NOTE

DESLANDES V. MCDONALD'S: NO-POACH AGREEMENTS AND THE RULE OF REASON

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In 2023, Judge Easterbrook held that an antitrust plaintiff's claim can be evaluated under the rule of reason despite an ancillary restraints defense from the defendant. Deslandes v. McDonald's *thereby directly contradicted* Polk Bros., Inc. v. Forest City Enters.*, which for decades stood for precisely the opposite proposition. In an environment of increased scrutiny from antitrust enforcers and uncertainty about the future of antitrust labor law, Deslandes only further muddied the waters. Clarity, however, lies in an analysis of the history and purposes underlying the ancillary restraints doctrine.*

This Note argues that ancillary no-poach agreements—those between purchasers in a labor market that are reasonably necessary to accomplish the purpose of a broader, non-pretextual agreement—are properly analyzed under the rule of reason. Part I examines the standards of antitrust adjudication—per se, rule of reason, and quick look—and the historical development of the ancillary restraints doctrine. Part II catalogues the regulatory actions of state and federal antitrust enforcers who have applied increased scrutiny to labor market restraints in recent years. Against that backdrop, Part II then explains the arguments at play in Deslandes v. McDonald's *and why Easterbrook's ruling in that case poses a problem for antitrust practitioners. Part III*

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critiques Easterbrook's ruling by arguing that ancillary restraints like those in Deslandes warrant analysis under the rule of reason, not the per se standard.

INTRODUCTION

The Federal Trade Commission (FTC) estimates that approximately 30 million workers in the United States are bound by a non-compete clause.[1] If that estimate is true, nearly 1 in 5 workers in America are prevented by contract from "seeking or accepting other work or starting a business after their employment ends" with a particular company.[2] In

[1] Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38346 (proposed Jan.19, 2023) (codified at 16 C.F.R. pt. 910).

[2] *Id.* at 38361. The accuracy of the 1-in-5 figure is disputed among scholars. *See* ALAN B. KRUEGER & ERIC A. POSNER, A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION 8 (The Hamilton Project, 2018) (estimating the number of American workers bound by a non-compete to be 15.5%); ALEXANDER J.S. COLVIN & HEIDI SHIERHOLZ, NONCOMPETE AGREEMENTS: UBIQUITOUS, HARMFUL TO WAGES AND TO COMPETITION, AND PART OF A GROWING TREND OF EMPLOYERS REQUIRING WORKERS TO SIGN AWAY THEIR RIGHTS 12 (Econ. Pol'y Inst., 2019) (estimating a range between 27.8% and 46.5%). The available studies hover around a 20% mark, however. *See* Peter Norlander, *New Evidence on Employee Noncompete, No Poach, and No Hire Agreements in the Franchise*

an executive order, President Biden wrote that addressing the issue of non-competes and concentration in labor markets is "critical to preserving America's role as the world's leading economy."[3] Yet when considering the legality of no-poach agreements under Section 1 of the Sherman Act, antitrust practitioners are left with a lack of clarity, particularly with regards to whether a per se rule or rule of reason standard should apply. As antitrust scrutiny of no-poach and non-compete clauses increases,[4] the need for a fair and workable standard that can balance the goals of efficiency and welfare has become crucial.

Antitrust enforcers—the FTC, the Department of Justice (DOJ), and State Attorneys General—have taken the position that no-poach agreements should be treated as per se violations of Section 1.[5] This view draws parallels between no-poach clauses in the labor market and per se violations that occur in the product market, such as price-fixing and geographical market allocation.[6] Such horizontal restraints in the product market have long been treated as per se illegal,[7] so antitrust plaintiffs argue the same treatment should apply to supposedly similar restraints in a labor market. These enforcers' aggressive approach has been less successful than

Sector, Rsch. Lab. Econ., May 28, 2024, at 12, https://ssrn.com/abstract=4342586 [https://perma.cc/RJ4V-ZEK5].

[3] Promoting Competition in the American Economy, 86 Fed. Reg. 36987 (Jul. 9, 2021).

[4] *See infra* Section II.a.

[5] *See infra* Section II.a.

[6] *See, e.g.*, United States' Opposition to Defendants' Motion to Dismiss at 9, United States v. Surgical Care Affiliates, LLC, and Scai Holdings, LLC, No.3:21-cr-00011-L (N.D.Tex. April 30, 2021), ECF No. 44. "[T]he Supreme Court has long made clear that the Sherman Act applies equally to all industries and markets—to buyers and sellers, to products and services, and to corporations and individuals. Thus, agreements among buyers in a labor market not to solicit each other's employees are treated no differently than agreements among sellers in a product market not to solicit each other's customers."

[7] *See infra* Section I.a.

they may have hoped.[8] Nonetheless, leadership at these agencies have remained relatively undeterred, and practitioners should expect them to go after no-poach and non-compete agreements with the same vigor.[9] While per se treatment for no-poach agreements is the dominant view among enforcers, there is good reason to think that the procompetitive possibilities relating to such agreements make a per se rule inappropriate.[10]

Under another view, no-poach agreements in a labor market can be readily distinguished from similar ones in a product market. The dynamic between an employer and an employee is much different than that between the seller and buyer of product. The employer/employee relationship involves reciprocal investments and creation of a relationship,[11] whereas buyer/seller relations are more often conducted at an arm's length. Further, supply and demand in a labor market is uniquely idiosyncratic. When choosing between jobs, employees may consider factors and respond to

[8] *See* Bryan Koenig & Nadia Dreid, *DOJ's Latest, Biggest No-Poach Trial Thrown Out,* Law360 (Apr. 28, 2023) https://www.law360.com/articles/1602209/ [https://perma.cc/Q7CK-M2CV]. *See also* Bryan Koenig, *DOJ Abandons Last Remaining No-Poach Prosecution*, Law360 (Nov. 14, 2023), https://www.law360.com/articles/1766482/doj-abandons-last-remaining-no-poach-prosecution/ [https://perma.cc/98G7-JD2V].

[9] Dee Bansal, Jacqueline Grise, Beatriz Mejia & Julia Brinton, *The 'No-Poach' Approach: Antitrust Enforcement of Employment Agreements*, GLOB. COMPETITION REV. (July 28, 2023), https://globalcompetitionreview.com/review/us-courts-annual-review/2023/article/the-no-poach-approach-antitrust-enforcement-of-employment-agreements# [https://perma.cc/FP2J-2L2B] ("[T]wo things are becoming clear: first, DOJ has been unable to convince juries to find the defendants criminally liable on the antitrust-related claims; and second, despite its losses, DOJ remains committed to prosecuting no-poach and wage-fixing agreements criminally.").

[10] *See infra* Sections III.a and III.b.

[11] *See* Justin McCrary & Bryan Richetti, *Accounting for the Employer-Employee Relationship in Antitrust Analysis*, ANTITRUST MAG. ONLINE (June 2023), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=5193&context=faculty_scholarship [https://perma.cc/F6JU-3Z7A]

incentives only tenuously related to wage, meaning labor markets resist the kind of analysis that is applicable to product markets. No-poach agreements may be necessary to facilitate investment from an employer in the development and training of experienced employees.

Deslandes v. McDonalds encapsulates this current debate in antitrust law. That case addressed the legality of a no-poach provision in a McDonald's franchise agreement that prevented Deslandes from working at another franchise location.[12] Some research has shown that the use of no-poach clauses is more pervasive among franchise employers than others.[13] Given the widespread use of these clauses, *Deslandes*' direct treatment of the issue of no-poach agreements in the franchise context is timely. Initially, the District Court applied the well-settled rule from *Polk Bros.* that an ancillary restraint must be afforded the rule of reason. Judge Easterbrook, however, reversed that opinion, arguing that the lower court had "jettisoned the per se rule too early."[14] In doing so, Easterbrook directly contradicted his prior holding in *Polk Bros.* and called into question whether litigators could rely on the doctrine of ancillary restraints.[15] *Polk Bros.* established that "[a] restraint is ancillary when it may contribute to the success of a cooperative venture that promises greater productivity and output."[16] An ancillary

[12] Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 703 (7th Cir. 2023).

[13] *See* Norlander, *supra* note 2, at 2–5 (suggesting that firms in the franchise context have adapted to increased judicial scrutiny, employing narrower and more carefully-tailored language in no-poach clauses). Krueger and Posner, *supra* note 2, observed an increase in the number of franchises using no-poach clauses, from 35.6% in 1996 to 53.3% in 2016. And in 2022, Krueger and Ashenfelter showed that employment contracts of roughly 58% of the largest franchise chains contained such clauses, representing a further increase of about 5%. *See* Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, 57 J. Hum. Res. S324 (2022). *See also* Eric A. Posner, *The New Labor Antitrust*, Univ. Chi. Coase-Sandor Inst. for L. & Econ. Rsch. Paper, Sept. 17, 2023, at 5, 10.

[14] Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 703 (7th Cir. 2023).

[15] *See* Polk Bros., Inc. v. Forest City Enters., 776 F.2d 185, 189 (7th Cir. 1985).

[16] *Id.* at 189.

restraint is evaluated using the rule of reason, not a per se standard.[17] In *Deslandes*, however, Easterbrook expressed skepticism as to whether a no-poach clause in an output-enhancing contract actually had anything to do with output.[18] *Deslandes* opened the door for expansion of the per se rule in the context of an ancillary restraint such as a no-poach clause.

In light of Easterbrook's departure from his own precedent in *Polk Bros.*, antitrust labor law stands at a crossroads. Whether more courts will adopt Easterbrook's view that no-poach agreements can be evaluated under the per se standard would have dramatic consequences for antitrust litigators and policymakers. If no-poach agreements are afforded the rule of reason, a plaintiff must allege that the defendant had market power within the relevant market. Thus, in private litigation, the rule of reason can spell the death of a plaintiff's case because of the "insurmountable logistical barriers" involved with certifying a class and defining a market using economic data.[19] For a per se claim, however, a plaintiff need not allege market power or define the relevant market at all. And without the rule of reason framework, a defendant to a per se allegation has much less opportunity to present procompetitive rationales for the conduct in question. Thus, if more courts adopt Easterbrook's approach, the doors of no-poach litigation would swing wide open. Enabling more plaintiffs to challenge no-poach provision on a per se basis would dramatically reshape the landscape of antitrust labor litigation.

This Note argues that no-poach agreements are properly analyzed under the rule of reason framework and that a per se rule for labor mobility restrictions is inappropriate. The Supreme Court's precedent makes clear that courts are to presumptively apply the rule of reason and only depart from it in situations where the court has extensive experience with the market and type of restraint in question. No-poach agreements in a labor are meaningfully different from

[17] *See infra* Section I.b.

[18] *Deslandes*, 81 F.4th at 703.

[19] Posner, *supra* note 13, at 3.

analogous restraints in a product market because of the nature of labor markets themselves.

Part I discusses the standards of antitrust adjudication—per se, rule of reason, and quick look—and notes the situations for which each is appropriate. It also considers how the ancillary restraints doctrine has developed historically, how it affects the application of the per se rule, and how no-poach agreements fit into the ancillary restraints framework.

Part II catalogues the increasingly aggressive posture federal enforcers, state enforcers, and lawmakers have taken toward no-poach agreements, paying particular attention to the appetite among antitrust enforcers for expansion of per se treatment. Against that background of increased scrutiny, Part II also addresses Easterbrook's 2023 opinion in *Deslandes v. McDonalds* and the unique procedural posture in which it arrived at the Seventh Circuit.

Part III offers a rebuttal to Easterbrook's 2023 opinion, recommending that other courts decline to follow the Seventh Circuit's approach and instead apply the rule of reason to no-poach agreements. A rule of reason approach is more consistent with the history and purpose of the antitrust laws in America, and structural differences between labor markets and product markets thwart simple comparison between the two types of markets.

I. THE RULE OF REASON AND THE ANCILLARY RESTRAINTS DOCTRINE

a. The Standards of Antitrust Adjudication

Despite the literal wording of Section 1 of the Sherman Act, every agreement that restrains trade is not prohibited by the antitrust laws. The Court has never taken a literal approach to language of the Sherman Act.[20] The Supreme Court held that "even though, 'read literally,' § 1 would address 'the entire body of private contract,' that is not what the statute

[20] *See* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 885 (2007).

means."[21] In prior scholarship, Frank Easterbrook has noted that "all business arrangements entail some cooperation, if only the cooperation in delivering the product pursuant to a contract of sale."[22] Contracts restrain parties because they bind the parties' behavior, but the Sherman Act does not outlaw all forms of private of contract. Rather, the Sherman Act prohibits only practices that restrain trade *unreasonably*.[23]

Throughout the 20th century, U.S. courts developed a legal framework to distinguish between reasonable and unreasonable restraints. This framework differentiates between conduct that has no procompetitive rationale and conduct that can be justified by its procompetitive effects. It consists of the per se rule, the rule of reason, and the quick look standard. Price-fixing schemes,[24] bid rigging agreements,[25] and geographical market allocation[26] are classic examples of per se violations because they restrict competition without any procompetitive benefit. These kinds of restraints promise no beneficial effect to the market they restrain, and "condemnation per se rests on a conclusion that all or almost all examples of some category of practices are inefficient."[27] In a per se case, liability attaches directly after a plaintiff demonstrates that the defendant engaged in per se illegal conduct, and a court is not required to perform further inquiry into the conduct's effects.[28] For that reason, litigation involving per se allegations typically centers on proving the per se illegal conduct occurred, not on proving its anticompetitive effects.

Other restraints of trade that are not plainly anticompetitive are evaluated using the rule of reason's three-

[21] Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 189 (2010).

[22] Frank H. Easterbrook, *Limits of Antitrust,* 63 TEX. L. REV. 1, 4 (1984).

[23] Standard Oil Co. v. United States, 221 U.S. 1, 58–60 (1911).

[24] *See* United States v. Trenton Potteries Co., 273 U.S. 392 (1927); *see also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[25] *See* Nat'l Soc. of Pro. Eng'r v. United. States, 435 U.S. 679 (1978).

[26] *See* United States v. Topco Assoc., Inc., 405 U.S. 596 (1972); *see also* Palmer v. BRG of Ga., Inc., 498 U.S. 46 (1990).

[27] Easterbrook, *supra* note 22, at 39.

[28] *See* Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289 (1985).

step, burden-shifting framework.[29] Under this framework, (1) the plaintiff has the initial burden to prove the challenged restraint has an anticompetitive effect, (2) the defendant then has the burden to show a procompetitive rationale for the restraint, and (3) the burden then shifts back to the plaintiff "to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."[30] In a rule of reason case, the plaintiff must allege that the defendant had power in both the relevant geographic market and the relevant product market. Market power is the ability of a firm to charge prices above the competitive level,[31] so firms with market power are able to harm the consumer because they have the ability to restrict output and raise prices above the competitive level.[32] Market power is a distinct concept from market share, though the two may of course be correlated.[33] In a market with numerous sellers and homogenous products, a firm without market power would be restrained from raising prices or restricting output because of the competitive pressure from other firms in the market to sell

[29] Ohio v. Am. Express Co., 585 U.S. 529, 541(2018).

[30] *Id.*

[31] Fortner Enter., Inc. v. U.S. Steel Corp., 394 U.S. 495, 503 (1969) ("Market power is usually stated to be the ability of a single seller to raise price and restrict output, for reduced output is the almost inevitable result of higher prices.") *See also* Eastman Kodak Co. v. Image Tech. Serv., Inc., 504 U.S. 451, 464 (1992) (quoting Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1984)) ("Market power is the power 'to force a purchaser to do something that he would not do in a competitive market.'"); U. S. v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) ("Monopoly power is the power to control prices or exclude competition.").

[32] PHILLIP AREEDA ET AL., ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES ¶ 110 (8th ed. 2022) ("The [market] failure of primary interest for antitrust policy is market power. Firms with significant market power are in a position to restrict output and raise prices above the competitive level.").

[33] The DOJ's 2010 Horizontal Merger Guidelines, for instance, presumed that increased market share is "likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power." *See* DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.1.3 (2010).

products close to their marginal cost.[34] Allegations of market power are therefore essential to a rule of reason claim because the inquiry as to whether the allegedly violative conduct had an anticompetitive effect requires "an inquiry into market power and market structure designed to assess the combination's actual effect."[35]

The quick-look standard is an intermediate standard, reserved for situations where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[36] Quick-look analysis appeared in a handful of cases from the late 20th century,[37] and it "carrie[d] the day when the great likelihood of anticompetitive effects c[ould] easily be ascertained."[38] The Supreme Court suggested that the quick-look standard could be applied "in the twinkling of an eye" for restraints that are obviously at one end of the competitive spectrum or the other because the effects of those restraints are readily determined.[39] However, the Supreme Court's ruling in *NCAA v. Alston* signaled a narrowing of the quick-look standard. There, the court declined to apply the quick-look standard even though the NCAA was a joint venture.[40] Departing from its typical deference for sports league restraints,[41] the court affirmed the lower court's application of a full rule-of reason-analysis to the NCAA's student athlete compensation rules.[42] *Alston*'s disapproval of the quick-look standard has led some

[34] AREEDA ET AL., *supra* note 32, at ¶ 106–09.

[35] Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984).

[36] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

[37] *See* Nat'l Soc. of Pro. Eng'r v. U. S., 435 U.S. 679 (1978); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986).

[38] *Cal. Dental Ass'n*, 526 U.S. at 770.

[39] Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010).

[40] *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S.Ct. 2141, 2156–57 (2021).

[41] *See* Leah Farzin, *On the Antitrust Exemption for Professional Sports in the United States and Europe,* 22 JEFFREY S. MOORAD SPORTS L.J. 75, 78–82 (2015).

[42] *Alston*, 141 S.Ct. at 2166.

commentators to note that "such abbreviated review is not appropriate" for the majority of cases.[43]

Which standard a court uses when evaluating a restraint drastically affects how the parties litigate. The per se standard typically disadvantages the defendant because it allows them fewer opportunities to argue that the restraint had a procompetitive rationale.[44] In contrast to the rule of reason, a per se standard does not require a plaintiff to identify the relevant market or prove the defendant had market power.[45] Furthermore, the rule of reason tends to pose logistical difficulties for the plaintiff that are simply not an issue for a per se claim. Because the rule of reason requires an allegation of market power in the relevant market, an antitrust labor plaintiff for a rule of reason claim "would be required to define thousands of local labor markets around the country and prove the impact of the clauses on wages—and only if they could afford and overcome the additional logistical burdens of defining thousands of classes."[46] Thus, defendants want their cases to be evaluated under the rule of reason rather than the per se standard, especially for claims regarding the labor market. These logistical issues related to the rule of reason may discourage plaintiffs from bringing cases regarding no-poach clauses and, during litigation, may incentivize them to settle a claim instead of bearing the exorbitant costs of antitrust litigation.

The differences between these standards may lead some practitioners to think that a bright line separates per se

[43] Julian D. Perlman & Carl W. Hittinger, *Continued Antitrust Focus on the Labor Market in the Wake of NCAA v. Alston,* BAKERHOSTETLER, (Apr. 25, 2022), https://www.bakerlaw.com/insights/continued-antitrust-focus-on-the-labor-market-in-the-wake-of-ncaa-v-alston/ [https://perma.cc/BJ4V-EMEN].

[44] Herbert Hovenkamp, *The Rule of Reason,* 70 FLA. L. REV. 81, 98 (2018) ("Applying the rule of reason typically requires expert testimony identifying a relevant market or alternative mechanisms for estimating market power, as well as some evidence that purports to measure actual anticompetitive effects. By contrast, the per se rule requires only proof that a particular type of conduct has occurred.").

[45] Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 703 (7th Cir. 2023).

[46] Posner, *supra* note 13, at 52.

violations from those that warrant the rule of reason standard. Like so many bright lines, however, this one is hazier than it first appears. In *California Dental Association v. FTC*, the Supreme Court made explicit that:

> [O]ur categories of analysis of anticompetitive effect are less fixed than terms like "*per se,*" "quick look," and "rule of reason" tend to make them appear. We have recognized, for example, that "there is often no bright line separating *per se* from Rule of Reason analysis," since "considerable inquiry into market conditions" may be required before the application of any so-called "*per se*" condemnation is justified.[47]

Instead of thinking of these two standards as categorically separate, it is more appropriate to think of the per se standard as being an exception to the rule of reason because it is reserved for practices which "lack any redeeming virtue" and therefore do not require the rule of reason's elaborate inquiry.[48] Courts presumptively apply the rule of reason analysis,[49] and the per se rule is "appropriate only after courts have had considerable experience with the type of restraint at issue."[50] Merely "talismanic invocation" of one of the per se categories is not sufficient "to bring the *per se* rule to bear on the actions of the alleged conspirators."[51] A court's analysis of which standard applies is not a formalistic process, and departure from the rule of reason "must be must be based upon demonstrable economic effect" rather than simple line drawing.[52]

[47] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999) (internal citations omitted).

[48] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

[49] *See* Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006).

[50] *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9 (1979) (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 607–08 (1972)).

[51] Apex Oil Co. v. DiMauro, 713 F.Supp. 587, 596 (S.D.N.Y. 1989).

[52] Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977).

b. The Ancillary Restraints Doctrine

The ancillary restraints doctrine, a concept originating from antitrust's common law history, can change which standard of adjudication will apply to a particular restraint. The Sherman Act is informed by the common law history of antitrust law, and its text should be understood in light of the common law understanding of reasonableness.[53] The context and legislative history surrounding the Sherman Act "manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade."[54] Thus, an understanding of the common law history regarding restraints of trade adds further context to the rule of reason as applied by courts following the Sherman Act's passage.

At common law, some restraints of trade that would otherwise have been void and unenforceable were deemed valid because they were necessary to achieve a legitimate procompetitive business purpose. These types of agreements were *ancillary*, meaning they are "subordinate or collateral to another transaction and necessary to make that transaction effective."[55] The English case of *Mitchel v. Reynolds* from 1711 is illustrative. Mitchel leased a bakeshop that Reynolds had formerly operated. Reynolds gave Mitchel a bond for £50, promising that Reynolds "should not exercise the trade of baker within th[e] parish" for a period of five years.[56] Reynolds breached his bond, and Mitchel sued. In determining whether

[53] Standard Oil Co. v. United States, 221 U.S. 1, 50-51. ("There can be no doubt that the sole subject with which the 1st section deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the subject with which the 2nd section is concerned. It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question.").

[54] *Id.* at 59.

[55] Robert H. Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. ANTITRUST SEC. PROC. 211, 211 (1959). *See also* Rothery Storage & Van Co. v. Atlas Van Line, Inc. 792 F.2d 210, 224 (D.C. Cir. 1986).

[56] Mitchel v. Reynolds, 1 P. Wms. 181, 181, 24 ENG. REP. 347, 348 (Q.B. 1711).

the bond was valid and enforceable, the Court of the Queen's Bench held:

> [T]hat wherever a sufficient consideration appears to make it a proper and an useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz. where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by and by.[57]

In other words, when a restraint is necessary to achieve the parties' purpose, the Queen's Bench thought it should not be voided. Because the case investigates whether the purpose-enabling provision is essential to the broader contract, *Mitchel v. Reynolds* contains the germ of the ancillary restraints doctrine and, indeed, the rule of reason itself. When the Supreme Court first clearly articulated the rule of reason in *Standard Oil Co. of New Jersey v. United States*, it also made reference to *Mitchel v. Reynolds*.[58] The ancillary restraints doctrine, therefore, is deeply embedded in the history of antitrust law both generally and in the United States specifically because it originates in one of the first common law cases where a court grappled with the purpose of antitrust law.

Then-Judge Taft first addressed the limits of the ancillarity defense as it relates to the Sherman Act in *United States v. Addyston Pipe & Steel Co.* [59] Also citing extensively from *Mitchel v. Reynolds*, Taft wrote that a restraint is ancillary if it is "reasonably necessary" to achieve the "legitimate fruits" of the main, lawful contract.[60] This *reasonably necessary* element of the ancillary restraints doctrine has remained central to its application since *Addyston Pipe*. In 2008 then-Judge Sotomayor echoed Taft,

[57] *Id.* at 182.

[58] Standard Oil Co. v. United States, 221 U.S. 1, 54 (1911).

[59] United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898).

[60] *Id.* at 281–82 (6th Cir. 1898).

writing that a challenged restraint must be "reasonably necessary to achieve any of the efficiency-enhancing benefits" to satisfy the test announced by Taft in 1898.[61] The ancillary restraints doctrine, as it is applied today, consists of the two prongs identified in *Mitchel v. Reynolds* and later by Taft in *Addyston Pipe*. An ancillary restraint must be (1) embedded in a broader non-pretextual agreement and (2) reasonably necessary to accomplish the purpose of that broader agreement.[62]

The reasoning behind this two-pronged inquiry is simple. Restraints that are not embedded within a lawful contract are naked because there is simply nothing to which they could be ancillary. This was the case in *Addyston Pipe*,[63] and it remains the case today. And without the reasonableness inquiry, any defendant to a per se allegation could plead ancillarity and have the allegation evaluated under the rule of reason. The two prongs of the ancillary restraints doctrine therefore serve as backstops, preventing defendants from unfairly gaining access to treatment under the rule of reason. As a defense to allegations of per se illegality, the ancillary restraints doctrine recognizes that some restraints of trade that would otherwise be per se illegal may be "an integral part of an arrangement with redeeming competitive virtues."[64] The embedded requirement and the reasonableness inquiry ensure that only

[61] Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 338 (2d Cir. 2008).

[62] *See Addyston Pipe & Steel Co.*, 85 F. at 281–82 ("Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary . . . to the enjoyment [of the contract] . . . . [T]he contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary.").

[63] *See id.* at 282–83 ("But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void.").

[64] *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 345 (2010). (quoting Polk Bros., Inc. v. Forest City Enters., 776 F.2d 185, 188 (7th Cir. 1985)).

restraints that are genuinely integral are evaluated under the rule of reason's more deferential standard.

As the doctrine of ancillary restraints developed under U.S. antitrust law, lower courts sought to clarify the standard of analysis that should apply. In 1986, the Court of Appeals for the D.C. Circuit decided *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, holding that horizontal restraints that integrate the economic activity of a group are not per se violations of the antitrust laws.[65] The case created a rule by which alleged antitrust violators involved in a joint venture could escape the per se standard if the restraint in question increased efficiency.[66]

> To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose.[67]

Notably, the majority opinion in this case was written by Robert Bork, whose scholarship has shaped antitrust policy since he sat as a circuit judge in the 1980s. Bork's article *The Antitrust Paradox* has been cited by over a hundred federal courts,[68] and the Supreme Court has adopted Bork's views in numerous cases.[69] In later scholarship, Bork opined that the "the sole function of the concept of ancillarity under the Sherman Act should be to point out instances when per se

[65] Rothery Storage & Van Co. v. Atlas Van Line, Inc., 792 F.2d 210, 224 (D.C. Cir. 1986).

[66] *Id.* at 223 ("The Atlas agreements thus produce none of the evils of monopoly but enhance consumer welfare by creating efficiency.").

[67] *Id.* at 224.

[68] *See* Roger D. Blair & Daniel D. Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 476 n.23 (2012).

[69] *See, e.g.*, Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 56 (1977); State Oil Co. v. Khan, 522 U.S. 3, 16 (1997); Leegin Creative Leather Prods,, Inc. v. PSKS, Inc., 551 U.S. 877, 889 (2007)); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984).

illegality should not attach and to confine the exceptions to their proper scope."[70]

In 1985, Judge Easterbrook in the Seventh Circuit dealt with the ancillarity defense in regards to non-compete agreements. *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, involved an agreement between a home furnishings store and a builder materials supplier not to compete with certain core products offered by the other. In that case, Easterbrook wrote that ancillary restraints should be evaluated under the rule of reason, not the per se standard:

> A court must ask whether an agreement promoted enterprise and productivity at the time it was adopted. If it arguably did, then a court must apply the Rule of Reason to make a more discriminating assessment. . . . If the restraint, viewed at the time it was adopted, may promote the success of the more extensive cooperation, then the court must scrutinize things carefully under the Rule of Reason.[71]

Under *Polk Bros.*, a defendant to a per se allegation could enjoy the rule of reason if they could successfully argue the challenged restraint was ancillary to a broader pro-competitive endeavor.[72] *Polk Bros*. preserved the standard for ancillarity from *Addyston Pipe*, meaning any ancillary restraint must still be embedded in a broader, non-pretextual agreement and be reasonably necessary to the success of the broader endeavor.

For thirty-eight years, *Polk Bros.* stood for the well-accepted proposition that an ancillary restraint must be evaluated under the rule of reason. This holding represented the culmination of antitrust jurisprudence relating to ancillary restraints dating back to Taft's opinion in *Addyston Pipe*. In 2023, however, Easterbrook revisited the doctrine and

[70] Bork, *supra* note 55, at 227.

[71] Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 189 (7th Cir. 1985).

[72] *See id.* at 188–89 (discussing the difference between naked and ancillary restraints).

turned it on its head when he again addressed the use of non-compete agreements in *Deslandes v. McDonald's*.

II. ENFORCEMENT AND *DESLANDES*

a. Increased Scrutiny for No-Poach Clauses

Non-compete clauses have attracted increased judicial, legislative, and regulatory scrutiny in recent years. The DOJ and FTC—the two federal government agencies charged with enforcing U.S. antitrust law—have published guidance for practitioners, proposed rules directly addressing no-poach practices, and brought numerous civil and criminal cases involving allegations of illegal no-poach agreements. State-level enforcers have also adopted a more aggressive posture, and the New York Attorney General has brought a slew of no-poach civil cases in recent years. This period of increased scrutiny culminated in the FTC's Non-Compete Clause Rule, promulgated in April 2024.[73] This heightened scrutiny raises the crucial question of whether no-poach and non-compete clauses should be evaluated under the per se rule or the rule of reason.

In 2016, the DOJ's Antitrust Division and the FTC published "Antitrust Guidance for Human Resource Professionals," which clearly stated that the DOJ "intends to proceed criminally against naked wage-fixing or no-poaching agreements."[74] The agencies highlighted previous civil enforcement actions brought against Adobe, Apple, Google, Intel, Intuit, Pixar, Lucasfilm and eBay (collectively known as the High-Tech Employee Antitrust Litigation).[75] Those cases, which settled in 2010, involved no-solicitation agreements that prohibited the employers from directly cold-calling

[73] *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342 (proposed Jan.19, 2023) (codified at 16 C.F.R. pt. 910).

[74] DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 4 (2016).

[75] *Id.*

employees.[76] Emboldened by their success against the tech sector, the agencies made explicit in 2016 that "[n]aked wage-fixing or no-poaching agreements among employers . . . are per se illegal under the antitrust laws," warning that the DOJ would prosecute naked no-poach agreements criminally.[77] The HR guidance drew parallels between well-established per se violations, such as price-fixing and geographical market allocation, and naked no-poach agreements, arguing that these behaviors "eliminate competition in the same irredeemable way."[78] An antitrust primer for federal law enforcement personnel, published by the DOJ in 2022, echoed this sentiment: "Labor market allocation (frequently referred to as "no-poach") and wage-fixing agreements, when not reasonably necessary to separate, legitimate transactions or collaborations, are per se Sherman Act violations that eliminate employers' competition for workers."[79] In 2023, the DOJ sought to reinstate a lawsuit against several high-end luxury designers for their use of no-poach agreements, leading California Attorney General Rob Bonta to opine that "[n]o-hire agreements are anti-worker and anticompetitive. They have no place in the labor market."[80] The message to antitrust practitioners is clear: unless you can argue a no-poach agreement is ancillary to a broader business purpose, the DOJ can and will prosecute that agreement criminally.

[76] Press Release, Dep't of Just. Off. of Pub. Aff., Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee [https://perma.cc/NL2Y-4SK2].

[77] DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3 (2016).

[78] *Id.* at 4.

[79] DEP'T OF JUST. ANTITRUST DIV., AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL 6 (2022).

[80] Mike Scarcella, *High-Fashion Workers' Bid to Revive Antitrust Lawsuit Gets US Justice Dept, State AG Support,* REUTERS (Aug. 9, 2023) https://www.reuters.com/legal/government/high-fashion-workers-bid-revive-antitrust-lawsuit-gets-us-justice-dept-state-ag-2023-08-08/.

The FTC attempted to answer definitively the question of which standard applies even more recently. On April 23, 2024, the FTC announced a final rule banning non-competes nationwide, with an exception for a very narrow category of senior executives.[81] In line with previous enforcement activity, the final rule argued that non-compete agreements raise prices, reduce innovation, and stifle labor mobility.[82] This broad, sweeping rule would create a sea change in antitrust law by banning nearly all non-compete agreements nationwide. Unsurprisingly, the rule prompted criticism and legal challenges. Administrative law scholars have called into question whether the FTC has the authority to engage in legislative rulemaking based on an interpretation of the Commission's organic act.[83] On August 20, 2024, the Northern District of Texas enjoined enforcement of the rule [84] and on October 18, 2024, the FTC appealed to the Fifth Circuit.[85] Despite the FTC's appeal, the FTC cannot currently enforce the rule against employers. However, the FTC can still address non-competes on a case-by-case basis via its adjudicatory power.[86] These pending challenges attack the rule from an administrative law angle, arguing the FTC lacks the authority to promulgate the rule or that the promulgation

[81] *See* Press Release, Fed. Trade Comm'n, FTC Announces Rule Banning Noncompetes (Apr. 23, 2024) https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes [https://perma.cc/R8CK-GBQM]. *See also* Non-Compete Clause Rule, 89 Fed. Reg. 38342 (proposed Jan.19, 2023) (codified at 16 C.F.R. pt. 910).

[82] Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38358 (proposed Jan.19, 2023) (codified at 16 C.F.R. pt. 910).

[83] *See* 15 U.S.C. § 46(g); *see also* Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, 75 ADMIN. L. REV. 277, 278 (2023).

[84] Ryan, LLC v. FTC, Civil Action No. 3:24-CV-00986-E, 2024 U.S. Dist. LEXIS 148488 (N.D. Tex. Aug. 20, 2024).

[85] Notice of Appeal, Ryan, LLC v. FTC, Civil Action No. 3:24-CV-00986-E, 2024 U.S. Dist. LEXIS 148488 (N.D. Tex. Aug. 20, 2024) (appeal filed Oct. 18, 2024).

[86] *See* WHITE & CASE, *White & Case Global Non-Compete Resource Center* (last visited Feb. 11, 2025) https://www.whitecase.com/insight-tool/white-case-global-non-compete-resource-center-ncrc.

failed to comply with the Administrative Procedure Act. Regardless of if the FTC has the authority to promulgate such a rule, the question of whether the rule comports with the history and logic of antitrust law remains.

In 2021, President Biden signed Executive Order 14036 that bemoaned "[p]owerful companies requir[ing] workers to sign non-compete agreements that restrict their ability to change jobs."[87] Biden noted that consolidation among corporate employers may impede the ability of workers "to bargain for higher wages and better work conditions." [88] To combat this trend, the order endorsed a "whole-of government" effort to "address overconcentration, monopolization, and unfair competition in the American economy."[89]

New York State Senate Bill 2023-S3100A, introduced in January 2023 and passed in June 2023, would have also made non-compete clauses and no-poach agreements illegal.[90] In December 2023, Governor Hochul vetoed the bill, following an extensive period of commentary from the public.[91] If it had become law, the bill would have authorized covered individuals to bring a civil action against any employer who violated it. In February 2025, Senator Sean Ryan introduced a substantially similar bill that excepted highly compensated individuals in much the same way as the FTC's 2024 non-compete rule.[92] While no-poach agreements likely fall within

[87] Promoting Competition in the American Economy, 86 Fed. Reg. 36987 (July 9, 2021).

[88] *Id.*

[89] *Id.* at § 2(g).

[90] S.B. 3100-A, 2022-3 Leg. Session (N.Y. 2023).

[91] *See* Jeremy A. Cohen & James S. Yu, *Gov. Hochul Vetoes Legislative Ban on Non-Competes in New York… For Now,* LAW.COM (Dec. 27, 2023) https://www.law.com/newyorklawjournal/2023/12/27/new-york-waits-to-see-if-non-compete-ban-will-be-enacted-by-year-end/ [https://perma.cc/RDQ8-X8XZ].

[92] *See* Leni D. Battaglia et al., *New York State Senate Introduces Bill that Would Ban Non-Compete Agreements,* MORGAN LEWIS (Feb. 27, 2025) https://www.morganlewis.com/pubs/2025/02/new-york-state-senate-introduces-bill-that-would-ban-non-compete-agreements#. *Compare* Non-

the ambit of Section 340 of the Donnelly Act (New York's version of the Sherman Act), Bills 2023-S3100A and 2025-S4641A have sent a clear message to employers to tread lightly.

State attorneys general have targeted no-poach and non-solicit agreements with similar vigor. In 2019, Dunkin' Donuts, Arby's, Five Guys, and Little Caesars settled with fourteen state attorneys general, agreeing to stop including no-poach provisions their franchise agreements and to stop enforcing the no-poach provisions of franchise agreements that were already in place.[93] In 2023, The New York attorney general entered into assurances of discontinuance with seven title insurance companies over allegations of illegal no-poach agreements, securing $13.75 million total in fines.[94] As antitrust regulators attack no-poach agreements more aggressively, the standard by which they ought to be evaluated becomes more important both to those regulators and to defendants.

While some enforcers have enjoyed success challenging labor restrictions civilly, the DOJ's performance during criminal trials has been less than stellar. Since the agency began filing criminal charges against wage-fixing and no-poach agreements in 2020, the DOJ has failed to secure a

Compete Clause Rule, 89 Fed. Reg. 38342 (proposed Jan.19, 2023) (codified at 16 C.F.R. pt. 910) with S.B. 4641-A, 2025 Leg. Session (N.Y. 2025).

[93] Press Release, OFF. OF THE ATT'Y GEN. FOR D.C., AG Racine Announces Four Fast Food Chains to End Use of No-Poach Agreements (Mar. 13, 2019), https://oag.dc.gov/release/ag-racine-announces-four-fast-food-chains-end-use [https://perma.cc/5UT7-4BJ2].

[94] Emily Enfinger, *Title Insurance Co. To Pay $4.5M Over No-Poach Agreements,* LAW360 (Oct. 27, 2023), https://www.law360.com/insurance-authority/articles/1737793/title-insurance-co-to-pay-4-5m-over-no-poach-agreements [https://perma.cc/JY86-S3QR]. *See also* Press Release, Off. of the N.Y. State Att'y Gen., Attorney General James Secures $4.5 Million from Title Insurance Company for Harmful Labor Practices (Oct. 27, 2023) https://ag.ny.gov/press-release/2023/attorney-general-james-secures-45-million-title-insurance-company-harmful-labor [https://perma.cc/BTN6-Z788].

single jury conviction.[95] In fact, in April 2023, Judge Victor Bolden of the District of Connecticut acquitted six aerospace and staffing company bosses of charges to fix wages and restrict recruitment under Rule 29 of the Federal Rules of Criminal Procedure.[96] Judge Bolden pushed back on the government's per se theory, imposing a higher bar on what constitutes per se conduct.[97] That acquittal was a major setback for the DOJ's plans to prosecute labor restrictions criminally, and as of November 2023, the DOJ has moved to drop its last remaining no-poach criminal case, perhaps signaling a détente in the no-poach realm.[98]

The concerted effort from antitrust enforcers to go after no-poach agreements with more vigor has been less successful than expected. Regardless, neither the DOJ nor the FTC has departed from its position that naked no-poach agreements are per se illegal. The question of which standard applies becomes more complicated, however, when considering no-poach agreements that may be ancillary to a legitimate business venture, that is no-poach agreements that are not naked.[99]

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[95] Bryan Koenig, *DOJ Abandons Last Remaining No-Poach Prosecution,* LAW360 (Nov. 14, 2023) https://www.law360.com/articles/1766482/doj-abandons-last-remaining-no-poach-prosecution [https://perma.cc/63GR-9Y7X].

[96] *See* Bryan Koenig & Nadia Dreid, *DOJ's Latest, Biggest No-Poach Trial Thrown Out,* LAW360 (Apr. 28, 2023) https://www.law360.com/articles/1602209/ [https://perma.cc/74HZ-LQ6C]. *See* Fed. R. Crim. P. 29(c)(1) (allowing a defendant to seek a judgment of acquittal after the government has closed its case).

[97] *See* Ruling and Order on Defendants' Motions for Judgment of Acquittal at 10**,** United States v. Patel, No. 3:21-cr-220-VAB (D. Conn. Apr. 28, 2023), Dkt. No. 599 ("Defendants also argue that 'even if the [G]overnment had presented evidence sufficient for the jury to find that Defendants entered into a market allocation agreement . . . , it still would not be entitled to present its case to the jury on a *per se* theory of liability without proving that the alleged agreement was in fact a naked, non-ancillary one.' The Court agrees. As a matter of law, this case does not involve a market allocation under the *per se* rule." (internal citation omitted).

[98] *See* Koenig, *supra* note 95.

[99] Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 703 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057, 218 L. Ed. 2d 241 (2024) [hereinafter *Deslandes (2023)*] ("Consider a partnership to practice law. The partners devote their time to the law firm and pool their revenues; that's a horizontal agreement. The partners also promise not to compete with the law firm by taking their

b. Deslandes: the No-Poach Problem

No-poach agreements pose a unique problem to antitrust law. At first blush, they seem to be the prime example of ancillary restraints necessary to achieve the franchise contract's lawful, legitimate purpose because they are embedded in output-enhancing contracts. But two critical questions arise. First, when asking whether the challenged provision increases output, should courts consider only increases in the labor market, increases in the product market, or both? Second, to what extent is a no-poach agreement necessary to achieving the contract's purpose, and is the agreement properly tailored for that purpose?

Against a backdrop of increased antitrust scrutiny by federal, state, and private plaintiffs, Judge Easterbrook of the Seventh Circuit addressed these questions in his 2023 *Deslandes v. McDonald's* opinion. This section examines how those issues arose in the trial court and how, in his opinion, Easterbrook departed from the rule that he previously announced in *Polk Bros*. Of particular importance to reconciling these analyses is the reliance of the *Deslandes* district court opinions on *Polk Bros*. As such, this section examines how and why Easterbrook's rulings in *Polk Bros.* and *Deslandes* conflict.

Before Easterbrook's Seventh Circuit opinion, the *Deslandes* case received three pivotal opinions from Judge Alonso in 2018, 2021, and 2022.[100] In each of the district court

own clients. That agreement is lawful because the promise to devote all legal time to the firm's business helps each law firm compete against its rivals; in antitrust jargon, the no-compete pledge is ancillary to the venture in the sense that it makes the partnership more effective when competing in the market for legal services.").

[100] Deslandes v. McDonald's USA, LLC, No. 17 C 4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018) [hereinafter *Deslandes (2018)*]; DeSlandes v. McDonald's USA, LLC, No. 17 C 4857, 2021 WL 3187668 (N.D. Ill. July 28, 2021) [hereinafter *Deslandes (2021)*]; Deslandes v. McDonald's USA, LLC, No. 17 C 4857, 2022 WL 2316187 (N.D. Ill. June 28, 2022) [hereinafter *Deslandes (2022)*].

opinions, Judge Alonso determined that the facts could not support the plaintiff's claim.

The fact pattern in *Deslandes* is fairly straightforward. Leinani Deslandes started working as an entry-level crew member at a McDonald's franchise location in Florida, and she quickly worked her way up to a management position.[101] Deslandes was scheduled to begin training at Hamburger University to become a General Manager, but her supervisors canceled her training upon learning she was pregnant.[102] Seeking a higher wage and a change in supervision, Deslandes applied for a position at a different McDonald's franchise but was stopped by a no-hire agreement that "forb[ade] the competing McDonald's restaurant to hire both current employees of other McDonald's restaurants and anyone who had worked for a competing McDonald's restaurant in the last six months."[103] Deslandes' original employer refused to release her to work at the other McDonald's location, so Deslandes continued to work at the original location until she took a lower-paying position at a Hobby Lobby store.[104]

The agreement that thwarted Deslandes' attempts to seek employment at a different location was part of the standard franchise agreement by which all McDonald's franchisees had to abide.[105] The language of the no-poach provision stipulated the following:

> Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph [] shall not be violated if such person has left the employ of any of

[101] *See Deslandes (2018)* at 1.

[102] *Id.* at 3. Notably, Deslandes did not assert a claim for discrimination against Bam-B, the franchisor in question. Whether she would be successful on such a claim is not at issue here.

[103] *Deslandes (2018)* at 1.

[104] *Id.* at 3.

[105] *Id.* at 2.

> the foregoing parties for a period in excess of six (6) months.[106]

Deslandes originally pled her case under the per se standard, alleging the no-poach provision in McDonald's standard franchise agreement amounted to a horizontal agreement in restraint of trade.[107] Here, the 2018 court partially agreed. While the agreement had "vertical elements" because it was "spearheaded by the entity at the top of the chain," the agreement restrained competition between franchisees who compete horizontally against each other for employees.[108] As a horizontal agreement, the no-poach provision might have been per se illegal in the district court's view.

The analysis, however, did not end there. Relying on *Polk Bros.*, which was decided by Judge Easterbrook in 1985, the 2018 court held that the no-poach provision could not be illegal per se because it was ancillary to an output-enhancing contract.[109] Judge Alonso noted that the supposedly procompetitive agreement produced benefits in the product market in the form of increased output: "Each time McDonald's entered a franchise agreement, it increased output of burgers and fries."[110] Similarly, Judge Alonso also highlighted that the no-poach clause enhanced output in the labor market by increasing demand: "When new outlets open, the outlets must be staffed. Thus, new restaurants also increase output in the labor market (i.e., demand for labor)."[111] That the no-poach clause had pro-competitive benefits to both the product market and the labor market was crucial to Judge Alonso's 2021 opinion.

Recognizing both that Deslandes' claim could not be analyzed as a *per se* violation and that she had failed to allege

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[106] *Deslandes (2022)* at 1.

[107] *Deslandes (2018)* at 6.

[108] *Id.*

[109] *Id.* at 7 ("Because the restraint alleged in plaintiff's complaint is ancillary to an agreement with a procompetitive effect, the restraint alleged in plaintiff's complaint cannot be deemed unlawful *per se*.").

[110] *Deslandes (2018)* at 7.

[111] *Deslandes (2021)* at 9.

sufficient facts to support a claim under the rule of reason, the district court in 2018 invited Deslandes to amend her complaint to include a claim under the rule of reason. She refused. Instead, Deslandes undertook an ambitious bid for class certification and continued arguing her claim ought to enjoy the quick-look standard.[112] In his 2021 opinion, Judge Alonso reiterated that the rule of reason was the appropriate standard for Deslandes's claims.[113] Following *Alston*, Judge Alonso agreed that "quick-look condemnations should be rare"[114] and that Deslandes's allegations fell into "'the great in-between' of restraints that require rule-of-reason analysis."[115] The defendant's bid for rule of reason treatment was further bolstered by expert testimony as to the purported pro-competitive effects of no-poach clauses in the franchise context.[116]

Now firmly within the territory of the rule of reason, Deslandes's claims lacked sufficient support. She failed "to identify a relevant market, beyond arguing that "the 'rough contours' are the service market for McDonald's restaurant workers."[117] At the same time, Deslandes sought to certify a nationwide class of McDonald's workers.[118] Again, however, her claims lacked necessary facts, such that Judge Alonso could never rule in her favor. She simply failed to "put forth evidence that [McDonald's company-owned restaurants] compete with franchisees in every part of the United States."[119] In light of the thin support for Deslandes's class, the 2021 court concluded that the evidence more clearly

[112] *See Deslandes (2021)* at 4–5.

[113] *Id.* at 7.

[114] *Id. See also* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S.Ct. 2141, 2156 (2021) (citing Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886–87 (2007)).

[115] *Deslandes (2021)* at 7.

[116] *See id.* at 8–10.

[117] *Id.* at 12.

[118] *Id.* at 10.

[119] *Id.* at 10.

showed class members sold their labor in local, fragmented markets, not one unified national market.[120]

Deslandes was no luckier in the 2022 opinion, which reaffirmed that the per se standard was inappropriate for Deslandes's claim.[121] Relying on *NCAA v. Alston*, which was decided in June 2021, the 2022 court also found Deslandes's arguments for a quick-look standard unconvincing. Quick-look is appropriate "*only* for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in *the great in-between*—a quick look is sufficient for approval or condemnation."[122] Again, relying on *Polk Bros.*, which had been settled law for nearly four decades, the court found the no-poach provision in the McDonald's franchise agreements was ancillary and therefore subject to the rule of reason because it "may contribute to the success of a cooperative venture that promises greater productivity and output."[123]

When Easterbrook addressed Deslandes's claims in 2023, however, he departed both from the three prior district court opinions and from his own precedent in *Polk Bros.* Easterbrook addressed Deslandes's per se theory of the case as follows: "[T]he district judge jettisoned the *per se* rule too early. The complaint alleges a horizontal restraint, and market power is not essential to antitrust claims involving naked agreements among competitors."[124] Even though the defendant in *Deslandes* asserted an ancillary restraints defense—which under the rule in *Polk Bros.* would have meant Deslandes's claim should be evaluated under the rule of reason—Easterbrook opined that a per se standard could be

[120] *Id.* at 12 ("The evidence put forth at the class certification stage bears out the intuition that the proposed class members sell their labor in local geographic markets, generally within easy commuting distance.").

[121] *Deslandes (2022)* at 5 ("The restraint plaintiffs allege must be judged under the rule of reason.").

[122] *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S.Ct. 2141, 2155 (2021) (emphasis added).

[123] Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 188–89 (7th Cir. 1985).

[124] *Deslandes (2023)* at 703.

applicable.[125] While the lower courts "thought that the anti-poach clause [wa]s justified as an ancillary restraint,"[126] Easterbrook was less convinced. Opting for a different read of *Alston*, Easterbrook noted that benefits to consumers (in the product market) cannot be used to justify detriments to workers (in the labor market).[127] The no-poach agreement led to an increase in burgers and fries,[128] but Easterbrook was suspicious that the no-poach clause created a pro-competitive benefit for workers.

The scope of the no-poach agreement was crucial to Easterbrook's decision.[129] He saw the no-poach clause in Deslandes's contract as overbroad and not narrowly tailored to the purpose of amortizing training costs. In his view, the no-poach clause could not be classified as ancillary. Easterbrook's discussion at the end of the opinion suggests that he might have condoned a narrower no-poach agreement.[130] But this argument contradicts the proposition that per se treatment is appropriate for no-poach agreements.[131] He suggests that a no-poach clause with a narrower scope or more limited duration could be acceptable.[132] But those restraints—even with a narrower

[125] *See supra* Section I.b.

[126] *Id.*

[127] *Id.*

[128] *Deslandes (2018)* at 7; *Deslandes (2023)* at 703.

[129] *Deslandes (2023)* at 704.

[130] *Id.*

[131] *See id.* ("Common training and job classifications could in principle justify restraints on poaching.").

[132] *See id.* ("So what was the no-poach clause doing? Was it protecting franchises' investments in training, or was it allowing them to appropriate the value of workers' own investments? That question can't be answered by observing that any given franchise contract, viewed by itself, expands the output of food. Why did the clause have a national scope, preventing a restaurant in North Dakota from hiring a worker in North Carolina, when the market for restaurant jobs is local? Why did the restriction last as long as the employment (plus six months), rather than be linked to any estimate of the time a franchise would need to recover its investments in training? If the answer to some of these questions depends (as McDonald's asserts) on the fact that the system as a whole advertises for workers and wants to

scope and limited duration – would still be captured as antitrust violations if courts adopt a per se rule for no-poach agreements.

The district court opinions thought the no-poach clause at issue fell within the rule of *Polk Bros*.[133] But Easterbrook saw things differently.[134] Easterbook honed in on the language from the 2018 opinion that noted that "[e]ach time McDonald's entered a franchise agreement, it increased output of burgers and fries."[135] That quotation, taken out of its context, obscures the benefits that may accrue to the labor market via implementation of a no-poach agreement.[136] If the no-poach agreement only increased output in the product market, then Easterbrook is correct. However, if the clause produced pro-competitive benefits for the employee,[137] the no-poach agreement could be justified as an ancillary restraint under current doctrine.[138] He correctly notes that *Alston* establishes that antitrust law is concerned with the market for inputs as well as outputs.[139] And because the "burger and fries" quotation from Judge Alonso recognized only the benefits to the market for outputs, Easterbrook held that the agreement was not ancillary to an agreement increasing productivity in the market for inputs.

However, perhaps Easterbrook focused too narrowly on the "burgers and fries" remark. In the 2021 opinion, Judge Alonso wrote that "[w]hen new outlets open, the outlets must be staffed. Thus, new restaurants also increase output in the labor market (i.e., demand for labor)."[140] Alonso saw procompetitive effects on *both* sides of the market. The no-poach clause increased output in the product market in the

prevent some outlets from free riding on the contributions of others, how do the terms of the no-poach clause reflect this objective?").

[133] *See Deslandes (2022)* at 5.

[134] *See Deslandes (2023)* at 703.

[135] *Deslandes (2018)* at 7.

[136] *See infra* Section III.a.

[137] *See infra* Section III.b.

[138] *See supra* Section I.b.

[139] *Deslandes (2023)* at 703.

[140] *Deslandes (2021)* at 9.

form of more burgers and fries, but it also increased output in the labor market by increasing demand for labor. The existence of procompetitive effects on both sides scuttles Easterbrook's analysis and strikes at the core of the view held by the DOJ and other antitrust enforcers that no-poach agreements should be per se illegal. The agencies have relied on *United States v. Philadelphia National Bank*, discussed extensively in *NCAA v. Alston*, that an anticompetitive restraint will not be saved "on some ultimate reckoning of social or economic debits and credits."[141] The anticompetitive effects of a restraint or merger must be weighed against the procompetitive effects that occur in the same market. For example, if the no-poach clause only increased product output without also increasing output in the labor market, the agencies would likely argue that kind of cross-market effect should not be taken into account. But this is not the situation in *Deslandes*. In *Deslandes*, the defendants could point to procompetitive effects on both sides of the market—increased output of burgers and fries as well as increased labor demand. Easterbrook's remarks on the procompetitive effects of the no-poach clause are therefore incomplete. In light of the procompetitive effects that accrued to both the labor and product markets in *Deslandes*, the no-poach agreement could have been evaluated as an ancillary restraint.

In *Polk Bros.,* Easterbrook simply wrote that "[a] restraint is ancillary when it may contribute to the success of a cooperative venture that promises greater productivity and output."[142] But in *Deslandes,* Easterbrook looks at no-poach agreements with more granularity, writing that a no-poach clause that appears in an otherwise output-enhancing contract might actually have nothing to do with the output.[143] In doing so, Easterbrook refused to consider the pro-competitive benefits that accrue to the labor market as a result of a no-poach agreement, and he suggested the per se

[141] *See* United States v. Phila. Nat. Bank, 374 U.S. 321, 371 (1963).

[142] Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 189 (7th Cir. 1985).

[143] *Deslandes (2023)* at 704.

rule could be expanded to cover restraints that would be ancillary under the rule he announced in *Polk Bros*.

III. IN DEFENSE OF THE RULE OF REASON FOR NO-POACH AGREEMENTS

a. Labor Markets vs. Product Markets

Despite arguments from antitrust enforcers and plaintiffs, there are salient differences between labor markets and product markets that cast doubt on the assertion that a per se rule should be applied to the former. The DOJ and FTC have previously embraced the opinions that "in important respects, monopsony is the mirror image of monopoly" [144] and that no-poach agreements "eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers."[145] But this simplified description is not entirely accurate. Typically, monopolies arise in the context of a product market, and monopsonies arise in labor markets. A market with only one seller (a monopolist) is dangerous to consumers because the singular firm will by definition have market power and can raise prices above the competitive level without facing competition from other market participants.[146] Monopolies therefore harm the welfare of the consumer. A labor market with only one buyer (a monopsonist) is dangerous to workers because the monopsonist can set workers' wages lower than the competitive level when workers have no other options. The lack of options—for the consumer (i.e., the worker)— are central to the problems that monopolies and monopsonies pose. Without meaningful substitutes, consumers and workers must pay the

[144] OECD, ROUNDTABLE ON MONOPSONY AND BUYER POWER, NOTE BY THE UNITED STATES 2 (2008).

[145] *See* DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 4 (2016).

[146] *See supra* Section I.a.

monopolist's price and accept the monopsonist's wage, respectively.[147]

Agencies have adopted the view that structurally a labor market is a mirror image of a product market because of these core similarities between the structure of monopolies/monopsonies and the harm they pose. In some cases, the DOJ has explicitly taken the position that the antitrust laws apply to labor markets in exactly the same way they apply to product markets.[148] Antitrust labor plaintiffs have enjoyed the per se standard for allegations of wage-fixing, just as a plaintiff in a product market case would enjoy the same deferential standard for allegations of price-fixing.[149] But *Deslandes* specifically addressed whether geographical market allocation should get the same analogous treatment.

The Sherman Act undoubtedly applies to the labor market.[150] However, it is not immediately apparent that the per se standard should apply in exactly the same way in the different types of markets. In fact, because of salient differences between labor and product markets, there is good reason to believe the same standard should not apply.

First, the geographic scope of labor and product markets are often much different. "[L]abor markets are almost always local; product markets are frequently national or international."[151] The idiosyncratic nature of geographic labor

[147] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956).

[148] *See* United States' Opposition to Defendants' Motion to Dismiss at 9, United States v. Surgical Care Affiliates, LLC, and Scai Holdings, LLC, No.3:21-cr-00011-L (N.D. Tex. April 30, 2021), ECF No. 44.; *see also* Ruling and Order on Motions at 40, United States v. Patel, No. 3:21-cr-220-VAB (D. Conn. Dec. 2, 2022), Dkt. No. 257. ("Although no poach agreements have rarely been prosecuted as a method of allocating the market, the fact that Defendants allegedly allocated the market in a novel way does not create a Due Process concern.").

[149] Fleischman v. Albany Med. Ctr., 728 F. Supp. 2d 130, 162 (N.D.N.Y. 2010) (denying motion to dismiss a per se wage-fixing claim).

[150] Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1362–63 (2020).

[151] Eric A. Posner, *Antitrust and Labor Markets: A Reply to Richard Epstein*, 15 N.Y.U. J.L. & LIBERTY 389, 400 (2022).

markets creates higher switching costs than would exist in a product market.[152] For example, if an employee making $10.25 an hour sees a job posting for a similar position paying $10.30 in the next state, the employee still faces significant barriers that may prevent them from taking the higher paying job. For one, the employee needs to find new housing, which entails paying broker fees, movers' fees, and may require the employee to sell their home entirely. Additionally, the employee might want to stay in their same position because it allows them to remain closer to their family and friends. These switching costs make the labor market more local and idiosyncratic than the product market. In contrast, if a consumer browsing Amazon, for example, can buy a product from seller A for $25 and from seller B for $24, the choice to buy from seller B is obvious, all else being equal. The switching costs present in the labor market more often than not do not exist in the product market. A consumer buying a product typically has to consider fewer factors than a worker choosing which job to take. The facts of *Deslandes* reflect this locality and idiosyncrasy.[153] After Deslandes's employer, McDonald's, refused to release her from her agreement, Deslandes took an entry-level job at Hobby Lobby.[154] Instead of seeking a job in a different geographical area for which her skills from working at McDonald's would have transferred—e.g., another food service position—Deslandes chose a more local position that was a less perfect fit. This locality also explains Easterbrook's suspicion of the no-poach clause's national, rather than local, scope.[155]

[152] DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.10 (2023) ("For example, labor markets often exhibit high switching costs and search frictions due to the process of finding, applying, interviewing for, and acclimating to a new job. Switching costs can also arise from investments specific to a type of job or a particular geographic location. Moreover, the individual needs of workers may limit the geographical and work scope of the jobs that are competitive substitutes.").

[153] *See supra* note 120 and accompanying text (discussing *Deslandes* 2021 holding that class members sold their labor in local, fragmented markets).

[154] *Deslandes (2018)* at 3.

[155] *Deslandes (2023)* at 704.

Second, the labor market involves the creation of relationships between employer and employee that do not exist in the product market between seller and buyer. McCrary and Richetti note that many economically valuable benefits flow from a productive and successful employer/employee relationship.[156] However, the productivity and success of that relationship depends on "investments from both sides in training, work experience, education and other types of skills."[157] To put it simply, an employee gaining experience is a win-win for both parties; the employee gains skills that they can leverage into a higher wage, and the employer benefits because it gains a more productive employee—one whose output will more greatly exceed their cost. Importantly, these benefits accrue over a prolonged period of time. For both parties to benefit, the employee must remain in their current role at least as long as is necessary to complete and implement their training. And the employer must employ the employee long enough to benefit from their increased expertise. This longer time horizon is absent in the typical product market. There, the buyer exchanges an amount of money for a product from the seller. The benefits to both are realized at the moment of transaction (the buyer acquires a product they value more than the money they have; the seller acquires an amount of money greater than the value of the product). The DOJ itself recognizes that "workers may seek not only a paycheck but also work that they value in a workplace that matches their own preferences, as different workers may value the same aspects of a job differently."[158]

Moreover, firms can use training and the reciprocal investment it entails to "expand the pool of available talent."[159] As a firm invests in training its employees it creates benefits external to the firm itself. A firm's goal in implementing a no-poach agreement, then, is to internalize

[156] McCrary & Richetti, *supra* note 11, at 2–3.

[157] *Id.* at 3.

[158] DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.10 (2023).

[159] Richard A. Epstein, *The Application of Antitrust Law to Labor Markets—Then and Now*, 15 N.Y.U. J.L. & LIBERTY 709, 742 (2021).

these benefits, to prevent free-riding by firms that do not invest resources into expanding the talent pool.

Third, the dynamics of antitrust enforcement differ greatly between product and labor markets. Much fewer labor market cases get adjudicated each year than product market cases.[160] This difference in enforcement arises for a few reasons. Most obviously, antitrust litigation is quite expensive, so "[o]nly highly compensated employees can afford lawyers to contest non-competes in court."[161] Unless an antitrust labor plaintiff can certify a class, they often lack the means and incentives to conduct a full-scale antitrust trial. Such classes, even if they can be certified, end up being small and "involving a geographically limited group, often just a town or city, and hence a lower level of damages."[162]

Labor market litigants face another obstacle in the form of reduced information in comparison to a product market. Consumer prices are public and frequently receive public scrutiny, whereas employers tend to keep aggregate wage information confidential.[163] Without readily available information regarding wages in a labor market, antitrust lawyers may be reluctant to launch a class action.[164] These obstacles have created what Eric Posner calls a "litigation gap" between product market and labor market cases.[165] This gap has created a dearth of labor market case law,[166] so on the whole, courts in the U.S. lack the kind of experience with labor market cases necessary to warrant application of the per se rule.[167] Perhaps a per se rule for no-poach agreements would incentivize more plaintiffs to bring more suits against employers, thereby developing the body of case law on the

[160] Marinescu & Posner, *supra* note 150, at 1365 ("Courts rarely adjudicate section 1 labor market cases. A Westlaw search suggests about six cases per year, about a tenth of the results for product market cases.").

[161] Posner, *supra* note 151, at 400.

[162] Marinescu & Posner, *supra* note 150, at 1380.

[163] *Id.* at 1381.

[164] *Id.*

[165] *Id.* at 1375; *see generally id.* at 1362–82.

[166] *Id.* at 1377.

[167] *See supra* Section I.a.

issue. But a *per se* rule's facilitation of litigation is not a coherent argument for its application—it puts the cart before the horse. When the procompetitive and anticompetitive effects of a type of restraint are difficult and complicated to determine, courts must have a level of experience with those restraints before applying a *per se* rule. To say we ought to apply a *per se* rule in order for courts to become experienced gets the order of operations backwards.

These crucial differences between labor and product markets cast doubt on Easterbrook's implication that the per se rule could be expanded in labor market cases involving a purportedly ancillary restraint. As such, courts should reject the agencies' framing that labor markets mirror product markets.

b. The Purpose of the Rule of Reason

The view adopted by the DOJ and FTC—that a per se rule should apply to labor markets in the same way that it applies to product markets—is flawed for another reason. It goes against the underlying purpose of the rule of reason. A per se rule is appropriate (1) when the restraint in question is plainly anticompetitive or (2) when a court has extensive experience scrutinizing a restraint and has repeatedly determined restraints of that type to be anticompetitive.[168] Neither is true of the restraint at issue in *Deslandes*, and Easterbrook's suggestion that a per se rule may still apply despite McDonald's assertion of an ancillary restraints defense forbodes a pernicious trend in antitrust jurisprudence. Applying a per se rule when the restraint is not plainly anticompetitive and when the court lacks sufficient experience analyzing the restraint goes against decades of U.S. antitrust precedent and the purpose of antitrust law. Deciding which standard to apply is not a formalistic process,[169] nor is appropriate when the competitive forces at play in a market are as idiosyncratic as they are in labor

[168] *See supra* Section I.a.

[169] *See* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977).

markets.[170] Thus, antitrust scholars and practitioners should resist application of the per se rule to labor mobility restrictions.

Even putting aside the structural differences between labor and product markets, antitrust practitioners should approach expansion of the per se rule with skepticism because such a rule is appropriate "only after [a court's] considerable experience with certain business relationships."[171] Per se condemnation must be based on "confidence that a whole category of restraints is likely to be anticompetitive [such] that there is no point in searching for a potentially beneficial instance."[172] Fundamentally, courts lack the requisite experience with any particular labor market that is necessary to warrant per se treatment.

The Supreme Court has made clear that the rule of reason is the default mode of antitrust analysis.[173] The precedent also makes clear that per se treatment is the rare exception, and the Supreme Court has "expressed reluctance to adopt *per se* rules . . . 'where the economic impact of certain practices is not immediately obvious.'"[174] When a court lacks significant experience with a type of restraint or when the economic impact is not obvious, courts apply the rule of reason, not a per se rule. This seems to imply that sometime in the future U.S. courts will have accumulated enough experience with no-poach agreements and labor market issues generally that a per se rule would be warranted. Perhaps this is true. But

[170] *See supra* Section III.a.

[171] *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9 (1979) (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 607–08 (1972)).

[172] Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 189 (7th Cir. 1985) (quoting *Cont'l T. V., Inc.*, 433 U.S. at 47–51.) *See also* White Motor Co. v. United States, 372 U.S. 253, 263 (1963) ("We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' and therefore should be classified as per se violations of the Sherman Act.") (internal citations omitted).

[173] *See* Texaco Inc. v. Dagher, 547 U.S. 1, 5 (U.S., 2006).

[174] State Oil Co. v. Khan, 522 U.S. 3, 10 (U.S., 1997).

again, determining whether a per se rule or rule of reason standard applies is not a formalistic process, so one cannot determine what amount of experience is necessary.[175]

Merely insisting that the rules applicable to product markets should be exactly mirrored when applied to labor markets invokes a kind of logic that the Supreme Court has disavowed in previous cases defining the nature of the rule of reason.[176] The Court resisted such formalistic reasoning in cases like *California Dental Association v. FTC*, and lower courts have repeatedly emphasized the need for holistic consideration.[177] Arguing that horizontal restraints in a labor market are perfectly analogous to those in a product market and are thus subject to the same per se treatment falls into the same formalistic trap. Application of the per se rule must be based on obvious or observed economic impact, so formalistic application of the per se rule to labor markets because of dynamics observed in product markets is not warranted under the law.

The possible procompetitive benefits that exist for no-poach clauses are absent from the product market. Price-fixing, bid-rigging, and geographical market allocation have been held to be per se illegal because they have no procompetitive benefit.[178] As these are restraints between horizontal competitors, U.S. courts have categorized them as per se violations consistently throughout the history of U.S. antitrust law. No poach agreements, in contrast, both have arguable procompetitive benefits and are not purely horizontal agreements.

Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive—that is, when no procompetitive benefit can possibly exist.[179] No-poach agreements, however, carry with them the promise of procompetitive benefits for both parties. Noncompete agreements that have a proper purpose and scope incentivize

[175] *See supra* Section I.a.

[176] *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999).

[177] *See* Apex Oil Co. v. DiMauro, 713 F.Supp. 587, 596 (S.D.N.Y., 1989).

[178] *See supra* Section I.a.

[179] Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49–50 (1977).

reciprocal investment between employers and employees that would not have occurred but for the noncompete clause.[180]

The following two hypothetical scenarios illustrate how procompetitive effects can arise from behavior in a labor market that might otherwise receive per se treatment if it occurred in a product market. Firm A offers broad training to its employees that those employees could use in later jobs, but Firm B does not. Firm B does not incur the costs of training, so it can more easily afford to pay employees a higher wage. Employees could take a position at Firm A, receive training, and then switch to Firm B. Similarly, suppose Firm A offers broad training to an employee, but that employee does not plan to stay at Firm A for very long. In this scenario, Firm A invests in the productivity of the employee because it expects the employees increased productivity to eventually outweigh the costs of training. However, if the employee leaves Firm A before this cost is fully amortized, Firm A's investment never pays off. In both scenarios, Firm A is disincentivized from providing training. Though offering broad training would both develop the talent pool in the labor market and benefit Firm A at the same time, without a properly tailored no-poach clause, that broad training would disappear. What these scenarios show is that labor mobility restrictions *can* have procompetitive for both employee and employer. The employee benefits in the form of training that would otherwise not be feasible to be provided, and the employer benefits by creating a more skilled labor force.

Easterbrook recognized that "[c]ommon training and job classifications could in principle justify restraints on poaching,"[181] but he failed to recognize that a per se rule is inappropriate for evaluating restraints when the procompetitive benefits can outweigh the harm.[182] Of course, as Easterbrook notes, a restraint to ensure these

[180] *See* McCrary & Richetti, *supra* note 11, at 5.

[181] *Deslandes (2023)* at 704.

[182] *See Cont'l T. V., Inc.*, 433 U.S. at 49–50 ("*Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive.").

procompetitive benefits come to fruition could be overbroad.[183] For instance, the no-poach clause could bind the trainees long after the cost of training has been amortized. At that point, the clause would not be necessary to create procompetitive benefits for both parties, failing the second prong of *Addyston Pipe*'s analysis.[184] Similarly, the scope of the no-poach clause could be larger than necessary. If all the employers in a certain geographical area agreed not to hire employees that had worked for each other, that would and should receive higher scrutiny than a restraint seeking to internalize the benefits of their investments in training. These are examples of extreme labor mobility restrictions. Applying a per se rule against no-poach agreements would eliminate these drastic kinds of restraints, but it would also eliminate agreements that create procompetitive benefits that otherwise would not exist. The rule of reason, however, allows a court to weigh the procompetitive benefits against the anticompetitive effects.[185]

Taking into account the history of the per se rule's application,[186] the rule of reason is a more appropriate standard for no-poach agreements between employers and employees; however, refusal to adopt a per se rule does not amount to complete approval for no-poach agreements. On the contrary, a rule of reason approach would allow courts to balance the procompetitive and anticompetitive effects of those agreements. It would permit courts to condemn those agreements that restrain labor mobility too much while allowing those that genuinely do increase output and quality to persist. Easterbrook recognized this possibility in *Deslandes*:

> So what was the no-poach clause doing? Was it protecting franchises' investments in training, or was it allowing them to appropriate the value of workers' own investments? That question can't be answered by observing that any given franchise contract, viewed by

[183] *Deslandes (2023)* at 704–705.

[184] See *supra* notes 59–61 and accompanying text.

[185] *See supra* Section I.a.

[186] *See supra* Section I.a.

> itself, expands the output of food. Why did the clause have a national scope, preventing a restaurant in North Dakota from hiring a worker in North Carolina, when the market for restaurant jobs is local? Why did the restriction last as long as the employment (plus six months), rather than be linked to any estimate of the time a franchise would need to recover its investments in training?[187]

Here, Easterbrook invites the lower court to consider the scope, purpose, and effects of the no-poach agreement—all factors that are included in a rule of reason analysis.[188] If the clause had a shorter duration or if it had a more local scope, Easterbrook suggests that the agreement might be acceptable. A per se rule would eliminate this type of inquiry. Liability under a per se rule attaches once the conduct has been proven; there is no reason under such a rule to inquire into the scope, purpose, and effects.[189] Thus, Easterbrook's implication that a per se rule could be appropriate despite an ancillarity defense is self-defeating. The rule of reason allows the scrutiny necessary to answer the questions he raises.

The entire purpose of the ancillary restraints doctrine is "to point out instances when per se illegality should not attach and to confine the exceptions to their proper scope."[190] Implementing a per se rule in spite of an ancillarity defense from the defendant frustrates that purpose.

IV. CONCLUSION

Deslandes v. McDonald's represents a departure by Judge Easterbrook from the rule he set forth in *Polk Bros.* That rule made clear that ancillary restraints should be evaluated under the rule of reason, provided that the agreement at issue

[187] *Deslandes* (2023) at 704

[188] *See* Bd. of Trade of Chi. v. United States, 246 U.S. 231, 239–40 (1918) (discussing the "nature," "scope," and "effects" of a price-setting rule in a commodity market); *see also* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 13–14, 23 (1979).

[189] *See supra* Section I.a.

[190] Robert H. Bork, *supra* note 55, at 227.

could survive the two-pronged inquiry from *Addyston Pipe*.[191] This framework was workable, clear, and cohesive with the history and purpose of antitrust law that began more than three centuries ago in *Mitchel v. Reynolds*. *Deslandes*, however, eliminated that clarity. Now, litigants in the Seventh Circuit cannot be sure whether their claim will be evaluated under the rule of reason or the much harsher per se rule. This lack of clarity will create significant problems, especially as defendants consider whether they ought to settle their claim before conducting a full-blown trial.

While this lack of clarity may redound to plaintiffs' and antitrust enforcers' benefits, it does so by sacrificing both efficient litigation and decades of antitrust jurisprudence. When litigants cannot know under which standard a claim will be adjudicated, they lack information crucial to deciding whether to settle or continue litigating. Easterbrook's departure from his rule in *Polk Bros*. risks creating additional wealth leakage for antitrust defendants.[192] Without a clear pronouncement as to whether no-poach agreements will be evaluated under a plaintiff-friendly per se rule or the rule of reason, antitrust litigants find themselves in a potentially much costlier situation. Further, the history of U.S. antitrust law clearly establishes that the rule of reason should be the default standard of antitrust adjudication, and courts should apply a per se rule only for restraints that cannot possibly create a procompetitive effect and for those restraints with which a court has extensive experience.[193] No-poach agreements fit neither of these criteria.

[191] Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 189 (7th Cir. 1985) ("Covenants of this type are evaluated under the Rule of Reason as ancillary restraints, and unless they bring a large market share under a single firm's control they are lawful." (citing United States v. Addyston Pipe & Steel Co., 85 F. 271, 280–83 (6th Cir. 1898) (Taft, J.), *aff'd,* 172 U.S. 211 (1899))).

[192] *See* John M. Bizjak & Jeffrey L. Coles, *The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm,* 85 AM. ECON REV. 436 (1995) (discussing the impact of antitrust allegations on firm value and settlement behavior).

[193] *See supra* Section I.a.

Antitrust enforcers have signaled that they will continue to go after no-poach agreements using the per se approach.[194] Agencies like the DOJ and FTC have announced that they will treat restraints in the labor market no differently than supposedly analogous restraints in product markets. This zeal should concern antitrust practitioners and scholars. The rule of reason, rooted in English common law and developed extensively through Supreme Court precedent in the 20th century, is the more appropriate tool to address these issues. Contrary to those enforcers' approach, these restraints that in some cases promise procompetitive benefits to both the product and labor markets exist in the "great in between" for which the careful, fact-specific inquiry of the rule of reason was designed.[195]

Forty years ago, Easterbrook published an article discussing the limits of antitrust law. He would be appointed to the Seventh Circuit the following year, and he would decide *Polk Bros*. during his first year on the bench. In that article, Easterbrook notes that both per se rules and the rule of reason are imperfect tools for achieving the goal of antitrust to "perfect the operation of competitive markets."[196] The treatment of no-poach agreements under antitrust law is marked by the same problems. The rule of reason requires extensive inquiry that might not be feasible in every case, and the per se rule risks being overbroad because it can prohibit behavior that may actually have a procompetitive effect. In Judge Easterbrook's own words, "[a]s time goes by, fewer and fewer things seem appropriate for per se condemnation. We see competitive benefits in practices that once were thought uniformly pernicious."[197] Though it may be sometimes imperfect for labor market cases,[198] the rule of reason is the tool U.S. courts have developed to address complex situations like that in Deslandes where procompetitive effects exist for

[194] *See supra* Section II.a.

[195] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S.Ct. 2141, 2155 (2021).

[196] Frank H. Easterbrook, *supra* note 22, at 1.

[197] *Id.* at 10.

[198] *See supra* Section III.a (discussing the obstacles labor market plaintiffs face).

both the labor and product markets.[199] Further, Seventh Circuit precedent made clear before Deslandes that the ancillary restraints doctrine would afford defendants treatment under the rule of reason precisely because of that complexity.[200] Easterbrook's suggestion in Deslandes that the trial court "jettisoned the per se rule too early"[201] therefore stands in stark opposition to the history of U.S. antitrust law and Easterbrook's own precedent. As such, the other circuit courts should decline to follow Easterbrook's holding in Deslandes that a per se standard can still be applied despite a defendant's assertion of the ancillarity defense. Whatever the problems regarding no-poach agreements under antitrust law may be, courts should agree with Easterbrook's general remark in 1984 that "[t]he per se rule is not a satisfactory response."[202]

[199] *See supra* Section I.a.

[200] *See* Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 189 (7th Cir. 1985).

[201] *Deslandes (2023)* at 703.

[202] Easterbrook, *supra* note 22, at 39.