

## University of Chicago Legal Forum

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Volume 2017

Article 31

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2018

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### Recommended Citation

Thomas, Phillip D. (2018) "Would California Survive the MOVE Act?: A Preemption Analysis of Employee Noncompetition Law," *University of Chicago Legal Forum*: Vol. 2017 , Article 31.  
Available at: <https://chicagounbound.uchicago.edu/uclf/vol2017/iss1/31>

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# Would California Survive the MOVE Act?: A Preemption Analysis of Employee Noncompetition Law

*Phillip D. Thomas<sup>†</sup>*

## ABSTRACT

*Employers use noncompete clauses at all levels of employment, from executives to managers to delivery drivers. Such agreements allow employers to protect their business interests like trade secrets, customer contact lists, and investments in employee training. But restrictions on mobility could disproportionately impact low-wage employees. Moreover, enforcement of noncompetition agreements varies widely throughout the states, with some states favoring enforcement and other states, like California, broadly prohibiting noncompetition agreements.*

*In 2015, United States Senators Chris Murphy and Al Franken introduced a bill that federally prohibits employers from requiring low-wage employees to enter into covenants not to compete, the Mobility and Opportunity for Vulnerable Employees (MOVE) Act. Although a statutory prohibition like California's seems facially reconcilable with the MOVE Act, the scope of prohibitions encompassed by each statute are far apart. Therefore, if the MOVE Act or similar federal legislation were passed, it would preempt California law because the state's broad prohibition would conflict with the Act's balancing of employer and employee interests and would nullify the Act's remedial structure.*

## INTRODUCTION

For years, covenants not to compete only appeared in the employment contracts for highly skilled or highly paid employees. But in the last two decades, employers have begun adding noncompete clauses to a wide array of employment arrangements that include non-skilled and

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low-wage laborers.<sup>1</sup> For example, the sandwich chain Jimmy John's requires all employees to sign a broad covenant not to compete.<sup>2</sup> Although Jimmy John's may not seek to enforce this agreement against low-level employees like delivery drivers, these employees must, nonetheless, agree to the clause. It therefore restricts their legal right to enter into numerous engagements after leaving Jimmy John's.<sup>3</sup>

Low-wage employees do not typically have access to the kind of information that employers want to protect from competitors. Enforcement of noncompetition agreements against low-wage employees, then, can unduly restrict their freedom and impact their livelihoods without the usual trade-offs of skills training, promotion to managerial roles, better wages and benefits, and other incentives to remain with the employer. Such restrictive covenants have therefore garnered the attention of both Illinois and New York attorneys general,<sup>4</sup> lawmakers,<sup>5</sup> and the Obama Administration.<sup>6</sup>

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<sup>1</sup> See Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES (June 8, 2014), <http://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html> [<https://perma.cc/6XN7-MFW3>] (describing a growth in the use of noncompete agreements in employment arrangements that include interns, lawn-care workers, and entry-level positions); Sophie Quinton, *These Days, Even Janitors Are Being Required to Sign Non-Compete Clauses*, U.S.A. TODAY (May 27, 2017), <https://www.usatoday.com/story/money/2017/05/27/noncompete-clauses-jobs-workplace/348384001/> [<https://perma.cc/AZE3-TG95>] (same).

<sup>2</sup> Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements*, HUFFINGTON POST (Oct. 15, 2014), [http://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete\\_n\\_5978180.html](http://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete_n_5978180.html) [<https://perma.cc/W4ST-VDBQ>].

<sup>3</sup> See *id.* (recognizing that “[e]ven if the clause failed to hold up in court, the very possibility of limited employment opportunities could dissuade certain workers from rocking the boat,” “like . . . trying to unionize”); Quinton, *supra* note 1 (noting that “[f]or the average worker, having the contract is what drives most of the behavior,” even if its terms are unenforceable).

<sup>4</sup> Jonathan L. Israel, *State Attorneys General on the Attack Against Noncompete Overuse*, LAB. & EMP. L. PERSP. (Aug. 15, 2016), <https://www.laboremploymentperspectives.com/2016/08/15/state-attorneys-general-on-the-attack-against-noncompete-overuse/> [<https://perma.cc/XAN2-B84L>].

<sup>5</sup> Geoff Toy, *Putting the Brakes on Jimmy John's: Bill Banning Non-Compete Agreements for Low-Wage Employees Introduced in Congress*, BERMAN FINK VAN HORN P.C. (July 9, 2015), <http://www.bfvlaw.com/putting-the-brakes-on-jimmy-johns-bill-banning-non-compete-agreements-for-low-wage-employees-introduced-in-congress-3/> [<https://perma.cc/6ZQC-EHSB>].

<sup>6</sup> *State Call to Action on Non-Compete Agreements*, OBAMAWHITEHOUSE.ARCHIVES.GOV (2016), <https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf> [<https://perma.cc/SH44-MBAX>] (calling on “state policymakers to . . . reduce the misuse of non-compete agreements”); OFFICE OF ECON. POLICY, U.S. DEP’T OF THE TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 26 (2016), <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf> [<https://perma.cc/JB3P-E38L>] [hereinafter TREASURY REPORT] (noting that “a growing body of evidence suggests that” noncompete clauses “are frequently used in ways that are inimical to the interests of workers and the broader economy”).

Although restrictive covenants were generally disfavored as “restraints of trade” under English common law,<sup>7</sup> the enforceability of covenants not to compete varies widely throughout the United States.<sup>8</sup> Most states examine noncompetition agreements under a reasonableness test that usually requires the clause be “reasonably tailored in scope, geography, and time to further a protectable interest of the employer.”<sup>9</sup> Some states, however, provide strong statutory prohibitions against the use of covenants not to compete in the employment context. California is one of those states. California Business & Professions Code § 16600 invalidates nearly all noncompetition agreements in employment contracts.<sup>10</sup>

In an attempt to provide uniformity to the assorted state regimes and, specifically, to protect low-wage employees against restrictions of their mobility, United States Senators Al Franken and Chris Murphy have proposed the Mobility and Opportunity for Vulnerable Employees (MOVE) Act.<sup>11</sup> If Congress were to pass the MOVE Act, the statute would prohibit employers from requiring employees below a certain pay level to enter into noncompete agreements, require notice of the prohibition to be displayed in the workplace, and require disclosure of non-

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<sup>7</sup> Michael Selmi, *Trending and the Restatement of Employment Law’s Provisions on Employee Mobility*, 100 CORNELL L. REV. 1369, 1376 (2015) (quoting *Outsourcer Int’l, Inc. v. Barton*, 192 F.3d 662, 669 (7th Cir. 1999) (Posner, J., dissenting)).

<sup>8</sup> See Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751, 771–79, 786–87 fig.1 (2011) [hereinafter Bishara, *Enforcement*]. Bishara created a noncompete agreement enforceability index for all fifty states and the District of Columbia by applying scores to the results presented in COVENANTS NOT TO COMPETE, A STATE-BY-STATE SURVEY (Brian M. Malsberger ed., 6th ed. 2008 & Supp. 2009) [hereinafter Malsberger, SURVEY].

<sup>9</sup> RESTATEMENT OF EMPLOYMENT LAW § 8.06 (2016).

<sup>10</sup> CAL. BUS. & PROF. CODE § 16600 (2016) (voiding all contracts “by which anyone is restrained from engaging in a lawful profession, trade, or business”).

<sup>11</sup> S. 1504, 114th Cong. (2015). The bill was referred to the Senate Committee on Health, Education, Labor, and Pensions and then stalled. *S.1504 - MOVE Act*, <https://www.congress.gov/bill/114th-congress/senate-bill/1504/committees> [<https://perma.cc/2J7R-87TS>]. A similar bill stalled at the subcommittee stage in the same session of the House of Representatives. *Freedom for Workers to Seek Opportunity Act*, H.R. 4254, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/4254/committees> [<https://perma.cc/7BFE-E3UB>]. Both federal bills proposed nearly identical language. Moreover, Illinois recently enacted strikingly similar legislation. 820 ILL. COMP. STAT. 90/1, 5, 10 (2017); see also Naureen Amjad, *Illinois Employers Prohibited from Requiring Low-Wage Employees to Execute Non-Compete Agreements*, PEDERSON & HOUP: NEWS & ALERTS, <https://www.pedersenhaupt.com/newsroom-alerts-40.html> (Jan. 2017) [<https://perma.cc/3UVP-5T5A>]. The controversiality of restraining low-wage worker mobility with noncompetition clauses has not dissipated. See, e.g., Orly Lobel, *Companies Compete but Won’t Let Their Workers Do the Same*, N.Y. TIMES (May 4, 2017), <https://www.nytimes.com/2017/05/04/opinion/noncompete-agreements-workers.html> [<https://perma.cc/K2CJ-QELW>] (writing strong criticism of noncompetition agreements). If Congress addresses the issue in the future, all of these bills show that legislators will probably use language similar to the MOVE Act. Therefore, while this Comment addresses the MOVE Act specifically, the analysis may have broader applications.

compete clauses early in the hiring process if the agreement is not otherwise prohibited by the Act. The MOVE Act and the California statute appear facially compatible because both laws seek to limit the use of restrictive covenants. But the scope of the prohibitions in each statute are far apart. Therefore, it is not clear which law would prevail in a California controversy involving noncompetition agreements.

This Comment argues that the MOVE Act would preempt § 16600 because California's broad prohibition of restrictive covenants would disrupt the fundamental policy judgments and remedial structures evident in the federal Act. Part I of this Comment examines the reasonableness test employed by most states, as well as the typical dimensions along which state policies vary. This is followed by a review of the law under California's statutory prohibition and an explanation of the proposed MOVE Act. Part II of this Comment advances a reading that illustrates the Act's objectives of balancing employer interests with employee mobility and discusses the remedies that would be available under the Act's enforcement provisions. Contrasting these aspects of the federal law with California law, the Comment concludes that the MOVE Act would preempt § 16600.

## I. THE LAWS GOVERNING EMPLOYMENT NONCOMPETITION AGREEMENTS

### A. A Mosaic of State Laws and the Reasonableness Test

As clauses in employment contracts, employees could challenge noncompete clauses with traditional contract doctrines like unconscionability. But such challenges are rare in practice. When examining restrictive covenants in the employment context, courts typically carry the traditional contract analysis only up to the point of looking for consideration.<sup>12</sup> If the court finds the employment contract supported by consideration, it then turns to a reasonableness test to weigh the interests of the employer against the breadth of restrictions imposed on the employee. Many jurisdictions also espouse an additional requirement to ensure that the restrictive covenant is not contrary to public interest, but this component is not frequently used.<sup>13</sup> States answer each of these questions differently, though: What are reasonable restrictions on an

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<sup>12</sup> See Selmi, *supra* note 7, at 1381 (characterizing consideration analysis as preliminary to examining the noncompete clause itself, but also noting that this area of law is changing).

<sup>13</sup> See Bishara, *Enforcement*, *supra* note 8, at 757 (noting the lack of a "truly uniform approach," yet recognizing a building consensus in the formulation of the reasonableness test). See also RESTATEMENT OF EMPLOYMENT LAW § 8.06 cmt.i (2016) (explaining that the public interest prong is rarely used).

employee's post-employment activities? What is a protectable employer interest? And what counts as consideration? The inquiry is ultimately fact-intensive, and the outcomes certainly vary from state to state, creating a mosaic of noncompete agreement enforceability throughout the country.<sup>14</sup>

1. States vary in determining reasonableness and recognizing protectable interests

California's broad prohibition of noncompetition agreements is rare. Moreover, the standard used by most states is flexible, and the differences in application are numerous.<sup>15</sup> While it is beyond the scope of this Comment to scrutinize the breadth of judicial variation, courts are in accord on the factors involved in determining whether a noncompete clause is reasonable or overly broad: (1) the scope of prohibited activities, as well as the extent of the restriction in (2) time and (3) geography. Courts also agree that those factors must be tailored to the business interests of the employer, but they disagree on what constitutes a legitimate, protectable interest.<sup>16</sup>

States are mostly aligned in the analysis of whether the restricted activities are reasonable in scope, which is arguably the most important factor. Whatever conduct the noncompete clause prohibits a former employee from engaging in must be tied to the interest the employer is seeking to protect and to the scope of the employer's business in the first place. Even states with strong enforcement regimes will tend to reject noncompete clauses that forbid employment of "any capacity within any entity that provides [like] services" if that broad restriction is not limited to a concern for competing business activities and founded in otherwise protectable interests.<sup>17</sup>

Whether the geographic and durational restrictions are permissible, however, varies from case to case and from court to court. For example, what makes a duration reasonable can depend on the interest the employer intends to protect and the scope of activities being prohibited.<sup>18</sup> But jurisdiction itself also matters. States that favor enforcement

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<sup>14</sup> See Bishara, *Enforcement*, *supra* note 8, at 787 fig.2 (grouping noncompete enforceability rankings derived by scoring cases provided in Malsberger, *SURVEY*, *supra* note 8).

<sup>15</sup> See generally Malsberger, *SURVEY*, *supra* note 8.

<sup>16</sup> See RESTATEMENT OF EMPLOYMENT LAW § 8.06 (2016) (restrictive covenants in employment agreements must be "reasonably tailored in scope, geography, and time to further a protectable interest of the employer").

<sup>17</sup> *Merryfield Animal Hosp. v. MacKay*, 33 Conn. L. Rptr. 554, 554 (Conn. Super. Ct. Dec. 19, 2002) (rejecting restriction that would keep veterinarian from working at another facility that treats completely different animals) (emphasis omitted).

<sup>18</sup> See, e.g., *Avalon Legal Info. Servs., Inc. v. Keating*, 110 So. 3d 75, 82 (Fla. Ct. App. 2013)

are likely to uphold lengthier restraints, while less favorable states will demand briefer constraints.<sup>19</sup>

Although similarly varied, the inquiry into geographic scope typically involves a discrete formulation. Courts look to the geographic reach of the employer's business to determine if the restriction is tailored accordingly. Local or regional employers cannot reasonably enjoin a former employee from working throughout an entire nation or, in more stringent states, beyond the employer's own market.<sup>20</sup> States also disagree on whether a national or international employer may enforce a restriction of the same scope—or, conversely, whether far-reaching restrictions are simply too broad to be overcome with a legitimate interest regardless of the expansiveness of the employer's market.<sup>21</sup>

In addition to the three prongs of the reasonableness test, nearly all courts require that an employer articulate a legitimate interest to be balanced against the former employee's restrictions. Although courts differ widely in what they consider protectable employer interests, the realm of protectable interests is concrete. All states consider trade secrets and the employee's duty of loyalty to be protectable interests.<sup>22</sup> The next most recognized interests include confidential information and developed customer lists. Behind those are firm goodwill, non-solicitation of other employees, and customer contacts. Only the states with the strongest enforcement regimes recognize customer goodwill

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(upholding a three-year restriction on customer solicitation to protect client relationships and goodwill); *Selmer Co. v. Rinn*, 789 N.W.2d 623, 630–31 (Wis. Ct. App. 2010) (upholding a one-year restriction on customer solicitation to protect customer base); *Sys. and Software, Inc. v. Barnes*, 886 A.2d 762, 766 (Vt. 2005) (upholding a six-month restriction on competitive employment to protect confidential information).

<sup>19</sup> See Bishara, *Enforcement*, *supra* note 8, at 787 fig.2 (Wisconsin and Vermont are far apart in the enforceability rankings at, respectively, 41 (moderate-to-weak) and 15 (moderate-to-strong), and Florida has the strongest enforceability ranking of 1.).

<sup>20</sup> Compare *Cambridge Eng'g, Inc. v. Mercury Partners 90 BI, Inc.*, 879 N.E.2d 512, 523–24 (Ill. App. Ct. 2007) (rejecting a geographic restriction covering all of Canada when employer did not do business in all provinces), with *Jaraki v. Cardiology Assocs. of Ne. Ark., P.A.*, 55 S.W.3d 799, 804 (Ark. Ct. App. 2001) (rejecting a 75-mile radius restriction that included a large market that was not a part of the employer's business). See also Bishara, *Enforcement*, *supra* note 8, at 787 fig.2 (Illinois has a strong enforceability ranking of 4, and Arkansas has a weak ranking of 49.).

<sup>21</sup> Compare *Unlimited Opportunity, Inc. v. Waadah*, 861 N.W.2d 437, 444 (Neb. 2015) (rejecting a restriction as unlimited because it covered all of the employer's "multi-state and international" territory), with *Sylvan R. Shemitz Designs, Inc. v. Brown*, No. AANCV136013145S, 2013 WL 6038263, at \*8 (Conn. Super. Ct. Oct. 23, 2013) (finding a restriction reasonable when it prohibits employment in the entire United States). See also Bishara, *Enforcement*, *supra* note 8, at 787 fig.2 (Connecticut has a strong enforceability ranking of 3, and Nebraska has a weak ranking of 44.).

<sup>22</sup> Trade secrets and the duty of loyalty may also be protected outside the context of a noncompete clause. See RESTATEMENT OF EMPLOYMENT LAW § 8.01–8.05 (2016). Even California provides these protections though it has a statutory ban on noncompetition agreements in the employment context. CAL. BUS. & PROF. CODE §§ 16600–07 (2016).

and the employer's investment in employee training as protectable interests.<sup>23</sup>

2. States can be grouped into four categories according to their general policies regarding restrictive covenants

The contextual nature of the reasonableness test leads courts to produce different outcomes even when they characterize the analysis in the same manner. When this happens within a single jurisdiction, the facts of the cases usually explain the discrepancy.<sup>24</sup> Across jurisdictions, though, there is an additional significant backdrop: the states approach covenants not to compete from different policy standpoints, setting the stage for contrasting analyses that can be traced back to each state's default position. Indeed, those default positions have been categorized into four distinct groups<sup>25</sup> and measured quantitatively according to a survey of outcomes.<sup>26</sup> The latter provided the basis for deeming a state to be either a strong or weak enforcement regime in the preceding section. The former might help explain the major stances that contribute to that variation.

Although the laws governing noncompete clauses have developed from common law in nearly every state, a significant number of states have enacted relevant legislation.<sup>27</sup> Generally, though, the statutes codify the common law reasonableness test, with only a few states providing guidance on employing the test.<sup>28</sup> Three particular exceptions stand out and constitute the first group. California and North Dakota statutorily ban covenants not to compete in the employment context.<sup>29</sup> In fact, these states rank fifty and fifty-one, respectively, on Bishara's enforceability index, meaning they rarely, if ever, enforce employment

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<sup>23</sup> See Bishara, *Enforcement*, *supra* note 8, at 774–75; Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287, 315 & fig.1A (2006) [hereinafter Bishara, *Economy*].

<sup>24</sup> *But see* Bishara, *Enforcement*, *supra* note 8, 786–87 fig.1 (showing that between 1991 and 2009, the enforceability rankings of Georgia, Idaho, Louisiana, and Vermont changed by over 20 points, suggesting that some jurisdictional differences may be explained by policy developments).

<sup>25</sup> See Selmi, *supra* note 7, at 1375–80 (grouping the states into categories based on policy).

<sup>26</sup> See Bishara, *Enforcement*, *supra* note 8, at 772–80 (using the Malsberger, SURVEY, *supra* note 8, to create an enforceability index for all 50 states and the District of Columbia).

<sup>27</sup> Compare Bishara, *Economy*, *supra* note 23, at 322 fig.3 (showing that sixteen states had legislation in 2006), with Bishara, *Enforcement*, *supra* note 8, at 778 (showing that eighteen states had legislation in 2011).

<sup>28</sup> See Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 223, 243–44 (2007) (discussing statutes that address employment noncompete clauses).

<sup>29</sup> See CAL. BUS. & PROF. CODE §§ 16600–07 (2016); N.D. CENT. CODE § 9-08-06 (2016).



noncompete clauses.<sup>30</sup> Colorado also has broad statutory restrictions on employment noncompetition agreements.<sup>31</sup>

In contrast, some states favor freedom of contract and look at covenants not to compete under that traditional lens rather than through the reasonableness test. The prime example in this group is Texas. In *Marsh USA Inc. v. Cook*,<sup>32</sup> the Supreme Court of Texas emphasized the state's constitutional protection of the freedom of contract<sup>33</sup> and state legislation that provides that "a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement."<sup>34</sup> Even when a statute in a state like Texas permits only reasonable restraints, the courts begin their examination of what is *reasonable* from a position that favors enforcement.<sup>35</sup>

The majority of states fall into two other distinct categories. On one hand, there are states that expressly disfavor noncompete clauses, and, on the other hand, there are states that are generally neutral regarding their enforcement.<sup>36</sup> The former—the hostile states—explain the policy as one that favors an employee's mobility more than the interest an employer has in preventing competition by a former employee, which is generally disfavored as a "restraint of trade."<sup>37</sup> This group includes states that are not usually employee-friendly, like Montana, Tennessee, and Virginia, as well as numerous states that are home to large and growing commercial centers, like New York, Illinois, and Georgia.<sup>38</sup>

The final group of states—the neutral states—expresses their position as one seeking to balance the interests of both employer and employee.<sup>39</sup> This set is smaller than the hostile group, and, to the chagrin of an outsider, states will at times embrace both hostility and neutrality simultaneously.<sup>40</sup> Perhaps the best and clearest example of this group

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<sup>30</sup> See Bishara, *Enforcement*, *supra* note 8, at 774, 778, 786–87 fig.1.

<sup>31</sup> See COLO. REV. STAT. § 8-2-113 (2016) (Notably, Colorado also allows for the recovery of education and training costs if an employee worked for the employer for less than two years.).

<sup>32</sup> 354 S.W.3d 764 (Tex. 2011).

<sup>33</sup> TEX. CONST. art. 1, § 16 (2016).

<sup>34</sup> Covenants Not to Compete Act (CNCA), TEX. BUS. & COM. CODE § 15.50(a). See also *Marsh USA Inc.*, 354 S.W.3d at 775 (interpreting the language of the CNCA).

<sup>35</sup> See *Selmi*, *supra* note 7, at 1379 (stating that "the position of the Supreme Court of Texas . . . is not where most jurisdictions start from").

<sup>36</sup> See *id.* at 1379–80.

<sup>37</sup> See, e.g., *Murfreesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674, 678 (Tenn. 2005) (explaining that "covenants not to compete are disfavored . . . a restraint of trade, and as such, are construed strictly in favor of the employee"); *Purchasing Assocs., Inc. v. Weitz*, 196 N.E.2d 245, 247 (N.Y. 1963) (explaining that "powerful considerations of public policy . . . militate against sanctioning the loss of a man's livelihood").

<sup>38</sup> See *Selmi*, *supra* note 7, at 1379–80.

<sup>39</sup> See *id.*

<sup>40</sup> See, e.g., *Hess v. Gebhard & Co., Inc.*, 808 A.2d 912, 917, 920 (Pa. 2002) (stating both that

is Missouri.<sup>41</sup> In *Whelan Sec. Co. v. Kennebrew*,<sup>42</sup> the Missouri Supreme Court unequivocally stated that the “law of non-compete agreements in Missouri seeks to balance the competing concerns” of employer investments in training, customers, and trade secrets with the employee’s desire for mobility to “provide for their families and advance their careers.”<sup>43</sup> A neutral court like Missouri will ultimately “enforce a non-compete agreement if it is demonstratively reasonable.”<sup>44</sup>

To the extent that these groups represent a spectrum relating policy to enforcement, they do not necessarily align with Bishara’s enforceability index. For example, while Colorado has enacted a broad prohibition against noncompete clauses, it has a moderate enforcement ranking of 26, far from the bottom of 51. Similarly, Texas’s favoring of the freedom of contract is hardly clear from its enforceability ranking of 32, and Illinois’s apparent hostility is controverted by an enforceability ranking of 4.<sup>45</sup> It is unclear what exactly accounts for these differences.<sup>46</sup> But the disparity demonstrates that enforceability is not reducible to simple categorizations of state policy, nor vice versa, even when expressly enacted as legislation.

## B. California’s Prohibition against Contracts in Restraint of Trade

Save for a handful of exceptions, in California “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”<sup>47</sup> The exceptions generally cover the sale or dissolution of corporations, partnerships, and limited liability corporations.<sup>48</sup> Covenants not to compete that appear in employment contracts fit squarely within this statutory prohibition.<sup>49</sup>

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“restrictive covenants are not favored in Pennsylvania” and that “this Court requires the application of a balancing test”).

<sup>41</sup> See Selmi, *supra* note 7, at 1380 (using Missouri as the example for the neutral group).

<sup>42</sup> 379 S.W.3d 835 (Mo. 2012).

<sup>43</sup> *Id.* at 841.

<sup>44</sup> *Id.*

<sup>45</sup> See Bishara, *Enforcement*, *supra* note 8, at 787 fig.2. Illinois has since enacted the Freedom to Work Act, which requires an employee be paid at least \$13 per hour to be restrained by a non-competition agreement. 820 ILL. COMP. STAT. 90/1, 5, 10 (2017).

<sup>46</sup> It is worth noting that this is not the only divergence between Selmi’s and Bishara’s analyses. Selmi contends that a trend is growing toward heightened scrutiny and invalidation of non-compete clauses, while Bishara contends that there have been only minor changes in the enforcement regimes, save for a few states that do not represent a trend.

<sup>47</sup> CAL. BUS. & PROF. CODE § 16600 (2016).

<sup>48</sup> See *id.* §§ 16601–02.5.

<sup>49</sup> See *Richmond Techs., Inc. v. Aumtech Bus. Sols.*, No. 11-CV-02460-LHK, 2011 WL 2607158, at \*16 (N.D. Cal. July 1, 2011) (quoting *Edwards v. Andersen LLP*, 189 P.3d 285, 291 (Cal. 2008)) (noting, “[t]oday in California, covenants not to compete are void, subject to several exceptions”).

Like most other states, California initially permitted covenants not to compete. But in 1872 the California legislature “rejected the common law ‘rule of reasonableness’” typically applied to noncompetition agreements and enacted a statute that “settled public policy in favor of open competition.”<sup>50</sup> Engaging the broader debates about competition, employment markets, and freedom of contract are outside the scope of this Comment, but it is clear that California’s position is that restrictive covenants hinder employee mobility.<sup>51</sup> The purpose of § 16600 is to protect employees by “ensur[ing] ‘that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice.’”<sup>52</sup>

Resolution of a § 16600 violation depends on the circumstances of the case and complaint made. That chapter of the California Business & Professions Code does not expressly grant any cause of action, define a compensable injury, or provide for a civil penalty.<sup>53</sup> It simply provides that the agreement is void. Instead, plaintiffs must rely on causes of action that penalize *unlawful conduct* and thus provide a catchall mechanism for prosecuting other statutory violations. For example, Cal. Bus. & Prof. Code Div. 7, Pt. 2, Ch. 5 is dedicated to the enforcement of unfair competition laws.<sup>54</sup> It mostly requires that violations be prosecuted by a public official, but it also creates a cause of action for a private party “who has suffered injury in fact and has lost money or property as a result of the unfair competition.”<sup>55</sup> Because unfair competition is defined “to include *any unlawful . . . business act*,”<sup>56</sup> this scheme provides a hook for violations of § 16600.

Loss of an employment opportunity may not be a straightforward claim of injury in fact due to unfair competition.<sup>57</sup> But such a loss goes to the heart of § 16600, and other causes of action provide standing based on unlawful conduct. In *Edwards v. Arthur Andersen LLP*,<sup>58</sup> for example, the plaintiff brought a claim of intentional interference with

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<sup>50</sup> *Edwards*, 189 P.3d at 290.

<sup>51</sup> *See id.* at 290–91.

<sup>52</sup> *Id.* at 291 (quoting *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 27 Cal. Rptr. 2d 573, 577 (Cal. Ct. App. 1994)).

<sup>53</sup> *See* Contracts in Restraint of Trade, CAL. BUS. & PROF. CODE §§ 16600–07 (2016).

<sup>54</sup> *See* Enforcement, CAL. BUS. & PROF. CODE §§ 17200–10 (2016).

<sup>55</sup> *Id.* § 17204.

<sup>56</sup> *Id.* § 17200 (emphasis added).

<sup>57</sup> *See* *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 886 (Cal. 2011) (“While it is difficult to reduce injury-in-fact to a simple formula, *economic injury* is one of its paradigmatic forms.”) (quoting *Troyk v. Farmers Grp., Inc.*, 90 Cal. Rptr. 3d 589, 623 (Cal. Ct. App. 2009)); *Hall v. Time Inc.*, 70 Cal. Rptr. 3d 466, 470–71 (Cal. Ct. App. 2008) (stating that “a plaintiff suffers an injury in fact . . . when he or she has . . . been denied money to which he or she has a cognizable claim,” as in cases regarding the payment of medical bills and the termination of disability benefits).

<sup>58</sup> 189 P.3d 285 (Cal. 2008).

prospective economic advantage<sup>59</sup> where the underlying wrongful conduct alleged was a violation of § 16600. The plaintiff was required to sign a noncompete clause in his employment contract. In the course of an acquisition, the purchasing company required the employer to terminate all noncompete clauses. In exchange, the employer wanted the plaintiff to sign a release of all claims against the employer. When the plaintiff refused, the employer terminated him, and the acquisition deal fell through.<sup>60</sup>

The plaintiff used the apparent violation of § 16600 as the unlawful conduct hook for his tort claim.<sup>61</sup> The California Supreme Court held that “an employer cannot by contract restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the exceptions to the rule.”<sup>62</sup> The court further rejected a court-made exception it said the Ninth Circuit had erroneously culled from prior California state court opinions: the exception would have permitted noncompete agreements “where one is barred from pursuing only a small or limited part of the business, trade or profession.”<sup>63</sup> The only exceptions, the California Supreme Court explained, are those enumerated in the statute.<sup>64</sup> It is clear that in California and under § 16600 noncompete agreements have little, if any, room in the employment context: employee mobility is favored over employers’ interests and the freedom of contract.

### C. The Proposed Federal Mobility and Opportunity for Vulnerable Employees Act

The lack of uniformity in policy and law tends to benefit employers. While the disparity across legal regimes means that neither employers nor employees will have much success predicting outcomes, states may race to the bottom to attract employers.<sup>65</sup> But what’s good for an em-

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<sup>59</sup> See *Tortious Interference with Prospective Advantage*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“An intentional, damaging intrusion on another’s potential business relationship, such as the opportunity of obtaining customers or employment.”).

<sup>60</sup> *Edwards*, 189 P.3d at 288–89 (reciting the facts of the case).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 291.

<sup>63</sup> *Id.* at 292–93 (quotation marks omitted) (quoting *Campbell v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 817 F.2d 499, 502 (9th Cir. 1987)).

<sup>64</sup> *Id.* at 293.

<sup>65</sup> See generally Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381 (2008) (discussing law as a commodity and factors that make noncompetition agreement enforcement a potential area of state competition for businesses through favorable regulations). But see Bishara, *Enforcement*, *supra* note 8, at 781 (rebutting Glynn’s premise and claiming that

ployer may not be so good for an employee: *racing to the bottom* is necessarily not *racing to the top*.<sup>66</sup> Moreover, employers benefit from the law-as-commodity model because they can draft employment contracts to take advantage of favorable laws.<sup>67</sup>

The rise of noncompetition agreements, especially with the use of overly broad restrictions against low-wage workers, has garnered attention from the media,<sup>68</sup> law enforcement,<sup>69</sup> and Congress alike.<sup>70</sup> Despite the availability of the reasonableness test for attacking overly broad or inappropriately applied noncompete clauses, U.S. Senators Al Franken (D-Minn.) and Chris Murphy (D-Conn.) proposed the Mobility and Opportunity for Vulnerable Employees (MOVE) Act in June 2015.<sup>71</sup> According to their prepared statements, both Senators were motivated by a concern that broad noncompetition agreements create difficulties for low-wage workers when they look for other employment.<sup>72</sup>

The stated purpose of the MOVE Act is to “prohibit employers from requiring low-wage employees to enter into covenants not to compete, to require employers to notify potential employees of any requirement to enter into a covenant not to compete, and for other purposes.”<sup>73</sup> That

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the analyzed data do not show a trend of states racing to the bottom to enact employer-friendly noncompete enforcement regimes).

<sup>66</sup> See Glynn, *supra* note 65, 1383 & n.6, 1389–95, 1389 n.39 (discussing interjurisdictional competition models and noting the race to the bottom/race to the top debate).

<sup>67</sup> See *id.* at 1385 (explaining that “because employers typically are the first movers in [non-competition agreement] litigation, they often can litigate in a hospitable judicial forum”); *id.* at 1421 (“From the perspective of an employer . . . , which state’s noncompetition law governs the enforcement of [noncompetition agreements] also matters—a lot.”).

<sup>68</sup> See Greenhouse, *supra* note 1; Quinton, *supra* note 1; Jamieson, *supra* note 2; Omri Ben-Shahar, *California Got It Right: Ban the Non-Compete Agreements*, FORBES (Oct. 27, 2016), <http://www.forbes.com/sites/omribensshahar/2016/10/27/california-got-it-right-ban-the-non-compete-agreements/> [<https://perma.cc/3E3E-Z5J5>] (concluding that “to ban non-compete clauses makes much sense and may indeed support economic growth, technological startups, and innovation”).

<sup>69</sup> Israel, *supra* note 4 (discussing lawsuits and investigations launched by various state attorneys general against employers using broad noncompete clauses).

<sup>70</sup> Meredith S. Campbell, *Congress May Step in to Prevent Overreaching Non-Competes*, LEXOLOGY (June 17, 2015), <http://www.lexology.com/library/detail.aspx?g=d6e7d771-7d7a-400a-b556-aeeba0ebf09f> [<https://perma.cc/AUK2-DTVY>]; Murphy, *Franken Introduce Bill to Ban Non-Compete Agreements for Low-Wage Workers*, CHRIS MURPHY: UNITED STATES SENATOR FOR CONNECTICUT (June 3, 2015), <https://www.murphy.senate.gov/newsroom/press-releases/murphy-franken-introduce-bill-to-ban-non-compete-agreements-for-low-wage-workers> [<https://perma.cc/4NVU-2TVZ>] [hereinafter *Murphy Press Release*]; *Sen. Franken Introduces Bill to Ban Non-Compete Agreements for Low-Wage Workers*, AL FRANKEN: U.S. SENATOR FOR MINNESOTA (June 3, 2015), [https://www.franken.senate.gov/?p=press\\_release&id=3167](https://www.franken.senate.gov/?p=press_release&id=3167) [<https://perma.cc/4W9T-PNPN>] [hereinafter *Franken Press Release*].

<sup>71</sup> S.1504, 114th Cong. (2015).

<sup>72</sup> See *Franken Press Release*, *supra* note 70 (“Forcing lower-wage workers to sign ‘non-compete agreements’ makes it harder for these workers to find new jobs . . . .”); *Murphy Press Release*, *supra* note 70 (“Non-compete agreements . . . trap these workers in low-paying jobs.”); see also TREASURY REPORT, *supra* note 6. *But see infra* notes 143–44 and accompanying text.

<sup>73</sup> S.1504, 114th Cong. (2015).

statement captures the effects of the operative sections, which function as follows.

Foremost, the MOVE Act defines a “covenant not to compete” with respect to the factors of the reasonableness test.<sup>74</sup> Under the MOVE Act, a covenant not to compete is any agreement “between an employee and employer that restricts such employee from performing . . . [1] any work for another employer for a *specified period of time*; [2] any work in a *specified geographical area*; or [3] work for another employer *that is similar to such employee’s work* for the employer included as a party to the agreement.”<sup>75</sup> The Act does not mention the reasonableness standard, and the language is written broadly by using “any” and the disjunctive “or.” Importantly, the MOVE Act would not implement a federal reasonableness test, but would statutorily prohibit the use of *any* kind of restrictive covenant between employers and their low-wage employees.

A low-wage employee under the MOVE Act is one who earns less than \$15 per hour or \$31,200 per year.<sup>76</sup> An exclusion is made, though, for salaried employees who receive “compensation that, for 2 consecutive months, is greater than . . . \$5,000.”<sup>77</sup>

Sections 3 and 4 contain the heart of the MOVE Act. Section 3 prohibits employers from “enter[ing] into a covenant not to compete with any low-wage employee” and requires notice of the Act to be posted in a “conspicuous place on the premises of [the] employer.”<sup>78</sup> Section 4, on the other hand, creates a disclosure requirement when dealing with non-low-wage earners. If an employer wishes to enter into a covenant not to compete with an employee that earns more than \$15 per hour, earns more than \$31,200 per year, or receives the exclusion compensation,<sup>79</sup> the employer “shall, prior to the employment of such employee and at the beginning of the process for hiring such employee, have disclosed to such employee the requirement for entering into such covenant.”<sup>80</sup>

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<sup>74</sup> See S.1504 § 2(2).

<sup>75</sup> *Id.* (emphasis added).

<sup>76</sup> See *id.* §§ 2(4)–(5).

<sup>77</sup> *Id.* § 2(5). It is not clear whether the exclusion is triggered by two consecutive months of compensation totaling at least \$5,000 or by compensation of at least \$5,000 for each of two consecutive months.

<sup>78</sup> *Id.* § 3.

<sup>79</sup> This Comment will focus on the \$15 per hour provision to simplify the discussion, but it should be noted that the annual pay and exclusion compensation provisions operate similarly.

<sup>80</sup> S.1504 § 4 (The MOVE Act does not provide a definition or any guideline for what is the “beginning of the process for hiring” an employee.).

Finally, section 5 provides for enforcement of the MOVE Act. Generally, the Secretary of Labor is responsible for enforcing the provisions of the Act. More precisely, though, the Secretary is to “receive, investigate, attempt to resolve, and enforce a complaint . . . in the same manner that the Secretary” does for “a violation of section 6 or 7 of the Fair Labor Standards Act of 1938.”<sup>81</sup> This means that, for the purposes of enforcement, the Secretary of Labor should treat the MOVE Act like the minimum wage and maximum workweek laws.<sup>82</sup> The Act also defines the maximum civil penalties as \$5,000 for a violation of the workplace notice requirement and \$5,000 per employee for entering into a prohibited covenant not to compete—either with a low-wage employee or with a non-low-wage employee who has not been provided the required disclosure.<sup>83</sup>

## II. PREEMPTION ANALYSIS OF CALIFORNIA STATE LAW AND THE MOVE ACT

### A. The Preemption of State Laws by Federal Statutes

Whenever Congress passes legislation covering an area of law that is also within the domain of states, by common law or by state legislation, there is the question of which law controls. Does the federal law preempt the state law? Or does the federal law give way to the state law? Or must there be some other interaction between the two? Answering these questions can be difficult, but doing so is a constitutional imperative. The Supremacy Clause states that:

This Constitution, and the *Laws of the United States* which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*.<sup>84</sup>

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<sup>81</sup> *Id.* § 5(a).

<sup>82</sup> See 29 U.S.C. § 206 (2012) (setting forth the minimum wage requirements under the Fair Labor Standards Act (FLSA)); *id.* § 207 (setting for the maximum workweek requirements under the FLSA); *id.* § 204 (creating obligations for and powers of the Secretary of Labor and an Administrator of the Department of Labor Wage and Hour Division); *id.* § 211 (granting authority to the § 204 Administrator to “investigate and gather data” as needed); *id.* § 215(2) (prohibiting violations of §§ 206 and 207); *id.* § 216 (defining the penalties and remedies for violations of the FLSA); *id.* § 218 (defining the relation of the FLSA provisions to other laws).

<sup>83</sup> S.1504 § 5(b).

<sup>84</sup> U.S. CONST. art. VI, cl. 2 (emphasis added).

There is no doubt that Congress has the power to preempt state law. But, like any constitutional authority, having a power and exercising that power are different things. Moreover, federalist concerns about the balance of powers were not only instrumental in the construction of the Constitution,<sup>85</sup> but motivate against the presumption that Congress exercises its authority to preempt state law in every statute it enacts.<sup>86</sup> Although there are many disagreements about the operation of the preemption doctrine,<sup>87</sup> the Court has reaffirmed its position that the analysis begins with a presumption against preemption.<sup>88</sup>

Moving past the presumption against preemption, state laws can be preempted expressly or impliedly. The existence of a statutory clause expressly addressing preemption, though, does not fully resolve the issue.<sup>89</sup> Therefore, courts must frequently apply the doctrines of implied preemption even where Congress has spoken.<sup>90</sup> There are three modes of implied preemption: conflict preemption, obstacle preemption, and field preemption. Federal and state laws conflict when the laws diverge so much that it is “impossible for a private party to comply with both

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<sup>85</sup> See *id.* (The Supremacy Clause); U.S. CONST. art. IV, § 1 (The Full Faith and Credit Clause); U.S. CONST. amend. X (Reserved Powers to States). See also THE FEDERALIST NO. 45, at 313 (James Madison) (Cooke ed., 1961) (stating that “[t]he powers delegated by the proposed constitution to the federal government, are few and defined,” yet “[t]hose which are to remain in the state governments are numerous and indefinite”).

<sup>86</sup> See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (plurality opinion) (stating that “because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action”); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (stating that when “Congress [has] legislated . . . in [a] field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”). See also Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2085–86 (2000) (explaining that in spite of some inconsistencies, “[i]t is generally accepted, however, that these cases found in traditional federalism principles a presumption against federal preemption of state law”).

<sup>87</sup> See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in judgment only) (stating that finding implied preemption based on “purposes and objectives” that “are not embodied within the text of federal law” is “inconsistent with the Constitution”); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 545–48 (1992) (Scalia, J., dissenting) (arguing that the presumption against preemption should not apply when an express provision is enacted and that an express provision does not necessarily render implied preemption inapplicable).

<sup>88</sup> See *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Rice*, 331 U.S. at 230).

<sup>89</sup> See, for example, *Altria*, 555 U.S. 70, and *Cipollone*, 505 U.S. 504, in which the Court addressed whether “requirements and prohibitions” that were expressly preempted by the Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331–41, included state common law duties such as the duty to warn. *Altria* affirmed the *Cipollone* plurality that the common law duties were not preempted, and, thus, plaintiffs had causes of action thereunder.

<sup>90</sup> See *Cipollone*, 505 U.S. at 545–48 (Scalia, J., dissenting) (arguing that conflict and obstacle preemption still have room to operate despite the presence of an express provision).



state and federal requirements,”<sup>91</sup> as well as when compliance is technically possible but the laws “give contradictory commands.”<sup>92</sup> A state law is preempted under obstacle preemption when it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>93</sup> And Congress’s purpose is the controlling factor, though the purpose of the state law may be informative.<sup>94</sup> Finally, field preemption occurs when state law “regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.”<sup>95</sup>

Before turning to the main arguments of this Comment, several tests can be more immediately addressed. First, because contract law and employment law are two areas traditionally left to the states,<sup>96</sup> the presumption against preemption disfavors preempting § 16600. The presumption, though, rarely ends the inquiry.<sup>97</sup> The MOVE Act is silent on preemption, so there is no need to consider express preemption. Similarly, one test of conflict preemption is straightforward: an employer can technically comply with both the MOVE Act and § 16600 by simply never using noncompete clauses. Finally, the MOVE Act does not clearly leave “no room for the States to supplement” federal law:<sup>98</sup> for example, states could impose more disclosure requirements or set a higher wage. Field preemption is thus not implicated.

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<sup>91</sup> *Mut. Pharm. Co., Inc. v. Bartlett*, 133 S. Ct. 2466, 2468–69, 2473 (2013) (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)) (holding that it would be impossible to comply with an FDA law prohibiting changes to labels after drug approval and a state law that required changes in certain circumstances). *But see, Wyeth*, 555 U.S. at 573 (holding the opposite).

<sup>92</sup> *Wyeth*, 555 U.S. at 590 (Thomas, J., concurring in judgment only) (noting that if a federal law grants a right that state law prohibits, abstaining from conduct might lead to compliance, but the laws nonetheless “give directly conflicting commands”).

<sup>93</sup> *English*, 496 U.S. at 79 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>94</sup> See Note, *Preemption as Purposivism’s Last Refuge*, 126 HARV. L. REV. 1056, 1065–68 (2013) [hereinafter *Preemption: Purposivism*] (discussing obstacle preemption and field preemption with emphasis on federal legislative intent). See, e.g., *Int’l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (discussing Congress’s purpose for the Clean Water Act, but only mentioning state laws with regards to where they fit within the federal regulatory framework and never examining the Vermont state law at issue for its independent purpose).

<sup>95</sup> *English*, 496 U.S. at 79.

<sup>96</sup> Although Congress has passed many employment laws, numerous employment matters remain with the states—for example, trade secret protection, unfair competition, and even state-based minimum wages. See, e.g., *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 643 (9th Cir. 2014) (stating that “[w]age and hour laws constitute areas of traditional state regulation”) (citing *Cal. Div. of Labor Standards Enf’t v. Dillingham Constr., N.A.*, 519 U.S. 316, 330–34 (1997)).

<sup>97</sup> See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 740 (2008) (discussing the inconsistency of the so-called fundamental principles of preemption doctrine); see also S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U.L. REV. 685, 733 (1991) (“The Supreme Court’s devotion to its presumptions, however, can only be described as fickle.”).

<sup>98</sup> *English*, 496 U.S. at 79 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); see also, S.1504 § 2(4) (defining the “livable hourly rate,” which is the basis for a low-wage worker, the Act leaves room for states to provide a higher wage than \$15 per hour).

## B. Invalidation under § 16600 Would Conflict with Federal Policy

Although the MOVE Act is only a proposed bill at present, there are nonetheless helpful indicators of congressional purpose. This Comment, of course, assumes that Congress would pass the MOVE Act as it is currently written and therefore draws upon the information available thus far in the process. This is undoubtedly less information than might be available if the statute were fully debated and enacted, but the following sections demonstrate that it is enough to form a sound conclusion.

Although a stated purpose may be elucidating, the stated purpose of the MOVE Act does nothing more than summarize the operative sections.<sup>99</sup> No members of Congress made any further statements during the session in which Senator Murphy introduced the bill,<sup>100</sup> nor has the bill been debated or otherwise recorded. But the lack of extratextual information is a boon for this inquiry given the Supreme Court's preference for textual analysis in non-preemption cases.<sup>101</sup> If an argument that resembles traditional preemption doctrine can be made on scarce sources other than the statute, then the argument is all the stronger. And obstacle preemption is losing favor with the Court because of the test's focus on congressional purposes.<sup>102</sup> Textual arguments can recover some of that lost ground.<sup>103</sup>

### 1. The MOVE Act balances employer and employee interests

The MOVE Act essentially creates an enhanced minimum wage for workers required to enter into noncompetition agreements: they must be paid at least \$15 per hour.<sup>104</sup> This is clearly a line-drawing effort. But why? Congress could enact a statute that prohibits all noncompetition agreements in the employment context regardless of wages.<sup>105</sup> Employers, though, face more costs than the wages they pay workers. For

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<sup>99</sup> See *id.* §§ 3(a), 4.

<sup>100</sup> 161 CONG. REC. S3776 (daily ed. June 4, 2015) (statement of Sen. Murphy).

<sup>101</sup> See *generally Preemption: Purposivism*, *supra* note 94 (describing how the Court abandons textual analysis when approaching questions of preemption and arguing that departure from textualism is unnecessary).

<sup>102</sup> See *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in judgment only) (writing separately to criticize the Court's "purposes and objectives" pre-emption jurisprudence).

<sup>103</sup> See *id.* (stating that "implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution").

<sup>104</sup> S.1504 § 3(a); see also *supra* Part I, Section C, for a brief explanation that the annual pay and exclusion compensation provisions operate the same as the hourly wage requirement.

<sup>105</sup> The language and structure of S.1504 cannot be considered an accident. Congress is undoubtedly aware of the variety of state legislation on covenants not to compete—from California's statutory ban in CAL. BUS. & PROF. CODE § 16600 to Texas's regard for the freedom of contract

example, employers may share proprietary information with employees and thus risk losing their hold on that information when employees leave. Employers also make considerable investments in training workers for their jobs.

The wage distinction establishes a tradeoff between, on the one hand, protecting employee mobility and, on the other hand, respecting the freedom of contract and permitting employers to protect their interests. In other words, where an employee is informed and properly compensated, federal policy under the MOVE Act would be to leave intact the mutual rights of the employer and employee to contract with each other. Federal law should only protect an employee's mobility and curtail the employer's rights when the employee earns below the enhanced minimum wage.

Reading the notice and disclosure provisions further supports the Act's achievement of balancing employee and employer interests. The purpose of these provisions is obviously to inform employees and potential employees of their respective rights. Any employee subject to a covenant not to compete will know she is entitled to at least \$15 per hour, and any potential employee will have legally mandated notice of an agreement that would restrain her mobility. It is important, though, to read § 4 in light of § 3(a). Since the Act prohibits covenants not to compete in employment contracts with low-wage workers, the mandated disclosure only applies to workers earning at least \$15 per hour. The wage distinction is visible again: above the wage threshold, federal policy would be to inform the applicant of a restraint, but ultimately to respect her and the employer's freedom of contract.

This balancing of interests is not surprising given the myriad of state laws in which the reasonableness test, and thus the freedom of contract, is predominant. Congress is presumed to be "knowledgeable about existing law pertinent to the legislation it enacts,"<sup>106</sup> and the inclusion of the factors of the reasonableness test in the MOVE Act support application of that presumption here.<sup>107</sup> Moreover, common sense stands as a barrier to the notion that "Congress has omitted from its

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under TEX. BUS. & COM. CODE § 15.50(a).

<sup>106</sup> *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988) (stating that "[i]n the absence of affirmative evidence in the language or history of the statute, we are unwilling to assume that Congress was ignorant of [relevant state law]"); see also *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696–97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.").

<sup>107</sup> See, e.g., *Goodyear Atomic Corp.*, 486 U.S. at 185 (noting that Congress was apparently aware of the state workers' compensation schemes because it designated that the federal plan should operate "in the same way and to the same extent' as provided by state law").

adopted text requirements that it nonetheless intends to apply.”<sup>108</sup> Senators Franken and Murphy could have proposed stronger legislation against the freedom of contract, like § 16600. Instead, the Act would establish a compensation requirement as the point where federal law pivots away from existing state laws. So long as an employer ensures that an employee is informed and paid the enhanced minimum wage, her mobility may be restrained. And she may be paid less, so long as the employer does not restrain her mobility.

## 2. Section 16600 would disrupt the balancing of interests

California “courts have consistently affirmed that § 16600 evinces a settled legislative policy in favor of open competition and employee mobility.”<sup>109</sup> At first, this policy seems compatible with the MOVE Act because both statutes seek to limit restraints on an employee’s freedom to work in her occupation of choice. The core distinction between the two statutes, though, is the scope of the prohibition: “the state Act’s generality stands at odds with the federal discreteness.”<sup>110</sup> While § 16600 makes all covenants not to compete unlawful, save for a few exceptions,<sup>111</sup> the MOVE Act would only prohibit covenants not to compete in the employment context and as applied to low-wage workers.<sup>112</sup> The difference in scope is such that § 16600 would fail both obstacle and conflict preemption.

First, operation of California law would frustrate the purposes and objectives of a Congress that enacts the MOVE Act by intruding on the balancing of interests the Act would achieve. Most states have long recognized the freedom of contract and permitted employers to protect legitimate interests—like proprietary information and employee training—through reasonable covenants not to compete.<sup>113</sup> Aware of these laws and employer interests, but motivated to cure a perceived problem of mobility, the proponents of the MOVE Act propose a tradeoff. Below

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<sup>108</sup> *Jama v. Immigration and Customs Enf’t*, 543 U.S. 335, 341 (2005) (rejecting a requirement that removal of an alien to a country pursuant to 8 U.S.C § 1231(b)(2)(E)(i)–(vi) required that country to “accept” the alien when none of those subsections had an acceptance requirement, but the alternative clause in subsection (E)(vii) did).

<sup>109</sup> *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 291 (Cal. 2008).

<sup>110</sup> *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 379 (2000) (holding that Massachusetts trade regulations were preempted despite an arguably compatible goal because the state law implemented different and broader sanctions and prohibitions).

<sup>111</sup> CAL. BUS. & PROF. CODE §§ 16600–07. *See also Edwards*, 189 P.3d at 293 (holding that the only exceptions to § 16600 are those listed in the statute).

<sup>112</sup> S.1504, §§ 3–4.

<sup>113</sup> *See supra* Part I, Section A (Excluding states with broad statutory prohibitions like California and North Dakota, states in each of Selmi’s groups and across Bishara’s index still use the reasonableness test to gauge an employer’s effort to protect a legitimate interest.).

the wage threshold of \$15 per hour, employee mobility is protected. Above that wage, freedom of contract remains prevalent and permits employers to protect their interests. But the broad legislative prohibition of § 16600 and the California Supreme Court's rejection of judge-made exceptions<sup>114</sup> work together so that no employer could seek to protect any interest with a noncompete clause, and no employee could seek a higher wage in exchange for entering into a noncompetition agreement.<sup>115</sup> Section 16600 thus stands as an obstacle to the MOVE Act and would be preempted.

Furthermore, commentators have noted that as the Supreme Court has considered narrowing obstacle preemption, it has shown a similar preference for expanding conflict preemption through the direct conflict test.<sup>116</sup> This is not unexpected given the framing of the two tests—a contradictory command certainly frustrates the purposes and objectives of Congress. Consider the commands of § 16600 and the MOVE Act. California says, “do not make this contract.” The MOVE Act says, “you can make it, but you have to pay for it.” Although not polar opposites, this contrast fits well into Justice Thomas's description of the direct conflict test: “if federal law gives an individual the right to engage in certain behavior that state law prohibits, the laws would give contradictory commands.”<sup>117</sup> Here, the federal law gives employers a right—indeed, a precise formula for permission—to bind their employees by covenants not to compete: give them notice and pay them at least \$15 per hour.<sup>118</sup> There is no question that California law would prohibit that arrangement and void the agreement.<sup>119</sup> California's command is therefore in direct conflict with the rights contemplated by the MOVE Act: § 16600 would thus be preempted.

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<sup>114</sup> See *Edwards*, 189 P.3d at 293 (holding that § 16600 is the domain of the legislature).

<sup>115</sup> It is worth noting that such an exchange could also result in greater employer investment in training and general job stability, which might also impact other benefits like the availability of stock options and employer contributions to retirement plans.

<sup>116</sup> See Gregory M. Dickinson, *An Empirical Study of Obstacle Preemption in the Supreme Court*, 89 NEB. L. REV. 682, 683 (2011) (explaining that “[s]uch an expansion is likely made necessary by the gap” left by narrowing obstacle preemption); Lauren Gilbert, *Immigrant Laws, Obstacle Preemption and the Lost Legacy of McCulloch*, 33 BERKELEY J. EMP. & LAB. L. 153, 162–63 (2012) (noting that as obstacle preemption is disfavored, “the Court may feel the need to expand the scope of impossibility preemption beyond . . . ‘physical impossibility’”).

<sup>117</sup> *Wyeth v. Levine*, 555 U.S. 555, 590 (2009) (Thomas, J., concurring in judgment only).

<sup>118</sup> See S.1504 §§ 3(a), 4.

<sup>119</sup> See, e.g., *Edwards*, 189 P.3d at 292 (“The noncompetition agreement that Edwards was required to sign before commencing employment with Andersen was therefore invalid because it restrained his ability to practice his profession.”).

### C. Nullification in California Would Preclude Federal Remedies

It is also important to consider the means by which the MOVE Act would operate.<sup>120</sup> This is crucial because, again, federal law can preempt state law despite a compatible purpose when the state law nevertheless obstructs the operation of the federal law.<sup>121</sup> Therefore, understanding how the MOVE Act would affect the employer-employee relationship through rights of action and remedies is important to assess how § 16600 could interfere with the objectives of the Act.

#### 1. The MOVE Act provides for a private cause of action

The stated remedies of the MOVE Act are found in § 5, which describes enforcement and heavily incorporates the FLSA. One method by which the MOVE Act is intended to operate is by deterring employers from engaging in wrongful conduct: an employer in violation of the MOVE Act risks thousands of dollars per violation,<sup>122</sup> and perhaps even imprisonment.<sup>123</sup>

The MOVE Act could also achieve its objectives through employer liability to the employee. The proposed statute, however, makes no direct mention of a private right of action or an employee's entitlement to damages. But these remedies are provided for in the FLSA for violations of the minimum wage and maximum hour provisions.<sup>124</sup> Although enforcement of MOVE Act violations could be entirely left up to the Secretary of Labor—if the § 5(b) civil fine provision were the only operative remedy—it is reasonable to conclude that there is a private right of action from the directive for enforcement in the “same manner” as under the FLSA sections,<sup>125</sup> as well as the MOVE Act's requirement that its

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<sup>120</sup> See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (stating that “[a]lso relevant” to understanding Congress's intent “is the ‘structure and purpose of the statute as a whole’ . . . as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to” work); *Wis. Dept. of Indus., Labor and Human Res. v. Gould Inc.*, 475 U.S. 282, 286 (1986) (recognizing that “[c]onflict in technique can be fully as disruptive . . . as conflict in overt policy”).

<sup>121</sup> See *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987) (explaining that “the Court must be guided by the goals and policies of the [federal] Act” in order to avoid a “result [that] would be a serious interference with the achievement of the ‘full purposes and objectives of Congress’”).

<sup>122</sup> S.1504 § 5(b) (setting the maximum fine to \$5000 for each violation).

<sup>123</sup> The FLSA section apparently supplanted by S.1504 § 5(b) refers to imprisonment as well. See 29 U.S.C. § 216(a) (providing for a fine of up to \$10,000, imprisonment for up to six months, or both). It is equally possible that S.1504 § 5(b) eliminates imprisonment as a penalty or that it only redefines the maximum civil fine.

<sup>124</sup> See *id.* § 216(b) (providing for employer liability to the employee for unpaid compensation, as well as “an additional equal amount as liquidated damages”).

<sup>125</sup> S.1504 § 5(a).

provisions be posted in the workplace.<sup>126</sup> Naturally, an employee who sees the posted notice and is aware that she is both bound by a covenant not to compete and inadequately paid will want to seek recovery. Given the FLSA's private right of action, there is no textual support for eliminating that right under the MOVE Act in light of its broad inclusion of FLSA enforcement provisions.

And because the MOVE Act draws a line around prohibited conduct at a specific wage level, there are two remedies it may provide if a private right of action is available: either (1) the contract is void, at least to the extent of the covenant not to compete; or (2) the employee is due unpaid compensation for being required to enter into the agreement.<sup>127</sup> The language of the Act does not point to either remedy. Thus, a court could allow a plaintiff to choose her remedy when filing a complaint. The text arguably supports this result. First, the MOVE Act incorporates enforcement provisions from the FLSA, which does provide damages for unpaid compensation in both minimum wage and overtime violations.<sup>128</sup> Furthermore, the MOVE Act does not have an *ex ante* preference for the employee's position on either side of the wage line: § 4 says Congress would be okay with restrictive covenants if an employee is informed and properly compensated, and § 3 says Congress would be okay with a lower wage as long as the employee's mobility is not restrained. When an employee falls in the prohibited gap—bound by an agreement but underpaid—the law should leave the preference to her: either (1) lower compensation, but void the contract, or (2) keep the restraint on mobility, but recover unpaid wages.<sup>129</sup> Therefore, as with a private right of action in general, the incorporation of FLSA provisions and the language of the MOVE Act support a reading that creates employer liability for unpaid wages.

## 2. Section 16600 would impede a right to unpaid wages

Ultimately, § 16600 would eviscerate the enhanced minimum wage established by the MOVE Act and thereby eliminate the private right of action. While the MOVE Act prohibits employers from “enter[ing]

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<sup>126</sup> *Id.* § 3(b).

<sup>127</sup> If it provided both a voided contract and monetary relief, the plaintiff would get a windfall, being in a better position than an employee whose employer complied with the law. There is no reason to think the statute is intended to do this.

<sup>128</sup> See 29 U.S.C. § 216 (providing that an “employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid . . . compensation”).

<sup>129</sup> It is not clear whether a non-low-wage worker would have standing or what remedy she could sue for: she would have received a legal wage, and the suit demonstrates knowledge. It may be that violations of § 4 (requiring disclosure) are enforceable only by the Secretary.

into a covenant not to compete with any low-wage employee,”<sup>130</sup> the Act does not invalidate the agreement. In California, however, any employment contract that contains a noncompete clause is “to that extent void” under § 16600 and, thus, not enforceable from the instant it takes form. A court must rule accordingly and cannot simultaneously award damages in the form of unpaid wages pursuant to the MOVE Act.<sup>131</sup> Legally, the employer and employee did not form a valid noncompetition agreement. Without the agreement, the MOVE Act’s provisions would be inoperative, and a low-wage employee would have no grounds for demanding enhanced wages because her mobility would not have been restrained.

Notice that the counterfactual is a classic moral hazard. If a plaintiff could obtain both remedies, she would have an incentive to seek out illegal contracts under California law. If she happens to also earn illegal wages under the MOVE Act, then she can get a windfall: mobility and enhanced wages. But the employees of compliant California employers only get mobility. This disparity might not be a concern if we think the employer intended to unduly restrain the plaintiff’s future employment activities. After all, the *windfall* to the low-wage plaintiff is really a *penalty* on the employer who pays for it.<sup>132</sup>

But § 16600 does not place a burden on the employer when it 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.”<sup>133</sup> A knowing employee who willfully and intentionally makes an illegal contract with her employer has also committed a wrong under § 16600 and should not be rewarded. The MOVE Act, though, does not have an *ex ante* preference for the employee’s mobility—she may intentionally enter into the noncompetition agreement in order to obtain higher wages. In fact, § 4 requires the employer in that case to disclose the agreement prior to starting the hiring process. An express purpose of the MOVE Act is to inform an employee of the noncompete clause and the wage requirements so that she knowledgeably and willfully agrees to the restraint.

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<sup>130</sup> S.1504 § 3.

<sup>131</sup> *But see* CAL. BUS. & PROF. CODE §§ 17200, 17204 (A plaintiff that can show economic injury as a result of having entered into the invalid agreement may be entitled to recovery.). But the MOVE Act’s enhanced wage logically cannot serve as the alleged economic injury.

<sup>132</sup> *See supra* Part I, Section C. California law may provide for recovery under laws like CAL. BUS. & PROF. CODE §§ 17200, 17204 and the tort of intentional interference with prospective economic advantage. But these laws would not protect a plaintiff that willfully induced the conduct.

<sup>133</sup> CAL. BUS. & PROF. CODE § 16600.



Moreover, if the MOVE Act preempts § 16600 in a low-wage action, it must preempt § 16600 in a non-low-wage action, as well.<sup>134</sup> Otherwise, employers would face a moral hazard. If all noncompetition agreements with non-low-wage workers are voided by § 16600, but agreements with low-wage workers will be enforceable if they sue for unpaid wages, then employers will be incentivized to pay their workers less than \$15 per hour to obtain enforceable agreements. In other words, employers will violate the express provisions of the MOVE Act in order to obtain enforceability under the MOVE Act in low-wage actions and avoid lawsuits that could result in invalidation under § 16600. Preemption in low-wage actions thus necessitates preemption in all actions.

Even if policies seem compatible at first, divergent means of achieving a similar goal can be “disruptive to the system Congress erected.”<sup>135</sup> Section 16600 frustrates the purposes and objectives of the MOVE Act by invalidating the antecedent contract that must be formed in order to establish the Act’s enhanced minimum wage. To preserve a remedy for unpaid wages, the MOVE Act must preempt § 16600 in low-wage actions. The laws cannot coexist because that would incentivize low-wage employees to seek illegal contracts and employers to pay illegal wages. The MOVE Act and § 16600 would therefore be in direct conflict. The Supremacy Clause would require preemption.

#### D. Section 16600 Would Not Fill Gaps in the MOVE Act

An alternative framing of the interaction between the MOVE Act and § 16600 begins by considering the target population: vulnerable employees. On the one hand, the MOVE Act defines these employees as those that earn less than \$15 per hour. On the other hand, § 16600 draws no line and, thus, protects all employees from restrictive covenants regardless of their wages. Logically, the California prohibition has a scope broader than and inclusive of the population targeted by the MOVE Act. It still protects low-wage workers from being required to enter into covenants not to compete.

Compare this interaction to minimum wage laws. Under federal law, employers must pay employees at least a minimum hourly rate of \$7.25 per hour.<sup>136</sup> Presently, California’s minimum wage is \$10 per hour.<sup>137</sup> Federal law does not preempt California’s law even though it essentially renders the federal law inoperative. Similarly, even though

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<sup>134</sup> A non-low-wage worker may not have standing. *See supra* note 129 and accompanying text. Regardless, the following argument applies no matter who sues the employer.

<sup>135</sup> *Wis. Dept. of Indus., Labor and Human Res. v. Gould Inc.*, 475 U.S. 282, 286 (1986).

<sup>136</sup> 29 U.S.C. § 206.

<sup>137</sup> CAL. LAB. CODE § 1182.12 (2016).

the MOVE Act would essentially be ineffective in California, that is acceptable because the California law protects the same, and more, workers.

There is some weight to this argument, and it is especially alluring given the simplified and straightforward definition of the objectives of each law. The problem, however, is that even if the purposes are assumed to be compatible, it is still important to consider how the two interact given the mandate of the Supremacy Clause.<sup>138</sup> Again, the minimum wage laws present a good example, and it helps to consider the gap-filling relationship between the laws. Even though California's higher wage requirement effectively renders the federal law moot, it is really filling a gap between two policy judgments. Federal law provides \$7.25 per hour to every employee. The California legislature decided that employees should always earn more. The compensation that California requires above the federal minimum wage is filling a gap—to the tune of \$2.75 per hour. There are two important parts to this gap-filling state law: (1) the gap is filled, so to speak, on a per person basis; and (2) the nature of the right addressed is one-dimensional: paying an employee \$10 per hour necessarily pays her \$7.25 per hour.

Compare this to the MOVE Act and § 16600. First, the gap is filled in terms of the population protected and not with respect to per-person policy considerations. Section 16600 expands the group of protected employees from *low-wage workers* to *all workers*. In this context, no particular worker benefits more because of the gap being filled. If no single person is worse off because of the state law, then this kind of gap filling would probably be permissible. But the interaction among the individual rights addressed by the MOVE Act and § 16600 do not occur along a single dimension. Instead, a person's rights in this context are more like a hand of trading cards. Section 16600 gives employees a mobility card, but it leaves employers empty-handed. The MOVE Act gives employers and employees complimentary sets of cards covering employee mobility, minimum wages, and employment disclosures. Resting on the freedom of contract, the Act permits employers and employees to negotiate, trading their cards according to their interests. There are, however, no exchanges available under § 16600 because the employer has no cards to trade. The Supremacy Clause requires courts give federal law priority over state law.<sup>139</sup> If § 16600 added cards to either side or

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<sup>138</sup> See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 252 (2000) (explaining that the Supremacy Clause “requires courts to disregard [a] state rule” that would prevent the application of a “valid rule[ ] of federal law”).

<sup>139</sup> See William Hochul III, *Enforcement in Kind: Reexamining the Preemption Doctrine in Arizona v. United States*, 87 NOTRE DAME L. REV. 2225, 2227 (2012) (citing Nelson, *supra* note 138, at 250) (explaining that “the Supremacy Clause establishes a rule of federal priority when a court

both sides, then perhaps the interaction could be characterized as harmonious. But California law would remove several federal cards from play.

While state law can fill gaps in federal law, the Supremacy Clause does not allow state law to make federal law ineffectual.<sup>140</sup> This stems, of course, from the need to respect the congressional prerogative to legislate uniformly across the nation.<sup>141</sup> The case law and other materials reviewed in Part I of this Comment help paint a picture of the background against which Congress would exercise that prerogative if the MOVE Act were enacted. It is apparent that the proponents of the MOVE Act have chosen to legislate in a particular position—in the spot between knowing employers are using noncompetition agreements with low-wage workers<sup>142</sup> and worrying that the effects are adverse, but not having enough empirical evidence to draw a conclusion.<sup>143</sup> Evidence shows that employers use noncompetition agreements regardless of the enforcement regime in a state,<sup>144</sup> and the MOVE Act is an attempt specifically to reach employer conduct at the federal level.<sup>145</sup> Section 16600, though, would make the MOVE Act inoperative in California even if the policies appear compatible. The Supremacy Clause forbids that.

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must choose between applying state or federal laws”).

<sup>140</sup> See Nelson, *supra* note 138, at 250–53 (describing the rule of priority set out by the Supremacy Clause and that “any obligation to disregard state law” derives from the first-order “obligation to follow federal law”).

<sup>141</sup> See U.S. CONST. art. I, § 8, cl. 18 (granting to Congress the power “[t]o make all Laws which shall be necessary and proper”); *id.* art. VI, cl. 2 (declaring that federal law is “the supreme Law of the Land[ ] and the Judges in every State shall be bound thereby”); Nelson, *supra* note 138, at 246 (explaining that one objective of the Supremacy Clause is to “make[ ] clear that . . . federal statutes take effect automatically within each state” and apply “even in state courts”).

<sup>142</sup> See Greenhouse, *supra* note 1 (discussing the proliferation of noncompete clauses in a number of different sectors); Jamieson, *supra* note 2 (discussing Jimmy John’s broad use of noncompete clauses with every level of employee).

<sup>143</sup> See generally Mark J. Garmaise, *Ties That Truly Bind: Non-competition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 376 (2011) (finding impacts from noncompetition agreements on compensation, mobility, and training for executive employees). Garmaise’s results may not apply to low-wage employees, and, to date, no comparable studies have been found with a focus on low-wage employees. See also TREASURY REPORT, *supra* note 6, at 21 (showing that enforceability of noncompetition agreements may affect employees’ ability to earn higher wages later in their career). The report, however, does not normalize wages: for instance, both California and New York do not favor noncompete clauses, see Bishara, *Enforcement*, *supra* note 8, 786–87 fig.1, and have high populations of wealth that may skew wage comparisons.

<sup>144</sup> See James J. Prescott, et al., *Understanding Noncompetition Agreements: The 2014 Non-compete Survey Project*, 2016 MICH. ST. L. REV. 369, 455–63 (2016) (concluding that “the frequency of noncompetes in a state appears unrelated to the governing legal regime”).

<sup>145</sup> See S.1504 preamble, § 3(a) (stating that its purpose is “[t]o prohibit employers from requiring low-wage employees to enter into covenants not to compete,” and requiring that “[n]o employer shall enter into a covenant not to compete with any low-wage employee”) (emphasis added).

## E. The FLSA Savings Clause Would Not Save § 16600

It might also be argued that because the MOVE Act extensively incorporates definitions and enforcement provisions from the FLSA, the FLSA's savings clause<sup>146</sup> would apply as well. Nothing in the definitions would require incorporating the FLSA savings clause, though, and it is at least not obvious that enforcement "in the same manner" as FLSA violations requires incorporation of the savings clause either.<sup>147</sup>

The enforcement provision of the MOVE Act defines how the "Secretary shall receive, investigate, attempt to resolve, and enforce a complaint of a violation" of the MOVE Act.<sup>148</sup> This involves the procedure by which the Secretary would carry out her duties in response to a complaint of violation. For instance, under the FLSA, the Secretary "may investigate and gather data . . . to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter."<sup>149</sup> The MOVE Act surely incorporates this section. Moreover, the penalties provided for under the FLSA are likely also incorporated, including civil penalties, potential imprisonment, and a private right of action to recover damages, subject to the MOVE Act's adjusted maximum civil fines.<sup>150</sup>

Whether the enforcement provision's language would be read to further incorporate the FLSA savings clause is unclear. But even if the clause were included, it would not help § 16600 escape preemption. Congress wrote the FLSA savings clause narrowly to address the "minimum wage established under this chapter," the "maximum workweek established under this chapter," and "provision[s] of this chapter relating to the employment of child labor."<sup>151</sup> The preserved laws are limited to those establishing higher minimum wages, lower maximum workweeks, and higher child labor standards.<sup>152</sup> Incorporating that clause into the MOVE Act would, therefore, only save a state law if it established a wage greater than \$15 per hour as the threshold at which an employer could escape liability under the MOVE Act.<sup>153</sup> Neither the lan-

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<sup>146</sup> Relation to other laws, 29 U.S.C. § 218.

<sup>147</sup> See S.1504, § 5(a).

<sup>148</sup> *Id.*

<sup>149</sup> 29 U.S.C. § 211.

<sup>150</sup> S.1504, § 5(b).

<sup>151</sup> 29 U.S.C. § 218(a).

<sup>152</sup> See *id.*

<sup>153</sup> See S.1504 § 2(4) (defining the "livable hourly rate" as the greater of \$15 per hour or the "minimum wage required by the applicable" state law, suggesting that an *applicable* state law could be one that also targets covenants not to compete but provides a higher wage).

guage of the MOVE Act, nor the language of the FLSA savings clause, support exempting the broad invalidation of agreements provided for by § 16600 from preemption.

#### CONCLUSION

If the MOVE Act or similar legislation were passed, it would preempt California's broad statutory ban on noncompetition agreements. This result is complicated by a call to action from the Obama Administration in 2016 that asked state legislatures to update their policies in order to curb the use of noncompete agreements in employment contracts. Proposed federal bills and the call to action represent mixed signals to state legislatures. This Comment further illustrates some of the difficulty in determining which level of government should respond and which government's law will prevail in real controversies.

The laws and policies of employment and of contracts have traditionally been the domain of the states. That, however, has resulted in a medley of enforcement regimes, including the common law reasonableness test employed with varying vigor, statutory implementations of that test, and some statutory prohibitions of restrictive covenants.

Although the MOVE Act and § 16600 embody ostensibly compatible policies, the laws operate in distinct ways. In particular, § 16600 is a nearly absolute prohibition on covenants not to compete that leaves very little room for mobility restraints in employment contracts. Yet the MOVE Act defines a bright-line rule that achieves a balancing of interests. On one side of the line, the Act would prohibit the use of noncompetition agreements with low-wage workers, but on the other side of the line, the Act expressly contemplates the use of noncompete clauses in contracts with informed and properly compensated employees. The result is that California's broad prohibition would obstruct the operation of the MOVE Act. The conflict is clear not only in theoretical rights as between the two statutes, but also in that § 16600 would essentially nullify the remedial structure of the MOVE Act within California. The Supremacy Clause requires federal law be the supreme law of the land. Therefore, the MOVE Act would preempt § 16600.