the “Minnesota action does not divest California of jurisdiction, and Advanced Bionics remains free to litigate the California action unless and until Medtronic demonstrates to the Los Angeles County Superior Court that any Minnesota judgment is binding on the parties.”¹²⁵

Advanced Bionics v. Medtronic is hardly the only case with such a convoluted procedural history. *In re AutoNation, Inc.*¹²⁶ involved a non-compete agreement between a Florida entity and an employee residing and working in Texas. The agreement contained a forum selection and choice of law clause designating Florida courts and law for any disputes concerning the agreement. The Texas Supreme Court succinctly described the complicated procedural history: “Relator AutoNation, Inc. sued Garrick Hatfield in Florida to enforce a covenant not to compete. In the employment contract containing the covenant, AutoNation and Hatfield had agreed to litigate any disputes arising under the contract in Florida under Florida law. Hatfield later sued AutoNation in Texas under the contract. The trial court declined to dismiss or stay this action and enjoined AutoNation from pursuing its first-filed Florida lawsuit. AutoNation now seeks mandamus relief to enforce the mandatory forum-selection clause, and we conditionally grant it.”¹²⁷

Hatfield (the employee) sought relief in Texas because he lived and worked in Texas. He argued that the non-compete should be governed by Texas law (by virtue of his residence in Texas), and that the non-compete would be invalid under Texas law. Indeed, he asserted that enforcement of the non-compete would violate Texas public policy.¹²⁸ Notwithstanding very strong pronouncements by Texas courts concerning the state’s public policy surrounding non-competes,¹²⁹ the Texas Su-

¹²⁴ Glynn describes this case as evidence of a dynamic in which “comity seems to run only one way, leaving California’s public policy at risk to aggressive state law exporters.” Glynn, *supra* note 2, at 1387.

¹²⁵ *Advanced Bionics*, 59 P.3d at 238.

¹²⁶ 228 S.W.3d 663 (Tex. 2007).

¹²⁷ *Id.* at 664.

¹²⁸ *Id.* at 666. (Hatfield argued “that Texas law should govern a Texas resident’s non-compete agreement, that AutoNation was attempting the circumvent Texas law by pursuing the Florida action, and that the Florida court likely would refuse to apply Texas law in deciding the enforceability of the non-compete agreement. Hatfield cited an unpublished Florida case . . . in support of his argument that the Florida court would apply Florida non-compete law, which Hatfield contended would ‘yield a result that offends Texas public policy.’”).

¹²⁹ *Id.* at 667 (“The court of appeals relied on our 1990 decision in *DeSantis v. Wackenhut*, [793 S.W.2d 670 (Tex. 1990)] in which we held that the enforcement of non-compete covenants was a matter of fundamental Texas public policy, governed by Texas law. The court noted that Hatfield had presented the trial court with the *Hankins* decision, which indicated that Florida courts would apply their own law to this dispute. The court of appeals concluded that ‘[b]ecause the Texas Supreme Court has held that fundamental Texas public policy requires application of Texas law to the question of enforceability of a non-compete agreement, we are unable to hold that the trial court

preme Court ultimately deferred to the Florida litigation in the Hatfield case.¹³⁰ Citing freedom of contract and comity principles, the Court held the forum-selection clause applicable: “the parties’ bargained-for agreement merits judicial respect. This dispute should be heard in the first-filed Florida action, as the parties explicitly contracted.”¹³¹ The Court noted that the “decision according deference to the first-filed Florida action, besides honoring the parties’ contractual commitment, also honors principles of interstate comity.”¹³²

These kinds of conflicts and state-to-state stand-offs have not been uncommon in the last decade. Numerous instances have arisen in which parallel litigation commences, in federal and/or state court, and neither conflicts principles nor federal court abstention doctrines manage to resolve the resulting problems. I have found at least thirteen sets of cases that look quite similar to *Advanced Bionics v. Medtronic* and *In re Hatfield*. In each, litigation over the enforceability of a non-compete proceeded in courts in two different states; in each there were plausible arguments for the application of either state’s law; and in each the only solution was for one court to back off as a matter of comity.¹³³ That is,

abused its discretion in issuing an injunction to halt the Florida proceeding and allow the Texas case to proceed to trial.””).

¹³⁰ *Id.* at 669. The court differentiated (though it’s not clear if this was a dispositive issue) between a choice-of-law clause and a forum-selection clause. “[W]e decline Hatfield’s invitation to superimpose the *DeSantis* choice-of-law analysis onto the law governing forum-selection clauses.”

¹³¹ *Id.*

¹³² *Id.* at 670. See also, Charles M. Hosch, *Business Torts*, 61 SMU L. REV. 589, 592-94 (2008).

¹³³ *Marcelo v. Ivy Ventures, LLC*, No. C 10-04609 WHA, 2010 WL 5115437 (N.D. Cal. Dec. 9, 2010) (litigation first-filed in Virginia; California federal court dismisses based on comity and deference to its “sister federal court.”); *Ethicon Endo-Surgery, Inc. v. Pemberton*, No. 10-3973-B, 2010 WL 5071848 (Mass. Super, Oct. 27, 2010) (California court and Massachusetts court granted conflicting motions for preliminary injunction; Massachusetts court stated that it was not required to defer to California ruling, noting that California is an outlier in regarding non-compete law); *EMC Corp. v. Donatelli*, No. 091727BLS2, 2009 WL 1663651 (Mass. Super., May 5, 2009) (Massachusetts court granted employer’s preliminary injunction motion while a parallel case filed by the employee was pending in California); *Rimkus Consulting Grp., Inc. v. Cammarata*, 255 F.R.D. 417 (S.D. Tex. 2008) (stand-off between courts in Texas and Louisiana; Texas refused to determine whether Louisiana decision invalidating non-compete applied in other jurisdictions); *St. Jude Med. S.C., Inc. v. Hasty*, No. CIV 06-4547, 2007 WL 128856 (D. Minn. Jan. 12, 2007) (based on Minnesota choice of law clause, Georgia court deferred to Minnesota jurisdiction); *Estee Lauder Co. v. Batra*, 430 F. Supp.2d 158 (S.D.N.Y. 2006) (California is first-filed court; New York court refused to dismiss or stay, rejecting abstention argument); *Swenson v. T-Mobile USA, Inc.*, 415 F.Supp2d 1101 (S.D. Cal. 2006) (California court deferred to earlier-filed suit in Washington state, in part based on a choice of law clause); *Mouchantaf v. Int’l Modeling & Talent Ass’n*, 368 F.Supp.2d 303 (S.D.N.Y. 2005) (based on *Colorado River* analysis, New York court abstained, deferring to Arizona litigation); *Covance Laboratories, Inc. v. Orantes*, 338 F.Supp.2d 613 (D. Md. 2004) (applying *Colorado River* doctrine, Maryland federal court abstained in favor of Wisconsin proceedings); *W. Publ’g Corp. v. Stanley*, No. CIV. 03-5832 (JRT/FLN), 2004 WL 73590 (D. Minn. Jan. 7, 2004) (in case involving litigation in three states, Minnesota court granted employer’s preliminary injunction and Nevada and California courts stepped aside); *Schmitt v. JD Edwards World Solutions Co.*, No. C 01-1009 VRW, 2001 WL 590039 (N.D. Cal. May 18, 2001) (cases filed in California and Colorado on the same day; California dismissed case, finding it likely that the employee had filed suit preemptively); *DeFeo v. Proctor & Gamble Co.*, 831 F.Supp 776 (N.D. Cal. 1993) (California court declining to exercise jurisdiction in light of later-filed action in Ohio state court).

there was no satisfactory doctrinal solution responsive to the disadvantages created by the diversity in state law.

III. THE STATES SHOULD ADOPT A RULE OF UNENFORCEABILITY OF EMPLOYEE NON-COMPETITION AGREEMENTS

As demonstrated above, the law of non-competes varies greatly among the jurisdictions. This variability in the law, even within a given jurisdiction, results in unpredictability that is compounded by the uncertainty of the choice of law and conflicts issues that arise due to the interstate nature of many industries and by the increasing mobility of employees. Because of the variability in the law, both employees and employers have an incentive to forum shop in search of favorable law. This effort is made both more plausible and more complicated by the fact that non-compete enforceability is very often deemed a matter of strong or fundamental public policy of the states. Thus the diversity in non-compete law has led not just to unpredictability in the law of non-competes, but also to complicated and difficult-to-resolve conflicts of law that have produced challenges to the interstate system. These problems arise for the federal system when both parties race to court in an effort to secure a favorable venue and parallel litigation ensues. Neither conflicts rules nor principles of comity succeed in addressing the issues raised in this context in a satisfactory manner.

There is a way out of this morass, however, that would virtually eliminate conflicts of law in this area, benefit employees as a class, and reduce the costs to the legal system and the litigants. The adoption by all of the states of a rule of unenforceability of employee non-competition agreements would virtually eliminate the uncertainty and the strategic litigation that are the hallmarks of current non-compete law. Uniformity in this area is both desirable and practicable.¹³⁴ It is desirable because it would work to reduce the disadvantages in the diversity of state law, it would facilitate the flow of commercial transactions, and it is, on balance, the substantively preferable rule. It is practicable because the rule proposed here is both discrete and easily adoptable by the states; because there is experience with and evidence concerning the substance of the rule along with some momentum for change in the law of non-competes; and because the benefits of the rule would accrue even in the absence of compete adoption by the states. Notably, all of these advantages are more likely to accrue with a uniform rule of unenforceability than with a different uniform rule – a uniform “reasonableness” approach, for example. After briefly discussing the nuts and bolts of this proposal, the Arti-

¹³⁴ This is the basic standard articulated by NCCUSL. Although the focus here is on the *goal* of uniformity rather than the process by which that uniformity is achieved, NCCUSL’s approach provides a helpful organizing principle.

cle explains its desirability and practicability before addressing some possible objections.

A. *The Rule of Unenforceability*

The states should adopt a rule of unenforceability of employee non-competes similar to California's statutory provision rendering virtually all non-compete agreements unenforceable. California's Business & Professions Code Section 16600 provides as follows: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."¹³⁵ The California code sets forth exceptions for non-competes in connection with the sale of a business¹³⁶ or dissolution of a partnership.¹³⁷

A uniform or model act might read as follows:

- (1) Except as provided in subsections (2) and (3), every contract by which any person is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.
- (2) Any person who sells the goodwill of a business, or any owner of a business entity selling or otherwise disposing of all of his or her ownership interest in the business entity, may agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business so sold has been carried on, so long as the buyer carries on a like business therein.
- (3) In the event of the dissolution of a partnership or the dissociation of a partner from a partnership, a partner may agree that he or she will not carry on a similar business within a specified geographic area where the partnership business has been transacted, so long as any other member of the partnership, or any person deriving title to the business or its goodwill from any such other member of the partnership, carries on a like business therein.

This language is quite similar to the language of the California statute (as well as that of Montana, North Dakota, and a few other states),¹³⁸ and is intended to set forth a strong rule against the enforceability of non-

¹³⁵ CAL. BUS. & PROF. CODE § 16600 (West 2011).

¹³⁶ *Id.* at § 16601 ("Any person who sells the goodwill of a business, or any owner of a business entity selling or otherwise disposing of all of his or her ownership interest in the business entity . . . may agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business so sold . . . has been carried on, so long as the buyer . . . carries on a like business therein.").

¹³⁷ *Id.* at § 16602 ("Any partner may [in the event of the dissolution of a partnership or the dissociation of a partner from a partnership] agree that he or she will not carry on a similar business within a specified geographic area where the partnership business has been transacted, so long as any other member of the partnership, or any person deriving title to the business or its goodwill from any such other member of the partnership, carries on a like business therein.").

¹³⁸ See *supra* Part I.

competition agreements.¹³⁹ It derives from the Field Code, which was adopted in whole or in part by a number of Western states in need of codification and uniformity in their laws.¹⁴⁰ The statute contains elements of the common law rule of reason, reflected in the exceptions for the sale of a business and the dissolution of a partnership.¹⁴¹ The provision voiding all other restraints on post-termination employment constitutes a break from the common law, however.¹⁴² Accordingly, in almost all states it would require the adoption of a statute abrogating the common law or amending the current statutory approach.

This change in the law is proposed as a uniform or model act for adoption by the states for several reasons. First, employment law and contract law are traditionally matters of state law and probably ought to remain so generally.¹⁴³ Second, even assuming Congress had the authority under the Commerce Clause (or otherwise) to pass a statute concerning the enforceability of non-competes, it is quite unlikely to do so. Finally, the Uniform Commercial Code and other uniform acts provide a template and precedent for the adoption of uniform laws. The first two points are relatively uncontroversial (or so controversial that they should be the subject of another article).

As to the third, although the focus in this paper is on uniformity as a *result*, rather than the NCCUSL's uniform act *process*, a few words about the uniform or model act approach are in order. A brief overview of the drafting and adoption of the UCC demonstrates the efficacy, in certain circumstances, of the approach to uniformity used by the National

¹³⁹ Gilson, *supra* note 15, at 607 ("Other than two statutory exceptions (which track the general rule outside of California) allowing enforcement of covenants not to compete associated with the sale of a business, the statute's prohibition is essentially unqualified."). See also *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 296 (2008).

¹⁴⁰ For a history of the adoption of the predecessor to CAL. BUS. & PROF. CODE § 16600, see Gilson, *supra* note 15, at 613-619. Gilson describes the adoption of the rule against non-competes not as "the result of the prescience of the California legislature" but as an outgrowth "of the nineteenth century coincidence of the codification movement in American law . . . and the need for a new state to bring some order to the chaotic condition of its laws following its admission to the Union." Gilson, *supra* note 15, at 613-14.

¹⁴¹ Gilson, *supra* note 15, at 617.

¹⁴² *Id.* at 618-19 ("Thus, beginning with the enactment of the Civil Code in 1872, California law on postemployment covenants not to compete diverged from that of Massachusetts and the rest of the large industrial states.").

¹⁴³ To be sure, there are issues of both employment law and contract law that have for good reason been nationalized – nondiscrimination law, for example – but many aspects of employment law and contract law are local in nature and reasonably subject to regionally different forms of regulation. *But see* Hirsch, *supra* note 4. To the extent that non-competes operate as a form of intellectual property protection – and they do – the balance may be somewhat different. I have argued in the past that intellectual property protection should be a matter primarily of federal law and that the overlapping protection provided by the states conflicts with the goals of federal intellectual property law. See Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policy-making*, 41 U.C. DAVIS L. REV. 45 (2007); See also Viva R. Moffat, *Regulating Search*, 22 HARV. J.L. & TECH. 475 (2009), and Viva R. Moffat, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 BERKELEY TECH. L.J. 1473 (2004).

Conference of Commissioners on Uniform State Laws (NCCUSL).¹⁴⁴ The genesis of the UCC set the stage for a variety of other uniform acts. It was the brainchild of Karl Llewellyn and others, growing out of the realist movement in the mid-twentieth century. As more and more transactions were conducted across state lines, the need for uniformity in the law governing those transactions grew. The passage by all of the states of the UCC (in one form or another) paved the way for uniform acts of all variety. The UCC became and remains a joint project of the NCCUSL and the American Law Institute (ALI). Since the drafting and adoption of the UCC, the NCCUSL has been involved with the drafting of a multitude of uniform acts, from the UCC to the Uniform Adoption Act to the Uniform Trade Secrets Act. The NCCUSL's self-stated mission is "to study and review the law of the states to determine which areas of law should be uniform. The commissioners promote the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable."¹⁴⁵

The passage of the UCC in whole or in part by all of the states is probably the most significant achievement of this movement, and it has largely been deemed a success.¹⁴⁶ To be sure, the UCC has not resulted in complete uniformity. Not all states have adopted the Code in its entirety, and judicial application of its provisions has in some instances resulted in divergent interpretations.¹⁴⁷ This is hardly surprising, however, and notwithstanding this development, the UCC has brought a degree of predictability and uniformity to commercial transactions that would not have existed in the absence of the uniform codification movement.¹⁴⁸

The NCCUSL has promulgated a variety of other smaller scale uniform acts, and a majority of the states have adopted many of them.¹⁴⁹ It is impossible to generalize about the reasons for the drafting and adoption of these various acts by the fifty states, but it is safe to say that in many cases the need for uniformity was deemed significant enough to

¹⁴⁴ NCCUSL is the National Conference of Commissioners on Uniform State Law. See <http://www.nccusl.org/> (last visited February 18, 2012).

¹⁴⁵ See the NCCUSL website, *About Us*, NCCUSL.ORG, <http://www.nccusl.org/Narrative.aspx?title=About%20the%20ULC> (last visited February 26, 2012). Similarly, the ALI, which drafts the Restatements, works toward the clarification and efficacy of the law. The ALI's charter stated that its purpose was "'to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.'" *About the American Law Institute*, ALI.ORG, available at <http://www.ali.org/doc/thisIsALI.pdf>, p. 1 (last visited February 26, 2012). The ALI has drafted the Restatement (Third) of Employment Law, which includes a section on non-competes, but it remains controversial.

¹⁴⁶ See 1 White & Summers, *Uniform Commercial Code*, at 444.

¹⁴⁷ See Gerald T. McLaughlin, *The Evolving Uniform Commercial Code: From Infancy to Maturity to Old Age*, 26 LOYOLA L.A. L. REV. 691, 692-93 (1993). See *infra* Part IV regarding objections concerning the failure of the uniform act process.

¹⁴⁸ McLaughlin, *supra* note 147, at 696-97.

¹⁴⁹ See <http://www.nccusl.org/Acts.aspx> (listing the "Completed Acts" of the Uniform Law Commission) (last visited February 28, 2012).

overcome objections based on the desirability of differing state laws and state sovereignty. Many of the uniform acts might be described as resulting from the “laboratories of state law.” Over time, state law diverges as legislatures and courts promulgate, apply, and interpret a variety of rules. In some situations, the divergent rules and interpretations give rise to problems, such as when many transactions take place across state borders or when individuals move from one state to another or when entities operate in more than one state. As conflicts arise and states gain experience with a particular rule or set of rules, it may be possible to draw conclusions about the efficacy of a particular rule or set of interpretations.¹⁵⁰ When that occurs, uniformity in the law becomes appealing both because of the conclusion that there is a substantively preferable rule and because uniformity will reduce or eliminate the problems caused by differing state law approaches. The laboratories of state law on non-competition agreements have now percolated such that some conclusions can be drawn.

*B. A Uniform Rule of Unenforceability is Both Desirable
and Practicable*

1. Desirability

Uniformity of state law is most desirable when it works to avoid conflicts or otherwise decrease the disadvantages flowing from the diversity in state law and when it facilitates the flow of commercial transactions.¹⁵¹ A uniform rule of unenforceability of non-competes would do both. In particular, it would significantly reduce the disadvantages of diverse state law by reducing or eliminating the number and difficulty of conflicts disputes and, at the same time, reducing the incentives for strategic litigation. In addition, as employers operate increasingly on a nationwide basis and as individuals are increasingly mobile, greater uniformity in some aspects of the employment relationship will facilitate commercial transactions and make the legal structures governing the employment relationship more predictable and, ultimately, fair.

a. “avoiding the disadvantages of diversity in state law”

¹⁵⁰ There are a variety of ways of thinking about this “laboratory of state law,” of course. See, e.g., Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 VAND. L. REV. 1229 (1994) (discussing “competing models of federalism”). At least one way of thinking about the metaphor is as an example of the scientific method. Amar describes this view: “. . . federalism permits pragmatic testing of novel policy proposals. State laboratories are *practical* and *empirical*. In effect, innovative states can conduct controlled legislative ‘experiments’ whose results can be monitored and interpreted by ‘scientific policymakers.’ Data may be collected and compiled, comparisons (both spatial and temporal) performed, hypotheses tested, and sound policy conclusions derived and applied elsewhere, if appropriate.” *Id.* at 1234.

¹⁵¹ The goal of NCCUSL is to propose uniform act “where uniformity is desirable and practicable,” and that is most common where uniformity would facilitate the flow of commercial transactions or avoid conflicts of law. See The NCCUSL, *supra* note 145.

A uniform rule of unenforceability of employee non-competition agreements would go a long way toward reducing or eliminating the current disadvantages that arise from the diversity of state law in this area. As described above, state law concerning non-competes varies dramatically, from regular enforcement of “reasonable” non-competes to fairly searching inquiries into the propriety of the agreements to outright refusal to enforce. This diversity in the law, along with the national scope of the labor market, has led to thorny choice of law problems, a significant amount of forum shopping, and regular races to the courthouse in an effort to secure a favorable result. All of these are, of course, to be expected in a federal system, but the frequency and difficulty of the issues arising in the non-compete context are such that the disadvantages of diversity in state law outweigh the benefits.

This is so, in large part, because the doctrinal approaches to dealing with choice of law problems, forum shopping, and interstate disputes arising from parallel litigation fail to resolve these issues in a predictable or fair way. Conflicts of laws principles seek to address choice of law problems, but in the non-compete context, the regular use of “escape valves” based on fundamental public policies means that conflicts doctrine is essentially preempted, or at least avoided, by the courts in many cases.¹⁵² This is true regardless of whether the employment agreement contains a choice of law clause, rendering the agreement of the parties with respect to choice of law and forum selection much less stable. When more than one court is involved, principles of comity and abstention tend to be applied inconsistently, if at all. Some courts adhere to the “first-filed” rule, but others are willing to ignore it when doing otherwise would conflict with state public policy. And finally, abstention doctrine only applies to a subset of the problematic cases. In other words, the currently available solutions simply are not up to the task. A uniform rule of unenforceability of non-competes, on the other hand, would sidestep *all* of these problems. In this subsection, I discuss the ways in which the current approaches to addressing the problems arising from the diversity in state non-compete law are flawed when applied to this context, and I demonstrate these flaws with a few examples.

As employers often operate in more than one state and as employees have become increasingly mobile, the unpredictability of non-compete enforcement has taken on an interstate dimension. Employers regularly, and increasingly, have asked employees to sign non-competition agreements, many with choice of law and forum selection clauses.¹⁵³ Commentators agree that non-competes “generate an unusual

¹⁵² See *supra* Part II.

¹⁵³ Sylvia Hsieh, *Litigation Over Non-compete Agreements on the Rise*, LAWYERS USA, June 12, 2009, available at <http://www.allbusiness.com/legal/contracts-law-covenants-not-to-compete/12362345-1.html> (“In the past few years, employers have dramatically stepped up their use of non-compete agreements to limit what a departing employee can do.”).

number of disputes about their validity.”¹⁵⁴ As described above in Part II, the conflicts issues have become quite knotty as employers and employees alike attempt to game the system, with choice of law clauses, forum-selection provisions, arguments about fundamental public policies, and races to the courthouse.¹⁵⁵ This has vastly increased the unpredictability surrounding non-competition agreements, on top of the unpredictability that already exists within many state law approaches. Moreover, this unpredictability is exacerbated by the public policy aspects of non-compete enforcement and is present even between states that regularly enforce “reasonable” non-competes.¹⁵⁶ The ability of states to “opt out” or refuse to enforce choice of law clauses on public policy grounds adds to the instability of the current hodge-podge system.¹⁵⁷

The diversity in state law also provides an incentive on both sides to forum shop. Forum shopping is an inherent part of our federal system, but in the case of non-compete disputes, it has become particularly problematic because the conflicts rules, which are designed to eliminate at least some of the incentive to forum shop, do not do so.¹⁵⁸ Because non-compete policy is a “fundamental” or “significant” policy in many jurisdictions, the possibility of using this “escape valve” is present in many cases.¹⁵⁹ As its name applies, this is a device that perhaps is meant to be used only in the extraordinary case, but it only serves to in-

¹⁵⁴ Estlund, *supra* note 29, at 401 n.69 (“Professor Stone maintains that ‘disputes over ownership of human capital’ – mostly involving postemployment restraints on competition – ‘are becoming one of the most frequently litigated issues in the employment law field.’”) (quoting KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 128 (2004)); *See also* Estlund, *supra* note 29, at 401-402. According to Estlund, non-compete agreements (and arbitration agreements) occupy a hybrid position between rights and contract, and it is this hybrid status that leads to difficulties of resolution. “The contractual platform enables parties – read ‘employers’ – wide discretion in drafting agreements, and generates almost endless variety in the kinds of provisions that might be included. Those provisions are potentially reviewable in court under multifaceted . . . legal standards that govern validity. Conditionally waivable rights have neither the uniformity of ordinary rights nor the presumptive validity of ordinary contracts.” Estlund, *supra* note 29, at 392 (“ . . . as firms’ profits have come increasingly to depend on information that is carried around in the heads of employees, non-compete covenants have filtered down to lower-level employees with relatively little sophistication, bargaining power, or economic where-withal . . . The growth of the information-based economy has converged with increasing job mobility to generate an upsurge in covenants not to compete . . . ”) (citing KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 128 n.3 (2004) (setting forth evidence of increasing use of non-competes by employers)). When I was in practice I had employers ask me on a number of occasions to draft non-competes for *all* of their employees, regardless of level of seniority or access to confidential or trade secret information.

¹⁵⁵ Lester & Ryan, *supra* note 6, at 406-7 (the fact that non-compete disputes are governed by varying state law approaches, that either side can seek relief, and that both sides are likely to turn to the courts – rather than arbitration – “sets the state for the proverbial ‘race to the courthouse’ that has characterized much recent litigation in the area of employee restrictive covenants.”).

¹⁵⁶ *Id.* at 402 (“Despite the attention garnered by cases involving conflicts between states that are willing to enforce reasonable employee non-compete agreements beyond the limited context of protectable trade secrets and those that categorically prohibit or virtually prohibit them, it bears emphasis that conflicts also arise between states that have a common willingness to enforce reasonable covenants but differ by degree.”).

¹⁵⁷ *See* Glynn, *supra* note 2, at 1437.

¹⁵⁸ *See supra* Part II.

¹⁵⁹ *Id.*

crease unpredictability because it regularly undermines the stability created by a contractual choice of law selection.¹⁶⁰ In fact, Professor Larry Ribstein found that in 71 non-compete cases that he reviewed, the parties' choice of law was not enforced in 29 of the cases.¹⁶¹ Thus the conflicts rules fail to address the conflicts that arise in non-compete disputes in a satisfactory way.¹⁶²

And when the courts of more than one state become involved, comity and abstention principles – which are generally matters of discretion and are applied only in extraordinary circumstances – do little to increase certainty or predictability.¹⁶³ In a number of non-compete cases, forum-shopping by the parties led to challenges to the interstate system because both parties raced to the courthouse, each in different states, resulting in parallel litigation in more than one court.¹⁶⁴ This can lead to a standoff in which neither jurisdiction has a clearly stronger interest in the resolution of the case or in which one or both states assert a strong policy preference concerning non-compete enforcement. That is, just as the conflicts rules do not lead to an obvious answer about what state's

¹⁶⁰ See Glynn, *supra* note 2, at 1409 (“More general choice-of-law principles apply in the employment context, and, under these terms, a forum state is far less likely to adhere to a contractual choice of law clause, particularly when important state policies are implicated.”). See also, Ribstein & O’Hara, *supra* note 2, at 689 (“Most states will refuse to enforce choice law if it is contrary to an interested states’ ‘fundamental policy.’ This exception carves out a category of ‘super-mandatory’ rules that trump contractual provisions not only under local law, but also as against the law of the contractually selected jurisdiction.”).

¹⁶¹ Ribstein, *supra* note 107, at 376. See also Symeon C. Symeonides, *Choice of Law in the American Courts in 2007: Twenty-First Annual Survey*, 56 Am. J. Comp. Law 1, 44 (2008) (“The ability of employers to bind mobile employees to the law of a particular state through a choice-of-law clause depends in large part on which state’s courts decide the question. This is because, as indicated by cases reported in previous years, choice-of-law clauses fare significantly better in the courts of the state whose law is chosen by the clause than in other states.”).

¹⁶² See Lester & Ryan, *supra* note 6, at 404 (“... when a conflict of laws issue arises in litigation over employee restrictive covenants, choice of law clauses are by no means foolproof mechanisms for ensuring application of a particular state’s law. The discretionary nature of conflicts rules, combined with the weight given to public policy concerns, combined with the fact that a public policy tension sits at the very heart of the law of employment restraints – a tension between public policies in favor of employee mobility, freedom of contract, and public access to certain kinds of professional services – means that resolution of these disputes can be highly unpredictable and depend a good deal on forum.”).

¹⁶³ See, e.g., *King v. PA Consulting Grp.*, 78 F. App’x. 645, 649 (10th Cir. 2003) (former employee filed suit in Colorado despite New Jersey forum selection clause); *Marcelo v. Ivy Ventures, LLC*, No. C 10-04609 WHA, 2010 WL 5115437 (N.D. Cal. Dec. 9, 2010) (former employee filed suit in California state court against Virginia-based employer and sought to transfer employer’s Virginia suit to California); *DeFeo v. Procter & Gamble Co.*, 831 F.Supp. 776 (N.D.Cal.1993) (former employee filed suit in California state court in the absence of a choice of law clause; employer filed in Ohio); *Schmitt v. JD Edwards World Solutions Co.*, No. C 01-1009 VRW, 2001 WL 590039 (N.D.Cal.2001) (court found former employee’s filing in California to be preemptive in an attempt to take advantage of the first-filed rule).

¹⁶⁴ Lester & Ryan, *supra* note 6, at 404 (“Forum selection clauses are more reliable contractual devices for securing future application of a particular law, but they, too, offer no guarantee. The result is that, wholly aside from the substantive merits of a particular dispute over the enforceability of an employee non-compete agreement, parties have strategic incentives to seek a forum favorable to their respective positions in order to increase their chances of a favorable verdict.”).

law ought to apply, the doctrines relating to inter-state disputes fail to assist in resolving these non-compete cases in a satisfactory way.¹⁶⁵

In their recent article, Professor Gillian Lester and Elizabeth Ryan survey the various permutations of interstate litigation, summarizing the issues raised in the three different contexts: federal-federal cases, federal-state litigation, and state-state cases.¹⁶⁶ In the case of parallel litigation in federal courts in different jurisdictions, “the ‘first-filed rule’ is a strong presumption across federal circuits, in the interests of conservation of judicial resources and orderly administration of justice . . .”¹⁶⁷ Generally, the court in the second-filed action will stay or dismiss the case, but it is within the court’s discretion “and federal courts do not invariably follow it.”¹⁶⁸ In the non-compete context, it seems that courts do not necessarily feel the need to stay or dismiss the second-filed suit because of concerns about promoting or protecting the forum state’s public policy. Thus, as with the application of conflicts principles, the fact that non-compete law is deemed a matter of public policy undermines the effectiveness of the doctrines used to address the diversity of state law.

In federal-state parallel litigation, federalism concerns are paramount, but the Supreme Court’s abstention doctrine is far from clear or simple. The Court’s opinions “give wide latitude to courts faced with federal-state parallel litigation . . . Unless and until the Supreme Court offers further guidance, the federal (and state) courts may continue to take *widely divergent views* on whether strategic forum shopping even ought to be a matter for concern.”¹⁶⁹ This brief summary is perhaps sufficient to indicate that the law in this area certainly provides no helpful resolution of the parallel litigation problem. Instead, it seems to assume that such problems are the exception. If that is the case, then an unsatisfactory doctrine is just that. But when the number of similar disputes is on the rise, this kind of uncertainty is costly and only exacerbates the potential for strategic litigation.

The final permutation involves parallel litigation in different state courts. The way in which one state will react to earlier or later filed parallel litigation in the court of another state is, unsurprisingly, unpredictable. Generally speaking, “[s]tate courts are more likely to defer to action in sister states if the second filed action is a declaratory action, if there is a forum selection clause selecting the other state, or based on the common law doctrine of *forum non conveniens*, which relies heavily on equitable principles of judicial comity.”¹⁷⁰ As Lester and Ryan detail,

¹⁶⁵ See *id.* at 405 (“The law of parallel litigation is complicated, conflicting, and rife with incentives for parties to seek tactical advantage.”).

¹⁶⁶ Lester & Ryan, *supra* note 6, at 408.

¹⁶⁷ Lester & Ryan, *supra* note 6, at 407.

¹⁶⁸ *Id.* at 407.

¹⁶⁹ *Id.* at 413 (emphasis added).

¹⁷⁰ *Id.* at 414.

the two issues that have arisen most regularly with respect to non-competes are (1) the geographic reach of civil judgments – that is, to what extent can a state export its own non-compete policy – and (2) the possibility of anti-suit injunctions.¹⁷¹ As to the first, the full faith and credit clause obviously governs the general question, but the extent to which courts are willing to issue nationwide injunctions in a non-compete case varies a great deal. As Professor Timothy Glynn points out, it is this issue that most affects whether a “market for law” in non-competes exists.¹⁷² At a minimum, as Glynn argues, it would behoove states concerned about employer overreach and employee rights to understand the potential for export of another state’s public policy.¹⁷³ In thinking about the disadvantages of the diversity of state law concerning non-competes, the full faith and credit clause simply does not address the problem.¹⁷⁴ Instead, the difficulty of its application in the non-compete context merely mirrors the disadvantages of diversity in the law in that area.

Finally, the potential for anti-suit injunctions looms over parallel state-state litigation. Although this possibility arises in a different situation – the full faith and credit clause applies only to final judgments – the same conclusion can be drawn about the effectiveness of any relevant doctrine in addressing the disadvantages that arise from the diversity of state law: comity concerns may influence a court’s decisionmaking, but that is hardly a useful rule in terms of certainty or disincentivizing strategic litigation.¹⁷⁵ In sum, the discretionary and unsettled nature of the doctrines governing parallel litigation may, in fact, encourage forum shopping and races to the courthouse. Under all of these scenarios, both employees and employers are likely to race to court in an effort to secure a favorable forum in which the preferred law would apply.¹⁷⁶

The litigated cases provide strong evidence of the disadvantages of the diversity of state law and of the failure of the current doctrine to ameliorate those disadvantages. *Advanced Bionics v. Medtronic* and *In re AutoNation* both present fact patterns that are the direct result of significant differences in state law and the uncertainty created by the doctrines available to mediate those differences.¹⁷⁷ In *Advanced Bionics*, Medtronic included a choice of law clause in Stultz’s non-compete

¹⁷¹ *Id.* at 414-15.

¹⁷² Glynn, *supra* note 2, at 1424.

¹⁷³ *Id.*

¹⁷⁴ Lester & Ryan, *supra* note 6, at 417 (“The cleaving of substantive judgments from remedies for purposes of extraterritorial force shifts the focus, but not the existence, of strategic incentives in parallel litigation.”)

¹⁷⁵ See, e.g., *Advanced Bionics v. Medtronic*, 59 P.3d 231 (Cal. 2002).

¹⁷⁶ Lester & Ryan, *supra* note 6, at 420 (“When taken together, modern rules on choice of laws and parallel litigation create significant incentives for parties in litigation over non-compete agreements to seek an advantageous forum.”).

¹⁷⁷ See *supra* Part II.

agreement, designating the law of the state in which Stultz last worked for Medtronic, which was Minnesota. Under Minnesota law, the non-compete provision was enforceable.¹⁷⁸ Given California's statute, the provision was likely unenforceable in that state, and the parties certainly acted as if the results would be different in the two states. As the Minnesota court said, "The California courts may view Medtronic's attempt to enforce the non-compete agreement in Minnesota as an attempt to evade California law. But it is clear that Advanced Bionics filed suit in California specifically to avoid Minnesota law . . ."¹⁷⁹ In other words, both sides forum-shopped in an effort to obtain a favorable outcome.¹⁸⁰

The same dynamic was present in the *In re AutoNation* cases. The former employer, AutoNation, filed suit in Florida, where the non-compete clause was more likely to be enforceable. Hatfield, the former employee, filed a declaratory relief action in Texas, his new state of residence, where the non-compete would most likely be held unenforceable.¹⁸¹ These are not just isolated incidents of the incentive provided for strategic litigation; it occurs regularly in the non-compete context.¹⁸²

In neither case, moreover, did conflicts principles assist in resolving the dispute, as the courts treated the issue as one revolving around significant state public policies. In *Advanced Bionics v. Medtronic, Inc.*,¹⁸³ the employer was based in Minnesota, the non-compete was entered into in Minnesota, the employee had worked in Minnesota, and the agreement was enforceable in Minnesota. California's interests were strong as well, however. The new employer was based in California, Stultz had moved to California, and California law expresses a strong public policy prohibiting enforcement of non-compete agreements. For California to enforce the Minnesota non-compete within its borders would be contrary to that policy. Thus, courts in both states reasonably asserted jurisdiction over the matter, and both did so, in part, on the basis of public policy.¹⁸⁴ It is this characterization of non-compete enforcement as a matter of strong or fundamental public policy that creates the standoff; public policy arguments permit circumvention of choice of law clauses, so that the effort to contract around potential conflicts is far from airtight. None of the various conflicts of law ap-

¹⁷⁸ *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 455 (Minn. App. 2001); *See id.* at 450 (noting "... it is clear that Advanced Bionics filed suit in California specifically to avoid Minnesota law, which is more likely to result in enforcement of the contract provision.").

¹⁷⁹ *Id.* at 450.

¹⁸⁰ *Id.* at 455 ("Moreover, applying Minnesota law does not promote forum shopping any more than applying California law. Both parties filed suit in the state that best fit their desired outcomes.").

¹⁸¹ *In re AutoNation, Inc.*, 228 S.W.3d 663, 666 (Tex. 2007).

¹⁸² *See supra* note 133 and cases cited therein.

¹⁸³ 59 P.3d 231 (Cal. 2002).

¹⁸⁴ Glynn does not characterize the Minnesota court's actions so charitably and recommends that "[i]f California is serious about protecting employees working within its borders, it ought to recalibrate its comity-driven judicial norms to account for interjurisdictional competition." Glynn, *supra* note 2, at 1439.

proaches permits a predictable or rational resolution to this kind of conflict. In *Advanced Bionics*, the California court eventually relinquished jurisdiction over the litigation, but as a matter of comity (even though the matter was first-filed in California) rather than conflicts doctrine.¹⁸⁵

Similarly in *In re AutoNation*, the Texas court, though expressing a strong public policy preference against the enforcement of the non-compete against a citizen of Texas, deferred to the Florida litigation (which in that matter was the first filed). Both jurisdictions quite reasonably asserted jurisdiction over the matter: the employer was based in Florida, the employee had worked in Florida, and the non-compete contained a Florida choice of law and forum selection clause. The employee moved to Texas, however, and found new employment there, and Texas public policy was in the employee's favor.

In both *Advanced Bionics* and *AutoNation*, both parties went to court, resulting in parallel litigation. Just as the conflicts rules were unavailing in resolving the choice of law issues in these cases, the doctrines governing parallel litigation did not lead to results that would promote certainty or deter parties from racing to court. In *Advanced Bionics*, the litigation proceeded in state court in California and Minnesota. Stultz, the employee, and Advanced Bionics, his new employer, filed an action for declaratory relief in state court. Shortly thereafter, Medtronic, Stultz's former employer, filed a lawsuit in Minnesota state court. The Minnesota court issued what amounts to an anti-suit injunction, ordering Stultz not to take any action that would interfere with the Minnesota court's jurisdiction. The California court likewise issued a TRO against Medtronic. Although the first-filed action was in California, the Minnesota court refused to defer to the California action. Instead, the California Supreme Court stood down, citing comity concerns. Here, then, the applicable principle was not applied, reducing even further the certainty that one might hope the law would provide. Stultz and Advanced Bionics won the race to the courthouse, in the jurisdiction with favorable law, yet still failed to achieve their desired result. The result will not, however, deter the kinds of actions taken by either party in the case.

In *In re AutoNation*, the Texas court, though agreeing that enforcement of the non-compete would violate its public policy, deferred to the employer's first-filed action in deference to "the parties' contractual commitment" and "principles of interstate comity." Thus there are occasions in which the parties' choice of law and the principles governing parallel litigation resolve the dispute in the way one might expect at the outset. When this occurs, it does indeed provide some measure of predictability, but still does little to discourage strategic litigation. In fact, it might encourage such behavior, and it certainly increases the possibility

¹⁸⁵ 59 P.3d 231, at 232-33.

of states marketing their law (as applied through choice of law clauses drafted by employers focused on this issue).

Professor Timothy Glynn has argued that we are the brink of just such a trend. As he discusses, non-compete enforceability may be the single most important employment-related issue for some firms.¹⁸⁶ As employers have the motivation and ability to select favorable law, states may well be motivated to cater to those preferences, creating the potential for an “interjurisdictional market” for non-compete law between the states.¹⁸⁷ Glynn argues that this is cause for concern, particularly for those worried about the disparities in bargaining between employers and employees generally.¹⁸⁸ Glynn does not advocate for a specific change in the law, but his argument emphasizes the problems or potential problems in the current state of the law of non-compete. A uniform rule of unenforceability would address the very concerns that Glynn has expressed.

In this section, I have demonstrated the disadvantages of the diversity of state law in the context of non-competes. The combination of the interstate nature of the employment market and the failure of the conflicts rules to resolve the public policy differences in non-compete law makes the diversity of state law on non-competes a significant disadvantage. It is a disadvantage because it leads to forum-shopping, races to the courthouse, and, ultimately, the potential for interstate standoffs. Even if these cases are rare, simply because few cases actually get litigated so extensively, the potential for this outcome creates vast uncertainty. The current state of the law – widely varying degrees of enforcement and manipulable conflicts rules – leads to an extremely unstable state of affairs, and one that would be better to avoid.

It follows from this argument that if state non-compete law were uniform, nearly all of these problems would disappear. Theoretically, at least, if non-competes were unenforceable nationwide, employers would not seek to impose them on employees. And even if they did, the predictability of outcome would be quite high: we can assume that a court would invalidate the agreement. If that were so, most, if not all, litigation over the agreements would disappear. Although there are alternatives, the best option is to reduce or eliminate the diversity in state law on non-compete enforceability. Finding a satisfactory resolution to the conflicts problems and a way to avoid the interstate stand-offs in some

¹⁸⁶ Glynn, *supra* note 2, at 1421 (“Indeed, at least with regard to some types of firms or categories of workers, employers’ *ex ante* concerns regarding NCA enforceability against departing employers may outweigh all other employment law considerations.”).

¹⁸⁷ *Id.* at 1424. (“States where the internal dynamics have produced such employer-friendly non-competition regimes therefore have powerful incentives to please home firms by offering to enforce their law extraterritorially.”).

¹⁸⁸ See, e.g., Bishara, *supra* note 7, at 751. See Glynn, at 1444.

other way is either improbable or impracticable, or both.¹⁸⁹ It should be clear that while *any* uniform rule might reduce the problems I have identified here, a uniform rule of unenforceability would be much more effective in that regard. A uniform rule of reason approach would leave the enforceability of non-competes still somewhat uncertain within any given jurisdiction and even more so between states. That is, such a uniform rule would do little to reduce or eliminate the disadvantages arising from the diversity in state law.

b. “facilitating the flow of commercial transactions”

Related to the disadvantages of diversity in state law, another factor making uniformity attractive is the extent to which it would facilitate the flow of commercial transactions. Employment may be considered a kind of commercial transaction; it is certainly a contractual relationship that benefits from predictability in the law.

There is little predictability in the law of non-competes, however. Not only is it somewhat difficult in many states to predict whether a given non-compete will be enforceable,¹⁹⁰ it is difficult to predict what state’s law might eventually be applied, and – therefore – how to draft or negotiate a non-compete agreement and a choice of law clause. These layers of unpredictability are costly, to employers, employees, and to the legal system as a whole. Employees may be ignorant of the law and thereby harmed. Employers, on the other hand, are more likely to have access to legal counsel, but that alone is costly. Uncertainty about the state of the law, the possibility of enforcement, the risks of nonenforcement, and so on all impose costs.¹⁹¹ When the disputes bubble up to the judicial system, further costs are imposed, presumably reducing the number of transactions and increasing the costs of those that do occur.¹⁹²

¹⁸⁹ See Glynn, *supra* note 2, at 1428 (“In sum, we observe employers using choice-of-law clauses to take advantage of more favorable noncompetition law, and the states supplying that law enforcing it robustly. Activity on both the demand and supply sides is therefore consistent with the emergence of export-style competition. Whether the supplier states consciously compete to drum up “enforcement business” beyond simply protecting domestic employers is unclear. But, at a minimum, some states are pushing their noncompetition law (regulating the activity of former employees and their potential new employers in other jurisdictions) for competitive advantage.”).

¹⁹⁰ See *supra* Part I. Various doctrines, including the rule of reason and the blue pencil approach can create a great deal of uncertainty. “In a blue pencil state, an employee wishing to leave his employer for a competitor will not know the actual terms of his non-compete agreement. Even if the agreement appears unreasonable and unenforceable, the blue pencil doctrine creates uncertainty.” Pivateau, *supra* note 5, at 691. See Christine M. O’Malley, *Covenants Not to Compete in the Massachusetts High-Tech Industry: Assessing the Need for a Legislative Solution*, 79 B.U. L. REV. 1215, 1226 (arguing for a statutory revision in Massachusetts, in part because of the unpredictability of the common law approach).

¹⁹¹ Pivateau, *supra* note 5, at 692 (“Although the point is often lost in the discussion of non-compete agreements, for every employer that benefits from the non-compete agreement, another suffers. Companies who want to hire an applicant subject to a non-compete agreement must weigh the potential benefits of the agreement against the burden of possibly having to enforce the agreement.”).

¹⁹² See, e.g., Pivateau, *supra* note 5, at 693 (“The blue pencil doctrine creates confusion for the legal system. Among those states where non-compete agreements are enforced, courts can look forward to

A rule of unenforceability also would facilitate commercial transactions in that it is a rule that promotes the free flow of labor. Employers would more easily be able to hire the employees they most need, and employees would be more free to accept the most profitable and satisfying employment available. In this way then, it is not simply uniformity, but this *particular* uniform rule that would reduce the disadvantages of the diversity in state law and facilitate commercial transactions. This is surely the most contested element of the argument; as briefly summarized below, however, there are good reasons to believe that a rule of unenforceability is the substantively preferable rule for both employees and employers.

c. A rule of unenforceability is the substantively preferable rule

There have been numerous calls for legal reform related to non-competition agreements. These have involved suggestions on a state-specific level,¹⁹³ proposals for changes in the general approach to interpreting and applying non-competes,¹⁹⁴ and various other ideas for altering the doctrine.¹⁹⁵ Despite this variety of proposals, no one – so far as I can determine – has called for uniformity in the law.¹⁹⁶ More than enough conflicts have arisen and the costs of the disparity in the law are sufficient to give rise to the need for uniformity. Moreover, there has now been sufficient experience in the laboratories of state law such that the best substantive approach can be determined. The uniform or model act approach allows for information gathering and dissemination in a manner that may convince policymakers of the benefits of the proposed rule.

It probably goes without saying that a rule of unenforceability is preferable from the employee perspective, but there is evidence that it should be preferable from the employer perspective as well. In a seminal article about economic development in Silicon Valley, Ronald Gilson

an ever-growing stream of non-compete litigation. Courts are already overburdened with the need to decide questions of reasonableness and whether the restraint as set forth in the agreement is actually necessary to protect the legitimate business interests of the employer.”).

¹⁹³ See, e.g., O'Malley, *supra* note 189, at 1217 (arguing that by passing a statute “the Massachusetts legislature could clarify the state’s public policy position, thus enabling the courts to act more consistently” and suggesting the possibility of the Massachusetts legislature adopting the California rule [at p. 1229-33]).

¹⁹⁴ See, e.g., Eileen Silverstein, *Bringing Forth a New World from the Ashes of the Old*, 34 CONN. L. REV. 803, 815 (2002). See Estlund, *supra* note 29, at 421-26 (floating a number of suggestions, including widespread adoption of a “strict scrutiny” approach and the potential of requiring “garden-leave” – payment to employee during the postemployment period of restriction).

¹⁹⁵ See, e.g., Piveteau, *supra* note 5, at 674 (arguing that “courts everywhere” should abandon the “blue pencil” doctrine and refuse to reform non-competes to make them reasonable and proposing a new test for reasonableness requiring a high level of specificity in any non-compete).

¹⁹⁶ The ALI included a Restatement provision on non-competes. RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981). The Restatement is, however, intended to be more descriptive than prescriptive, and I do not regard it as a call for uniformity. Jeffrey Hirsch has called for the nationalization of all of workplace law, which would, presumably, include non-compete enforcement, but his proposal doesn’t discuss the agreements in particular. Hirsch, *supra* note 4, at 1059-60.

contended that California's refusal to enforce non-competes solved a collective action problem: because of the information spillovers created by employee mobility, it is collectively irrational for firms to impose non-competes on their employees, but a legal regime in which such contracts are enforceable make it individually rational (or at least appealing) for firms to use the agreements.¹⁹⁷ Recent empirical studies support Gilson's argument. There is evidence of greater rates of economic development and innovation in California than in Massachusetts, for example.¹⁹⁸ Studies indicate that the labor market is more mobile and there is more innovation where non-competes are not enforceable.¹⁹⁹

Finally, a rule of unenforceability is arguably preferable in the context of the intellectual property regimes. In an earlier piece, I argued that non-compete agreements should be generally unenforceable because while they are used by firms primarily as tools for protecting intellectual property assets, but they are ill-suited to that task. Non-competes do not work well to protect IP assets because they are, at the same time, both too narrow and too blunt an instrument. They are too narrow because they operate only between an employer and an employee and thus do not protect the IP against the world. And they are too blunt because, unlike other forms of IP protection, they are directed at people rather than at (intangible) things.²⁰⁰ Moreover, as an effort to protect intellectual property, they may well impinge upon the existing IP regimes. There is substantial evidence that employers seek to protect with non-competes information that they cannot protect under, for example, trade secret law, copyright law, or patent law. To the extent that those regimes are deemed to have achieved the proper balance between protection and the public domain, non-competes conflict with and upset that balance. Even if the balance is not optimal – and it surely is not optimal – non-competes nonetheless interfere with the *effort* in the IP regimes to work toward a balance.²⁰¹

The extent of academic commentary and number of proposals for reform indicate the widespread discomfort with the use of non-

¹⁹⁷ Gilson, *supra* note 15, at 595-96.

¹⁹⁸ ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128, at 3 (1994).

¹⁹⁹ See, e.g., RICHARD GORDON, INNOVATION, INDUSTRIAL NETWORKS, AND HIGH-TECHNOLOGY REGIONS, IN INNOVATION NETWORKS: SPATIAL PERSPECTIVE 185-91 (R. Camagni ed., 1991) (arguing that employee mobility leads to increased innovation and economic growth because of the transfer of information among firms). See also Richard C. Levin, *Appropriability, R&D Spending, and Technological Performance*, 78 AM. ECON. REV. 424, 427 (1988) (suggesting that information spillovers between firms do not negatively affect spending for research and development). There is no consensus on this issue, of course. Some have asserted that there may be too much employee mobility, arguing that employee mobility is beneficial to individuals but imposes costs on the economy as a whole. See RICHARD L. FLORIDA & MARTIN KENNEDY, THE BREAKTHROUGH ILLUSION: CORPORATE AMERICA'S FAILURE TO MOVE FROM INNOVATION TO MASS PRODUCTION 91 (1990).

²⁰⁰ Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Non-competition Agreements*, 52 WM. & MARY L. REV. 873, 914 (2010).

²⁰¹ *Id.*

competition agreements. A straightforward rule of unenforceability is simply the most practicable solution to the myriad problems presented by the agreements as a substantive matter.

2. Practicability

Not only is a uniform rule of unenforceability desirable, but it is also practical as an administrative matter. The proposed rule of unenforceability is practicable because it is concise and will require only a simple legislative change, because some states already have experience with the rule and there is momentum for change in a number of jurisdictions, and because benefits would accrue even in the absence of complete adoption by all of the states.

As is obvious, the proposed uniform rule is brief and it involves a single, discrete legal issue. Adoption by most states would be simple. Many states have left the enforceability of non-competes to common law development.²⁰² In those states, all that would be required is the adoption of the uniform act. In jurisdictions with an existing statute, that statute would have to be repealed and replaced with the uniform act. In either case, however, the brevity of the uniform act and its focus on a single issue makes it a relatively practicable legislative change. Moreover, as compared to the rule of reason, a rule of unenforceability is subject to substantially less interpretation and needs less iterative common law development. The various rule of reason approaches taken by many states are similar in their broad brush, but they differ greatly in the details, with the result that there is no uniformity even among the states that ostensibly apply the same approach. A rule of unenforceability, on the other hand, is simpler, can be enacted as a relatively short statute, and, if applied in its strong form, has little need for interpretation, fact-intensive discovery, or development of exceptions.

The workability of a rule of unenforceability is not merely theoretical. A number of states have applied a rule of unenforceability for many years, demonstrating that the rule is practicable. A few states – most notably California – have existed under a legal regime in which non-competition agreements are unenforceable and have not apparently suffered particularly ill effects. Indeed, as I have argued, there is evidence that a simple rule of unenforceability is the substantively preferable approach and that they are both pro-competitive and pro-growth and innovation.²⁰³

²⁰² See *supra* Part I.

²⁰³ *Id.* As I described in an earlier paper, an absolute rule of unenforceability is a substantially better rule than the approach taken in most states. While the approach taken in all states purports to take into account the problematic aspects of non-competition agreements – indeed, no state treats non-competes as it treats other commercial contracts – it is ineffective. Briefly put, the “reasonableness” test, however it is applied, does not prevent the imposition of many overbroad and unenforceable agreements, it does not address the employee mobility concerns, it fails to account for the cognitive

The uniform or model act process would allow for the collection and dissemination of all these kinds of studies and other information about the various states' experience with differing rules concerning non-competition agreements. Because of the legislative-style consideration of uniform acts, with the involvement of lawyers, judges, law professors and others, testimony from experts and interested parties, and sessions for debate, relevant information is likely to be collected, presented, and disseminated. This process, of course, also entails the downsides of the legislative process – compromise, the possibility of capture, and so on.²⁰⁴ It is difficult, however, to argue that the dissemination of information would be a bad idea, and there are few vehicles in this circumstance for doing so.

Finally, even if not all jurisdictions adopted the rule proposed here, the benefits of some uniformity would accrue. This would be particularly true if a few of the more populous states adopted the rule. For example, if Massachusetts, New York, and Texas adopted a rule of unenforceability of non-competes, that would affect a huge number of employers and employees and, presumably, substantially reduce the actual number of conflicts disputes that would arise. Moreover, the movement by some states to eliminate non-compete enforcement might well make it less likely that employers would ask employees to sign non-competes and less likely that the parties would resort to litigation in the event that a dispute arises.

IV. THE UNIFORM ACT PROCESS IS NOT PERFECT

Various objections to this proposal will certainly be raised: uniformity may not be desirable when the states have varying “political policies or philosophies;” the uniform act process has its flaws and may, in some circumstances some have argued, actually *reduce* interstate uniformity; and, finally, some will argue that if the rule proposed here is the substantively preferable rule, it will be adopted by most, if not all, states eventually. I briefly address each of these critiques below.²⁰⁵ While these critiques are not without their merit, I maintain that the uniform or model act process is, on balance, nonetheless likely to be the most effective tool in an effort to reduce the disadvantages of the diversity in state law and disseminate information about the actual operation and effects of employee non-competition agreements.

and behavioral mechanisms that are present in the bargaining process, and it fails to recognize that non-competes are used primarily to protect IP and they are the wrong tool for that job.

²⁰⁴ See *infra* Part IV.

²⁰⁵ I do not here address the objection that a rule of unenforceability is not the substantively preferable rule. I discuss that briefly above, see *supra* Part III, and in depth in Moffat, *Wrong Tool*, *supra* note 200, at 914.

One of the strongest arguments in favor of uniformity is also one of the most powerful critiques of uniformity: the states have differing policy preferences. One reason to celebrate diversity in state law is that it allows different jurisdictions to express divergent policies and philosophies, perhaps reflecting differing demographics, geographies, and social mores. And indeed, many states express their policies concerning non-competition agreements as a matter of fundamental public policy. But, as described above, the fact that non-competes are deemed a matter of public policy has increasingly led to intractable conflicts, particularly as the employment relationship has grown increasingly national in scope. This has led to the myriad disadvantages of the diversity in state law described above. Thus, an argument in favor of diversity in state law counsels at the same time for uniformity in state law and, I contend, the disadvantages of diversity weigh heavily against the traditional notions of local control in this instance.

Moreover, another reason to advocate the diversity of state law is to foster a “laboratory” in which different legal approaches can be tested. In the context of non-competition agreements, I argue, the laboratories of state law have yielded some results: an absolute rule of unenforceability is preferable to the rule of reason approach. The argument for the diversity of state law is weaker when there is reason to believe that there is a substantively better rule.

Finally, diverse state law is preferable, or at least not problematic, when it affects “purely local” areas traditionally governed by state law. While this might have been true of the employment market and the employment relationship a century ago, it is no longer the case. Many employers operate on a national, if not an international, scale, and employees are increasingly mobile. Even if a business does not have an interstate presence, the labor market is national in scope and individuals are far more likely to move multiple times in their career. Differing rules governing the employment relationship are thus much more likely to lead to conflicts and unpredictability when employment disputes arise.

Another critique focuses on the uniform act process in particular. Professor Larry Ribstein and others have conducted a number of studies and concluded that, under some circumstances at least, the uniform act process actually leads to *less* uniformity.²⁰⁶ This is the case, he argues, because of NCCUSL’s structure as a legislative-style body and the compromises that structure entails.²⁰⁷ These compromises lead to “idiosyncratic” proposals that are less likely to be adopted by the states than, for example, the “leading forms” for LLC formation.²⁰⁸ Professors Ribstein

²⁰⁶ Bruce H. Kobayashi & Larry E. Ribstein, *The Non-Uniformity of Uniform Laws*, 35 J. CORP. L. 327, 359 (2009).

²⁰⁷ *Id.* at 343–44.

²⁰⁸ *Id.* at 352.

and Kobayashi conclude that “[t]he basic problem is that the uniformity goal invites a process that, ironically, subverts the uniformity that the process is intended to achieve.”²⁰⁹

While this certainly may be the case in some instances, as described by Ribstein and Kobayashi, this Article focuses on uniformity as a result, not on any particular process. To be clear, a uniform rule of unenforceability is preferable regardless of the means by which the states reach that uniformity. Ribstein does not conclude that the uniform act process always leads in this direction. Rather, it is under circumstances in which the uniform act process leads away from the “leading forms” or other organic movements toward uniformity. It is thus the Uniform Act *process* rather than uniformity of law as a goal to which Ribstein and others have objected. My focus here has been on the goal of uniformity in the law and not on the process by which that uniformity is achieved.

A related concern might be that even when states putatively apply the same rule, differing interpretations and factual scenarios result in some degree of divergence over time. This may well be true. A state with a rule against enforcement of non-competes might well adopt an exception, or apply a narrow interpretation of one element. This is only to say, however, that no legal rule or solution is perfect. The hurdle for a proposal like this is to show that it is the best of the imperfect approaches, and it is the goal of this article to clear that hurdle.

A corollary to the critique of the uniform act process is that, if a substantively better rule emerges, it will eventually be adopted by the various states. Although this is an appealing notion, it is not clear that it actually occurs. A number of states have recently reconsidered their approaches to non-compete enforceability.²¹⁰ And it certainly will not happen in the absence of research and the dissemination of information. The Uniform Act process is one way in which information can be distributed and shared.

CONCLUSION

I will end where I started: the state of non-compete law is a mess. Commentators generally agree, legislatures are considering a variety of statutory changes, and courts have been tinkering with the doc-

²⁰⁹ *Id.* at 360.

²¹⁰ See, e.g., Indiana S.B. 140 (2011) (prohibiting hospitals from entering into employment contracts with healthcare providers that include non-competes); Massachusetts HB2293 and HB2296 (2011) (setting up specific requirements for enforcement of non-competes; establishing a presumption that a restriction of six months or less is reasonable); Michigan SB 786 (2011) (requiring employers to inform employees of non-compete provisions in initial offer of employment); South Carolina H.J.R. 24 (2011) (undertaking a study into the impact of non-competes on employees); West Virginia H.B. 3046 (2011) (voiding all non-compete agreements).

trine. Rather than adding another proposal for incremental change, this Article has advocated for wholesale reform: employee non-competes should be unenforceable, and the states should adopt a rule to that effect.

While this is in some ways a radical proposal, it is not so implausible. A few states already have a rule of unenforceability and have not suffered terribly as a result, so far as can be determined. In fact, a number of recent studies indicate that a legal regime in which non-competes are unenforceable is preferable not just for employees (which goes without saying), but also for employers who will gain from access to more skilled and qualified employees and from increased overall innovation and financial returns. The results of these studies should be quite compelling to policymakers, as should the argument presented here. In the context of employee non-competes, the disadvantages of diversity in state far outweigh the usual benefits of the “laboratories of state law.” The experiment has been allowed to run, and the results are clear – a uniform rule of unenforceability of non-competes would virtually eliminate the myriad problems resulting from the current state of the law.