Antitrust's Place in Regulation

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Introduction: Regulation and the "Whole of Government"

Public regulation of business and the economy comes from many sources and from every level of government: federal, state, and local. We sometimes think of competition policy as a product of the antitrust laws, but that seriously simplifies reality. Many non-antitrust statutes either explicitly or implicitly take competition policies into account. Others would be greatly improved if they did. The question then is how should these policies be made to work together?

These issues are particularly critical today as antitrust policy makers consider the phenomenon of big tech platforms such as Alphabet (Google), Amazon, Apple, Meta (Facebook), and Microsoft. Many people would like to see antitrust do more. Some even think of antitrust law as a kind of Swiss Army Knife, that can address every problem economic problem.[1] So one question is how broadly can antitrust policy reach under current legislation? Another is Why Antitrust? Should we expect the antitrust laws to shoulder this burden alone? That leads to demagoguery if the laws are interpreted to give enforcers significant power that is not articulated in the antitrust laws. Those who are frustrated because Congress has not acted in a certain way are tempted to obtain relief through the court system, taking advantage of the antitrust law's highly general language.

In 2021 President Biden signed a broad Executive Order (EO) on promoting competition in the American economy.[2] The EO announced that the antitrust laws formed the "Statutory Basis of a

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[1] E.g., Peter Brigham, The Case for Green Product Fixing: Reconciling Antitrust Law with Self-Regulation to Combat Climate Change, 73 Amory L.J. 241 (2023); Amy T. Brantly & Jennifer M. Oliver, The Correlation Between Antitrust Enforcement and Gender Equality, 31 J. Antitrust Unfair Competition L. 116 (2021).

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

Whole-of-Government Competition Policy."[3] It also acknowledged that "Congress has also enacted industry-specific fair competition and anti-monopolization laws that often provide additional protections." Further, the Order "recognizes that a whole-of-government approach is necessary to address overconcentration, monopolization, and unfair competition in the American economy."

Many problems that the Executive Order identifies are things that antitrust is already empowered to do something about. These include high prices, reduced mobility of workers, noncompetitive market structures, and unreasonable foreclosure from business opportunities. The goal that the EO states has come to be called the "consumer welfare" principle. Its comes from the Supreme Court, whose full statement is:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests 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 conductive to the preservation of our democratic political and social institutions.[4]

Under that principle, high output, low prices, and high quality are central antitrust goals. The EO then relates the need for lower prices specifically to telecommunications, internet access (broadband), airline flights, and prescription drugs.

The preservation of democratic political and social institutions are equally important. The antitrust laws provide no authority for duplicating or reinterpreting the rules governing such things as race or gender discrimination, or excessive environmental emissions. Rules governing these practices come from other sources. However, Antitrust law supports democratic political and social institutions by protecting political actions that might otherwise be challenged as anticompetitive. For example, organized and even

[3] Id. The EO included the Sherman Act, the Clayton Act, and the FTC Act, even though the FTC Act is not an "antitrust law." See 15 USC §12.

[4] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

collusive political activity is legal under the antitrust laws because it is essential to the functioning of democratic political processes. This applies even to boycotts that would be unlawful in a purely commercial arena.[5] The hard part is being able to distinguish legitimately political from commercial conduct. For example, it requires a close look when interested actors do such things as boycott government agencies in order to obtain higher fees for themselves.[6] In addition, people have the right under the antitrust laws to petition the government for legislation at every government level, even if what they want is anticompetitive under antitrust standards.[7] Industry and professional associations composed mainly of smaller firms have petitioned governments at all levels and received many government-authorized restraints that would be unlawful if they were done purely by private firms.[8]

The price and output goals that the Supreme Court articulated usually pull in tandem.[9] Lower prices yield higher output, and vice-versa. Antitrust's goal is not wealth redistribution itself, unless a correlation exists with output –for example, more competitive markets

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[5]NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (boycott of racially-discriminating businesses not unlawful); Missouri v. National Org. for Women, Inc. (NOW), 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980) (boycott of states that had not ratified the Equal Rights Amendment not unlawful). Cf. Fashion Originators Guild v. FTC, 312 U.S. 457 (1941) (purely private boycott of retailers who violated defendants' design rules unlawful).

[6]FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (condemning boycott of lawyers seeking higher fees for representing indigent criminal defendants).

[7]Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (organized railroad legislative campaign against truckers); United Mine Workers v. Pennington, 381 U.S. 657 (1965) (similar, mine safety rules).

[8]Parker v. Brown, 317 U.S. 341 (1943) (upholding state-managed raisin cartel); Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48 (1985) (collective rate making); Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) (allegedly anticompetitive municipal annexation policies).

[9] For a reasonably comprehensive list of the Supreme Court's statements on output and price goals, see Herbert Hovenkamp, Antitrust's Goals in the Federal Courts (Penn Law, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4519993

might yield both greater output and greater equality – or not. By attacking price fixing, antitrust may be working toward a more even distribution of wealth, but price fixing is in fact illegal whether or not it has desirable redistributive effects. Antitrust is also not a substitute for products liability law. Manufacturers acting on their own who make saws that can cut off people's fingers are not violating antitrust law, even though they may be committing a tort. However, if manufacturers agree with *each other* not to deploy a device that could prevent such harms, then the antitrust laws kick in because an agreement to make a product less safe is an unlawful restraint of trade.[10]

The goals of statutory regulation are more complex than those of antitrust. Under the neoclassical theory, regulation's principal purpose is to mimic competitive markets. When the market cannot reach a competitive equilibrium on its own, it looks for suitable alternatives to marginal cost pricing.[11] Alternatively, it may respond to externalities, by requiring health, safety, or environmental protections that the market itself cannot be trusted to deliver.[12]

Regulatory rules also reach more broadly, and many of them cannot be justified in purely neoclassical terms. The deviations have provoked a great deal of debate about regulation's politics. On the one hand, they are seen as ways of incorporating principles of justice or nondiscrimination into regulatory policy.[13] On other, they are accused of reflecting little more than interest group capture.[14]

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[10]SD3, LLC v. Black & Decker, Inc., 801 F.3d 412 (4th Cir. 2015) (partially sustaining claim that table saw manufacturer agreed with one another not to incorporate technology that would prevent many sawing accidents).

[11]E.g., Alfred E. Kahn, The Economics of Regulation: Principles and Institutions (1988).

[12]W. Kip Viscusi, Regulation of Health , Safety, and Environmental Risks, Ch. 9, 1 Handbook of Law and Economics (A. Mitch Polinsky and Steven Shavell, eds. 2007).

[13]E.g., Daniel Heme, Regulation and Redistribution with Lives in the Balance, 89 Univ. Chi. L. Rev. 649 (2022).

[14] For a critique, see Peter H. Aranson & Peter C. Ordeshook, Regulation, Redistribution, and Public Choice, 37 Public Choice 69 (1981).

The dominant schools of antitrust thought have generally not involved themselves much in this debate. For the most part they have agreed that the goal of antitrust law is the promotion of competitive markets, reflected in the "lowest prices, the highest quality and the greatest material progress" that the Biden EO declares.

A prominent feature of the EO is the centrality of antitrust law to its "whole of government" approach to regulation. But antitrust law is not the whole of government, or even the whole of that part of government that is involved in economic regulation. Nothing in the text of the Sherman and Clayton Acts empowers a "whole of government" approach to economic control that will achieve these goals.

The antitrust laws are brief and quite focused. They condemn restraints of trade,[15] monopolization,[16] practices that threaten substantially to lessen competition,"[17] and the FTC Act's "unfair methods of competition" provision, which is not an antitrust law and can be enforced only by the FTC.[18] They do not empower any government agencies other than the Justice Department and the Federal Trade Commission. Unlike many regulations, they can also be directly enforced by private parties, except for the FTC Act.[19] Further, they apply to virtually all commercial activity within the reach of federal law under the Commerce power, except for some specific areas that have been legislatively removed.

While the EO mentions several federal laws and agencies in addition to antitrust that can contribute to a "whole of government" approach to competitive markets, it contemplates that each Agency will do this through the laws that it is empowered to enforce. An Executive Order is not legislation, and it cannot broaden the range of a statute beyond its scope. In any event, President Biden's EO cannot be interpreted as requiring that. It certainly does not suggest that antitrust law should displace labor law, act as a substitute for the Consumer Product Safety Commission,[20] enforce civil rights, or make environmental law in the place of Congress and the United States

[15] 15 U.S.C. §1.
[16] 15 U.S.C. §2.
[17] 15 U.C.C. §§13, 14, 17.
[18]15 U.S.C. §45.
[19] 15 U.S.C. §15.
[20] https://www.cpsc.gov/.

Environmental Protection Agency.[21] All of these tasks have been assigned elsewhere.

One distinctive feature of the antitrust laws is the level of generality they employ in addressing economic issues. As a result people sometimes try to use them to fix every imaginable economic problem. But that was never the system that Congress had in mind and, in any event, it did not leave any detailed instructions of the type that more targeted regulatory provisions contain.

Other federal statutes, including the securities acts, the labor laws, telecommunications law, tax law, environmental law, and civil rights law are far more specific and have more targeted enforcement mechanisms in place. Some also include provisions that are relevant to the promotion of competitive markets. A "whole of government" approach to the economy should assign management duties to statutory regimes and Agencies that have jurisdiction over the practice at issue and are well placed to address each problem.

Within this framework antitrust policy has a critically important role, but it is limited in important ways. The Sherman Act is addressed to practices that restrain trade by reducing market output and producing higher prices, as well as single-dominant-firm practices that accomplish the same results through unreasonable exclusion of rivals.[22] The Clayton Act, which is more specific, targets a form of price discrimination, anticompetitive exclusionary contracts, and anticompetitive mergers.

A "whole of government" approach to achieving a more competitive economy involves the coordinated activity of many legal institutions. That means two things: first, they need to be effective regulators within their own domain; but second, they must make room for other regulators' prerogatives as well. On the latter, antitrust law as the federal courts apply it actually does a fairly decent job of accommodating other regulatory regimes, both federal and state. Perhaps because of the highly general language of its statutes, it has

[21] https://www.epa.gov/.

[22] See Herbert Hovenkamp, The Antitrust Text, Indiana L.J. (forthcoming, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4277914.

proven itself to be quite open to ceding some territory to other regulatory regimes.

For antitrust, over-accommodation has actually been a bigger problem than aggrandizement. On federal regulation generally, the Supreme Court initially took a position of broad deference, holding that antitrust law should stay out of markets that were already "pervasively" regulated by a different federal statutory regime. For example, in the *RCA* case the Supreme Court held that FCC regulation of broadcast license transfers was not so pervasive as to oust antitrust jurisdiction.[23] It reached substantially the same result in a decision holding that the then existing Federal Power Commission's approval of a pipeline merger did not prohibit antitrust scrutiny.[24] And in *Otter Tail* it held that because the then existing Federal Power Commission had no authority to compel wholesale exchanges, or "wheeling," of power among utilities, a refusal to wheel could be governed by the antitrust laws.[25] By contrast, in the *Hughes Tool* case the Supreme Court held that the then existing Civil Aeronautics Board's control over TWA Airlines was "pervasive," and that served to remove a merger from antitrust scrutiny.[26] All of these decisions effectively took the position that if regulation in a particular market is "thick," leaving few gaps, antitrust simply has no place.

Changing Attitudes About Regulation and Antitrust's Role

This "pervasiveness" approach to the separation of regulation and antitrust was based on an optimistic view of regulation which saw it as relatively complete government substitute for private business decision making. Once an industry was regulated in this fashion there was simply not much point to antitrust law.

That view of regulation lost much of its luster in the 1970s and 1980s, however, with the rise of public choice theory and deregulation.[27] The deregulation movement coincided with a general

[23]United States v. RCA, 358 U.S. 334, 348-351 (1959).
[24]California v. FPC, 369 U.S. 482 (1962).
[25]Otter Tail Power Co. v. United States, 410 U.S. 366, 373 (1973)
[26]Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 389 (1973).
[27]Prominent literature includes includes James Buchanan & Gordon Tullock, The Calculus of Consent (1962); Mancur Olson, The Logic of Collective Action (2d ed. 1971) (1965). A good survey is Daniel A.

decline in antitrust enforcement overall, as the federal courts increasingly came to believe that antitrust policy had lost its focus on market competition. Instead of protecting competition and economic growth, it was being used excessively to protect smaller, high cost businesses from more aggressive competition.[28]

Ironically, the same period also saw growth in the specific use of antitrust law in regulated industries. Antitrust increasingly became viewed as a kind of middle way between "pervasive" regulation and totally free-for-all markets. As regulatory agencies backed off and began applying a lighter touch, antitrust came in to pick up the slack.[29]

A Supreme Court less enamored of regulation began to make new room for antitrust law by looking more closely at specific actions alleged to be antitrust violations, and also the specific position of the regulator in relation to those actions. That inquiry came to focus on two questions: first, whether the agency had jurisdiction over the precise action in question; and second, whether the agency had adequately exercised its authority. As the Court put it in 1981 in its *Gerimedical Hospital* decisions:

> To be sure, where Congress did intend to repeal the antitrust laws, that intent governs,…but this intent must be clear. Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry….Intent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of

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Farber and Philip P. Frickey, Law and Public Choice: A Critical Introduction (2010).

[28] Prominent examples include Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (limiting range of private actions); Matsushita Electrical Indus. Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574 (1986) (stronger standards for summary disposition of cases).

[29]For a fuller discussion, see 1A Phillip E. Areeda & Herbert Hovenkamp Antitrust Law ¶241 (5th ed. 2022); Stephen G. Breyer, Regulation and Its Reform (1982) (written before Justice Breyer went on the Supreme Court); Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward,* 7 Yale J. Reg. 325 (1990).

conduct under antitrust challenge.[30]

The Supreme Court best summarized this approach in its *Trinko* decision in 2004, which held that there was no room for an antitrust claim of unlawful refusal to deal when the regulatory agency had jurisdiction over that decision and was actually performing as an "effective steward" of the antitrust function.[31] This was particularly true in this case, the Court held because of the highly general language of the antitrust laws when compared with the specific interconnection obligations contained in the 1996 Telecommunications Act. The nature of the antitrust was that the defendant was deficient in meeting these obligations.

One feature of the deregulation literature was its emphasis on political or interest group theories of government economic control, and a corresponding de-emphasis on theories that were driven by assumptions about market structure. While the regulation movement in the New Deal may have been overly concerned with market structures or imperfections as determining the need for regulation, the public choice literature made these issues virtually irrelevant. Instead, the explanations for regulation became mainly political and largely reduced to some form of government capture.

Consider George Stigler's 1971 essay on the theory of economic regulation – written by a Nobel Prize economist who understood markets as well as anyone.[32] Stigler's "central thesis" was that "regulation is acquired by the industry and is designed and operate primarily for its benefit." Stigler never rooted the source of regulation in natural monopoly or in some other market imperfection that interfered with competitive equilibria. Rather, it was all about special interest preference and legislative victory in achieving it. Indeed, his only mention of natural monopoly was in reference to Harold Demsetz' important theory that natural monopoly markets could be made to achieve competitive performance without price regulation, by

[30]National Gerimedical Hosp. v. Blue Cross, 452 U.S. 378, 389 (1981); accord Credit Suisse Sec. (USA), LLC v. Billing, 551 U.S. 264 (2007) (SEC had the authority and was actively managing process by which new securities issues were underwritten).
[31]Verizon Comm'ns v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 413 (2004).
[32]See also George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971).

requiring firms to bid for the right to be the monopolist for a period of time.[33]

Antitrust case law, although not academic writing, has largely stayed out of the debate about public choice and the rationales for regulation. While antitrust policy has fluctuated between eras of lesser and greater confidence in markets, very little of the literature ever abandoned markets entirely. Further, it has quite correctly taken the position that the role of federal courts acting under the Sherman and Clayton Acts is not to critique regulation but rather to accommodate it, although with a more critical eye when a federal regulation demands something anticompetitive.

Thus the view reflected in the *Gerimedical* case above: antitrust's role is not to speak to the merits of any regulatory regime, or for that matter even to make determinations about the regulatory approach that would work best in a particular market. Rather its job is two-fold: first, determine that a challenged private practice is within the jurisdiction of a regulatory agency. Second, ensure that the agency is actually involved in reviewing that practice. In the *Gerimdical* case itself the question was whether a group of health care providers violated the Sherman Act by collectively refusing to deal with the hospital simply because one portion of its regulatory plan had not been approved.[34] The Court noted that the regulatory regime did not contain such a provision and that the mere fact that the National Health Planning and Resources Development Act was "pervasive" would not immunize the conduct when there was no "specific conflict" between the requirements of the regulatory regime and the application of antitrust.

The Divisive Case of Patent Law

One place where the road to accommodation with antitrust has been irregular and bumpy is patent law. Initially, in the *Bement* and *General Electric* decisions the Supreme Court held that price fixing could be shielded from liability if it were contained in a patent license. The Patent Act authorizes licensing, although not the price fixing

[33]Harold Demsetz, Why Regulate Utilities?, 11 J.L. & Econ. 55 (1968).
[34]National Gerimedical Hosp. v. Blue Cross, 452 U.S. 378, 379 (1981).

portion.[35] The upshot of *Bement* and *GE* was that in a case of conflict between patent and antitrust law, patent law should win. That highly controversial rule remains the law to this day.

In sharp contrast, the Supreme Court applied the law of vertical restraints involving patent licenses very aggressively, particularly in tying cases,[36] often holding that tying arrangements that involve patented products were unlawful even if there was no evidence of harm to competition.[37] This meant that for a fifty year period antitrust policy was unreasonably lenient toward horizontal price fixing agreements involving patents, where the threat of competitive harm was substantial, but unreasonably harsh on patent tying arrangements which caused competitive harm only infrequently.

While the *GE* price-fixing doctrine has never been overruled, it has been limited to agreements between a single patentee and a single licensee. [38] On the other side the harsh rules governing patent ties have been relaxed, first by a statutory amendment to the Patent Act itself so as to require a showing of market power for certain patent tying claims.[39] Later, a Supreme Court decision eliminated the antitrust presumption of market power for patented goods.[40] These rules greatly facilitated the development of a great deal of internet and digital innovation, much of which depends on "tying" of good protected by intellectual property rights.

Antitrust and patent law are the most important bodies of law we have for stimulating innovation, both by protecting exclusivity of patent rights and their competitive use. Nevertheless, accommodation between them has remained contentious. The EO addresses the problem several times, observing that patent law has often been used

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[35]Bement v. National Harrow Co., 186 U.S. 70 (1902); United States v. General Electric Co., 272 U.S. 476 (1926). The licensing authorization in the Patent Act is at 35 U.S.C. §261.

[36]International Salt Co. v. United States, 332 U.S. 392 (1947), overruled by Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006).

[37]E.g., *International Salt*, *supra*.

[38]FTC v. Actavis, Inc., 570 U.S. 136, 150 (2013).

[39] 35 U.S.C. §271(d)(5) (part of Patent Misuse Reform Act, passed in 1988).

[40]Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006).

to "inhibit or delay" the development and marketing of generic drugs, to extend market power "beyond the scope of granted patents," and to limit competition in markets for genetically-engineered seed.

These views place the Biden EO in sharp conflict with the Trump administration's "New Madison" doctrine, put forward in 2018.[41] Under that approach antitrust law should stay out of a broad range of patent licensing disputes, even if the agreement in question is anticompetitive under antitrust law. The Biden administration has rejected that doctrine but has not produced a replacement. A good place to begin, however, is with then Justice Breyer's decision in the *Actavis* case: if a particular license restriction is expressly authorized in the Patent Act, then antitrust law has no place overriding it. That would require a statutory amendment. However, if the Patent Act is silent, then antitrust can move forward when a practice violates one of its provisions. The *Actavis* Court held that a naked agreement under which a drug manufacturer used a payment in a patent license to delay the entry of a generic drug could be addressed under antitrust law. Because that rule did not depend on the patent's validity, the Patent Act was not a hindrance.[42]

Federalism

One striking thing about the EO is that the states or governmental subdivisions play no role. From the beginning, however, antitrust law was regarded as a joint enterprise between the federal government and the states. In fact, the states passed their own antitrust laws at about the same time that the Sherman Act was passed, and many of them enforced these effectively against anticompetitive

[41] United States Department of Justice, The "New Madison" Approach to Antitrust and Intellectual Property Law (March 16, 2018), https://www.justice.gov/opa/speech/file/1044316/dl. For a critique, see Herbert Hovenkamp, The DOJ's "New Madison" Doctrine Disregards Both the Economics and the Law of Innovation" (Stigler Center, Promarket, Sep. 8, 2021), https://www.promarket.org/2021/09/08/doj-madison-doctrine-antitrust-innovation/.

[42] FTC v. Actavis, Inc., 570 U.S. 136, 151 (2013) (The dissent does not identify any patent statute that it understands to grant such a right to a patentee,whether expressly or by fair implication.")

practices within the state.[43] Further, the state regulated other forms of enterprise long before the federal government did. The EO claims to be a "whole of government" approach, not a "whole of federal government" approach to competitiveness.

The legislative and agency initiatives of state and governmental subdivisions have had a big impact on competitiveness in the American economy. Nevertheless, the EO's "whole of government" approach appears to assume that this burden is one to be shouldered entirely by the federal government.[44]

The substantive requirements for determining the relationship between federal antitrust law and regulation by state or local government are practically identical, even though they are articulated in very different terms. Federal regulation and federal antitrust both come from Congress and the federal courts. By contrast, state and local regulation are inferior and governed by the Supremacy Clause of the Constitution. Municipal or other local government regulations are further governed by similar hierarchies between the governmental subdivision and the state in which it contained.

If Congress had wished, it would very likely have the Constitutional authority to use the antitrust laws to override a great deal of state and local regulation. It has decided not to do so. Instead, the *Parker* "state action" doctrine[45] immunizes state supervised conduct that would otherwise be unlawful under the antitrust laws. However, the conduct must be clearly "authorized" by state law, and any private conduct "actively supervised" by an appropriate state actor.[46]

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[43]See James May, Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual reach of State Antitrust Law, 1880-1918, 135 Univ. Pa. L. Rev. 495 (1986); Herbert Hovenkamp, State Antitrust in the Federal Scheme, 58 Ind. L.J. 375 (1982).

[44] On the role of the "state action" doctrine and state regulation, see discussion infra, text at notes __.

[45]Parker v. Brown, 317 U.S. 341 (1943).

[46]California Retail Liquor Dealers Assn. v. Midcal Aluminum (Midcal), 445 U.S. 97 (1980). For a relatively brief presentation of the doctrine and how it operates vis-à-vis state and local government regulation, see HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE, Ch. 20 (7th ed. 2024).

That authorization and supervision requirements create a set of rules for antitrust that are very similar to those applied today in the context of federal antitrust regulation. First, the court must determine that the power to regulate has been adequately authorized by the legislative body in charge. Second, private conduct that is covered by this body of regulations cannot simply be rubber stamped. Rather, it must be adequately supervised by a neutral government actor.

Conclusion

President Biden's Executive Order contemplates that the whole of government, not just the antirust agencies, must promote competitiveness in the American economy. Just as the EO cannot change the antitrust laws, however, so too it cannot change the laws that authorize and control other regulatory regimes. What it can do, however, is influence agencies to act toward a common goal in matters that are within each agency's control.

Achieving this requires a shared understanding of what it means to be "competitive." The Supreme Court, quoted in the EO, said it best: "the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress," while also providing for the "preservation of our democratic political and social institutions." One problem, of course, is that markets differ from one another. The same technical rules about price, quality, interfirm coordination, or innovation that work for one market may not work for another, but that need not mean that the goals are different.