

**NO MORE NO-POACH? AN (EARLY) RETROSPECTIVE ON PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT IN THE FIGHT AGAINST FRANCHISE NO-POACH AGREEMENTS**

*Spencer J. Parts*<sup>1</sup>

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**This piece is part of the *University of Chicago Law Review* Symposium 2022: [Law and Labor Market Power](#).**

As Professor Eric A. Posner and others have trained our attention on [labor market power](#), one category of labor mobility restrictions to come [under fire](#) is franchise no-poach agreements. These provisions have frequently been included in franchise agreements and prevent franchisees subject to them from hiring away each other's employees. For example, for many years such agreements [precluded](#) Jimmy John's franchisees from hiring each other's sandwich makers. If a Jimmy John's worker wanted to move to the shop across town, they could not have done so without the [approval](#) of the Jimmy John's where they worked. In 2016, roughly [half](#) of major franchise chains included no-poach agreements in their franchise contracts. The employees whose mobility was restricted by these no-poach agreements never saw or signed them, but they could be turned away from a job because of them anyway.

The fight against franchise no-poach agreements began in 2017 and is currently taking place on several fronts. Employees have filed class action lawsuits against [McDonald's](#), [Little Caesar's](#), [Domino's](#), and other companies challenging franchise no-poach agreements. These lawsuits have met with mixed success—some have been [dismissed](#) because employees agreed to arbitrate their claims against the franchisor, or because they [failed](#) on a rule of reason analysis. Under the rule of reason, courts assess the overall economic effects of a practice to determine whether it is forbidden by the antitrust laws, and antitrust plaintiffs are often ill-equipped to offer the economic evidence courts demand. Other cases, including the one against McDonald's, continue to be litigated. In 2018, Congress [proposed](#) legislation that would have prohibited these franchise no-poach agreements nationally, but it failed to move forward. An extremely effective effort to chase these agreements out of the franchise ecosystem, however, has emerged in Washington State. The Evergreen State's attorney general, Bob Ferguson, began suing franchisors in 2018, alleging that no-poach agreements violate antitrust law. By 2020, when Ferguson ended his

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<sup>1</sup> Spencer J. Parts is a J.D. Candidate at the University of Chicago Law School, Class of 2023. He thanks Pallavi Guniganti, Ben Remaly, Candice Yandam Riviere, and the *University of Chicago Law Review Online* team.

investigation, more than 200 franchisors had [agreed](#) to stop using no-poach agreements, covering an estimated 197,000 franchise locations nationwide.

This recent experience with enforcement against franchise no-poach agreements offers insight into how antitrust law evolves. This Essay offers reflections on the role of federal, state, and private antitrust enforcement in that process. It argues that private lawsuits and state enforcement were a suboptimal way to reach the place where we are today—where these agreements are being abandoned by most major franchisees. From one angle, the franchise no-poach fight appears to show the virtues of America’s distributed antitrust decision-making. Word of the harms of these agreements spread among economists, plaintiff’s lawyers, politicians, and a state attorney general, each of whom was able to participate in the movement to force companies to abandon them. But compared to a plausible alternative—a statement early on from the federal enforcers on the legality of such agreements—the way the franchise no-poach fight played out was inefficient and driven by an enforcer who is not politically accountable to those whom his actions affected.

## **I. The Movement against No-Poach Agreements**

The turn against franchise no-poach agreements began in October 2016 when the Department of Justice and the Federal Trade Commission released a policy [statement](#) on no-poach agreements, stating that such agreements were per se illegal and subjecting employers to criminal prosecution. A few months later, President Donald Trump [nominated](#) Andrew Puzder, chief executive of fast-food chain Carl’s Jr., to be Secretary of the Department of Labor. Shortly thereafter, two Arby’s employees [sued](#) Carl’s Jr. for using no-poach agreements in its franchise contracts. A report on the lawsuit [cited](#) the DOJ guidance as a reason for finding that franchise no-poach agreements violated antitrust law. Later in 2017, McDonald’s, apparently looking to get out ahead of potential legal liability, [stopped](#) putting the agreements in new franchise contracts. This turn of events prompted a wave of private lawsuits over franchise no-poach agreements. Employees of McDonald’s, Jimmy John’s, and other fast-food brands [sued](#) their employers, claiming that franchise no-poach agreements are per se antitrust violations. The DOJ then sought to clarify its position on franchise no-poach agreements—it filed a [statement of interest](#) in the Eastern District of Washington [arguing](#) that these agreements are not always illegal.

Washington Attorney General Bob Ferguson got involved through a somewhat circuitous route. Professor Alan Krueger wrote about these agreements in 2017, after he learned about them from the

Arby's lawsuit. (An early version of Krueger's paper with fellow economist Orley Ashenfelter was circulated in 2017, while the National Bureau of Economic Research [published](#) the final version later.) The New York Times [covered](#) this work, and it was their article that caught Ferguson's attention. Ferguson [concluded](#) that these agreements harm low-wage workers and were always illegal under the antitrust laws. He wrote letters to these companies, threatening to sue if they continued to enforce their no-poach agreements but promising to leave them alone if they dropped the agreements from their contracts. Almost every franchisor agreed. The only franchisor to take the fight to court was sandwich chain Jersey Mike's. After about a year of litigation in Washington state court, however, Jersey Mike's also gave up, [agreeing](#) to pay \$150,000 and drop the agreements from its contracts.

The scene today is that many of the companies involved in litigation over their use of these agreements have [already agreed](#) with Ferguson to stop enforcing them. These include companies in a wide range of industries: McDonald's, Jimmy John's, Jiffy Lube, tax company Jackson Hewitt, and many others.

## II. Reflections on the Movement against No-Poach Agreements

From one perspective, this experience was a great success for the U.S. model of distributed antitrust decision-making.<sup>2</sup> The federal agencies touched off the effort to cut down on no-poach agreements with their policy statements. Private attorneys then pushed the reach of the law, seeking to cover a type of agreement the federal agencies did not initially intend to forbid. They succeeded marvelously, inspiring economic research on the practice that brought it to national attention. (The role of the media is also notable here—newspapers were crucial at every stage in the fight against franchise no-poach agreements.) Bob Ferguson then picked up the baton, using his state enforcement authority to convince franchisors to drop these agreements without needing to take them to court. The DOJ took a different perspective than Ferguson on the legality of these agreements—it thought they should be evaluated on a case-by-case basis and should not be excised completely from the franchise landscape. But the federal enforcers could not stop Ferguson from sending his letters, nor could it stop the franchise companies from giving him what he wanted: complete removal of no-poach agreements from all franchise contracts nationwide. From the perspective of a Jimmy John's sandwich maker who wanted these agreements to go

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<sup>2</sup> See Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1014 (2001) (characterizing the structure of U.S. antitrust enforcement as a “‘flat’ network of antitrust enforcement agencies” over which there is “no hierarchical control”).

away, U.S. antitrust's distributed decision-making seemed to produce a very positive outcome.

There are two reasons to think the picture is not quite that sunny, and to conclude that this experience shows the drawbacks of our diffuse enforcement design. First, it creates uncertainty for corporations and gives too much leverage to state enforcers. Ferguson took advantage of the uncertainty in this area of law to extract concessions from franchisors. From one perspective, he operated beyond the scope of his authority by convincing franchisors to drop these agreements nationwide. Other states may take a different perspective on franchise no-poach agreements. Idaho's legislature, for example, recently made no-poach agreements [easier to enforce](#)—but franchises that operate in Idaho also dropped their franchise no-poach agreements because of Ferguson's initiative. Some franchise lawyers thought these agreements were a "[sweet spot](#)" for a state attorney general initiative. The benefits to the national franchisor were relatively insignificant—the real benefits were to the local franchisees who did not have to worry as much about high turnover and disputes with other franchisees—so they were quick to give them up when they got into trouble in one of the markets in which they operated. In an area in which there are many different interests to weigh—including those of employees, franchise owners, and customers—it is strange that one state attorney general had such a strong influence over franchise businesses nationwide.<sup>3</sup>

Second, the ongoing private litigation over franchise no-poach agreements is a waste of judicial resources. The range of enforcer approaches to these agreements has created a disconnect: companies were willing to abandon these agreements in the face of Ferguson's initiative but are determined to fight antitrust liability tooth and nail in private lawsuits. McDonald's, for example, continues to [fight](#) no-poach claims with no end in sight. This makes sense—if they lose these private suits, they could be subject to massive liability to a nationwide class of employees claiming lost wages. Given that so many companies have agreed to stop using these agreements, this ongoing litigation is a waste of judicial resources. Already, the McDonald's manager will not be limited in his or her employment prospects by franchise no-poach agreements. We have (arguably) improved the U.S. labor market by eliminating a harmful employment practice that the market was not able to correct. The issue of liability for the use of these no-poach agreements is a distraction, since damages are speculative and

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<sup>3</sup> Judge Richard A. Posner [argued](#) in 2001 that states should have their antitrust enforcement authority taken away because the influence of local politics can lead to "irresponsible state action."

defendant franchises entered into these agreements operating under the reasonable assumption that franchise no-poach agreements did not violate the antitrust laws. It's time to move on to the next way we might improve the labor market. That work is urgent given the various continuing ills in the modern U.S. labor market, from low [labor mobility](#) to declining [returns on labor](#) as compared to capital generally.

### III. An Alternative Path to Antitrust Regulation

How could we have gotten a better result? One way is if the FTC and DOJ had anticipated this issue in 2016 and addressed it. They could have acknowledged that their statement on criminal enforcement of no-poach agreements created uncertainty in the franchise context and stated their view on the legality of such agreements. Instead, franchising was not specifically mentioned in the DOJ/FTC October 2016 [guidance](#), and the applicability of the language in the guidance to the franchise situation was unclear. The agencies [wrote](#) that an “individual likely is breaking the antitrust laws if he or she . . . agrees with individual(s) at another company to refuse to solicit or hire that other company’s employees (so-called ‘no poaching’ agreements).” This is ambiguous in that franchisees never agree with each other not to hire each other’s employees. Instead, they agree with their franchisor not to hire away another franchisee’s employees. The document went on to say that the agencies intend to criminally prosecute “naked wage-fixing or no-poaching agreements,” excluding agreements ancillary to another legitimate business relationship from the possibility of criminal prosecution. The neglect of the franchise issue was not because the agency document was devoid of detail. It included questions and answers on a range of potential employer collusion situations, from an industry-wide pay scale to an agreement to refuse to offer gym memberships. More helpful than this elaboration would have been a statement of the agencies’ view on this hard case—the application of the per se no-poach ban to franchise agreements.

When the DOJ eventually did weigh in on the legality of franchise no-poach agreements, it argued that such agreements should be evaluated under the fact-specific rule of reason. Unfortunately, this provided little prospective guidance to companies deciding whether to include these agreements in their franchise contracts. The DOJ stated its view on franchise no-poach agreements in two private actions in which plaintiffs alleged that franchise no-poach agreements violated the antitrust laws. In *Stigar v. Dough Dough, Inc.* (E.D. Wash. 2019), the DOJ filed a [statement of interest](#) in 2019 stating that the rule of reason should usually apply to franchise no-poach agreements. In 2020, the DOJ filed an *amicus* [brief](#) in franchise no-poach litigation against Burger King, arguing that the agreement’s inclusion in a

franchise contract does not protect it from antitrust scrutiny. Citing *American Needle v. National Football League* (2010) and *Copperweld Corp. v. Independence Tube Corp.* (1984), the agency wrote that the proper analysis focuses on whether the challenged restraint “deprives the marketplace of independent centers of decisionmaking.” The DOJ thus rejected a bright-line rule either allowing or forbidding these agreements.

Under current antitrust [principles](#), the rule of reason is appropriate when it is unclear how a particular economic arrangement operates, and when more factual development is necessary in each case to determine how to treat the restraint. But in this situation, where franchise no-poach agreements operate [similarly](#) across the board, advocating for the rule of reason was passing the buck. Franchisors incorporated these provisions into their contracts using [boilerplate language](#), so the factual contexts were often very similar from one case to the next. The DOJ could and should have adopted a position on the legality of these agreements generally, one way or the other, rather than sending courts on a rule of reason fishing expedition.

As the DOJ’s recent trial [loss](#) on no-poach agreements outside the franchise context shows, courts serve as a check on agency enforcement even when the agency adopts a per se rule. The proper application of the antitrust laws to franchise no-poach agreements could have been determined through dialogue between the agencies and the courts even if the agency adopted a per se rule. Nonetheless, where a practice is national in scope and regional variation in economic circumstances is inconsequential, it makes little sense for national enforcers to refuse to adopt such a rule one way or the other and thus not participate meaningfully in that dialogue. When they vacate the field in this way, they leave room for other actors to operate as national enforcers. Those other actors are inevitably less politically accountable and not as competent to develop national competition law.

## Conclusion

Ultimately, whether to allow franchise no-poach agreements is an [economic regulatory matter](#). With few franchises enforcing these agreements today, we may have reached the right result. But we did it in the wrong way—by allowing actors who are [not accountable nationwide](#) to make decisions affecting the entire country and wasting judicial resources deciding private lawsuits that are inconsequential to forward-looking regulation. Congress [designed](#) a [system](#) that allows a better result, empowering national regulators to prevent powerful companies from coordinating in ways that harm the public. The federal agencies should use that power more effectively in the future.

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