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Preventing Post-PepsiCo Disaster: A Proposal for Refining the Inevitable Disclosure Doctrine

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Preventing Post- *PepsiCo* Disaster: A Proposal for Refining the Inevitable Disclosure Doctrine*

*Peter Huang†*

Far and away the best prize that life offers is the chance to work hard at work worth doing.¹

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I. INTRODUCTION

Work plays a crucial role in any individual's life. In an ideal world, everyone would be free to pursue whatever work she finds most meaningful and rewarding. However, in the real world many employers have important trade secrets that may be revealed by a departing employee. That departing employee may be blocked from pursuing meaningful and rewarding work because of the trade secrets she knows. Trade secret law has long struggled to balance the interests of departing employees with the equally legitimate interests of their former employers. Unfortunately, that balance may be threatened by the current development of a particular area of trade secret law: the inevitable disclosure doctrine.

The inevitable disclosure doctrine may provide employers with a means to significantly limit employee mobility. This comment will illustrate how the doctrine does not require that an employer prove that a departing employee has revealed or currently intends to reveal any trade secrets. Instead, the doctrine only focuses on whether the departing employee is such a threat to the employer's trade secrets that the employee's freedom to seek new work must be curtailed.

Employees in the high technology sectors are often exposed to trade secrets, and the inevitable disclosure doctrine will be of special interest to them. This comment will show that an extreme interpretation of the doctrine may unacceptably restrict the freedom of such employees. On the other hand, a balanced approach to the inevitable disclosure doctrine may provide a valuable tool that protects the interests of all parties involved. Some elements of constitutional law may provide valuable suggestions on how to develop such a balanced approach.

This comment will analyze the impact of the inevitable disclosure doctrine on individuals whose work exposes them to trade secrets. In Part II, basic trade secret law and background regarding the inevitable disclosure doctrine will be set forth.
In Part III, this comment will examine inevitable disclosure case law in greater detail. This examination will reveal a lack of consistent respect for the former employee's interest in free employee mobility.

Part IV will contrast inevitable disclosure doctrine with case law applying constitutional substantive due process protections covering analogous types of restrictions on employment. It will especially focus on serious restrictions such as restrictions on entry into a profession and the total deprivation of government employment. This comment will argue that the constitutional commentary and case law suggest interesting alternatives that may be helpful to current analysis in inevitable disclosure cases.

Part V will attempt to combine ideas from recent inevitable disclosure case law with substantive due process law to produce a viable analytical framework that is applicable to inevitable disclosure cases. Thus, this comment will attempt to use these ideas to provide a fair and coherent approach to future inevitable disclosure analyses.

II. BACKGROUND

A. Basic Trade Secret Law

The roots of trade secret law can be traced back to ancient Rome. However, American trade secret law has mainly evolved from state common law in the nineteenth century, and remains primarily a state law matter. In the last 20 years, most states have codified trade secret law through the adaptation of the National Conference of Commissioners on Uniform State Laws' ("NCCUSL") contribution to trade secret law, the Uniform Trade Secrets Act ("UTSA").

The exact application of trade secret doctrine differs among the various states. Perhaps the leading analytical framework is provided by the UTSA, which was developed in 1979 to provide a model trade secret code. Forty states and the District of Columbia have enacted versions of it. The UTSA first requires that the plaintiff show that it actually possessed a valuable trade secret. Second, the plaintiff must

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3. See id. at 31.
4. See id. at 32.
5. See JAMES POOLEY, TRADE SECRETS 2-27 to 2-28 (1997).
6. See MERGES, supra note 2, at 32.
7. See id. at 33.
show that the defendant misappropriated that trade secret or seriously threatens to do so.8

1. What is a trade secret?

The UTSA provides the following definition of a trade secret in Section 1(4):

[A] "Trade secret" [is] information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.9

The UTSA in Section 1(4)(i) broadly defines trade secret subject matter. Any valuable information that is capable of providing economic value to the plaintiff can be protected. However, the UTSA circumscribes this broad definition with the requirement that the information not be "generally known."10

In addition, the plaintiff must show that it took reasonable precautions under the circumstances to prevent the secret's disclosure.11 This requirement does not mean the plaintiff must take all optimal precautions available.12 However, the plaintiff must be consistently diligent in protecting information.13 If the plaintiff freely releases the disputed information to the public, the plaintiff has no claim under trade secret law.14

2. What constitutes misappropriation of a trade secret?

Once a plaintiff has established that she possessed a trade secret

8. See id.
10. See MERGES, supra note 2, at 33. See, e.g., 765 ILL. COMP. STAT. ANN. 1065/2(d) (West 1993 & Supp. 1998) (stating a trade secret must be "sufficiently secret to derive economic value... from not generally being known to other persons who can obtain economic value from its disclosure or use... ").
11. See MERGES, supra note 2, at 34.
12. See POOLEY, supra note 5, 4-27 to 4-28.
13. See MERGES, supra note 2, at 34. Examples of precautions include requiring employees and licensees to sign confidentiality agreements, investing in physical security measures, and designing products to not reveal trade secrets upon inspection. See id. at 55.
14. See id.
under the UTSA, she must then show that the defendant misappropriated the information,\textsuperscript{15} either by wrongfully acquiring it, or by misusing it in some way following a proper acquisition.

Thus, there are two basic types of misappropriation. The first occurs when the defendant deliberately acquires information by improper means and knows or should have known it to be the trade secret of another.\textsuperscript{16} The UTSA states that "improper means" of acquisition "includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means."\textsuperscript{17}

The second type of misappropriation requires two analytical steps.\textsuperscript{18} The first step involves the acquisition of the trade secret, and is satisfied if the defendant knows the trade secret was acquired directly under a duty of confidence or knows the trade secret was acquired directly by improper means.\textsuperscript{19} It can also be met if the defendant knows the trade secret was acquired by accident or mistake.\textsuperscript{20} The second step is met if the defendant discloses or uses the trade secret without authorization.\textsuperscript{21} When both steps are met, misappropriation occurs.

3. Trade Secret Remedies

When a plaintiff shows that its trade secret was misappropriated, an array of remedies becomes available, including the possibility of receiving royalties, actual and punitive damages, and attorneys fees. Most typically, the plaintiff seeks an injunction prohibiting further use by the defendant.\textsuperscript{22} A court will consider factors such as the potential for irreparable harm to the plaintiff, the likelihood of harm to the defendant from the injunction, the likelihood the plaintiff will succeed on the merits of her suit, and the public interest.\textsuperscript{23} In trade secret cases, the court will often tailor the injunction to equal the "headstart" time that taking the trade secret provides the plaintiff.\textsuperscript{24} In the

\textsuperscript{15} See id. at 33.
\textsuperscript{16} See POOLEY, supra note 5, at 6-2.
\textsuperscript{17} UNIF. TRADE SECRETS ACT § 1(1) (amended 1985).
\textsuperscript{18} See POOLEY, supra note 5, at 6-2.
\textsuperscript{19} See id.
\textsuperscript{20} See id.
\textsuperscript{21} See id.
\textsuperscript{22} See generally MELVIN F. JAGER, TRADE SECRETS LAW 7-1 to 7-121 (1985 & Release #25, Oct. 1998).
\textsuperscript{24} See POOLEY, supra note 5, at 7-36.
employment setting, injunctions of varying scope have issued which limit the ability of the former employee to work for a new employer in the name of protecting against misappropriation.25

4. Contract and the Former Employee

Former employees often pose a trade secret threat to their former employers. Valuable competitive advantages can be instantly destroyed or acquired as employees “jump ship” to rivals.26 Traditionally, employers have primarily relied on contract to solve this problem.27 There are three general types of such contracts: invention assignments, confidentiality agreements, and noncompetition agreements.28

Invention assignments confirm the employer’s right to intellectual property created by the employee during employment.29 Confidentiality agreements record the former employee’s acknowledgment that he will receive confidential information during his employment and that he agrees to keep it secret.30 Finally, noncompetition agreements limit the ability of the former employee to compete with the former employer for customers.31

There may be disputes about unequal bargaining power regarding employment contracts. But at least with the traditional contract framework, the employee usually can negotiate about her post-employment conduct and in theory, receive adequate compensation for any restriction. It is arguable that the government should not interfere with the worker’s freedom to contract as long as she does not bear an unconscionable burden. This view has common law support.32

5. Inevitable Disclosure Doctrine Developed to Further Support Contract Protection of Employers from Departing Employees

However, employers have not been completely satisfied by

25. See id. at 7-16 to 7-17.
26. See id. at 6-17 to 6-19.
27. See MERGES, supra note 2, at 83.
28. See id.
29. See id.
30. See id.
31. See id.
protection via contract. This dissatisfaction is particularly acute in situations when a valued former employee leaves the employer to work for a rival in the same field. In some situations, it will be difficult for the employer to explicitly prove that its former employee has revealed the former employer’s trade secrets. Thus, confidentiality agreements can be difficult to enforce and sometimes provide little practical protection.

As for noncompetition agreements, they often fail to provide employers with the results they desire. First, like the high technology powerhouse California, some jurisdictions generally do not enforce noncompetition agreements on the basis that they overly restrict employee mobility. In almost all other states, noncompetition agreements must pass judicial examination of reasonableness in time and scope. Employers that overreach will either have the entire agreement thrown out or the offending sections “blue-penciled” out.

6. Overview of the Inevitable Disclosure Doctrine

Employers may desire more protection than employment contracts can provide. Others may want another, more effective way to control their former employees’ behavior, regardless of whether a restrictive covenant exists. A tool many former employers may turn to is the inevitable disclosure doctrine.

In the leading cases, the inevitable disclosure doctrine has been brought to bear against the former employee and the potential new employer. The idea behind this move towards the use of the doctrine is that sometimes “circumstantial evidence strongly indicating a likelihood of misappropriation may be sufficient to support an injunction, despite the defendant[s’] protestations to the

34. See id.
35. See id.
38. Factors considered when determining reasonableness may include length of time, geographic area covered, and scope of activity restricted. See Harlan M. Blake, Employment Agreements Not to Compete, 73 HARV. L. REV. 625, 626 (1960).
39. POOLEY, supra note 5, at 8-36 to 8-37.
contrary." A court will examine factors such as whether a trade secret exists, whether evidence shows the defendant "could not help but use his knowledge in employment with a competitor," as well as what kind of injunction should be crafted to neutralize the threat.

The gradual emergence of the inevitable disclosure doctrine may have provided employers with additional leverage. The inevitable disclosure doctrine allows the courts to enjoin an employee from a range of action, including accepting a new position with a different employer, even when there has been no trade secret misappropriation proven and she promises to never misappropriate in the future.

III. Inevitable Disclosure Doctrine Currently Reveals a Troubling Under-Appreciation for the Former Employer's Legitimate Interest in Employee Mobility

The recent high-profile case of *PepsiCo v. Redmond* has renewed interest in the inevitable disclosure doctrine. An examination of *PepsiCo* and other recent cases reveals a general trend focusing very heavily on the risk to the former employer and the degree of harm it will potentially suffer. However, there is less clarity regarding how the courts should treat the rights of the individual employee to earn a living and enjoy job mobility.

A. The *PepsiCo* Decision Greatly Intensified Interest in Inevitable Disclosure Doctrine

1. The *PepsiCo* Decision

Perhaps the most famous case concerning the inevitable disclosure doctrine is *PepsiCo v. Redmond*. In that case, defendant William Redmond was a former manager for PepsiCo North America. Redmond had worked for PepsiCo in its Pepsi-Cola North American division for ten years and had recently been promoted to general manager of PepsiCo's California business unit. Redmond had

41. POOLEY, supra note 5, at 7-14.
43. Id. at 1433 n.17.
44. See, e.g., id. at 1435-38.
45. See infra Part III.
46. PepsiCo v. Redmond, 54 F.3d 1262 (7th Cir. 1995).
47. See Edelstein, supra note 33.
48. See *PepsiCo*, 54 F. 3d at 1264.
access and exposure to PepsiCo’s strategic plans, to operational
innovations, and to marketing decisions.\textsuperscript{49}

In 1994, Redmond accepted an offer from Quaker Oats Co. to
become the chief operating officer of Quaker Oats’ Gatorade and
Snapple divisions.\textsuperscript{50} Redmond had kept his negotiations with Quaker
Oats secret.\textsuperscript{51} Redmond also briefly misled PepsiCo by telling it that
he was considering a job offer from Quaker when in fact he had
already accepted the offer.\textsuperscript{52}

The district court granted PepsiCo’s request for a preliminary
injunction, preventing Redmond from taking the position.\textsuperscript{53} The
Seventh Circuit affirmed, accepting the district court’s doubts about
Redmond’s sincerity when he promised not to use the PepsiCo
information at his new position.\textsuperscript{54} The Seventh Circuit explained that
even if he could avoid consciously disclosing or using PepsiCo’s
information, Redmond would still be unable to “compartmentalize”
the trade secrets.\textsuperscript{55} Further, the Seventh Circuit reasoned that
Redmond in his new job would necessarily be making decisions using
PepsiCo trade secret material.\textsuperscript{56} Noting the fierce competition
between the two companies\textsuperscript{57} and the sensitive nature of the
marketing data that Redmond had been exposed
\textsuperscript{to,\textsuperscript{58}} the Seventh
Circuit concluded that the district court had properly found a threat of
misappropriation.

2. \textit{PepsiCo’s Analysis of the Impact on the Employee}

The decision did acknowledge Redmond’s abstract interest in job
mobility.\textsuperscript{59} Oddly, it failed to analyze the potential harm to Redmond
from the injunction with the same level of care that it applied when
analyzing PepsiCo’s need for the injunction. In the process, the court
issued a broad injunction effectively preventing Redmond from taking

\begin{itemize}
\item\textsuperscript{49} See \textit{id.} at 1265.
\item\textsuperscript{50} See \textit{id.} at 1264.
\item\textsuperscript{51} See \textit{id.}
\item\textsuperscript{52} See \textit{id.}
\item\textsuperscript{53} See \textit{id.} at 1267.
\item\textsuperscript{54} See \textit{PepsiCo}, 54 F.3d at 1270-71.
\item\textsuperscript{55} See \textit{id.} at 1269.
\item\textsuperscript{56} See \textit{id.} at 1270-71.
\item\textsuperscript{57} See \textit{id.} at 1263.
\item\textsuperscript{58} See \textit{id.} at 1270.
\item\textsuperscript{59} See \textit{id.} at 1268 ("[T]he] law should not prevent workers from pursuing their livelihoods
when they leave their current positions.").
\end{itemize}
the job.\textsuperscript{60}

This uneven treatment of the employee's interests is disturbing. Taken to the extreme, inevitable disclosure can result in a blanket prohibition against any new work involving a specialist's area of knowledge, at least with any organization that would find the specialist's knowledge useful. For example, there should be some concern the injunction in \textit{PepsiCo} may impact Redmond's ability to use his knowledge of the beverage marketing industry in general as well as his particular knowledge of PepsiCo's marketing plans.

In effect, an extreme application of the inevitable disclosure doctrine would be equivalent to a very broad noncompetition agreement, with the critical difference being that the employer is forcing the restrictions upon the former employee without the opportunity to negotiate. Such an involuntary, after-the-fact restriction on a former employee's ability to earn a living is very troubling, and arguably also affects the public interest in vigorous competition and a mobile workforce.

\textbf{B. Inevitable Disclosure Case Law Currently Treats Individual Employee Rights Unevenly}

The existing case law regarding inevitable disclosure doctrine does not clearly teach how much weight should be given to the impact of an injunction on the employee's life or new job prospects. While some courts take such consequences into account, others seem not to; this is not really surprising, since no standard has been clearly articulated yet.

1. The Substantive Due Process Experience Suggests Reasonable Limitations on Employment are Acceptable

At one end of the spectrum, some courts refuse to apply the inevitable disclosure doctrine at all. In those cases "the courts typically will emphasize the devastating consequences to the individual employee and the lack of special circumstances in the case that might indicate that the defendant cannot be trusted."\textsuperscript{61}

This strand of cases seems to express a significant concern for the individual employee, and perhaps is exemplified by \textit{AMP Inc. v. Fleischhacker}.\textsuperscript{62} Although the legal weight of this case might be

\textsuperscript{60} See \textit{PepsiCo}, 54 F.3d. at 1272.
\textsuperscript{61} \textit{POOLEY}, supra note 5, at 7-16.
\textsuperscript{62} AMP, Inc. v. Fleischhacker, 823 F.2d 1199 (7th Cir. 1995).
questioned,\textsuperscript{63} it still has instructive value. The \textit{AMP} court rejected an application for a preliminary injunction.\textsuperscript{64} Like in \textit{PepsiCo}, the \textit{AMP} court considered the factors of risk and harm to the plaintiff \textit{AMP} to be important.\textsuperscript{65} But the \textit{AMP} court also expressed significant concern for the defendant, Fleischhacker. For example, the \textit{AMP} court noted that "[T]he practical effect of any grant of injunctive relief in favor of \textit{AMP} would be to prohibit Mr. Fleischhacker from working in the connector industry."\textsuperscript{66}

A post-\textit{PepsiCo} case that also expresses significant concern for employee rights is \textit{FMC Corp. v. Cyprus Foote Mineral Co.}\textsuperscript{67} \textit{FMC} rejected an inevitable disclosure analysis.\textsuperscript{68} In that case, Joseph Fickling had worked as an engineer for FMC, dealing with lithium battery technology, considered a valuable technical specialty.\textsuperscript{69} Fickling worked for FMC for fourteen years before he decided to take a better position at Cyprus Foote, FMC's direct competitor.\textsuperscript{70}

FMC requested a preliminary injunction preventing the new employment,\textsuperscript{71} claiming that the only reason Cyprus Foote hired Fickling was that Cyprus Foote had a critical need to acquire lithium battery technology.\textsuperscript{72}

However, the \textit{FMC} court did not find significant risk to the plaintiff, whom it emphasized had failed to produce "some showing of bad faith, underhanded dealing, or employment by an entity so plainly lacking comparable technology that misappropriation can be inferred."\textsuperscript{73} Fickling had not offered to reveal any of FMC's trade secrets,\textsuperscript{74} nor had he taken any secret material with him.\textsuperscript{75} In addition, there was no evidence that Cyprus Foote had tried to target Fickling, which undercut FMC's assertion that there was a plan to

\textsuperscript{63.} \textit{AMP} predates the adoption of the Illinois Trade Secrets Act, which abolished any common law remedies. See \textit{PepsiCo}, 54 F.3d at 1269. However, in \textit{PepsiCo} it was noted that "[T]he ITSA mostly codifies rather than modifies the common law doctrine that preceded it. Thus, we believe that AMP continues to reflect the proper standard." See id.

\textsuperscript{64.} See AMP, Inc., 823 F.2d at 1200-01.

\textsuperscript{65.} See id. at 1206-07.

\textsuperscript{66.} Id. at 1205.

\textsuperscript{67.} \textit{FMC Corp. v. Cyprus Foote Mineral Co.}, 899 F. Supp. 1477 (7th Cir. 1995).

\textsuperscript{68.} See id.

\textsuperscript{69.} See id. at 1480.

\textsuperscript{70.} See id. at 1479-80.

\textsuperscript{71.} See id. at 1480.

\textsuperscript{72.} See id.

\textsuperscript{73.} \textit{FMC Corp.}, 899 F. Supp. at 1483.

\textsuperscript{74.} See id. at 1480.

\textsuperscript{75.} See id. at 1481.
misappropriate.\textsuperscript{76}

The \textit{FMC} court noted that the general technical expertise gained by an employee while working for his former employer is not one of the former employer's trade secrets, but can be taken by the employee to a new employer.\textsuperscript{77} In addition, the \textit{FMC} court expressed a concern that "the potential harm to Fickling [was] very great"\textsuperscript{78} because the effect of the requested injunction would have been to block his working in his chosen field of expertise. "[I]f the doctrine is applied [liberally] . . . then no employee could ever work [in his specialty] for his former employer's competitor on the theory that disclosure of confidential information is inevitable."\textsuperscript{79} The \textit{FMC} court found that result unacceptable. "Fickling can perform any number of tasks from typing to management, but he would rather not start a second career at this point."\textsuperscript{80}

2. Some Courts Apply the Inevitable Disclosure Doctrine with Cautious Respect for Individual Rights

Some courts have applied the inevitable disclosure doctrine, while carefully limiting the scope and duration of the injunction to avoid excessively impinging the individual employee's rights. For example, courts have limited injunctions to particular products and areas of business.\textsuperscript{81} Even the injunction on employment at Quaker Oats in 	extit{PepsiCo} was limited in time to about five and a half months.\textsuperscript{82}

Another post-\textit{PepsiCo} case in which the court took a careful approach is \textit{Merck & Co. v. Lyon},\textsuperscript{83} which effectively limited the holding of \textit{FMC}. Gary Lyon worked for Merck as a marketing specialist focusing on its Pepcid AC product.\textsuperscript{84} In 1996, Lyon left to work for Glaxo Wellcome as its director of global marketing.\textsuperscript{85} His responsibilities included Zantac 75, a product in direct competition with Pepcid AC.\textsuperscript{86}

The \textit{Merck} court refused to completely enjoin the new

\begin{footnotes}
\item[76] See id.
\item[77] See id. at 1482.
\item[78] Id. at 1483.
\item[79] \textit{FMC Corp.}, 899 F. Supp. at 1482.
\item[80] See id at 1484.
\item[81] See POOLEY, supra note 5, at 7-16. The \textit{Merck} case discussed next is a good example.
\item[82] See \textit{PepsiCo} v. Redmond, 54 F.3d 1262, 1267 (7th Cir. 1995).
\item[84] See id. at 1447.
\item[85] See id.
\item[86] See id. at 1448.
\end{footnotes}
employment without a very strong showing of risk that Lyon would be likely to disclose a trade secret.\textsuperscript{87} However, it distinguished \textit{FMC} based on the scope of the requested injunction.\textsuperscript{88} Merck carefully limited its injunction request to work regarding a particular product, \textit{Zantac 75}.\textsuperscript{89} It thus avoided threatening Lyon’s ability to work in his general area of expertise.

The court reasoned that when the trade secret is “clearly identified and of significant value . . . bad faith or underhanded dealing by the former employee or new employer would not necessarily be required.”\textsuperscript{90} When the injunction is carefully limited, explained the court, the plaintiff need only show a “degree of similarity between the employee’s former and current position, and the value of the information.”\textsuperscript{91}

3. Some Courts Apply the Inevitable Disclosure Doctrine Aggressively with Little Attention to Individual Rights

At the other extreme, some cases appear to give very little or no consideration at all to the former employee’s interests. In pre-\textit{PepsiCo} cases, some courts issued injunctions that were very harsh both in scope\textsuperscript{92} and in duration.\textsuperscript{93} Those courts expressed very little interest in balancing the defendants’ right to earn a living relative to other factors.\textsuperscript{94}

For a post-\textit{PepsiCo} example, the U.S. District Court for the Northern District of Iowa has recently applied the inevitable disclosure doctrine to place a significant burden on the departing employee. In \textit{Uncle B’s Bakery Inc. v. O’Rourke},\textsuperscript{95} the trade secret concerned a process for making bagels. Kevin O’Rourke worked as a manager for Uncle B’s,\textsuperscript{96} and in that capacity was exposed to and became very familiar with Uncle B’s secret bagel-making process.\textsuperscript{97}

\begin{itemize}
\item \textsuperscript{87} See \textit{id.} at 1455.
\item \textsuperscript{88} See \textit{id.} at 1458.
\item \textsuperscript{89} See \textit{Merck}, 941 F. Supp. at 1458. The court also limited the duration of the injunction to one to two years. See \textit{id.} at 1464-1465.
\item \textsuperscript{90} \textit{Id.} at 1460.
\item \textsuperscript{91} \textit{Id.}
\item \textsuperscript{92} See, \textit{e.g.}, \textit{Union Carbide Corp. v. UGI Corp.}, 731 F.2d 1186, 1188 (5th Cir. 1984) (affirming injunction against use of information in 14 different areas).
\item \textsuperscript{93} See, \textit{e.g.}, \textit{Monovis, Inc. v. Aquino}, 905 F. Supp. 1205, 1236 (W.D.N.Y. 1994) (issuing a permanent injunction).
\item \textsuperscript{94} See generally POOLEY, \textit{supra} note 5, at 7-17.
\item \textsuperscript{95} \textit{Uncle B’s Bakery Inc. v. O’Rourke}, 920 F. Supp. 1405 (N.D. Iowa 1996).
\item \textsuperscript{96} See \textit{id.} at 1409, 1416.
\item \textsuperscript{97} See \textit{id.} at 1432-33.
\end{itemize}
O'Rourke subsequently accepted a job as a plant manager for a competitor, Brooklyn Bagel Boys. 98 Uncle B’s applied for an injunction preventing O’Rourke from working for the competition.99

O’Rourke testified that he had not disclosed any trade secrets regarding the bagel-making process and that he would not do so.100 In addition, Brooklyn Bagel Boys had explicitly requested that O’Rourke disclose no trade secrets.101 These promises were supported by certain aspects of the Brooklyn Bagel Boys’ operation, which employed significantly different recipes and processes.102 The defendants argued that it would be impossible to revamp Brooklyn Bagel Boys’ production line to incorporate Uncle B’s recipe.103

The Iowa court was not impressed by these arguments, and articulated a standard of proof that would have made it extremely difficult for any employee to defend against. The court held that because the plaintiff had “reason to fear that [Brooklyn Bagel] will be motivated to appropriate its technology and processes,”104 Uncle B’s only had to show that “[w]here the . . . [general] knowledge ends and the other begins is sufficiently uncertain . . . to raise a realistic threat of inadvertent disclosure of trade secrets . . . ”105

The Iowa court made passing mention of the injunction’s impact on O’Rourke.106 It nevertheless ignored his interests and issued a broad injunction prohibiting O’Rourke from working for any competitor within 500 miles of any Uncle B’s bakery.107 The injunction seems very harsh considering that there was no actual misappropriation proven.

IV. SUBSTANTIVE DUE PROCESS EXPERIENCE SUGGESTS THAT INEVITABLE DISCLOSURE DOCTRINE SHOULD MAINTAIN A REASONABLE LEVEL OF RESPECT FOR EMPLOYEE MOBILITY

When there is such apparent confusion over the application of legal doctrine, often it is instructive to examine a second, similar legal problem and draw lessons from the analytical framework applied to

98. See id. at 1420.
99. See id. at 1409.
100. See id. at 1420.
101. See Uncle B’s Bakery, 920 F. Supp. at 1420.
102. See id.
103. See id.
104. Id. at 1436.
105. Id. at 1435.
106. See id. at 1437.
the second problem. Thus, one approach to improving inevitable disclosure doctrine may be found by analogy to the law in substantive due process analysis. Similar questions regarding how far restrictions on employee mobility and the right to livelihood can extend have arisen in this constitutional arena. Specifically, substantive due process analysis has been used to review government regulation of employment, especially when the government has completely excluded people from certain types of private and public employment.108

It is true that substantive due process cases require some sort of state action.109 Thus, substantive due process law does not directly apply to cases strictly between private parties such as PepsiCo. However, an examination of substantive due process analysis may still indirectly provide an instructive aid to inevitable disclosure doctrine.

This section will argue that certain applications of inevitable disclosure doctrine share common ground with substantive due process, and that ideas in substantive due process are applicable to the inevitable disclosure doctrine. Substantive due process analysis maintains a foundation of respect for individual rights, and that respect should also be present in inevitable disclosure doctrine.

A. Overview: Inevitable Disclosure and Substantive Due Process Analysis of Government Employment Restrictions both Fundamentally Involve Locating Reasonable Limits on Interference with the Right to Livelihood

The thorniest issue in inevitable disclosure doctrine relates to what extent a judge can restrict the employment opportunities of an individual at the behest of a private party. When can a court restrict a person from working in their chosen profession? When can a court prevent a person from working for their chosen employer? Analogous questions have arisen in several substantive due process contexts regarding how far various government entities can restrict an individual’s choice of employment.110

In the arena of economic regulation, the courts have articulated a general standard of review regarding restrictions on the freedom to

108. See infra Part IV.B.2.
109. See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-1, at 1688 (1988 2nd ed.).
110. See infra Part IV.B.2.
earn a living.\textsuperscript{111} Rationally limited intrusions on how one makes a living, such as maximum hours that can be worked, have been upheld.\textsuperscript{112} Thus, substantive due process does not suggest a prohibition on reasonable applications of the inevitable disclosure doctrine.

However, the Court has sent signals that there should be limits to such intrusions. For example, substantive due process analysis has been applied to licensing requirements for professions that exclude members of certain groups.\textsuperscript{113} Such requirements have been upheld, but not in extreme and unreasonable circumstances.\textsuperscript{114} In addition, substantive due process protection has been applied to strike down statutes that absolutely prevent certain classes of people from working for a particular employer.\textsuperscript{115} This is especially true when the employer is the federal government.\textsuperscript{116}

\textbf{B. \textit{Substantive Due Process Analysis of the Deprivation of Employment by the Government Suggests an Approach that Gives Reasonable Respect for Employment Mobility}}

1. Substantive Due Process Suggests that the Government Can Create Reasonable Limitations on Employment Mobility

The Fourteenth Amendment provides the basis for substantive due process protection regarding state law. Section 1 of the Fourteenth Amendment states that "No state shall... deprive any person of life, liberty, or property, without due process of law . . ."\textsuperscript{117} The protection of due process that binds the states is also extended to the federal government via the Fifth Amendment, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."\textsuperscript{118}

Substantive due process protection for mere "economic rights" is not extremely aggressive.\textsuperscript{119} This is in contrast to the early part of the century, when the U.S. Supreme Court closely examined state

\textsuperscript{111.} See id.  
\textsuperscript{112.} See id.  
\textsuperscript{113.} See id.  
\textsuperscript{114.} See id.  
\textsuperscript{115.} See id.  
\textsuperscript{116.} See infra Part IV.B.2.  
\textsuperscript{117.} U.S. CONST. amend. XIV.  
\textsuperscript{118.} U.S. CONST. amend. V.  
\textsuperscript{119.} See generally TRIBE, supra note 109, § 8-7, at 581-86.
economic regulation. A prime example of this earlier approach is *Lochner v. New York.* 120

In that case, the Court struck a state law regulating the maximum hours which bakery employees could work. *Lochner* held that there must be a very close fit between the statute and the objective it was meant to serve.121 In addition, only certain objectives were acceptable. Those acceptable objectives were limited to the regulation of health and safety, and had to be more than mere readjustment of economic power.122

The earlier approach was swept away during the New Deal era. The Court has since then significantly restricted its review of state economic regulation for substantive due process violations. The Court now reviews general economic regulation cases under the minimal scrutiny or "rational basis" standard.123

The Court's application of this current standard is quite deferential. It is remarkable that the Court has not struck a general economic regulation on purely substantive due process grounds since 1937.124 If the current substantive due process analytical framework is examined to glean ideas for inevitable disclosure doctrine, such an examination would not seem to suggest that applications of inevitable disclosure doctrine are impermissible per se.

In fact, this type of analysis could be applied to the inevitable disclosure doctrine to help develop a balanced approach. The protection of intellectual property does help create an incentive to produce valuable innovation, which is a socially productive objective.125 Issuing injunctions before actual misappropriation has occurred, based on estimates of risk and harm, may or may not be the ideal way to protect trade secrets. However, in situations where deferential minimal scrutiny is appropriate, the means used do not have to be the least intrusive available. As long as the measures taken

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121. See id. at 62-63.
122. See id. at 64.
123. See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, (1978). The courts should defer to legislative judgment regarding economic interests "unless it is demonstrably arbitrary or irrational." See id. at 84.
124. See GERALD GUNTHER, CONSTITUTIONAL LAW 462 (12th ed. 1991). However, the Court has taken significant substantive due process protection measures in important cases; these substantive due process measures have merely been mixed in with other constitutional issues. See infra Part IV.B.2.
are not irrational, they are defensible.  

However, a further examination of substantive due process reveals that the Court has endorsed some significant protections regarding the right to earn a living. It should be emphasized that unreasonable regulation by the government is not permissible. Certain applications of the inevitable disclosure doctrine appear to go beyond reasonable restrictions, and should be similarly avoided.

2. Substantive Due Process Commentary and Case Law
Do Not Support Extreme Deprivation of Employment
Similar to that which Results from Overaggressive
Application of Inevitable Disclosure Doctrine

The Supreme Court in recent years has subjected general economic regulation and "purely economic" rights to minimal substantive due process scrutiny. However, the Court has indicated that state interference with the right to engage in one's chosen occupation does implicate certain important elements of personal autonomy above mere economic interests.

A strong argument can be made that American law can and has generally recognized the importance of the specific right to make a living. Professor Chester Antieau has noted that "[t]he American Founding Fathers in enshrining in our early constitutions 'liberty' and 'the pursuit of happiness' intended to recognize jurally the right of all men to develop their talents as they saw fit, subject only to reasonable controls necessitated by the common weal." This statement suggests a general respect for employment free of unnecessary interference. In light of this respect, extremely restrictive inevitable disclosure injunctions, such as the one issued in Uncle B's, seem undesirable.

In addition, while there are few recent pure substantive due process cases, there are cases involving both substantive due process and other doctrines that support reasonable scrutiny of restrictions on occupation. It is interesting to note that some of those disapproved governmental restrictions are similar in impact to the private restrictions that are created by overreaching application of the

\[126. \text{See, e.g., Duke Power, 438 U.S. at 82-87.}\]
\[127. \text{See infra Part IV.B.2.}\]
\[128. \text{See id.}\]
\[129. \text{See generally Tribe, supra note 109, § 8-7, at 581-86.}\]
\[130. \text{See id.}\]
\[131. \text{CHESTER JAMES ANTIEAU I, MODERN CONSTITUTIONAL LAW § 21.00 (2nd ed. 1997).}\]
inevitable disclosure doctrine.

One such case is *Schware v. Board of Bar Examiners of New Mexico*. In *Schware*, the Court held that states may not prevent a person from practicing his chosen occupation for arbitrary reasons. The plaintiff in *Schware* had been a member of the Communist Party. The state bar association prevented him from receiving a license to practice law in New Mexico based in part on that previous membership. The Court noted that "[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause." The Court then held that the Board of Bar Examiners should only consider factors that "have a rational connection with the applicant's fitness or capacity to practice law," and that membership in the Communist Party lacked any rational connection to practicing law.

Thus, the Court appears to have expressed significant respect for the ability to practice one's area of professional specialization. If the government cannot arbitrarily take away the ability to practice one's occupation at the behest of a board of bar examiners, arguably neither should it arbitrarily take away that ability at the behest of a private employer. Thus, an extremely broad inevitable disclosure injunction that completely prevents or very significantly affects the ability to practice one's profession, should be avoided.

Another interesting case that further suggests the desirability of protection of the right to livelihood is *Hampton v. Mow Sun Wong*. That case involved a restriction on individuals working for their chosen employer, specifically a regulation that banned all non-citizens from working in the federal civil service. In perhaps the most important part of the case, the Court reasoned that the right to work for that particular employer had an important impact on the individual's liberty. Thus, the right to work in the civil service

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133. See id.
134. See id. at 236-38.
135. See id. at 238.
136. Id. at 238-39.
137. Id. at 239.
138. See *Schware*, 353 U.S. at 246-47.
140. It should be noted that there were equal protection issues, involving the plaintiffs' alienage, mixed in with the substantive due process analysis. See id. at 100.
141. See id. at 102.
could be regarded as an "interest in liberty" and deserved due process protection.142 Especially interesting is the Court’s statement that “[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of . . . personal freedom and opportunity . . . “143

The Court went on to strike down the Civil Service Commission rules barring all non-citizens from employment in the federal civil service as not “justified by reasons which are properly the concern of the [the Civil Service Commission].”144 This test is arguably more demanding than the “rational basis” test.145 In Mow Sun Wong the Court appears to have also expressed a respect for the qualified individual’s ability to work for his chosen employer, at least when the employer is the federal government.

In fact, Professor Laurence Tribe suggests that Mow Sun Wong could be applied even more generally. He notes that “[t]he mode of analysis employed by the Court in Hampton v. Mow Sun Wong may provide a model for future cases involving governmental infringements of personal freedom to pursue a vocation.”146

Tribe suggests applying an analytical framework that examines factors that include:

(1) the breadth of the infringement, (2) the character of the group upon which it was imposed, (3) the nature and responsibilities of the body that imposed it, (4) the availability of less restorative alternatives, (5) the reasons actually canvassed in the process of adopting the challenged rule, and (6) the arguments made in defense of the rule enforcement.147

Factors 1, 4, and 6 seem particularly applicable to inevitable disclosure injunctions that completely forbid any type of employment with a particular employer. The impact of an inevitable disclosure injunction that forbids an individual from doing any sort of work for a particular employer is very similar to the regulation in Mow Sun Wong, which forbade an individual from doing any sort of work for a specific new employer: the federal government. If it is so undesirable for the state to arbitrarily bar an individual from working for his chosen employer, it can also be argued that it is equally undesirable to
allow private parties to use the courts to arbitrarily restrict an individual’s choice of employer as well. It seems reasonable to apply ideas from the analysis in *Mow Sun Wong* to this type of inevitable disclosure injunction.

Thus, while substantive due process does condone some restrictions on employment, it also suggests limits. A significant degree of caution has been expressed when the restrictions would have a major impact on the ability to earn a living. As this Part has discussed, under certain circumstances the courts have refused to uphold government restrictions that completely prevent the individual from working in her chosen profession or for her preferred employer. The courts could, and should, easily apply that same caution to private employment restriction requests.

V. APPLYING LESSONS FROM THE SUBSTANTIVE DUE PROCESS COMMENTARY AND THE SCHWARE/MOW SUN WONG ANALYSIS TO INEVITABLE DISCLOSURE DOCTRINE

Substantive due process law clearly shows that an individual’s ability to practice her livelihood is worthy of serious respect. Regardless of substantive due process doctrine’s direct applicability, reasonable analysis and decision-making would be improved by incorporating elements from this constitutional concept into inevitable disclosure cases. This comment recommends the following approach.

A. Assessment of the Former Employer’s Needs

The starting point for inevitable disclosure should still be an examination of the need for an injunction in the absence of a showing of past or current misappropriation. The risk of irreparable destruction or compromise of the plaintiff’s interests remains the logical threshold question in any injunction proceeding. Courts should also continue to examine whether underhanded behavior by the former employee or new employer indicates that either would be likely to misappropriate the former employer’s trade secrets in the future.

The magnitude of harm from possible misappropriation is also relevant to the rationality of issuing an injunction. The nature of the secret, how critical it is to the former employer, and how irreparable the damage resulting from its misappropriation are all relevant factors. The analysis of risk and harm will produce an estimate of the threat of misappropriation posed by the employee’s new employment.
B. However, Only if the Former Employer Has a Significant Interest Can the Employer’s Interest in Protection Rationally Outweigh the Individual’s Right to Livelihood

As shown in Part III, in many cases courts have concentrated very heavily and almost exclusively, on the first two factors of the inevitable disclosure doctrine analysis: (1) the risk of misappropriation and (2) the harm that would flow from misappropriation. The third factor, the impact on the individual employee, often appears as only an afterthought. A comparison to substantive due process analysis illustrates that this casual treatment of the impact on the former employee is highly questionable. The intrusion on personal liberty is always a serious matter to be avoided whenever possible. It is worthy of emphasis equal to the first two factors.

If the Tribe-style analysis of Schware and Mow Sun Wong is applied to inevitable disclosure doctrine, a weak showing of the threat of misappropriation should result in an injunction not being issued. In such a case, the legitimate interest in protecting intellectual property would not be undercut by the absence of an injunction, because the benefit of that injunction would be so minimal. In fact, when the resulting damage from an injunction outweighs the minimal danger, the inevitable disclosure doctrine irrationally over-protects the legitimate interest in intellectual property protection.

However, when a sufficiently strong showing of risk and harm supports the conclusion that a threat of misappropriation exists, the issuance of an injunction would be an acceptable intrusion on the individual’s rights. The interest in preventing harm to the former employer would, in this scenario, outweigh its impact on the individual.

C. However, Carefully Limited Restrictions Are Acceptable and Only Under Very Rare Circumstances Should Broad Injunctions Issue

However, the determination that there is a rational showing of danger of misappropriation worthy of an injunction should not end the inquiry. As in Uncle B’s, courts also fail to adequately consider the employee interest when fashioning the scope of relief to be granted.

The restrictions placed on the former employee and the scope of the material that former employee may not use should have reasonable bounds. For example, in E.W. Bliss Co. v. Struthers-
Dunn, Inc. the Eighth Circuit struck down an injunction against use of "trade secrets and confidential technical information" of the plaintiff as being too vague and overbroad. As the Eighth Circuit stated, the defendants should not be required to "test their legal opinion on the law of trade secrets and their technical opinion on the state of the prior art... to show cause why they should not be held in contempt.”

An analogy to substantive due process case law strongly reinforces common law cases like E.W. Bliss. It must be reiterated that the individual's right to a livelihood does not evaporate as soon as the judge decides an injunction should issue. The employer's interest in intellectual property protection ought to be balanced with the employee's interest in her right to livelihood at all stages of the analysis. Injunctions like the one found in Uncle B's are unnecessarily broad in scope and duration, especially when narrowly tailored injunctions like the injunction in Merck are adequate. Overly broad injunctions should be challenged as an inappropriate intrusion on the former employee's right to livelihood.

Through broad injunctions, a court allows the employer to deeply intrude on the individual's right to make a living. Enjoining the individual from working for her particular chosen employer is similar in effect to the total prohibition on working for the government that was struck down in Mow Sun Wong. An even broader injunction against working for any competitor can result in an employee's being completely shut out of his chosen profession for an indefinite period. That result smacks of the same unfairness as the unconstitutional licensing struck down in Schware. Arguably, both types of results should be avoided.

D. Ideas Regarding a Limited Injunction

If only a carefully balanced injunction will sufficiently protect the interests of both parties, the question remains how the limited injunction should be crafted. An interesting approach can be imported from the field of legal ethics. When a lawyer changes law firms and his new firm comes into conflict with a client of the former firm, in many jurisdictions an "ethical wall" may be formed to prevent the disclosure of confidential information. The employee can

149. See E.W. Bliss, 408 F.2d at 1113-14; see also American Can Co. v. Mansukhani, 742 F.2d 314 (7th Cir. 1984) (discussing how to frame an injunction).
150. E.W. Bliss, 408 F. 2d at 1114.
work at the firm, but only if precautions are taken.

A good description of the elements of an ethical wall is found in the California case, *Henriksen v. Great American Savings & Loan*.151 "The typical elements of an ethical wall are: physical, geographic, and departmental separation of attorneys; prohibitions against and sanctions for discussing confidential matters; established rules and procedures preventing access to confidential information and files . . . ."152

A subtly and narrowly crafted injunction, when combined with reasonable time limits, can provide the employer with sufficient trade secret protection while leaving the former employee with a reasonable opportunity to make a living in her specialty. For example, the injunction in *Merck* was well-crafted in scope as well as in duration.153 A broad injunction on employment with a particular employer or in a particular area should only be issued when there is no way to create an effective ethical wall and an extreme threat of disclosure exists.

As substantive due process analysis helps illustrate, the courts should be extremely reluctant to issue such an injunction.

VI. Conclusion

Employee mobility today is more important than ever. In a world of corporate downsizing154 an individual employee benefits enormously from being able to move to a new employer before being laid off. In addition, it has been argued that a major reason that companies in places like Silicon Valley produce so much technological innovation is because of the high employee mobility in those locations.155 The *PepsiCo* case left us with challenging questions about how to balance the employer's interest in preventing the otherwise inevitable disclosure of valuable trade secrets with the equally important individual interest in the free pursuit of an occupation.

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152. *Id.* at 116 n.6.
153. See *Merck & Co. v. Lyon*, 941 F. Supp. 1443, 1464-65 (M.D.N.C. 1996) (issuing an injunction with duration of one to two years and only affecting work on a specific product).
The PepsiCo court's efforts regarding analogous employment restrictions in the substantive due process area teach that freedom of employment is worthy of a substantial amount of respect. The extreme approach taken by the Iowa court in Uncle B's unreasonably impinges on the individual employee's legitimate interests in mobility and the freedom to practice her occupation. A moderate approach, similar to one the North Carolina courts have adopted, allows the inevitable disclosure doctrine to provide narrow injunction requests, but prevents overly broad prohibitions on new employment.156

The inevitable disclosure doctrine may be a fair and useful tool to safeguard intellectual property. However, careless application by the courts will result in the unacceptable restriction of employee mobility. The new approach described above does not represent a radical change. Many judges instinctively afford significant weight to the defendant's interests in trade secrets cases. What this approach does is explicitly ensure thoughtful balancing, and provide a specific analytical framework that all parties can use to shape their expectations. The suggestions from substantive due process analysis, when combined with the common law in this area, indicate the reasonable limits that the inevitable disclosure doctrine so desperately needs.

In closing, Professor Tribe points out that Justice Douglas may have provided a particularly good insight into restriction on occupation.157 Justice Douglas noted that:

The right to work I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property . . . . It does many men little good to stay alive and free and propted, if they cannot work. To work means to eat. It also means to live.158

Justice Douglas went on to say:

[C]ertainly a man has no affirmative right to any particular job or skill or occupation . . . . But [the Bill of Rights] does say that certain rights are protected, that certain things shall not be done. And so the question here is not what government must give, but rather what it may not take away.159

157. See Tribe, supra note 109, § 15-13, at 1376.
159. Id. at 472-73.
The government should not be able to take away the right to control one's livelihood without adequate safeguards. Neither should a private party when it invokes the inevitable disclosure doctrine.