

# PRESIDENT BIDEN’S EXECUTIVE ORDER ON COMPETITION: AN ANTITRUST ANALYSIS

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*In July 2021, President Biden signed a far-ranging Executive Order directed to promoting competition in the American economy. The Order is not limited to antitrust enforcement but extends over a wide range of situations where more competitive processes or outcomes could be beneficial. Some federal agencies are already responding.*

*This paper examines the Executive Order and considers how it should be implemented. The result could be important shifts in antitrust policy, as well as related policies involving patents, telecommunications, and agriculture.*

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## INTRODUCTION

In July 2021, President Biden signed a far-ranging Executive Order (“EO”) directed to promoting competition in the American economy.<sup>1</sup> Not mentioned by the EO is a closely related action—namely the Federal Trade Commission’s (“FTC”) withdrawal of its 2015 “Statement of Enforcement Principles.”<sup>2</sup> That statement did two things, both of which were regarded as narrowing the FTC’s ability to bring more expansive antitrust claims. First, it observed that the Commission would be guided by what it called the “consumer welfare” principle, without explaining the meaning of that term. Second, it stated that practices evaluated under § 5 of the FTC Act would be evaluated under “a framework similar to the rule of reason.”<sup>3</sup>

The FTC’s withdrawal of its “Statement of Enforcement Principles” is significant because it may open the way for the FTC to do more things along the lines that the EO contemplates. Although the withdrawal has produced some hand wringing even from sources such as the *Washington Post* Editorial Board,<sup>4</sup> repeal of this statement is overall a good thing. First, use of the “consumer welfare” principle has become so fraught with ambiguity that it is useless unless it is given a more precise meaning. For example, it is often used today to justify antitrust conduct that clearly harms consumers.<sup>5</sup> Second, the rule of reason has become a powerful vehicle for antitrust underenforcement, a point that even conservative Justice Gorsuch acknowledged in his recent opinion in *NCAA v. Alston*.<sup>6</sup> Without significant reform in how the courts approach the rule of reason, the FTC is wise not to limit itself in that way.

Third, the *Washington Post* Editorial Board writes as if the Sherman Act applies clear rules while § 5 of the FTC Act permits unspecified overreaching. That is an exaggeration. The language of the two relevant sections of the Sherman Act

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1. Exec. Order No. 14036 on Promoting Competition in the American Economy, 86 Fed. Reg. 36,987 (July 9, 2021).

2. Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (withdrawn), [https://www.ftc.gov/system/files/documents/public\\_statements/735201/150813section5enforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf).

3. *Id.*

4. *Opinion: Don’t Want the FTC to Act on Antitrust? Tell Congress to Get Moving*, WASH. POST (July 11, 2021, 8:00 AM), <https://www.washingtonpost.com/opinions/2021/07/11/dont-want-ftc-act-antitrust-tell-congress-get-moving/> [https://perma.cc/W7GP-EUTM].

5. *See, e.g.,* *FTC v. Actavis, Inc.*, 570 U.S. 136, 160–61 (2013) (Roberts, C.J., dissenting) (stating that goal of antitrust laws is to promote “consumer welfare” but then voting to approve a patent settlement that would have led to enormous price increases in drugs based on doubtful patents); *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2290 (2018) (majority opinion) (adhering to “consumer welfare” principle while validating a policy that caused higher prices in every case where it was applied); Herbert Hovenkamp, *Antitrust Harm and Causation*, 99 WASH. UNIV. L. REV. 787 (2021).

6. *NCAA v. Alston*, 141 S. Ct. 2141, 2160–61 (2021); *see* Herbert Hovenkamp, *A Miser’s Rule of Reason: Student Athlete Compensation and the Alston Antitrust Case*, NYU ANN. SURV. AM. L. (forthcoming 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3879580](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3879580) [https://perma.cc/53B7-3HST].

(“restrain trade” and “monopolize”)<sup>7</sup> are both associated more with practices that reduce output anticompetitively, although they give no detail.<sup>8</sup> The condemnation of “unfair methods of competition” in § 5 of the FTC Act<sup>9</sup> suggests a more tort-like approach that could reach beyond output-reducing content. Neither set of provisions describes proscribed conduct with anything approaching precision. Further, nothing in any of the statutes suggests a consumer welfare principle nor the years of judge-made law that has defined it, including the rule of reason. What § 5 lacks is a long line of antitrust precedents that define its boundaries in a way similar to the extensive caselaw interpreting the equally opaque provisions of the Sherman Act. In fact, important precedents in competition law prior to the issuance of this statement of principles interpreted § 5 as not reaching very far beyond the Sherman Act.<sup>10</sup> A much better case can be made that § 5 jurisprudence has not been pushed far enough.

Fourth, there is a good reason for using § 5 of the FTC Act to reach beyond the Sherman Act: as a standalone provision, § 5 cannot be enforced by private plaintiffs. Much of the overreaching in the antitrust laws has come about in private actions, motivated mainly by the availability of treble damages and attorneys’ fees.<sup>11</sup> As a result, when the FTC wants to use § 5 to reach out it need not worry about debilitating damages actions and—what frequently goes with them—jury trials.

Repeal of the “Statement of Enforcement Principles” does come with one warning, however: it does not turn § 5 into a license to go after private wrongs that do not injure competition. One common criticism of the *Federal Trade Commission v. Brown Shoe* decision, which first applied this expansionist principle, was that Brown Shoe was not doing anything anticompetitive.<sup>12</sup> It was imposing exclusive dealing (“single branding”) on a large number of small retail stores that sold its shoes, effectively turning them into its franchisees. The market was unconcentrated, Brown’s own market share was small, and entry at the retail level was undoubtedly easy.<sup>13</sup> Further, the individual franchise stores were free to terminate their franchise agreements at will, and even under the franchise agreements about 25% of their sales were of products produced by competitors.<sup>14</sup> Today a ruling this broad would very likely wipe out the franchise agreements of many of the larger fast foods chains and the automobile industry. The Court simply did not understand how modern distribution systems work. Rather, the ruling was based on a quaint image of an economy in which small manufacturers produced their products and were done. Retailers simply purchased them and resold them at will.

The danger that the FTC might overreach lies mainly in the high degree of subjectivity that can go into determination of what is “unfair,” as opposed to what

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7. 15 U.S.C. §§ 1, 2.

8. See Hovenkamp, *Antitrust Harm*, *supra* note 5.

9. 15 U.S.C. § 45.

10. *E.g.*, *E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984) (refusing to condemn parallel pricing plus facilitating practices as collusive in the absence of evidence of an agreement).

11. 15 U.S.C. § 15.

12. *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

13. See the Eighth Circuit’s opinion, *Brown Shoe Co. v. Federal Trade Commission*, 339 F.2d 45, 49 (8th Cir. 1964).

14. *Id.* at 50.

restrains trade or monopolizes. Interpreting the two sections of the Sherman Act can be difficult, mainly because both markets and firms are complex. But the general goal is coherent: identify and sanction practices that tend to reduce output (measured by quantity, quality, or innovation) and raise prices beyond what could realistically be made to prevail under competition. The problem with “unfair” methods of competition is that it encompasses a wide range of meanings that have historically been given to anticompetitive, competitively neutral, and sometimes even beneficial behavior. For example, the decades long battle over “fair trade” produced recipes for protecting small business from more efficient competitors,<sup>15</sup> for choosing business over consumers and labor in battles over pricing, or for condemning vertical integration simply because integrated firms could undersell unintegrated rivals.<sup>16</sup>

While the EO has been touted as a “progressive” document,<sup>17</sup> its content falls short of that. It does not suggest that the antitrust enforcement agencies break up any firms, other than becoming more aggressive about mergers. Nor does it contain any general expression of concern about vertical integration as such or advocacy for removal of antitrust immunities. Consistent with antitrust policy generally, it repeatedly expresses concerns about market power or the power to profit by charging high prices, but it never complains about large firm size as such or suggest that low prices are bad because they harm small business.<sup>18</sup> Further, while it discusses market power repeatedly, it does not speak about displacing antitrust’s

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15. See, e.g., Edward D. Cavanagh, *Vertical Price Restraints After Leegin*, 21 LOY. CONSUM. L. REV. 1, 20–21 (2008) (noting the consensus that “fair trade” regimes which encouraged vertical price restraints led to higher prices but did not produce offsetting benefits); see also 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1604 (4th ed. 2018) (collecting sources). On the history, see LAURA PHILLIPS SAWYER, AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE “NEW COMPETITION,” 1890–1940 (2018) and Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1063–64 (1989) (describing small druggists’ concerted campaign to use resale price maintenance to pursue “aggressive cutters,” the term used to describe discounters).

16. A good example is the district court’s opinion in the *Brown Shoe* vertical merger case, which the Supreme Court affirmed. The court condemned the merger precisely because it enabled the post-merger firm to sell better shoes:

[I]ndependent retailers of shoes are having a harder and harder time in competing with company-owned and company-controlled retail outlets. National advertising by large concerns has increased their brand name acceptability and retail stores handling the brand named shoes have a definite advertising advantage. Company-owned and company-controlled retail stores have definite advantages in buying and credit; they have further advantages in advertising, insurance, inventory control . . . and price control. These advantages result in lower prices or in higher quality for the same price and the independent retailer can no longer compete . . .

United States v. Brown Shoe Co., 179 F. Supp. 721, 738 (E.D. Mo. 1959), *aff’d*, 370 U.S. 294 (1962).

17. See Phil Gramm & Mike Solon, *Biden Turns Back the Progressive Clock*, WALL ST. J. (July 14, 2021, 2:12 PM), <https://www.wsj.com/articles/biden-turns-back-the-progressive-clock-11626286594> [<https://perma.cc/4YBR-WYTC>].

18. Exec. Order, *supra* note 1, at 36,987–88.

current economic approach with concerns about political power or large firm size. To the contrary, it makes no reference to political power at all, except for this one telling passage that it quotes from a 1957 Supreme Court decision declaring that the Sherman Act:

[R]ests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.<sup>19</sup>

The passage is important for what it does *not* say about political power, even during a period of great antitrust expansion. The goals are to achieve the best allocation of economic resources, lowest prices, highest quality, and greatest material progress—but all of this within an environment that is conducive to the preservation of our democratic institutions. That is hardly an endorsement of the proposition that antitrust should ignore economic concerns in favor of political ones. The EO could as easily have been written by Friedrich Hayek or Milton Friedman.

Of course, rulemaking of an unspecified scope such as the EO contemplates could reach further. The EO does represent a more aggressive approach to antitrust policy than has been reflected in the recent past. It is also a significant corrective for an anti-enforcement bias that has hampered antitrust policy for decades, that was never economically justified, and that continues to affect portions of the federal judiciary.<sup>20</sup>

This Article briefly examines those portions of the Executive Order that are most immediately relevant to antitrust policy. It does not discuss recommendations that are likely to be carried out through means unrelated to antitrust enforcement.<sup>21</sup> To be sure, nearly any area of the economy may end up raising antitrust concerns, but that is largely because the antitrust laws are not limited to a specific sector. Their scope is nearly as broad as the scope of congressional power to regulate commerce. Further, fact finding may uncover some antitrust violations. For example, high baggage handling fees, high prices for defense contracting, or high prices for beer distribution may all involve antitrust violations if they result from collusion. A

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19. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958). This case is quoted in the executive order. See Exec. Order, *supra* note 1, at 36,989.

20. See Herbert Hovenkamp, *Antitrust Error Costs*, UNIV. PA. J. BUS. L. (forthcoming 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3853282](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853282) [<https://perma.cc/DUK2-9PVF>].

21. Because the EO is far ranging, many of the things it discusses are likely to be addressed by institutions outside of antitrust. These include net neutrality and other broadband regulation, unfair data collection and surveillance, control over aviation and baggage fees, bottlenecks in public transportation, plant and seed protection through the patent system, wine and beer distribution, pricing and distribution of hearing aids, transparency in hospital and medical services pricing, prescription drug pricing both in the general insurance markets and via programs such as Medicare, defense contracting, issues relating to consumer mobility among financial institutions, and competitive development of nascent technologies such as pilotless drones.

number of provisions may or may not have antitrust consequences depending on what happens next, and future legislation could sweep in some of them.

One of the reasons so many areas of concern covered by the EO do not immediately implicate the antitrust laws is its expression of a “whole of government” competition policy. This policy urges competitive solutions both through the antitrust laws and to other areas of law in which competitive concerns are prominent.<sup>22</sup> One good result of a presidentially supported “whole of government” approach to competition policy is more attention given to competition concerns by the relevant agencies and federal judges when they are applying bodies of law other than antitrust.<sup>23</sup> This can cut both ways. On the one hand, it can increase attentiveness to competition issues in non-antitrust enforcement. On the other hand, it can also yield more regulation in situations where the uncontrolled market is viewed as failing because it is unreasonably restrictive or biased.

One example of this is the EO’s strong commitment to net neutrality, or the imposition of common-carrier-like nondiscrimination rules on the suppliers of internet services.<sup>24</sup> These are stated in a section of the EO addressed to the Chair of the Federal Communications Commission (“FCC”) entitled, “To promote competition, lower prices, and a vibrant and innovative telecommunications ecosystem.”<sup>25</sup> The EO expresses an analogous similar concern that communications-spectrum auctions be organized in ways that distribute purchasers widely and evenly, prevent hoarding, or create entry barriers.

While this approach of declaring greater amounts of regulation to be “competitive” might seem odd today, it is strictly consistent with the neoclassical approach to regulation: permit markets to do their job when they can, but use regulation that corrects market failures with a goal of emulating competition as closely as possible.<sup>26</sup> On the other hand, it is inconsistent with a theory of regulation widely shared by neoliberals since the 1970s that regulation is little more than the

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22. Exec. Order, *supra* note 1, at 36,989. The EO expressly refers to the Packers and Stockyards Act, the Federal Alcohol Administration Act (Public Law 74-401, 49 Stat. 977, 27 U.S.C. § 201 et seq.), the Bank Merger Act, the Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98-417, 98 Stat. 1585), the Shipping Act of 1984 (Public Law 98-237, 98 Stat. 67, 46 U.S.C. § 40101 et seq.), the ICC Termination Act of 1995 (Public Law 104-88, 109 Stat. 803), the Telecommunications Act of 1996, the Fairness to Contact Lens Consumers Act (Public Law 108-164, 117 Stat. 2024, 15 U.S.C. § 7601 et seq.), and the Dodd–Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203, 124 Stat. 1376) (Dodd–Frank Act).

23. Cf. Tom Christensen & Per Laegreid, *The Whole-of-Government Approach to Public Sector Reform*, 67 PUB. ADMIN. REV. 1059 (2007).

24. As expressed during the Obama Administration by the FCC, Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738 (Apr. 13, 2015).

25. Exec. Order, *supra* note 1, at 36,994.

26. On the neoclassical approach to regulation, see Herbert Hovenkamp, *Regulation and the Marginalist Revolution*, 71 FLA. L. REV. 455 (2019). The classic treatment is ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* (2d ed. 1988).

purchase of economic access or exclusion by interest groups.<sup>27</sup> The EO at least implicitly recognizes that the neoclassical theory is almost always better, but only if the government is capable of sticking to it without playing favorites or letting politics intervene.

### I. MONOPOLY IN THE AMERICAN ECONOMY

The EO correctly describes the state of competition in the American economy as declining but does so in terms of “consolidation” and “excessive market concentration.”<sup>28</sup> Today the level of concentration in American markets is hotly disputed, as are the methodologies for assessing it. Much of the uncertainty results from the types of data that are used to define markets. Because “concentration” refers to the number of firms in a market, it is essential that markets be defined accurately. The most widely used data for this purpose, which are from the U.S. Census, offer incredibly poor correlations with higher concentration in properly defined markets.<sup>29</sup> To say that the data are “useless” might be an exaggeration, but not by much.

There are better ways of assessing the amount of market power in the economy—namely, by direct measurement of price-cost margins. In a competitive economy, overall prices should be reasonably close to marginal costs, with some adjustments for innovation and other fixed costs. Monopoly power is measured directly in terms of high price-cost margins.<sup>30</sup> The measurement tools that we have today for direct measurement of price-cost margins are much more accurate and relevant to the task than concentration numbers driven by census data.<sup>31</sup> For example, these approaches do not need to worry about such things as whether markets are national, regional, or local, nor about variations in the correlation

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27. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 6 (1971) (devoting no discussion to natural monopoly, high fixed costs, bottlenecks or other economic indicia of market failure, but instead only the purchase of exclusive rights from government officials).

28. Exec. Order, *supra* note 1, at 36,987.

29. See Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 726 (2018); Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996 (2018).

30. William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 939 (1981); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE, ch. 3 (6th ed. 2020).

31. Good recent examples are Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561 (2020) (seeing dramatic rise in margins since 1980) and Robert E. Hall, *Using Empirical Marginal Cost to Measure Market Power in the U.S. Economy* (NBER Working Paper, 2018), <https://www.nber.org/papers/w25251> [<https://perma.cc/8SKQ-HLLJ>]. See Hall, *supra*, at 18 (finding “substantial growth in market power” over the period from 1988 to 2015, although less than some others); Jan De Loecker, Jan Eeckhout & Simon Mongey, *Quantifying Market Power and Business Dynamism in the Macroeconomy* (CEPR Discussion Paper, May 2021), <https://repec.cepr.org/repec/cpr/ceprdp/DP16097.pdf> [<https://perma.cc/C8HM-AEYV>]; David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms* (NBER Working Paper, May 2017), <https://www.nber.org/papers/w23396> [<https://perma.cc/54EL-2YMS>].

between structure and power. That is, direct measurement enables us to estimate the extent of monopoly without the need to define a market.

The EO does not mention margins or direct measurement. Nevertheless, the story, at least at the general level, is quite consistent with the account given in the EO: price-cost margins have been rising, particularly since the 1980s. These new approaches also permit something that concentration data do not, and that is determine where the increased returns are going. While the returns to capital have increased significantly, the share of returns that goes to labor has been seriously in decline, particularly among those who are less skilled.<sup>32</sup>

Although antitrust policy did become significantly less aggressive in the 1980s and following, this cannot be more than partly to blame for these declines in performance. They are also attributable to generally hostile attitudes toward organized labor that have prevailed since the 1980s. In sum, these newer methodologies for measuring monopoly provide support for several initiatives in the EO, including those addressing the decline in labor competition. Just as we need more aggressive antitrust enforcement in some areas, we also need more aggressive support for labor and worker mobility, as well as for education and the other institutions that support them.

## II. “NEW INDUSTRIES AND TECHNOLOGIES”

The EO refers to the “challenges posed by new industries and technologies,” which include the “dominant internet platforms.”<sup>33</sup> That is a good and positive way of expressing the issue. The giant platforms that have been in the crosshairs of Congress and other areas of public debate (mainly Amazon, Apple, Meta (Facebook), and Alphabet (Google)) are new industries and technologies. These large platforms are not fundamentally a menace to society, although they certainly do raise competitive concerns. They have also been a principal contributor to economic growth, and the higher output that they facilitate benefits both consumers and labor as well as other businesses that interact with them.<sup>34</sup>

The reason that the big platforms are so successful, of course, is that consumers like them. It takes a special measure of arrogance and, in any event, would be political suicide to ignore consumer behavior. Nevertheless, metered antitrust relief of proven anticompetitive conduct is appropriate, and that is where antitrust’s litigation-driven, fact-intensive approach is valuable. Further, the focus

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32. See Autor et al., *supra* note 31; Matthias Kehrig & Nicolau Vincent, *The Micro-Level Anatomy of the Labor Share Decline*, 136 Q.J. ECON. 1031 (2021) (showing a significant decline at the macro level, but instability at the firm level). For an attempt to link rising corporate returns and declining labor share to Chicago School antitrust policy, see Erdogan Bakir, Megan Hays & Janet Knoedler, *Rising Corporate Power and Declining Labor Share in the Era of Chicago School Antitrust*, 55 J. ECON. ISSUES 397 (2021). See also Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2019).

33. Exec. Order, *supra* note 1, at 36,988.

34. See Joshua P. Zoffer, *Short-Termism and Antitrust’s Innovation Paradox*, 71 STAN. L. REV. ONLINE 308 (2019).



should be on remedies that tend toward higher output, increased consumer satisfaction, and more opportunities for labor and other input suppliers.

The relationship between a dominant platform such as Amazon and the numerous small businesses who are affected by it is very complex and cannot be captured in a single sentence. Amazon, as well as other large internet firms, has clearly injured many small businesses forced to compete with it. On the other hand, Amazon has also supplied distribution services to many small businesses, who are able to reach broader markets as a result.<sup>35</sup> While there are some vague similarities with the “chain stores” that were the target of Justice Louis Brandeis’s wrath a century ago, there are also important differences.<sup>36</sup> The war between family-owned single stores and large multistore operators such as Macy’s, Woolworth’s, the Great Atlantic and Pacific Tea Company (“A&P”), and Sears was far more devastating to small business than the one between online sellers such as Amazon and smaller retailers. For example, A&P simply put its products in competition with family-owned grocers, who had no choice but to compete.<sup>37</sup> By contrast, Amazon often becomes their internet broker, enabling many small businesses to find markets that they could not otherwise reach.<sup>38</sup> Others have been pressured into expanding their own online presence on other platforms. That is, for many small businesses the story has been repositioning and reaching out rather than bankruptcy.

In any event, the Brandeisian war against the chain stores utterly failed. Changing demographics are hard to resist, and the Brandeis movement for widespread use of resale price maintenance (“fair trade”) and discriminatorily high taxes on multistore owners<sup>39</sup> has given way to a consumer culture that has few qualms about shopping at large retailers. More importantly, a policy of forcing

35. See, e.g., Brock Blake, *Amazon: Small Business Friend or Foe?*, FORBES (Sep. 23, 2019, 10:23 AM), <https://www.forbes.com/sites/brockblake/2019/09/23/amazon-friend-or-foe/?sh=27f171057367> [<https://perma.cc/AMG2-SAPV>].

36. For a balanced evaluation of the issues, including Justice Brandeis’s involvement, see Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011 (2005). On the “fair trade” movement to impose resale price maintenance on discounters, see LAURA PHILLIPS SAWYER, *AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE “NEW COMPETITION,” 1890-1940* (2017).

37. See FRED ROWE, *PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 11-23* (1962) (noting a large number of small grocers bankrupted by A&P led to passage of Robinson-Patman Act); Hugh C. Hansen, *Robin-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1119-24 (1983); JOSEPH C. PALAMOUNTAIN, JR., *THE POLITICS OF DISTRIBUTION* (1955) (similar, but more detailed).

38. See *Amazon Has 1.9 Million Active Sellers Worldwide (Plus Other Stats)*, EDESK (Jan. 31, 2022), <https://www.edesk.com/blog/amazon-statistics/> [<https://perma.cc/58KJ-Y8P8>] (stating that Amazon has 1.9 million active third-party sellers and 9.7 million sellers worldwide).

39. See *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933) (striking down progressive tax on chain stores whose rate increased with the number of stores, over a dissent by Justice Brandeis). *J.C. Penney, F.W. Woolworth Co., Montgomery Ward & Co., A&P, Kinney Shoes, United Cigar Stores*, and other retail chains were listed among the affected stores. See *Louis K. Liggett Co. v. Amos*, 141 So. 153 (1932), *rev’d sub nom. Liggett v. Lee*, 288 U.S. 517 (1933).

higher costs on larger retailers in order to protect smaller ones hurts low-income people the most.<sup>40</sup> The enemy is high prices and inadequate access to low-cost alternatives, not size. A policy of expanding broadband access into low-income and other underserved populations is almost certain to have a much bigger welfare payoff than one of disciplining online retailers simply because they are big.

Anticompetitive practices that reduce output and raise prices are another matter. It seems clear that anticompetitive things are happening, and large e-retailers such as Amazon could be performing more competitively than they are. One important thing for the FTC to do is to study large online sellers and sort out the good from the bad. These conclusions will strongly affect the remedy. Overly aggressive remedies applied with too little thought could injure large numbers of consumers who benefit from low prices and wide access. Any remedy that reduces output will also injure labor as well as other suppliers. Particularly at the lower, or hourly wage, end of the labor spectrum, employment opportunities and wages are closely linked to product market output.<sup>41</sup>

The EO does not mention any of the dominant digital platforms by name, does not weigh in on the question whether they have substantial market power, and does not call for breakups. While it does not accuse any particular platform of an anticompetitive practice, it does list several practices that should be investigated and pursued—namely, “serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects.”<sup>42</sup>

The inclusion of network effects is a mystery, as if they were inherently a bad thing. The dramatic growth of networks since the second half of the twentieth century has produced extraordinary economic growth and benefitted nearly everyone, although some more than others.<sup>43</sup> The task is not to get rid of them, which we could not do without reversing the telecommunications and internet revolution. Rather, government policy, including antitrust, should try to ensure that networked markets operate competitively and as openly as realistically possible.

The EO also makes a point of stating that nothing in the relevant portions of the EO should “be construed to suggest that the statutory standard . . . should be displaced or substituted by the judgment of the Attorney General or the Chair of the FTC.”<sup>44</sup> While that statement is of course true as a matter of law, the EO seems intent on confirming that the document should not be read as a license on the part of the antitrust enforcement agencies to go beyond existing law, at least not until such

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40. See Ethan Kay & Woody Lewenstein, *The Problem with the Poverty Premium*, HARV. BUS. REV. (Apr. 2013), <https://hbr.org/2013/04/the-problem-with-the-poverty-premium> [<https://perma.cc/E7SV-8C8F>] (noting that low-income people pay much higher prices for most things than middle-class consumers do in the absence of large stores offering low prices).

41. See S. Nickell et. al, *Wages and Product Market Power*, 61 *ECONOMICA* 457 (1994).

42. Exec. Order, *supra* note 1, at 36,988.

43. See generally YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006).

44. Exec. Order, *supra* note 1, at 36,990.

times as additional laws might be passed. Later, the EO encourages the heads of these two agencies “to enforce the antitrust laws fairly and vigorously.”<sup>45</sup>

### III. “UNFAIR COMPETITION IN MAJOR INTERNET MARKETPLACES”

While nothing in the EO suggests aggressive structural remedies against the large internet markets, it clearly supports expanded enforcement against anticompetitive practices. This is one area where the FTC in particular could do much good. “Major internet marketplaces” presumably refers to large internet sellers (which the EO does not name). Amazon is certainly a target, although there are others.

The idea of unfair competition, which implicitly invokes § 5 of the FTC Act,<sup>46</sup> has provoked controversy with respect to sellers who simultaneously sell their own products in competition with those of third parties. The complaints range from antitrust claims that Amazon imposes anticompetitive most-favored-nation (“MFN”) clauses on its third-party merchants,<sup>47</sup> that it steals information from its own third-party vendors and uses it to make look-alike copies,<sup>48</sup> and other claims akin to exclusive dealing or tying.<sup>49</sup> MFN’s, which are already the subject of both state attorney general and private litigation against Amazon,<sup>50</sup> are clauses that require Amazon’s third-party suppliers to provide Amazon with terms that are at least as favorable as those supplied to others, or that prohibit them from dealing with firms who charge less than Amazon charges.<sup>51</sup> Some of these provisions have been withdrawn, possibly in contemplation of antitrust litigation.<sup>52</sup> But there may be others, and even withdrawn policies can be subject to an injunction to prevent them from recurring. These are matters for fact finding and litigation or rulemaking.

45. *Id.* at 36,991.

46. 15 U.S.C. § 45 (“Unfair methods of competition . . . are hereby declared unlawful.”).

47. *E.g.*, Complaint, District of Columbia v. Amazon.com, Inc., No. \_\_ (Sup. Ct. D.C. May 25, 2021), <https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint-.pdf>.

48. *See* Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations 274–81, U.S. House of Representatives, Subcommittee on Antitrust Commercial and Administrative Law of the Committee on the Judiciary (2020).

49. *Id.* at 287–92.

50. Complaint, District of Columbia v. Amazon.com, Inc., No. \_\_ (Sup. Ct. D.C. May 25, 2021), <https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint-.pdf>; *see* David McCabe et al., *D.C. Accuses Amazon of Controlling Online Prices*, N.Y. TIMES (May 25, 2021), <https://www.nytimes.com/2021/05/25/business/amazon-dc-lawsuit.html> [<https://perma.cc/TY7J-3NQE>]. In addition, a class of purchasers has filed a lawsuit challenging MFNs in e-books under federal antitrust law. Complaint, Fremgen v. Amazon, No. 1:21-cv-00351-GHW-DCF (S.D.N.Y. Feb. 3, 2021), <https://www.hbsslaw.com/sites/default/files/case-downloads/amazon-ebooks-price-fixing/02-04-21-amended-complaint.pdf> [<https://perma.cc/F47L-XSFG>].

51. *See* Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176 (2018).

52. *See, e.g.*, *Amazon Eases Price Restrictions on Third-Party Vendors*, FIN. TIMES (Mar. 11, 2019), <https://www.ft.com/content/3beea4a6-445b-11e9-b168-96a37d002cd3> [<https://perma.cc/H5UW-GF3Y>].

In any event, judicially created legal standards should become more accommodating of enforcement. Under current law, vertical MFNs are presumably unlawful under the Sherman Act only if the defendant has a market share in excess of 30%–40%. MFNs are not unlawful per se because under the right circumstances they can serve competitive ends. For example, a competitive dealer invited to bid on a project may be more willing to bid if it has assurance that others are not being offered a better deal, with the result that its own offerings would not be competitive. But the 30%–40% market share requirement will knock out most claims against Amazon, because there are not that many products for which its shares are that large. E-books could be an exception, depending on how the market is defined.<sup>53</sup>

A better way to think about the MFN problem is to focus less on the total market share covered by the arrangement, but instead consider the role of marginal and inframarginal distributors. A large firm need not control a large share of a market if its own outlets are more desirable than those of others. In that case it may be able to impose higher costs on rival sellers simply because small producers need its business.<sup>54</sup> What needs to happen is adjudication or rulemaking that is based on good economic evidence, and that then addresses these practices and enjoins them without undermining the overall benefits of the defendant's distribution system. If the story about Amazon's MFNs is as reported and they are still in force, enjoining them could lead to higher output and reduced prices across the covered market. This is an area where FTC input, perhaps by rulemaking, could be beneficial. The FTC could also quite reasonably use its own economic expertise to investigate the effects of MFNs under § 5 and come up with a more aggressive rule than the Sherman Act currently employs.

The same thing is true of Amazon's allegedly discriminatory practices between its own products and the products that it sells as a broker or reseller for other firms on the same website. The commingled selling of one's own products with the products of third parties is a good thing, even for a dominant firm. Aggregate output increases if retail stores or platforms offer a variety of alternatives. Dual distribution of one's own and competitor's brands is a well-established practice, and it increases consumer choice by forcing firms to compete with each other even within a particular store or website.<sup>55</sup> For example, someone looking for an e-reader on Amazon will find Amazon's own Kindle products, Apple iPads, Barnes & Noble's Nook, Sony, and some others. Amazon's use of its own brands

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53. Amazon's share of the e-book market is roughly 67%, but e-books make up only about 21% of total book sales. That could give Amazon a market share of 67% if the relevant market is e-books, but more like 13% of books generally. For 2021 data, see ABOUT EBOOKS, <https://about.ebooks.com/ebook-industry-news-feed/> [https://perma.cc/GHC8-D285] (last updated Mar. 22, 2022).

54. See Herbert Hovenkamp, *Vertical Control*, NYU L. REV. ONLINE (2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3793733](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793733) [https://perma.cc/LY3F-CRES]. The issue is explored further in 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 570 (5th ed. 2021).

55. See, e.g., Peter J. Boyle & E. Scott Lathrop, *The Value of Private Label Brands to U.S. Consumers: An Objective and Subjective Assessment*, 20 J. RETAILING & CONSUMER SERVS. 80 (2013); Rajeev Batra & Indrajit Sinha, *Consumer-Level Factors Moderating the Success of Private Label Brands*, 76 J. RETAILING 175 (2000).

resembles the widespread use of house brands by grocery chains, who often sell one or more house brands in competition with national brands, which are typically more heavily advertised. Initially many customers believed that house brands were inferior, but that perception has changed significantly.<sup>56</sup>

In the case of Amazon there are also concerns that Amazon uses nonpublic data collected from sales of third-party brands to design and engineer its own competing brands, or that it discriminates against third-party sellers in its Buy Box, which selects default alternatives among sellers of the same product.<sup>57</sup> Critics, such as Senator Elizabeth Warren during her campaign for President, choose examples from among the large number of very small merchants who sell on the Amazon website.<sup>58</sup> Amazon has in the past made copies of merchandise that it sells for some firms and then markets variations under its own brand.<sup>59</sup>

Others, however, point to situations when Amazon enters with its own brand against large manufacturers.<sup>60</sup> For example, Duracell is owned by Berkshire-Hathaway, a very large company. It sells alkaline household batteries on the Amazon website in competition with Amazon's own AmazonBasics house brand. Here the effect seems clear: the presence of the Amazon brand forces Duracell to cut its own price if it wants to make more sales.<sup>61</sup> That kind of competition between "house brands" and "name brands" brings higher output, lower prices for consumers, and a higher degree of choice. These things need to be investigated empirically and dispassionately, with an eye toward the possibility of conduct that violates the antitrust laws or perhaps intellectual property laws. When such conduct is discovered, the most effective and least disruptive remedy is most often an injunction that forces it to stop.<sup>62</sup>

Eliminating Amazon's right to sell its own house brand batteries in competition with Duracell will not solve any problem worth solving and will instead cause others. It will force higher prices by eliminating an important arena of low-switching-cost competition. To the extent the higher prices reduce output, it will also

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56. See Stephen J. Hoch, *How Should National Brands Think About Private Labels*, 37 SLOAN MGMT. REV. 89 (1996).

57. Selection of products for the Buy Box has produced some non-antitrust litigation. See *Kangaroo Mfg., Inc. v. Amazon.com, Inc.*, 2019 WL 1280945 (D. Ariz. Mar. 20, 2019) (sustaining partially claims based on tortious interference, unfair competition, and trademark infringement). For good introductions to the Buy Box, see Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237 (2021) and Ben Bloodstein, *Amazon and Platform Antitrust*, 88 FORDHAM L. REV. 187 (2019).

58. See Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics*, 101 B.U. L. REV. 489, 540–42 (2021).

59. See Dana Mattioli, *Amazon Scooped Up Data from Its Own Sellers to Launch Competing Products*, WALL ST. J. (Apr. 23, 2020, 9:51 PM), <https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015> [<https://perma.cc/MAQ9-QWTB>].

60. See Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 2015 (2021).

61. See Julie Creswell, *How Amazon Steers Shoppers to Its Own Products*, N.Y. TIMES (June 23, 2018), <https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html> [<https://perma.cc/QL4C-W872>].

62. See Hovenkamp, *Antitrust and Platform Monopoly*, *supra* note 60, at 2016.

harm labor and other input suppliers. It will of course benefit Berkshire Hathaway by freeing it from an aggressive competitor, but that would not be something to crow about. More fundamentally, it would run counter to the entire thrust of this EO as well as President Biden's economic policy generally, which is to strengthen economic growth by bringing more output, more competition, lower prices, and broader choice to consumers. Antitrust's role in promoting economic growth is surely limited, but it should not operate as an affirmative obstacle.

#### IV. MERGERS

Merger policy in the United States is currently enforced by the two antitrust enforcement agencies acting mainly under guidelines issued in 2010 for horizontal mergers<sup>63</sup> and 2020 for vertical mergers.<sup>64</sup> There are no current guidelines for "conglomerate" mergers, which are mergers that are neither horizontal nor vertical. In addition, the focus of the current guidelines is against mergers that enable the parties to charge higher prices, whether it be the two parties to the merger or the entire market in which the merger occurs.

In September 2021, the FTC withdrew the 2020 Vertical Merger Guidelines ("VMG"), which had been jointly issued by the two agencies a few months earlier. That move seems ill-considered, and the rationales that the FTC gave for its withdrawal made no economic sense.<sup>65</sup> Guidelines are never perfect and are revised periodically. However, the best practice, which has always been followed, is to leave existing guidelines in place until new ones are issued. The principal effect of this early withdrawal is that the FTC will lose the benefit of these guidelines in vertical merger cases that are decided prior to their replacement. In the *Time-Warner* vertical merger cases, which the Justice Department lost prior to issuance of the VMGs, the court cited the fact that the guidelines had not been updated in more than thirty years.<sup>66</sup>

The more sensible approach would have been to leave the 2020 VMGs in place for whatever advantages they produce, which are many,<sup>67</sup> and work on more far-reaching guidelines. In any event, the unilateral withdrawal does not seem to be a good faith effort to comply with the EO, under which the Attorney General and

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63. U.S. DEP'T OF JUST. & FTC, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010> [<https://perma.cc/FS3Q-74Y7>].

64. U.S. DEP'T OF JUSTICE & FTC, VERTICAL MERGER GUIDELINES (June 30, 2020), [https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical\\_merger\\_guidelines\\_6-30-20.pdf](https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf) [<https://perma.cc/34J9-8CEE>].

65. See Carl Shapiro & Herbert Hovenkamp, *How Will the FTC Evaluate Vertical Mergers?*, PROMARKET (Sep. 23, 2021), <https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/> [<https://perma.cc/Q7DY-FQD9>].

66. *United States v. AT&T, Inc.*, 916 F.3d 1029, 1037 (D.C. Cir. 2019).

67. See, e.g., Herbert Hovenkamp, *Competitive Harm from Vertical Mergers*, 39 REV. INDUS. ORG. (2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3683386](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3683386) [<https://perma.cc/Y2NE-5YME>].

the Chair of the FTC “are encouraged to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines.”<sup>68</sup>

Another problem is that mergers are not addressed in the guidelines as exclusionary practices, and that has turned out to be an important oversight. Many acquisitions of smaller firms by large tech platforms are very likely intended to prevent the emergence of these small firms as new competitors.<sup>69</sup> A July 2021 article in the *Wall Street Journal* observed that one feature of U.S. antitrust law has been its traditional reliance on the rise of upstarts to discipline monopoly—but that reliance is unjustified in an environment in which most of the promising upstarts are acquired by their potential rivals.<sup>70</sup> The FTC explicitly alleged in its Facebook complaint<sup>71</sup> that the reason Facebook acquired Instagram was because it feared Instagram’s emergence as a viable competitor. Significantly, the FTC’s challenge was under § 2 of the Sherman Act. The court sustained the amended complaint after noting the concern that a dominant firm could use a policy of buying up potential competitors in order to prevent the emergence of competition.<sup>72</sup>

New guidelines should address these issues with respect to all firms, including but not limited to the large digital platforms. The concerns include both mergers that are neither horizontal nor vertical, and the use of mergers to prevent the emergence of new rivals. Beyond that are other problems. For example, several recent empirical studies indicate that prices have increased following mergers that were close to the line of illegality but approved, indicating that the current thresholds are too lenient.<sup>73</sup> One thing that would go a long way is to eliminate an anti-enforcement bias that too often inclines courts to understate the competitive threats, while exaggerating anticipated efficiencies.<sup>74</sup>

## V. LABOR AND EMPLOYEE NONCOMPETITION AGREEMENTS

The EO also recommends that the relevant enforcement agencies develop policies intended to protect workers from agreements that suppress wages or worker mobility.<sup>75</sup> It does not address another labor-related question which is in fact more weighty: how can antitrust policy ensure that labor markets are as robust and

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68. Exec. Order, *supra* note 1, at 36,991.

69. See Kevin A. Bryan & Erik Hovenkamp, *Startup Acquisitions, Error Costs, and Antitrust Policy*, 87 UNIV. CHI. L. REV. 221 (2020).

70. Daniel Michaels & Brent Kendall, *U.S. Competition Policy Is Aligning with Europe, and Deeper Cooperation Could Follow*, WALL ST. J. (July 15, 2021, 3:40 AM), <https://www.wsj.com/articles/u-s-competition-policy-is-aligning-with-europe-and-deeper-cooperation-could-follow-11626334844> [<https://perma.cc/5QX4-25EU>].

71. FTC v. Facebook, Inc., No. 20-3590 (JEB) (D.D.C. June 28, 2021), [https://www.pacermonitor.com/view/ITKR63Y/FEDERAL\\_TRADE\\_COMMISSION\\_v\\_FACEBOOK\\_INC\\_dcdce-20-03590\\_0073.0.pdf?mcid=tGE3TEOA](https://www.pacermonitor.com/view/ITKR63Y/FEDERAL_TRADE_COMMISSION_v_FACEBOOK_INC_dcdce-20-03590_0073.0.pdf?mcid=tGE3TEOA) [<https://perma.cc/9G4M-LTAA>].

72. FTC v. Facebook, Inc., No. 20-3590 (JEB), 2022 WL 103308 (D.D.C. Jan. 11, 2022) (citing 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 701 (4th ed. 2018)).

73. *E.g.*, JOHN KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* (2015).

74. See generally Hovenkamp & Shapiro, *supra* note 29.

75. Exec. Order, *supra* note 1, at 36,992.

competitive as they realistically can be?<sup>76</sup> The explicit agreements referenced in the EO cover a relatively small percentage of workers while the health of the overall market affects everyone who depends on wages.

The agreements referenced in the EO are those among *employers* to suppress wages or not to poach one another's employees. These agreements are already illegal per se under U.S. antitrust law and may be criminal offenses.<sup>77</sup> The reference is not to agreements among *employees* to withhold their labor for a higher wage. Most such agreements are immune from the antitrust laws under § 6 of the Sherman Act as well as several other provisions, and a long caselaw recognizing a labor immunity from antitrust.<sup>78</sup> The EO also urges the Attorney General and the FTC to consider revising the Antitrust Guidance for Human Resource Professionals, which the Agencies issued jointly in October 2016.<sup>79</sup> Those guidelines already make clear that naked anti-poaching or wage fixing agreements are illegal per se, while similar agreement in bona fide joint ventures that involve shared employment are not.<sup>80</sup> The current guidelines also take the position that exchanges of information about wages or other terms of employment are not illegal per se.<sup>81</sup> However, even an unaccepted invitation to engage in wage fixing can be unlawful under the FTC Act.<sup>82</sup> Such unaccepted invitations generally do not violate § 1 of the Sherman Act, which requires an "agreement" between the parties and does not contain an attempt offense. Section 5 of the FTC Act contains no such limitations, however. As a result, this is one of those areas where the FTC Act can reach further than the Sherman Act.<sup>83</sup>

The EO also urges the chair of the FTC to engage in rulemaking with respect to "unfair use of non-compete clauses" or other clauses limiting worker mobility. Here the problems are significant. Employee noncompete agreements are typically clauses contained in employment agreements that prohibit employees from

76. On this, see Herbert Hovenkamp, *Labor's Interest in Antitrust*, UNIV. CHI. L. REV. (forthcoming 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4015834](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4015834) [<https://perma.cc/BR6N-45ZG>].

77. See *No-Poach Approach*, U.S. DEP'T OF JUST., ANTITRUST DIV. <https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach> [<https://perma.cc/3VZV-LW9H>] (last updated Sept. 30, 2019); see also *Indictment, United States v. Surgical Care Affiliates, LLC*, No. 3-21CR0011-L (N.D. Tex. Jan. 5, 2021), ECF No. 1 (discussing the naked market division among competitors in agreeing not to hire one another's senior level employees); *Indictment, United States v. Davita, Inc.*, No. 21-cr-00229 (D. Colo. 2021), ECF No. 1 (discussing competitors agreeing not to hire or solicit one another's senior level employees).

78. See 15 U.S.C. § 17. On the scope of the labor immunity, see 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶¶ 255–57 (5th ed. 2021).

79. U.S. DEP'T OF JUSTICE & FTC, *ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS* (Oct. 2016), <https://www.justice.gov/atr/file/903511/download> [<https://perma.cc/G6GL-PQ8E>].

80. *Id.* at 2.

81. *Id.* at 4.

82. *Id.* at 7.

83. See *infra* text accompanying note 95. On unaccepted solicitations under the FTC Act, see 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1419 (4th ed. 2018).



moving to competitors for a defined period after job termination. Historically they were used mainly to protect firms whose employees possessed significant trade secrets or managerial know-how, or else who had received substantial on-the-job training at their employers' expense.<sup>84</sup> In these cases, the fear was that hiring employers could free ride by stealing employees who possessed these things from their current employment. Even under these limitations there was always a question about whether employee noncompetition covenants produced the social benefits that were claimed for them.

For example, studies examining technically trained employees in California, which forbids most employee noncompete covenants, and Massachusetts, which enforces them, tended to conclude that the California model actually facilitated economic development more than the Massachusetts model. Indeed, some studies even suggested that the reason Silicon Valley grew up in the Stanford, California area—rather than near MIT and Harvard University in the Cambridge, Massachusetts area—was California's refusal to enforce agreements limiting employee mobility.<sup>85</sup> Others dispute these results.<sup>86</sup>

Even covenants that involve highly trained employees should be re-examined, and consideration should be given to less restrictive alternatives, including such things as direct enforcement for trade secret theft. If the studies in the majority are correct, however, a strong rule against enforcing such covenants may not do much harm and could even do some good. It does bear noting, however, that the bulk of noncompetition covenant enforcement actions occur under state statutory and common law.

A relatively recent phenomenon concerning noncompetes is more disturbing because it involves employees who have not received a high degree of technical training or generally do not possess valuable trade secrets. This current phenomenon is the widespread use of noncompetition agreements imposed on low wage workers who have minimal training in industries such as fast-food service. The covenants are hard to defend economically even on traditional grounds. As of this

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84. See generally Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOCIO. REV. 695 (2011).

85. David P. Twomey, *The Developing Law of Employee Non-Competition Agreements: Correcting Abuses: Making Adjustment to Enhance Economic Growth*, 50 N. ATL. REG. BUS. L. ASSN. 87 (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3119986](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119986) (arguing that non-compete agreements limit worker mobility); Matt Marx, Jasjit Singh & Lee Fleming, *Regional Disadvantage? Employee Noncompete Agreements and Brain Drain*, 44 RES. POL. 394, 403 (2015) (“[E]mployee non-compete agreements encourage the migration of workers from states where such contracts are enforceable to states where they are not.”); Paul Almeida & Bruce Kogut, *Localization of Knowledge and the Mobility of Engineers in Regional Networks*, 45 MGMT. SCI. 905 (1999) (noting that worker mobility is most conducive to the flow of knowledge). More qualified, but still finding a positive effect of California nonenforcement policy in the computer industry is Bruce Fallick, Charles A. Fleischman & James B. Rebitzer, *Job-Hopping in Silicon Valley: Some Evidence Concerning the Microfoundations of a High-Technology Cluster*, 88 REV. ECON. & STAT. 472 (2006).

86. E.g., Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 UNIV. CHI. L. REV. 953 (2020).

writing a few franchisors have terminated these agreements in the face of antitrust litigation.<sup>87</sup>

A complicating factor for antitrust policy is that these covenants are vertical agreements and typically exist in competitively structured product markets. Many of those that are currently being litigated arise within single franchises. For example, *DesLandes v. McDonald's* was a challenge to noncompetition agreements that McDonald's placed in the franchise agreements of all of its franchisees, and that are drafted so as to prevent employees from moving from one McDonald's franchise location to another.<sup>88</sup> While a horizontal agreement of this nature between competing restaurants would be unlawful per se,<sup>89</sup> the McDonald's agreements are formally a set of vertical agreements between McDonald's as franchisor and each of its individual franchisees. Under current antitrust law a purely vertical agreement of this nature must be governed by the rule of reason,<sup>90</sup> and even a large fast-food company such as McDonald's does not possess the 30%–40% market share that the courts generally require for rule of reason illegality.<sup>91</sup>

The question whether these formally vertical noncompete agreements are actually horizontal and for the (anticompetitive) benefit of the competing franchisees can then be important. Sometimes the contract terms are a giveaway. For example, in declining to dismiss an antitrust complaint against a noncompete agreement imposed by the Jimmy John's sandwich franchise in its franchisee agreements, a court noted a third-party beneficiary provision that permitted one Jimmy John's franchisee to enforce the agreement with respect to a different franchisee.<sup>92</sup> That strongly indicates that this particular set of noncompete

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87. See *Conrad v. Jimmy John's Franchise, LLC*, No. 18-CV-00133, 2021 WL 718320 (S.D. Ill. Feb. 24, 2021) (noting that the Jimmy John's comprehensive employee noncompete provision was terminated in 2018).

88. *Deslandes v. McDonald's USA, LLC*, No. 17 C 4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018) (partially sustaining complaint); see also *Arrington v. Burger King Worldwide, Inc.*, 448 F. Supp. 3d 1322 (S.D. Fla. 2020), *appeal docketed*, (11th Cir. Sep. 23, 2020) (concluding that franchisor and franchisees were a single firm, so there was no concerted action; court noted that 50 out of 7,226 restaurants were owned by BK; the rest were independently owned with franchise agreements); *Blanton v. Domino's Pizza Franchising, LLC*, No. 18-13207, 2019 WL 2247731 (E.D. Mich. May 24, 2019) (denying motion to dismiss on claim of a horizontal restraint). For a straightforward evaluation, see Michael Iadevaia, *Poach-No-More: Antitrust Considerations for Intra-Franchise No-Poach Agreements*, 38 ABA J. LAB. & EMP. L. 151 (2020).

89. See *supra* text accompanying note 76.

90. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137–40 (1998) (holding that a purely vertical exclusionary agreement is to be addressed under rule of reason).

91. *Fast Food Market Share*, T4 LABS, <https://www.t4.ai/industry/fast-food-market-share> [<https://perma.cc/2YKB-BH5V>] (last updated Jan. 23, 2021) (noting that the McDonald's market share was 21.4% of the fast-food restaurant industry in 2018).

92. *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 793 (S.D. Ill. 2018). Jimmy John's withdrew its noncompete agreement as part of an antitrust settlement with the New York Attorney General. See Press Release, New York State Office of the Attorney General, A.G. Schneiderman Announces Settlement with Jimmy John's to Stop Including Non-Compete Agreements in Hiring Packets (June 22, 2016), <https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete> [<https://perma.cc/AS65-JAWU>].

agreements was in fact horizontal, for the benefit of the franchisees by enabling them to limit wage competition among themselves.

Here, federal antitrust law acknowledges a theory of “hub-and-spoke” conspiracies, which reaches situations where a central firm (the “hub”) communicates individually with the “spokes,” but the spokes do not apparently communicate with one another. The law generally requires a central offer from the hub, parallel acceptance by the spokes, and a finding that independent decision-making would have been contrary to each spoke’s individual self-interest. That is, each spoke agrees with the hub only because it understands that others are agreeing as well.<sup>93</sup> Whether the theory could be used against franchise-wide noncompete agreements would very likely depend on whether each franchisee agreed only on the understanding that other franchisees were going along. That certainly seems plausible. Why would a franchisee give up its right to hire away a different franchisee’s employee unless it assumed that the other franchisees were promising the same thing in return?

The EO encourages the Chair of the FTC, in the Chair’s discretion, to work with the rest of the Commission to engage in rulemaking “appropriate and consistent with applicable law,” respecting “agreements that may unduly limit workers’ ability to change jobs.”<sup>94</sup> As noted previously,<sup>95</sup> § 5 of the FTC Act can be used against everything covered by the Sherman Act plus a penumbra of practices that may not fall within the letter of the Sherman Act but are within its spirit.<sup>96</sup> In this case, rulemaking that applies a harsh rule against intra-franchise noncompetes seems well justified, even if the agreements are not formally horizontal. The agreements serve to limit the mobility of employees in a vulnerable, low wage sector and promise very little benefit in return—particularly, as in these cases, when they are applied more-or-less universally to all employees.<sup>97</sup>

Another limit on employee mobility is occupational licensing restrictions, which the EO mentions but does not cover in any detail.<sup>98</sup> This reference is very likely to state-issued licenses thought to be too restrictive. If so, that would almost certainly require preemptive federal legislation and would raise major disputes over federalism and the right of the states to license internal practitioners of various

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93. The classic case is *Interstate Circuit v. United States*, 306 U.S. 208 (1939). See also *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000); 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1402c (4th ed. 2018); Barak Orbach, *Hub-and-Spoke Conspiracies*, 15 *ANTITRUST SOURCE* 1 (Apr. 2016).

94. Exec. Order, *supra* note 1, at 36,992.

95. See *supra* text accompanying notes 1–16.

96. *FTC v. Brown Shoe Co., Inc.*, 384 U.S. 316, 321 (1966) (“This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws.”).

97. See Herbert Hovenkamp, *Antitrust and the FTC: Franchise Restraints on Worker Mobility*, *PROMARKET* (Dec. 1, 2021), <https://promarket.org/2021/12/01/antitrust-ftc-franchise-worker-mobility-labor/> [<https://perma.cc/Y4V5-CNDR>] (arguing that the FTC would be a good enforcer because it might be able to evade the “agreement” requirement in § 1 of the Sherman Act).

98. Exec. Order, *supra* note 1, at 36,992.

occupations. Closely related but more easily reachable under the antitrust laws are “unauthorized practice” rules that are often promulgated by interested professional groups themselves. Here federal antitrust policy has a role, provided that the rules are set by the practitioners themselves and without independent state supervision. For example, in *North Carolina Board of Dental Examiners v. FTC*,<sup>99</sup> a divided (6–3) Supreme Court held that antitrust “state action” immunity did not apply when a state board controlled entirely by practicing dentists and not supervised by any public agency passed and enforced a rule prohibiting teeth whitening by nondentists.<sup>100</sup> The three dissenters (Justices Alito, Scalia, and Thomas) protested that even this was too deep an incursion into state prerogatives to control professional conduct.

What is not clear from the EO is whether the President wishes to go further. The “state action” doctrine, which has a long history,<sup>101</sup> has always been a balancing act of federalism, as the dissent in the *North Carolina Dental* case makes clear. Under it the states are free to engage in as much occupational licensing and restriction of practice as they wish, provided that it is actually the state rather than private parties doing the regulating. For example, if a state wished to license dog walkers it could do so, as long as it clearly stated its intent via appropriate legislation or other action, and that any private decision-making was adequately supervised by an independent government actor. At that point, antitrust policy has nothing further to say and stands aside. Going further might be constitutionally possible, but it would require a different judgment about the division of federal and state regulatory power in an area that for most occupations was traditionally reserved to the states. A few exceptions exist where interstate impact is substantial, such as the granting of airplane pilots’ licenses<sup>102</sup> or the numerous types of licenses granted for telecommunications.<sup>103</sup> In any event, federal intrusion more deeply into state control of the professions is not likely to be something that the antitrust enforcement agencies can accomplish on their own, and Congress may not think it desirable.

## VI. PATENTS, STANDARD ESSENTIAL PATENTS, AND PRACTICES INVOLVING ANTICOMPETITIVE PATENT AGREEMENTS

One place that a “whole of government” approach to competition policy could go even further than the EO pushes is with patents. Patent law has often taken the exclusionary privilege conferred by patents to extremes, writing as if competition were the enemy to be conquered rather than a body of law that should

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99. 574 U.S. 494 (2015).

100. On the “state action” doctrine, see PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶¶ 221–31 (5th ed. 2021).

101. See *Parker vs. Brown*, 317 U.S. 341 (1943).

102. See generally *Licenses & Certificates*, FED. AVIATION ADMIN., [https://www.faa.gov/licenses\\_certificates/](https://www.faa.gov/licenses_certificates/) [<https://perma.cc/9YXE-WDPG>] (last updated Oct. 14, 2021).

103. See generally *Licensing*, FED. COMM’N COMM’N, <https://www.fcc.gov/licensing> (last visited March 28, 2022).

be made to work in tandem with antitrust law.<sup>104</sup> This level of disdain for competition policy is in sharp conflict with the fact that the impact of competition policy is much easier to assess than is the impact of patent policy. As a general matter, patent protection operates as a severe exception to the free movement of resources and ideas, and its coverage should not extend further than the Patent Act expressly authorizes. Beginning with that premise, enforcement authorities can do much good.<sup>105</sup>

In what can only be regarded a serious understatement, the EO asks the Attorney General and the Secretary of Commerce to reconsider the position taken on standard essential patents and Fair Reasonable and Non-Discriminatory (“FRAND”) commitments.<sup>106</sup> Consistent with that policy statement, the Antitrust Division parted ways with the FTC and intervened against it in an important case involving exclusionary practices in the market for standard essential patents.<sup>107</sup> The Ninth Circuit’s decision, which reversed a well-reasoned and well-supported decision in the Northern District of California,<sup>108</sup> did considerable damage to the usefulness of antitrust to police anticompetitive practices in FRAND patent licensing. For its part, the Department of Justice’s (“DOJ”) “New Madison” Policy Statement that was put into question by the decision was inconsistent with well-established law on the entitlement to an injunction.<sup>109</sup>

Both the Ninth Circuit’s decision and the New Madison statement threaten to undermine highly successful, voluntary arrangements for technology sharing in areas such as cellular phones and autonomous vehicles that produce enormous social benefits but are also quite vulnerable to manipulation, particularly by larger

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104. *E.g.*, *Trebro Mfg., Inc. v. Firefly Equip., LLC*, 748 F.3d 1159, 1172 (Fed. Cir. 2014); *see* Erik Hovenkamp & Thomas F. Cotter, *Anticompetitive Patent Injunctions*, 100 MINN. L. REV. 871 (2016).

105. *See* Herbert Hovenkamp, *Antitrust and the Patent System: A Reexamination*, 76 OHIO ST. L.J. 467, 475 (2015).

106. That statement is a reference to “Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments,” issued jointly by the Department of Justice, the United States Patent and Trademark Office, and the National Institute of Standards and Technology on December 19, 2019, available at <https://www.justice.gov/atr/page/file/1228016/> [<https://perma.cc/5QUY-8VZT>]. The FTC did not join. The term “FRAND” refers to “Fair Reasonable and Non-Discriminatory” royalties. Sometimes the “F” is dropped to “Rand,” yielding the EO’s usage of F/RAND. *See* Exec. Order, *supra* note 1, at 36,991.

107. *See* *FTC v. Qualcomm*, 969 F.3d 974 (9th Cir. 2020).

108. *FTC v. Qualcomm*, 411 F. Supp. 3d 658 (N.D. Cal. 2019).

109. *See* Herbert Hovenkamp, *Justice Department’s New Position on Patents, Standard Setting, and Injunctions*, REG. REV. (Jan. 6, 2020), <https://www.theregreview.org/2020/01/06/hovenkamp-justice-department-new-position-patents-standard-setting-injunctions/> [<https://perma.cc/U6TZ-F73F>] [hereinafter Hovenkamp, *Justice Department’s New Position*] (criticizing the Justice Department’s policy statement). On the legacy of the Trump-era position, which is apparently already on the outs in the Antitrust Division, *see* DOJ Downgrades Delrahim Letter to IEEE on Standard-Essential Patents, FOSS PATS. (Apr. 16, 2021), <http://www.fosspatents.com/2021/04/doj-downgrades-delrahim-letter-to-ieee.html> [<https://perma.cc/N5TY-JKZE>].

participants.<sup>110</sup> Of course, one cannot be sure that the same thing would not have happened if the Antitrust Division had not “switched sides” and decided to speak on behalf of a FRAND violator rather than the FTC. Further, care must still be taken not to breach the line between contract and antitrust. FRAND agreements are voluntary contracts among IP holders, manufacturers and others involved in a common technology, under which they agree to license freely to all other members in exchange for FRAND royalties. The arrangements are fundamentally contractual and not every breach of contract violates the antitrust laws. But neither is contract law a defense, and in the *FTC v. Qualcomm* case the record of Qualcomm’s antitrust violations seemed clear enough.<sup>111</sup>

One important thing to understand about FRAND is its inherently private, contractual nature, as well as its ability to pull large numbers of developers into a competitive but networked infrastructure. This makes it an engine with great potential for producing economic growth in networked high-tech markets. It enables both private cooperation and competition in technology development.

Nevertheless, destabilizing temptations such as those that befell Qualcomm are a serious threat. Declaring a patent to be “standard essential,” which is a prerequisite to placing it within the FRAND system, makes it worth far more because standard essential patents can be adopted by other firms without worry that they will later be surprised by infringement actions after they have made a significant investment in technology that writes on that standard.<sup>112</sup> The FRAND system addresses this with an important tradeoff: FRAND patents will get adopted into the standard, but with important limitations on the power to exclude that patent law would otherwise grant. First, the FRAND system imposes component level (rather than final product) licensing based on the *ex ante* value of the patent prior to its FRAND declaration—i.e., at a time when it was still in competition with a broader range of alternatives.<sup>113</sup> FRAND then also requires that such patents be licensed to all takers at FRAND rates, without regard to whether the putative licensee is a competitor.

These are simply variations on a principle that is well established in the law-and-economics literature: when a market is structured in such a way that monopoly is likely, we could force firms to bid against one another for the right to occupy that market, with the *ex ante* bid based on the promise of competitive behavior *ex post*.<sup>114</sup> Once a firm has successfully entered the market by making this promise, the higher profits available to incumbents will motivate it to renege on its earlier promise.

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110. Herbert Hovenkamp, *FRAND and Antitrust*, 105 CORNELL L. REV. 1683 (2020).

111. *Id.* at 1700–28.

112. See Aminta Raffalovich & Steven Schwartz, *Antitrust Analysis of FRAND Licensing Post-FTC v. Qualcomm*, 31 COMPETITION: ANTITRUST & UNFAIR COMPETITION L. 138 (2021); Hovenkamp, *FRAND and Antitrust*, *supra* note 110, at 1728–34.

113. See Erik Hovenkamp, *Tying, Exclusivity, and Standard-Essential Patents*, 19 COLUM. SCI. & TECH. L. REV. 79 (2017).

114. Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55 (1968).

The Trump-era DOJ's New Madison statement effectively permitted firms to do exactly that. Qualcomm flaunted these rules by charging royalties higher than FRAND-determined rates and selectively refusing to license to competitors, in violation of FRAND commitments.<sup>115</sup> The evidence based on market power and exclusion was more than sufficient to support claims of antitrust violations. This was a case that the FTC should not have lost. Hopefully the FTC can write rules for FRAND that will indicate the types of conduct that will trigger FTC actions, and a new DOJ will cooperate. Simple breaches of FRAND agreements are not enough, but when market power and exclusionary effects are present, as they clearly were in *Qualcomm*, antitrust intervention is appropriate. That then leaves the issue to the federal courts, and many judges remain suspicious. That gives the FTC a particularly high burden to justify and clarify its position.

In December 2021, the Antitrust Division responded to some of these concerns. Together with the U.S. Patent and Trademark Office (“USPTO”) and the National Institute of Standards and Technology (“NIST”), the Antitrust Division put forward a draft statement on “Licensing Negotiations and Remedies for Standards-Essential Patents” (“Draft Statement”).<sup>116</sup> The draft substantially repudiates the New Madison statement as well as another Trump-administration declaration: the same agencies’ 2019 statement on remedies for standards essential patents.<sup>117</sup> The Press Release accompanying the 2021 statement indicates that it was drafted in response to President Biden’s EO.<sup>118</sup>

The Draft Statement does two things: first, it shifts a strong bias favoring injunctions that was articulated in the 2019 policy statement on remedies back to a perspective that is consistent with equitable principles generally. Under the Draft Statement, entitlement to a patent infringement injunction is not automatic but rather should be guided by the historical principles that the Supreme Court returned to in its *eBay* decision.<sup>119</sup> A firm that has subjected its patents to FRAND requirements has already promised to license its patents to other participants in a nondiscriminatory fashion. The adequacy of its remedy at law (royalties in this case) must be determined within that framework. That leaves only a narrow window for

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115. *FTC v. Qualcomm*, 969 F.3d 974, 983–86 (9th Cir. 2020).

116. U.S. PAT. & TRADEMARK OFF., NAT’L INST. OF STANDARDS & TECH., & U.S. DEP’T OF JUST., DRAFT POLICY STATEMENT ON LICENSING NEGOTIATIONS AND REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS (2021), <https://www.justice.gov/atr/guidelines-and-policy-statements-0/public-comments-draft-policy-statement-licensing-negotiations-and-remedies-standards-essential> [<https://perma.cc/A2PE-9BWH>] [hereinafter DRAFT POLICY STATEMENT ON LICENSING NEGOTIATIONS].

117. *See* U.S. PAT. & TRADEMARK OFF., NAT’L INST. OF STANDARDS & TECH., & U.S. DEP’T OF JUST., POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS (2019). For my critique of this statement, see Hovenkamp, *Justice Department’s New Position*, *supra* note 109.

118. *See* Press Release, U.S. Dep’t of Just., Off. of Pub. Affairs, Public Comments Welcome on Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to F/RAND Commitments (Dec. 6, 2021), <https://www.justice.gov/opa/pr/public-comments-welcome-draft-policy-statement-licensing-negotiations-and-remedies-standards> [<https://perma.cc/L6XR-8HAC>].

119. *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).

injunctions, as the Draft Statement notes<sup>120</sup>—mainly against firms that are violating clearly established obligations under the FRAND system. Until that violation has been established, no injunction should be forthcoming. Further, a patent holder who is in violation of its FRAND obligations has “unclean hands,” in the language of equity, and would be denied an injunction. That would be the case of a firm that has made an enforceable commitment to license a patent under certain conditions and then violated that commitment.<sup>121</sup>

Second, on the merits, the Draft Statement seeks to restore FRAND patent licensing to the same position as licensing generally—that is, subject to antitrust rules when they are violated.<sup>122</sup> This does not mean that an antitrust action should lie for breach of a FRAND agreement; it does entail, however, that when market power and anticompetitive effects are present, the existence of a FRAND agreement is not a bar to antitrust enforcement. For the most part, the statement stays out of interpretative problems that do not implicate the antitrust laws, such as what the royalty base should be when it is not specified. It does at one point suggest that the FRAND commitment might do better to include more specific information about the offered terms.<sup>123</sup> This position responds to a critique that FRAND commitments can be difficult to interpret, and this can complicate the determination of a violation supporting an injunction.<sup>124</sup> It is also consistent with Harold Demsetz’s proposal that bidders for the right to sell in monopolized markets announce their prices in advance.<sup>125</sup> Speaking with possible reference to the *Qualcomm* decision, the statement observes that:

Opportunistic conduct by SEP holders to obtain, through the threat of exclusion, higher compensation for SEPs than they would have been able to negotiate prior to standardization, can deter investment in and delay introduction of standardized

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120. DRAFT POLICY STATEMENT ON LICENSING NEGOTIATIONS, *supra* note 116, at 8–9 (citing *Apple, Inc. v. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014)).

121. See Hovenkamp, *Justice Department’s New Position*, *supra* note 109.

122. On these requirements, see Hovenkamp, *Antitrust and the Patent System*, *supra* note 105.

123. See DRAFT POLICY STATEMENT ON LICENSING NEGOTIATIONS, *supra* note 116, at 5 n.8, which states:

Providing additional information with the licensing offer that allows a potential licensee to evaluate for each SEP whether (1) a license is needed and (2) the offer is F/RAND can facilitate the progression of negotiations and enable the timely conclusion of a F/RAND license. This may be particularly helpful to small entities that do not have the expertise or resources to fully address SEP issues and may lack access to information from which to draw assurance that proposed terms are F/RAND.

124. See Case C-170/13, *Huawei Techs Co. v. ZTE Corp.*, 2015 E.C.R. 477 (responding to these concerns under EU law); see also A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make Frand Commitments More Effective*, 127 *YALE L.J.* 2110, 2115, 2121–22 (2018); William F. Lee & Douglas Melamed, *Breaking the Vicious Cycle of Patent Damages*, 101 *CORNELL L. REV.* 385, 430–31 (2016).

125. See Demsetz, *supra* note 114, at 56 (stating “the rival who offers buyers the most favorable terms will obtain their patronage,” whether or not they share production).



products, raise prices, and ultimately harm consumers and small businesses.<sup>126</sup>

The EO also unfortunately states its concerns about patent abuses too narrowly by seeking to “avoid the potential for anticompetitive extension of market power beyond the scope of granted patents.”<sup>127</sup> That is certainly a problem, but by relying on this ancient “beyond the scope of the patent”<sup>128</sup> formulation, the EO overlooks the potential for anticompetitive abuse that can arise *within* the scope of a patent. Pay-for-delay itself is an example. The question in a pay-for-delay case is not whether the conduct—a settlement of patent infringement litigation—lies outside the scope of the patent. Rather, the practice results from serious doubts that the patent itself is any good to begin with. For that reason, it was the anti-enforcement *dissenters* in *FTC v. Actavis* who argued in favor of the “scope of the patent” test.<sup>129</sup> In most of the cases that condemned anticompetitive conduct for being “beyond the scope” of the patent, the patent itself was presumed to be valid. Rather, the defendant was asserting some kind of right to exclude, such as the tying of unpatented goods that the patent did not protect.<sup>130</sup>

The same thing is true of anticompetitive patent acquisitions and much of the activities of patent assertion entities (“PAEs”) in acquiring and aggregating large numbers of patents from outside inventors. In most of these cases the problem is not that the defendant is acting beyond the scope of the patent, but that the patents themselves are either invalid or the activities, such as post-issuance acquisitions, are not protected by the Patent Act at all.<sup>131</sup> For these, stronger guidance from the FTC would be a good idea.

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126. DRAFT POLICY STATEMENT ON LICENSING NEGOTIATIONS, *supra* note 116, at 4. However, the statement also acknowledges the offsetting concern:

At the same time, when standards implementers are unwilling to accept a F/RAND license or delay licensing negotiations in bad faith, these strategies can lessen patent holders’ incentives to participate in the development process or contribute technologies to standards voluntarily. Without adequate incentives to contribute to a consensus-based process, patent holders may opt for closed, proprietary standards that do not offer the same benefits of interoperability and enhanced consumer choice.

127. Exec. Order, *supra* note 1, at 36,991.

128. *E.g.*, *Coupe v. Royer*, 155 U.S. 565, 576 (1895) (“[T]he courts have no right to enlarge a patent beyond the scope of its claim . . . .”); *see* Herbert Hovenkamp, *The Rule of Reason and the Scope of the Patent*, 52 SAN DIEGO L. REV. 515 (2015).

129. *FTC v. Actavis, Inc.*, 570 U.S. 136, 162, 167 (2013) (Roberts, C.J., dissenting) (noting that under the “scope of the patent” test the pay for delay settlement would not violate the antitrust laws); *see also* *Impax Laboratories, Inc. v. FTC*, 994 F.3d 484 (5th Cir. 2021) (mentioning no scope of the patent test in a recent FTC victory in a pay-for-delay case).

130. *E.g.*, *Motion Picture Pats. Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917) (tying of patented film projector to unpatented films was attempt to create a monopoly “wholly without the scope of the patent”).

131. *See, e.g.*, *Intellectual Ventures I, LLC v. Capital One Fin. Corp.*, 280 F. Supp. 3d 691 (D. Md. 2017) (noting the defendant’s practice of buying up all patents by outside inventors relating to an area of technology and then using them to extract royalties from unknowing infringers was not unlawful where at least some of the patents were valid; further, observing that the enforcement fell within the scope of the patents).

Aggregations of issued patents by nonpracticing entities who bring them simply to file infringement suits actually have at least a partial remedy in existing law. Section 7 of the Clayton Act,<sup>132</sup> the merger provision, prohibits anticompetitive assets as well as stock acquisitions, and a patent is clearly an “asset” for this purpose.<sup>133</sup> While patents are transferable assets, patent acquisitions can become unlawful mergers when they threaten competition, and patent validity is not a defense.<sup>134</sup> While a patent itself creates a right to exclude, it does not create the right to create a monopoly after the patent has been issued. This is a simple principle that derives from the difference between a property right and an economic monopoly. For example, ownership of a factory gives its owner the power to exclude trespassers, but that does not protect the parties when the sale of the factory becomes an unlawful merger. Any revision of the merger guidelines to cover exclusionary practices<sup>135</sup> should provide guidance on these patent aggregation practices.

The EO also invites the FTC to engage in rulemaking with respect to pay-for-delay pharmaceutical settlements.<sup>136</sup> In its *Actavis* decision in 2013 the Supreme Court held that pay-for-delay pharmaceutical settlements are reachable under the antitrust laws.<sup>137</sup> Briefly, the Hatch–Waxman Act grants a 180-day period of exclusivity, kind of a short second patent, to the first generic to come into the market upon the expiration of a primary patent on a particular drug.<sup>138</sup> This system has become heavily gamed. While initial drug patents, particularly those on molecules, are usually very strong, the drug companies have developed a variety of ways to patent lookalike products that serve the same market need as the pioneer drug. These patents, in contrast to the pioneer patents, are notoriously weak and have a high invalidity rate.<sup>139</sup>

The simplest variation of the pay-for-delay practice is that a generic drug maker files its intent to enter the market when the primary patent expires. The owner of that patent then files an infringement suit on the weak follow-on patent—a suit that the patentee would be likely to lose on grounds of invalidity. At that time, however, the pioneer patentee pays the generic a very large sum, often in the hundreds of millions of dollars, to delay its entry for several years. Under the Hatch–Waxman Act, no other generic can enter during that time either. The effect of this “reverse payment” settlement—that is, from the patentee to the alleged infringer, rather than the other way around—is to extend the primary drug’s period of exclusivity, often for several years. The more important result is that the settlement serves to preserve the drug’s price at the high level it obtained during the period of

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132. 15 U.S.C. § 18.

133. See 5 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1202f (5th ed. 2021).

134. See Erik Hovenkamp & Herbert Hovenkamp, *Buying Monopoly: Antitrust Limits on Damages for Externally Acquired Patents*, 25 TEX. INTELL. PROP. L.J. 39 (2017).

135. See *supra* text accompanying note 129.

136. Exec. Order, *supra* note 1, at 36,997.

137. *FTC v. Actavis, Inc.*, 570 U.S. 136, 159–60 (2013).

138. 21 U.S.C.A. § 355(j)(5)(B)(iv).

139. See Hovenkamp, *Rule of Reason*, *supra* note 128, at 547.

the pioneer patent.<sup>140</sup> This was one of those cases where the dissenters gave voice to a “consumer welfare” standard for antitrust while approving a practice that unambiguously increased consumer prices, often by hundreds of millions of dollars.<sup>141</sup>

Justice Breyer’s *Actavis* opinion for the majority found a basis for illegality but also held that, given offsetting considerations due to the patents, the rule of reason should be applied.<sup>142</sup> That meant that the practice entered the rule-of-reason labyrinth which, under current law, is subject to a severe anti-enforcement bias.<sup>143</sup> The result is very costly litigation. On top of that, causation and damages requirements are heroic, making it exceedingly difficult for private plaintiffs to win cases.

A better approach would be a much harsher substantive rule—close to per se illegality, but with allowance for reasonably anticipated litigation costs (roughly \$5 million).<sup>144</sup> A patentee still has a right to defend a patent reasonably believed to be valid and also to settle rather than confront the cost and uncertainties of litigation. When reverse payment settlements in the Hatch–Waxman setting reach into the hundreds of millions of dollars, however, it is pretty clear that the parties are not disputing over a patent presumed to be valid. Rather they are gaming the system so as to divide rents from a practice that uses that Act precisely in the opposite way from intended, which was to facilitate the prompt entry of generic drugs.<sup>145</sup>

A recently passed California statute excluding pay-for-delay settlements is a good model for Congress to examine. That statute prohibits a generic from receiving “anything of value” in exchange for an agreement to delay research, development, or marketing of a generic drug.<sup>146</sup> At this writing a federal court has issued a preliminary injunction against enforcement of the statute, largely on Commerce Clause grounds because the statute applies to out-of-state settlements.<sup>147</sup> Federal legislation taking the same approach would not confront that issue.

Finally, the EO contains statements directed mainly to the Secretary of Health and Human Services addressing practices that unreasonably delay the competitive introduction and production of biosimilar drugs, as well as outside

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140. See Aaron Edlin et al., *The Actavis Inference: Theory and Practice*, 67 RUTGERS UNIV. L. REV. 585 (2015).

141. *Actavis, Inc.*, 570 U.S. at 161 (Roberts, C.J., dissenting, joined by Justices Scalia and Thomas).

142. *Id.* at 159.

143. See *supra* text accompanying notes 5–6.

144. See Jongsub Lee, Seungjoon Oh & Paula Suh, *Inter-Firm Patent Litigation and Innovation Competition* (Working Paper, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3298557](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3298557) [<https://perma.cc/THR3-63JH>] (describing median of all patent litigation through trial; could be larger for valuable patents).

145. See Erik Hovenkamp, *Antitrust Law and Patent Settlement Design*, 32 HARV. J.L. & TECH. 417 (2019) (stating the relevant conditions for such rules); *Impax Labs., Inc. v. FTC*, 994 F.3d 484 (5th Cir. 2021) (noting that even under the rule of reason, a settlement that did not provide for a delay would be a less restrictive alternative).

146. CAL. HEALTH & SAFETY CODE § 134002(a)(1).

147. *Ass’n for Accessible Meds. v. Bonta*, No. 2:20-cv-01708-TLN-DB, 2021 WL 5853431, at \*9–10 (E.D. Cal. Dec. 9, 2021).

producer access to drug products for purposes of litigation.<sup>148</sup> A biosimilar drug is a distinguishable compound from the original, but one that has no clinically meaningful differences in terms of safety and effectiveness.<sup>149</sup> One particularly pernicious abuse of the patent process is a pioneer drug maker's acquisition of patents on similar drugs to its own products. The firm does not practice these patents, but holds them to make sure that no outside firm can innovate a similar competitor.<sup>150</sup> At present there is some antitrust litigation involving firms who delay the entry of biosimilars by acquiring the relevant patent preemptively.<sup>151</sup> Other claims are of anticompetitive bundled discounts that tie packages or cocktails of drugs together, effectively excluding a biosimilar competitor.<sup>152</sup> There is also litigation, not exclusively under the antitrust laws, involving agreements with insurers that restrict payment for use of biosimilars.<sup>153</sup>

For much of patent and antitrust litigation the FTC has a distinctive advantage over private plaintiffs. Acting as an enforcer, the FTC need not prove causation or damages, but only the violation itself. A private plaintiff needs to prove both.<sup>154</sup> This is particularly important in innovation-intensive areas because the requirement that private plaintiffs prove causation and damages—both essential statutory features of private claims—requires them to establish “but for” situations that are extremely difficult to establish in complex markets where the effects of innovation are an important element.<sup>155</sup>

## VII. RIGHT TO REPAIR

The issue of a right to repair one's own durable equipment, or alternatively to choose one's own repair technician, sounds somewhat removed from antitrust,

148. Exec. Order, *supra* note 1, at 36,997.

149. See Michael A. Carrier & Carl J. Minniti III, *Biologics: The New Antitrust Frontier*, 2018 UNIV. ILL. L. REV. 1.

150. See Gregory R. Day & W. Michael Schuster, *Patent Inequality*, 71 ALA. L. REV. 115, 121–30 (2019); Peter Loftus & Denise Roland, *By Adding Patents, Drugmaker Keeps Cheaper Humira Copies Out of U.S.*, WALL ST. J. (Oct. 16, 2018), <https://www.wsj.com/articles/biosimilar-humira-goes-on-sale-in-europe-widening-gap-with-u-s-1539687603?ns=prod/accounts-wsj> [<https://perma.cc/7MWX-RTFH>].

151. E.g., *In re Humira Antitrust Litig.*, 465 F. Supp. 3d 811 (N.D. Ill. 2020), *appeal docketed*, (7th Cir. July 30, 2020) (noting the *Noerr-Pennington* doctrine precluded antitrust liability where roughly half of the patents that the defendant asserted were found to be valid); *cf.* *Biocad JSC v. Hoffman-La Roche*, 942 F.3d 88 (2d Cir. 2019) (finding that foreign manufacturers failed to show that their claim that defendant's scheme to exclude biosimilar drugs fell within exclusion of the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, given that in the first instance the injuries accrued entirely to foreign firms). The problem of antitrust and new entry by biosimilars is treated in HERBERT HOVENKAMP, MARK D. JANIS, MARK A. LEMLEY, CHRISTOPHER LESLIE & MICHAEL CARRIER, *IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW* (3d ed. 2017 & 2021 Supp.).

152. *Pfizer, Inc. v. Johnson & Johnson*, 333 F. Supp. 3d 494 (E.D. Pa. 2018) (denying motion to dismiss bundled discount claim).

153. See *In re Remicade Antitrust Litig.*, 345 F. Supp. 3d 566 (E.D. Pa. 2018).

154. For a good examination, see Kevin B. Soter, *Causation in Reverse Payment Antitrust Claims*, 70 STAN. L. REV. 1295 (2018).

155. See Hovenkamp, *Antitrust Harm*, *supra* note 5, at 842–45.

and much of it is. In fact, however, the right to select one's own repair service was the subject of a controversial Supreme Court antitrust decision in 1992.<sup>156</sup> The Court held that a nondominant firm's restraints on third-party repairs of its photocopiers was actionable when the owner of the photocopier was "locked in" by virtue of its purchase. After remand, the plaintiffs won a significant victory at trial.<sup>157</sup> As a result, a type of antitrust right to repair still has some vitality under the Sherman Act, particularly if the restraint imposed by the manufacturer can be characterized as a tying arrangement.<sup>158</sup>

The right to repair can also raise issues under patent law—in particular, patent law's ancient distinction between "repair" and "reconstruction."<sup>159</sup> Under the Patent Act, the purchaser–user of a patented good has a right to "repair" it, but "reconstructing" it while it is still under patent is an act of infringement. The Supreme Court has generally interpreted this law in a way that is favorable to accused infringers. For example, in its fractured plurality decision in *Aro Manufacturing Co. v. Convertible Top Replacement Co.*,<sup>160</sup> the Court held that an independent firm could lawfully replace the entire canvas top of a traditional "ragtop" convertible automobile, leaving only the metal supports as original. As is so often the case, the patented good contained some parts that are either single-use or else that wear out more quickly than other parts. Relying on that decision, the Federal Circuit held in *Jazz Photo Corp. v. ITC*<sup>161</sup> that firms who completely refurbished disposable cameras that were intended for a single use were conducting a permissible "repair" and not a "reconstruction." This right by the purchaser to rebuild is also strongly reflected in the patent "exhaustion" doctrine, which holds that the purchase of a patented article exhausts all of the patentee rights in that article, leaving the owner free to repair it. For example, once a printer maker sells a patented toner cartridge it cannot enforce by patent law a restriction prohibiting users from refilling it and replacing worn parts as needed.<sup>162</sup> Patent exhaustion is not an antitrust doctrine, but it is often applied in such a way as to reach the same vertical practices that antitrust law reaches.<sup>163</sup>

Looking only at products that are sold, the right of the purchaser to make her own repairs appears to be strongly embedded in American law. Indeed, the patent exhaustion doctrine stated as much since the beginning of the twentieth

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156. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992).

157. Largely affirmed by 125 F.3d 1195 (9th Cir. 1997).

158. The decision was widely criticized, including by this Author. See HOVENKAMP, *FEDERAL ANTITRUST POLICY*, *supra* note 30, § 3.3a.

159. See Natali Richter, "Substantial Embodiments" and "Readily Replaceable Parts": A Contemporary Understanding of the Doctrine of Permissible Repair, 59 UNIV. LOUISVILLE L. REV. 333, 335 (2021) (summarizing many doctrine developments to date).

160. 365 U.S. 336 (1961), subsequently qualified in 377 U.S. 476 (1964).

161. 264 F.3d 1094 (Fed. Cir. 2001).

162. *Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523 (2017).

163. The practice is most frequently analogized to tying. See 10 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1782 (4th ed. 2018).

century<sup>164</sup> and even tilted toward expansive permission of repairs prior to the Civil War.<sup>165</sup>

Two important variations can provoke serious problems, however. One is when the aftermarket part is itself patented, and the other is when essential diagnostic or repair tools include software, which is licensed rather than sold.

Suppose a particular patented electronic part in a cellular phone fails and must be replaced. Here, the Patent Act provides that a patentee has no duty to license a patent to someone else, and this entails that a manufacturer of the patented part has no duty to sell it.<sup>166</sup> In that case, under current law, the owner of the phone may be stuck: she can obtain the part only from the manufacturer–patentee, who may insist on installing it as well. That could be a tie of parts and service, which under some circumstances could be unlawful under the antitrust laws.<sup>167</sup>

A related variation occurs when the replacement part bears design features that are covered by a design patent. This issue has arisen in the market for aftermarket “crash” parts for automobiles and could threaten the enterprise of making and selling non-OEM (Original Equipment Manufacturer) parts. In *Automotive Body Parts Assn. v. Ford Global Tech, LLC*, the Federal Circuit held that an automobile manufacturer could lawfully enforce design patents on aftermarket parts such as bumpers.<sup>168</sup> The result can prevent third parties from manufacturing replacement parts for automobiles—or practically anything else—if the replacement part has a visible, nonfunctional design component protected by a patent. For example, an independent manufacturer could not produce an exact copy of an aftermarket automobile bumper but would have to make its appearance sufficiently different that it did not infringe the design patent. This decision could effectively wipe out a large portion of the market for third-party design of aftermarket parts. Insurers often prefer third-party parts because they are less expensive. By contrast, car owners presumably prefer cars whose replacement parts are identical to the originals. Design patents are supposed to cover nonfunctional

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164. *Goodyear Shoe Mach. Co. v. Jackson*, 112 F. 146, 150 (1st Cir. 1901) (finding permissible repair rather than reconstruction when purchasers of heavy-duty sewing machines used for making shoes replaced the machines’ worn-out cams); *Morrin v. Robert White Eng’g Works*, 138 F. 68, 77 (C.C.E.D.N.Y. 1905) (holding that part replacement constituted a repair rather than reconstruction when consumption of the replaced part is an essential element of the device).

165. *Wilson v. Simpson*, 50 U.S. 109 (1850) (noting that “repairing” is permissible, but not “replacing;” here, purchaser of patented wood-planing machine had right to replace the blades, or cutters, which wore out frequently). On the history prior to the Sherman Act, see Herbert Hovenkamp, *Antitrust and the Design of Production*, 103 CORNELL L. REV. 1155 (2018).

166. 35 U.S.C. § 271(d)(4). The *Kodak* case got around the problem by reasoning that the provision merely codified existing law, although that did not explain why the court could impose a duty that neither the statute nor pre-existing common law would have recognized. *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1214 n.7 (9th Cir. 1997).

167. See discussion of *Kodak v. Image Technical Services*, *supra* note 155–157.

168. *Automotive Body Parts Ass’n v. Ford Global Techs., LLC*, 930 F.3d 1314 (Fed. Cir. 2019).

features, which is an important distinction with utility patents. In the past, the Federal Circuit had been more sensitive to this problem—holding, for example, that a design patent on a key blade could not be enforced if its principal purpose was to make the key blade incompatible with locks made by others.<sup>169</sup> This issue could be addressed by advocacy to the Federal Circuit, where most of these cases land on appeal, or else to the Supreme Court. Otherwise, new legislation may be needed to broaden the design patent statute’s exclusion of functional content. In fact, the Federal Circuit has been backsliding on the issue, offering protection to designs that have a substantial functional component. This slippage needs to be reversed.<sup>170</sup>

The other situation arises when the repair in question requires access to diagnostic software that is licensed subject to restrictions that effectively prohibit diagnostic use by third parties, including even the owner of the device. For example, John Deere has used such clauses in software licenses for some of its tractors.<sup>171</sup> As a general matter, the first sale doctrine does not apply because software is licensed, not sold. Two doctrines that could be applied, however, are copyright misuse and fair use.

Copyright “misuse” occurs when the owner of a copyright places restrictions that are thought to impair competition unreasonably, even though they might not be antitrust violations.<sup>172</sup> For example, in *Lasercomb America, Inc. v. Reynolds*,<sup>173</sup> the Fourth Circuit found copyright misuse in a software license for a computer-assisted design package that prevented the licensee from designing any competing software. While that agreement very likely did not violate the antitrust laws, it did impose an anticompetitive restraint on the use of the software product at issue. Or in *Assessment Technologies, LLC v. WIREdata, Inc.*<sup>174</sup> Judge Richard Posner—who never read misuse law expansively<sup>175</sup>—struck down as “akin to misuse” the attempt by an owner of a copyrighted database to use it in such a way as to restrict unreasonable access to uncopyrightable data contained in the database. In this case the database was designed to store property tax data, and tax assessors used it to collect this data, which was in the public domain. As a result, the only way to access the tax data was by using the database, which the owner denied.

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169. *Best Lock Corp. v. Ilco Unican Corp.*, 94 F.3d 1563 (Fed. Cir. 1996).

170. For a good discussion of the Federal Circuit’s gradual slippage on this issue, see Peter S. Menell & Ella Pardon-Corren, *Design Patent Law’s Identify Crisis*, BERKELEY TECH. L.J. (forthcoming 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3668032](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668032) [<https://perma.cc/D23D-N23H>]

171. For a good survey of the issues, including discussion of John Deere’s restriction on tractor repairs, see Nicholar A. Mirr, *Defending the Right to Repair: An Argument for Federal Legislation Guaranteeing the Right to Repair*, 105 IOWA L. REV. 2193 (2020).

172. See Kathryn Judge, *Rethinking Copyright Misuse*, 57 STAN. L. REV. 901, 905–14 (describing the history of copyright misuse).

173. 911 F.2d 970 (4th Cir. 1990).

174. 350 F.3d 640, 647 (7th Cir. 2003). For additional analysis of the problem, see CHRISTINA BOHANNAN & HERBERT HOVENKAMP, *CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION* 265–68 (2013).

175. *E.g.*, *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 510–12 (9th Cir. 1982).

The *WIREDdata* case seems quite relevant to the John Deere situation. The farmer in question, or her service provider, wants access to the software not to make pirated copies but only to read it in order to diagnose the tractor that the farmer already owns.

An alternative to the same result is the doctrine of fair use, recently expanded by the Supreme Court in *Google, LLC v. Oracle America, Inc.*<sup>176</sup> That decision found fair use in Google's copying of application programming interface code in an Oracle software. In the right to repair situation, by contrast, the service provider or owner of the device seeks to use it only to make a repair.

The FTC has already addressed some of these issues in a report on the right to repair, issued in May 2021.<sup>177</sup> That report recommends new legislation, which may be necessary for many situations. The discussion here simply observes that existing antitrust and IP law already address at least a part of the problem.

### VIII. AGRICULTURE: PACKERS AND STOCKYARD ACT (PSA) AND AGRICULTURAL SEED

The EO instructs the Secretary of Agriculture to consider practices in agricultural markets and ways to improve enforcement of the Packers and Stockyards Act ("PSA").<sup>178</sup> That Statute, which is not part of the antitrust laws, is enforced by the Secretary of Agriculture, although delinquent penalties may be recovered by the Attorney General.<sup>179</sup> Under a related statute, a private person who is injured by a violation of the PSA or certain related orders of the Secretary of Agriculture may obtain single damages. Further, the PSA expressly provides that an injured plaintiff may also sue under state law.<sup>180</sup> In addition, the Secretary may act upon the complaint of a private plaintiff or a state.<sup>181</sup>

The Statute prohibits unfair and deceptive practices as well as practices such as manipulating or controlling prices or giving "undue preferences" for some participants over other. The Statute's broad and vague language led Chief Justice Taft to describe the Act in 1922 as treating U.S stockyards like "great national public utilities."<sup>182</sup> More recently, the courts have responded to this statutory breadth by

176. 141 S. Ct. 1183 (2021); *see also* Chamberlain Grp. v. Skylink Techs., 381 F.3d 1178 (Fed. Cir. 2004) (explaining that neither the Copyright Act nor the Digital Millennium Copyright Act prohibited a competitor from simply reading the plaintiff's code in order to make a compatible garage door opener).

177. FED. TRADE COMM'N, NIXING THE FIX: AN FTC REPORT TO CONGRESS ON REPAIR RESTRICTION (2021), [https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing\\_the\\_fix\\_report\\_final\\_5521\\_630pm-508\\_002.pdf](https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf) [<https://perma.cc/6LVM-MZ8P>].

178. Exec. Order, *supra* note 1, at 36,992–93.

179. 7 U.S.C. §§ 192, 213, 215–16. For coverage under the statute, *see* § 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 363 (5th ed. 2021). *See also* Herbert Hovenkamp, *Does the Packers and Stockyards Act Require Antitrust Harm?* (Jan. 10, 2011) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1737440](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737440) [<https://perma.cc/4CHC-XUVK>].

180. 7 U.S.C. § 209.

181. *Id.* § 210.

182. *Stafford v. Wallace*, 258 U.S. 495, 516 (1922).



reading into it both market power and competitive harm requirements akin to those contained in the antitrust laws.<sup>183</sup> Many of the covered practices resemble business torts more than antitrust violations, and the Statute was drafted so as to treat them that way. In *Terry v. Tyson Farms, Inc.*,<sup>184</sup> however, the court decided that Tyson's alleged practice of under weighing chickens presented to it by contract growers did not violate the Statute because it did not cause injury to competition.<sup>185</sup> But the deceptive practices provision in the Statute contains no competitive injury requirement.

Decisions such as *Terry* are incorrectly reading antitrust-like competitive harm requirements into the PSA. The first two subsections of the Statute contain no market power or competitive injury requirement at all.<sup>186</sup> The subsequent three sections do contain a competitive harm requirement.<sup>187</sup> Clearly it is inconsistent with the language of the Statute to read the competitive harm provisions into the first two subsections. The *Terry* action was under the first subsection. As a result, this concern of the EO is clearly supported by the existing Statute without amendment. If the Statute is opened up to become more tort-like in its approach, the amount of

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183. *E.g., In re Pilgrim's Pride Corp.*, 728 F.3d 457 (5th Cir. 2013) (reading statute narrowly to as to impose competitive harm requirements analogous to those created by the Sherman Act.).

184. 604 F.3d 272 (6th Cir. 2010).

185. *Id.* at 276.

186. Substantive violations are enumerated in 7 U.S.C. § 192:

It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or . . .

187. Detailed below:

(c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, *if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly*; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or *with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce*; or

(e) Engage in any course of business or do any act for the purpose or *with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce*; . . .

*Id.* (emphasis added).

litigation will certainly increase, effectively expanding the reach of federal law into agricultural business torts.

Finally, the EO briefly refers to ensuring that the intellectual property system does not unnecessarily reduce competition in seed “beyond that reasonably contemplated by the Patent Act”<sup>188</sup> and also by the Plant Variety Protection Act of 1970.<sup>189</sup> This could be read as at least an implicit invitation to revisit the Supreme Court’s unreasonably narrow decision in *Bowman v. Monsanto*,<sup>190</sup> which held that a farmer–licensee committed patent infringement when he saved some seed from the previous year’s crop and replanted it.<sup>191</sup> One thing worth studying is the decision’s impact on the competitiveness of the market for agricultural seed. The patent exhaustion doctrine has always served to limit the extent of downstream monopoly of durable products. Granted, “self-replicating” is not precisely the same thing as “durable.” *Bowman* was not re-using the same seed but rather planting its offspring. Nevertheless, the two situations present similar economic issues and equivalent dangers of overreaching.

### CONCLUSION

President Biden’s efforts to restore the American economy have pointed consistently in one direction—getting economic output up. High output benefits consumers with lower prices. It benefits labor and other suppliers with increased work opportunities and greater competitiveness in job markets, and it benefits business overall as well.

The goal of the antitrust laws is also to promote maximum sustainable output in the individual markets where antitrust claims are addressed. Antitrust should not be a device for punishing firms or for making them less productive just in order to satisfy some noneconomic goal. Nor should it protect one economic group such as small business at the expense of others, such as consumers and labor. One feature of an output-driven approach is that it can be quite tolerant of large firms, provided that they do not behave anticompetitively. Sometimes it is tempting to look back nostalgically at the age of Brandeis and admire the protection of small firms from the incursions of chain stores and organized distribution. But that movement failed miserably—as it should have, for the simple reason that customers did not prefer it. By contrast, anticompetitive practices need to be carefully investigated, prosecuted where appropriate, and enjoined. That is where antitrust policy can create the most widely distributed benefits.

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188. 35 U.S.C.  
189. 7 U.S.C. §§ 2321–582.  
190. 569 U.S. 278 (2013).  
191. *Id.* at 284–85.