

# TESLA, LET ME FIX MY CAR: THE RIGHT TO REPAIR AND THE NEED FOR A BALANCE BETWEEN PUBLIC AND PRIVATE ENFORCEMENT

EMANUELE S. PUTRINO\*

## *Abstract*

*In recent years, consumers and third-party technicians have struggled in securing their right to repair products including vehicles. Manufacturers continue to, among other things, condition warranty coverage upon the use of authorized repair facilities and limit access to parts and vehicle schematics to consumers and independent shops. Tesla is one such manufacturer that has hindered independent repair for years yet escaped liability. Consumers finally had enough and filed class action suits against the manufacturer in March 2023. The causes of action in these private suits fall short in protecting consumers, and Congress has failed to pass legislation to remedy the problem.*

*In February 2022, a congressional bill was proposed to federalize an automotive right to repair. The bill empowers the Federal Trade Commission (“FTC”) to enforce its provisions as an FTC Act section 5 violation. Despite the FTC’s successful efforts in consumer protection, the FTC is ill-equipped to properly enforce a federal right to repair by itself. To adequately protect consumers, Congress must balance enforcement between the FTC and private individuals harmed by repair restrictions. This Article proposes that Congress should amend the FTC Act and give the FTC a statutory deadline to investigate and take action against violators of section 5. If the FTC fails to do so by the required time, the FTC should promptly serve a “right-to-*

---

\* J.D. Candidate 2024, Maurice A. Deane School of Law at Hofstra University; B.S. in Criminal Justice and Sociology, summa cum laude, Adelphi University, 2021. I first want to thank my parents, Angelo & Nunziata, for sacrificing everything and leaving their home behind in Italy to give me a better life here in America. I also want to thank my brothers, Vinie and Anthony, for teaching me everything I know about cars and for giving me the idea for this Article. Thank you to Professor J. Scott Colesanti and my Notes Editor, Korinne Utting, for guiding me through this process every step of the way and giving unparalleled insight and support. To John J. Healy, thank you for initial comments on this Article and for being an amazing friend throughout our time in law school. Lastly, I want to thank the Editors of the *Oklahoma Law Review* for their efforts and ultimately for giving me the opportunity to publish with their prestigious journal.

*sue” letter on aggrieved individuals notifying them of their rights to sue under section 5 of the FTC Act. Only then will consumers and independent repair shops finally have the protection they deserve.*

### *I. Introduction*

As concerns for climate change and the depletion of natural resources grow, electric vehicles (“EVs”) are becoming more commonplace.<sup>1</sup> Tesla, Inc. (“Tesla”), the largest manufacturer of EVs, has sold almost two million vehicles since its inception in 2003.<sup>2</sup> CEO and co-founder of Tesla, Elon Musk, has touted that the fundamental intention of Tesla is “to accelerate the [progression] of sustainable energy.”<sup>3</sup> Consumers have fallen in love with Tesla’s message and, among other things, the availability of battery-charging stations.<sup>4</sup>

Tesla dominates consumer satisfaction reports, but what if consumers knew the truth behind its practices?<sup>5</sup> Imagine you are taking a family road trip to California in your Tesla that you just repaired and you are running low on battery.<sup>6</sup> Suddenly, the car stops showing the locations of Tesla’s

---

1. See Gemma Tyler, *Are Electric Cars Becoming More Popular in Recent Years?*, BLUE & GREEN TOMORROW (May 31, 2022), <https://blueandgreentomorrow.com/energy/are-electric-cars-becoming-more-popular-in-recent-years> [<https://perma.cc/DW6N-HS8D>].

2. See Mark Kane, *Tesla Sold 2 Million Electric Cars: First Automaker to Reach Milestone*, INSIDE EVS (Oct. 21, 2021), <https://insideevs.com/news/542197/tesla-sold-2000000-electric-cars> [<https://perma.cc/5WM4-EDEF>]; see also Brian Dean, *Tesla Revenue and Production Statistics for 2023*, BACKLINKO (Mar. 27, 2023), <https://backlinko.com/tesla-stats#total-teslas-sold> [<https://perma.cc/E954-GYX5>] (showing that according to Tesla investor reports, Tesla has sold 1,917,450 EVs to date since it was incorporated in July 2003).

3. Eric Holthaus, *Why Elon Musk’s Ambition Is an Antidote to Climate-Pessimism*, ROLLING STONE (Feb. 9, 2018), <https://www.rollingstone.com/culture/culture-news/why-elon-musks-ambition-is-an-antidote-to-climate-pessimism-196804> [<https://perma.cc/X4WB-B4QS>].

4. See Kristina Zucchi, *What Drives Consumer Demand for Tesla?*, INVESTOPEDIA (Sept. 17, 2021), <https://www.investopedia.com/articles/personal-finance/021715/what-drives-consumer-demand-tesla.asp> [<https://perma.cc/77RX-4K3C>] (explaining that the charging stations, cost of fossil fuels, concerns for the environment, and perceived elite status have driven the demand for EVs and Tesla cars).

5. See Fred Lambert, *Tesla Tops the List of Most Satisfied Customers in the Entire Auto Industry*, ELECTREK (June 15, 2022, 2:29 PM), <https://electrek.co/2022/06/15/tesla-tops-list-most-satisfied-customers-entire-auto-industry> [<https://perma.cc/L69K-Z8NJ>].

6. See Michael Karkafiris, *Tesla Accused of Disabling Features on Salvaged Model Without Telling Owner*, CARSCOOPS (May 11, 2018, 3:30 PM), <https://www.carscoops.com/2018/05/tesla-accused-disabling-features-salvaged-model-without-telling-owner> [<https://perma.cc/6RQ2-MS2F>]; see also Rich Rebuilds, *Has Tesla Gone Too Far?*, YOUTUBE (May

Superchargers and the car loses its ability to supercharge, all without notice from Tesla.<sup>7</sup> You are stranded in an unfamiliar place far from home, so you decide to call the Tesla service manager, whom you visited before the road trip, to repair the vehicle under warranty.<sup>8</sup> He tells you that Tesla permanently disables supercharging for unsupported and salvaged vehicles.<sup>9</sup> Then, he gives you worse news: Tesla will not restore supercharging unless you pay a recertification fee of over \$10,000.<sup>10</sup> Though you took the proper steps by repairing the minor damage to the car's doors and fenders and satisfying state-inspection criteria, Tesla still foreclosed supercharging.<sup>11</sup> With no other option, you get your Tesla towed to a friend's house one

---

10, 2018) [hereinafter Rebuilds, *Has Tesla Gone Too Far?*], <https://www.youtube.com/watch?v=okLgtYgnd7A> [<https://perma.cc/PC3W-82T3>] (explaining the situation of a family who was on a road trip when their vehicle's ability to supercharge suddenly stopped without notice from Tesla).

7. See Karkafiris, *supra* note 6; see also Rebuilds, *Has Tesla Gone Too Far?*, *supra* note 6. A Tesla Supercharger is an electric car charger unit that offers incredibly fast charging speeds that can charge the entire battery of the Tesla within an hour. Tom Pritchard, *What Is a Tesla Supercharger? Everything You Need to Know*, TOM'S GUIDE (Sept. 13, 2022), <https://www.tomsguide.com/reference/what-is-a-tesla-supercharger-everything-you-need-to-know> [<https://perma.cc/L4F6-JNNX>]. Both the Tesla app and the in-car navigation system help track the nearest Supercharger location. *Id.* A salvage vehicle is a vehicle that has been declared a total loss by an insurance company due to some damage resulting from an accident. Brian O'Connell, *What Is a Salvage Title Car and Should I Buy One?*, EXPERIAN (Mar. 21, 2018), <https://www.experian.com/blogs/ask-experian/what-is-a-salvage-title-car-and-should-i-buy-one> [<https://perma.cc/XQ62-H9E5>]; *Unsupported or Salvaged Vehicle Policy*, TESLA, INC., <https://www.tesla.com/legal/additional-resources#unsupported-or-salvaged-vehicle-policy> [<https://perma.cc/JXJ9-PRWW>] (last visited Sept. 13, 2023) ("An unsupported or salvaged vehicle is a vehicle that has been declared a total loss, commonly after extensive damage caused by a crash, flooding, fire, or similar hazard . . .").

8. See Karkafiris, *supra* note 6; see also Rebuilds, *Has Tesla Gone Too Far?*, *supra* note 6.

9. See *Unsupported or Salvaged Vehicle Policy*, *supra* note 7.

10. Karkafiris, *supra* note 6; Rebuilds, *Has Tesla Gone Too Far?*, *supra* note 6; *Unsupported or Salvaged Vehicle Policy*, *supra* note 7 ("A 'Salvage-Titled Vehicle HV Safety Inspection' may be performed (at the customer's expense) on the vehicle to determine if the HV-related components are safe to work on or access."). HV means high-voltage, the type of battery system located inside Tesla cars. *Unsupported or Salvaged Vehicle Policy*, *supra* note 7.

11. Rebuilds, *Has Tesla Gone Too Far?*, *supra* note 6. To operate salvaged vehicles legally, a consumer must pass a state inspection by a Department of Motor Vehicle official and be issued a rebuilt title. *E.g.*, *About the Salvage Vehicle Examination Program*, N.Y. DEP'T OF MOTOR VEHICLES, <https://dmv.ny.gov/registration/about-salvage-vehicle-examination> [<https://perma.cc/6L2K-DFBK>] (last visited Sept. 13, 2023).

hundred miles away and rent a car to finish your road trip.<sup>12</sup> This situation is not a hypothetical; it was the experience of a real family, which this Article will refer to as “the Smith family.”<sup>13</sup>

Similarly, imagine you are driving your new Tesla Model 3 and you run over debris causing minor damage to the battery pack of the vehicle.<sup>14</sup> You bring your Model 3 to a local Tesla service center expecting to pay a few hundred dollars to fix the battery pack.<sup>15</sup> Instead, Tesla gives you a \$16,000 estimate, requiring you to replace the entire battery assembly.<sup>16</sup> This exact dilemma happened to Daniel Bone, placing him in a difficult and costly position.<sup>17</sup> Fortunately, he was able to bring his Tesla to an independent repair shop that only charged \$700 to repair the damage.<sup>18</sup>

Despite its unconscionable practices, Tesla contends that the supercharging policy (the “Policy”) and obscenely high price estimates are meant to ensure safety and proper repair.<sup>19</sup> However, consumers and third-

---

12. See Karkafiris, *supra* note 6; see also Rebuilds, *Has Tesla Gone Too Far?*, *supra* note 6.

13. See Rebuilds, *Has Tesla Gone Too Far?*, *supra* note 6. The family—which was not named—complained to YouTube Tesla independent repairer, Rich Rebuilds, about their unfortunate series of events. *Id.* Since the actual name of this family is not publicly available, this Article refers to them as “the Smith family.”

14. See Rich Rebuilds, *Tesla Wanted \$16,000 to Fix this New Model 3, We Did It for \$700! The Importance of Right to Repair!*, YOUTUBE (July 11, 2021) [hereinafter Rebuilds, *Tesla Wanted \$16,000*], <https://www.youtube.com/watch?v=vVSw3KSevEc> [<https://perma.cc/BVZ9-TJET>].

15. See *id.*

16. See *id.*

17. See *id.*

18. See *id.* An independent or third-party repair shop is a smaller service shop that works on many different brand vehicles, unlike a car dealership. Mike Jones, *Dealership vs. Independent Repair Facility – Which Is Better?*, AUTOPOM! (Jan. 24, 2023), <https://www.extended-vehicle-warranty.com/dealership-vs-independent-repair> [<https://perma.cc/RZ4J-BEW3>]. At these facilities, consumers get the double benefit of developing a direct relationship with the mechanic and saving money because parts and labor cost less than at a dealership. *Id.*

19. See *Unsupported or Salvaged Vehicle Policy*, *supra* note 7; see also Rob Stumpf, *Tesla’s \$16,000 Quote for a \$700 Fix Is Why Right to Repair Matters*, DRIVE (July 13, 2021, 9:32 AM), <https://www.thedrive.com/news/41493/teslas-16000-quote-for-a-700-fix-is-why-right-to-repair-matters> [<https://perma.cc/WKN2-ZFPC>] (discussing that Tesla wanted to replace the entire battery pack instead of changing the flange of the coolant line because that Tesla service center was unable to safely and properly service it). Two recent class actions were filed against Tesla regarding these issues. See Mike Scarcella, *Tesla Hit With ‘Right to Repair’ Antitrust Class Actions*, REUTERS (Mar. 15, 2023, 12:58 PM), <https://www.reuters.com>.

party repairers are not convinced that the Policy and high repair prices are necessary; rather, they believe these practices are nefarious schemes to discourage third-party repair or self-repair and to incentivize the purchase of new vehicles.<sup>20</sup> To make matters worse, Tesla has banned the use of third-party fast chargers on salvaged Tesla vehicles.<sup>21</sup> Disturbingly, the manufacturer sent out an internal memorandum detailing that Tesla would take legal action against consumers using third-party repair to modify Tesla vehicles to restore the supercharging feature.<sup>22</sup>

Other manufacturers outside the automotive industry, such as Apple, Inc. and John Deere, have discouraged independent repair by threatening to terminate warranty coverage and refusing service if goods are repaired by a third-party. These manufacturers also enforce end user license agreements (“EULAs”) that require only licensed technicians make repairs to the software.<sup>23</sup> Both companies have been exposed to private litigation for these measures over the past few years.<sup>24</sup> On the public side, the FTC—the agency

---

com/legal/tesla-hit-with-right-repair-antitrust-class-actions-2023-03-15 [https://perma.cc/HU5V-KEDV]. In *Orendain v. Tesla, Inc.*, the complaint alleges both antitrust and federal warranty law violations for Tesla’s practices. Complaint at 31-38, *Orendain v. Tesla, Inc.*, No. 23-cv-01157-JCS (N.D. Cal. filed Mar. 15, 2023) [hereinafter *Tesla Complaint*] (discussing 15 U.S.C. §§ 1-2, 2302(c)).

20. Gustavo Henrique Ruffo, *Is It Ok for Tesla to Disable 3rd-Party Fast Charging in Salvage Cars?*, INSIDEEVS (Feb. 17, 2020, 3:03 PM), https://insideevs.com/news/399152/tesla-disable-fast-charging-salvage [https://perma.cc/J5GT-RZZ2] (“Overall, it’s utter nonsense. It’s a garbage policy that just has no basis in reality. . . . The sole purpose of it seems to be to force people to buy new or clean title used versus buy a salvage car and repair.”).

21. Fred Lambert, *Tesla Now Disables Supercharging in Salvaged Vehicles*, ELECTREK (Feb. 12, 2020, 9:08 AM), https://electrek.co/2020/02/12/tesla-disables-supercharging-salvaged-vehicles [https://perma.cc/3W39-5ZAZ].

22. *Id.* (“Tesla reserves the right to deactivate Supercharging capability on any vehicle we believe would be unsafe. If a vehicle is found to have been modified to enable Supercharging and/or fast-charging through third parties, Tesla may take legal action and seek compensation.”).

23. See Steve Hanley, *It’s Complicated: Biden, Right to Repair, Deere, Tesla, Apple, & You*, CLEANTECHNICA (July 14, 2021), https://cleantechnica.com/2021/07/14/its-complicated-biden-right-to-repair-deere-tesla-apple-you [https://perma.cc/GB3K-XE4E]; *Terms and Conditions for Service Website (Service.TeslaMotors.com)*, TESLA MOTORS, https://service.tesla.com/docs/Public/Terms\_And\_Conditions/Service\_Website\_Terms\_and\_Conditions\_20131128.pdf [https://perma.cc/92UM-BNQA] (last visited Sept. 15, 2023) (version 20131117).

24. See Carlton Fields, *“Right to Repair” Class Actions Against John Deere Obtain a Centralized Forum*, JDSUPRA (July 11, 2022), https://www.jdsupra.com/legalnews/right-to-repair-class-actions-against-6013092 [https://perma.cc/72XQ-SL89]; Peter Blumberg,

that enforces consumer protection laws—has launched investigations into these companies for potential unfair and deceptive practices for restricting repair.<sup>25</sup>

As a result of these practices, the burgeoning “right to repair”<sup>26</sup> movement is starting to make significant progress in some states to allow independent repair.<sup>27</sup> However, states are struggling to pass laws that adequately protect consumers due to the substantial lobbying power held by manufacturers.<sup>28</sup> For instance, in Massachusetts, the first state to enact an automotive right to repair law, manufacturers are suing to prevent enforcement of the state’s right to repair law.<sup>29</sup> Not surprisingly, Tesla emailed consumers urging them to vote no.<sup>30</sup>

It is clear that the federal government must address this issue.<sup>31</sup> Since passing right to repair laws at the state level has stagnated, President Biden, in an Executive Order, urged the FTC “to exercise [its] statutory rulemaking

---

*Apple Sued by Customers Over Right to Repair Their Own Devices* (Apr. 13, 2022, 11:24 PM), BLOOMBERG L., <https://news.bloomberglaw.com/class-action/apple-sued-by-customers-over-right-to-repair-their-own-devices> [<https://perma.cc/BS4D-9KZ4>].

25. *About the FTC*, FTC, <https://www.ftc.gov/about-ftc> [<https://perma.cc/ZSE6-FDXD>] (last visited Sept. 15, 2023); see, e.g., *FTC Complaint Sparks Investigation into Deere’s Repair Restrictions*, FARM ACTION (Apr. 4, 2022), <https://farmaction.us/2022/04/04/ftc-complaint-sparks-investigation-into-deeres-repair-restrictions> [<https://perma.cc/96C-L-C6ZB>].

26. See *infra* Part II for a definition and background of the movement.

27. See Nathan Proctor, *Half of U.S. States Looking to Give Americans the Right to Repair*, PIRG (Apr. 22, 2022), <https://pirg.org/articles/half-of-u-s-states-looking-to-give-americans-the-right-to-repair> [<https://perma.cc/R6UV-3K29>] (explaining that over half of states have introduced right to repair bills involving electronics, medical equipment, and automobiles).

28. Nicholas A. Mirr, Note, *Defending the Right to Repair: An Argument for Federal Legislation Guaranteeing the Right to Repair*, 105 IOWA L. REV. 2393, 2416 (2020).

29. See Matt Murphy, *Massachusetts Senate Passes Right-to-Repair Bill with Eye Toward Avoiding Ballot Fight*, MASSLIVE (May 18, 2012, 2:51 AM), [https://www.masslive.com/politics/2012/05/massachusetts\\_senate\\_passes\\_ri.html](https://www.masslive.com/politics/2012/05/massachusetts_senate_passes_ri.html) [<https://perma.cc/C926-KDME>]; see also Mack DeGeurin, *Carmakers Launch Desperate Attempt to Delay Massachusetts Right-to-Repair Law*, GIZMODO (Jan. 12, 2022), <https://gizmodo.com/carmakers-launch-desperate-attempt-to-delay-massachuset-1848347047> [<https://perma.cc/8P6G-YGV3>].

30. See Matthew Gault, *Newly Passed Right-to-Repair Law Will Fundamentally Change Tesla Repair*, VICE (Nov. 10, 2020, 10:35 AM), <https://www.vice.com/en/article/93wy8v/newly-passed-right-to-repair-law-will-fundamentally-change-tesla-repair> [<https://perma.cc/48CK-M4P3>].

31. See generally Mirr, *supra* note 28 (arguing for congressional intervention to protect the right to repair); Jared A. Mark, *Realizing a New Right: The Right to Repair at the Federal Stage*, 23 N.C. J. L. & TECH. 382 (2021) (arguing for a federal right to repair due to vast amounts of lobbying on the state level).

authority . . . in areas such as . . . unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment.”<sup>32</sup> Prior to the order, the FTC released a report to Congress revealing that manufacturers have been restricting independent and third-party repair through, among other things, policies or statements that steer consumers to manufacturer repair networks, unavailability of parts and repair information, software locks, firmware updates, and EULAs.<sup>33</sup>

In February 2022, a bill (the “Repair Bill”) was proposed in the House of Representatives to protect the right to repair automobiles.<sup>34</sup> However, this bill does not give private consumers or independent repair shops the right to sue automobile manufacturers for violating its provisions. Instead, the Repair Bill gives the FTC the sole power to enforce its provisions as violations of unfair or deceptive practices under the Federal Trade Commission Act (“FTC Act”).<sup>35</sup> This is problematic because the FTC cannot investigate each complaint it receives on unfair or deceptive practices.<sup>36</sup>

Though the FTC is the proper entity to address the right to repair,<sup>37</sup> many consumers are left without redress, especially because state consumer

32. Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,992 (July 9, 2021).

33. FED. TRADE COMM’N, NIXING THE FIX: AN FTC REPORT TO CONGRESS ON REPAIR RESTRICTIONS 6 (2021) [hereinafter FED. TRADE COMM’N, NIXING THE FIX], [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/PC3Z-HGHG>].

34. See Right to Equitable and Professional Auto Industry Repair Act, H.R. 6570, 117th Cong. (2022).

35. See *id.* § 6(a) (“A violation of this Act or a regulation issued under section 5 shall be treated as a violation of a regulation under section 18(a)(1)(B) of the Federal Trade Commission Act regarding unfair or deceptive acts or practices. The Commission shall enforce this section in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Commission were incorporated into and made a part of this Act.” (citations omitted)); see FTC Act § 18(a)(1)(B) (codified as amended at 15 U.S.C. 57(a)(1)(B)).

36. Stephanie L. Kroeze, Note, *The FTC Won’t Let Me Be: The Need for a Private Right of Action Under Section 5 of the FTC Act*, 50 VAL. U. L. REV. 227, 262 (2015); *Guernsey v. Rich Plan of the Midwest*, 408 F. Supp. 582, 586 (N.D. Ind. 1976) (holding that there was an implied right of action under the FTC Act because at the time the case was decided, the FTC received about 9,000 complaints a year and was only able to investigate one out of eight or nine complaints).

37. See Mark, *supra* note 31, at 410 (“The future of the right to repair at the federal stage hinges on the FTC’s . . . plan of action.”). Consumers have submitted complaints for right to repair issues directly to the FTC, rather than another agency, since it enforces consumer protection and antitrust laws. See, e.g., Nat’l Farmers Union et al., Complaint for Action to

protection laws, or “Little FTC Acts,” do not provide the same broad protections that section 5 of the FTC Act does.<sup>38</sup> Some state right-to-repair bills vest enforcement power solely in the attorney general and do not give consumers private rights of action.<sup>39</sup> Although a private right of action can provide several benefits, this scheme would ineffectively resolve the issues regarding the right to repair.<sup>40</sup> Therefore, this Article proposes a balanced solution—one that will serve congressional interests by giving the FTC enforcement power over the right to repair and private consumer interests by allowing redress for exploitation, especially by manufacturers like Tesla.<sup>41</sup> To make this possible, Congress must amend the FTC Act to incorporate a notice of right-to-sue provision modeled after the one in the Equal Employment Opportunity Act (“EEOA”).<sup>42</sup> Similar to the Equal Employment Opportunity Commission (“EEOC”) under the EEOA,<sup>43</sup>

---

Stop Unfair Methods of Competition and Unfair and Deceptive Trade Practices (Mar. 3, 2022) [hereinafter Nat’l Farmers Union et al., Complaint] (requesting FTC sanctions against Deere & Company), <https://farmaction.us/wp-content/uploads/2022/03/Deere-Right-To-Repair-FTC-Complaint.pdf> [<https://perma.cc/3Q7Y-72PU>].

38. Kroeze, *supra* note 36, at 253-54. For instance, the FTC Act provides remedies that state consumer protection laws do not provide, such as injunctions, cease and desist orders, consent decrees, and disgorgement of profits obtained. *See* Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 174 (2011) (citing 15 U.S.C. § 45). Minnesota is one example of a state that provides limited remedies. MINN. STAT. § 325D.45 (2022) (showing only injunctive relief, costs, and attorney fees).

39. *See, e.g.*, S.B. S149, 2021-2022 Gen. Assemb., Reg. Sess. § 2(d) (N.Y. 2021) (“A violation of this section shall be enforceable by the attorney general and punishable by a fine of a maximum of five hundred dollars per incident.”).

40. *See* Rachel E. Barkow, *Foreword: Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1180 (2016) (“Private actors may be well situated to detect certain violations and buttress limited government resources to pursue them. On the other hand, private actors may go too far in the other direction and pursue cases that are not in the best interests of the agency.”); *see also* David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1254 (2012) (“Profit-driven [private] enforcers will act whenever it pays to do so, even where the social cost of enforcement . . . exceeds any benefit.”).

41. *See infra* Section IV.A.

42. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 706(f)(1), 86 Stat. 103, 105-06 (1972) (codified as amended at 42 U.S.C. § 2000e-5(f)(1)).

43. *Id.* (“[I]f within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action . . . the Commission . . . shall so notify the person aggrieved and within ninety days . . . a civil action may be brought against the respondent . . . by the person claiming to be aggrieved . . .”). The EEOC was created by Title VII of the Civil Rights Act of 1964, but the law gave the EEOC little statutory authority which led to the



Congress should give the FTC a statutory deadline to investigate a complaint so that if it halts its investigation or chooses not to pursue a civil action on behalf of the aggrieved consumer, the consumer may still have the opportunity to seek relief.<sup>44</sup> By doing so, the Repair Bill, if enacted, will effectively address the right to repair.<sup>45</sup>

Next, Part II discusses the history of vehicle right to repair in the United States. This Part begins with the definition of automotive right to repair, its benefits and setbacks, and its similarity to the right to repair in other industries. Then, this Part considers the current state initiatives for vehicle right to repair and how Tesla has responded to those regimes. Subsequently, this Part addresses the federal approach to regulating right to repair issues, such as a de facto national regulation enacted by car manufacturers and the federal government's various efforts.

Despite the recent class actions filed against Tesla regarding its repair restrictions, Part III explains how current federal protections, including the federal claims alleged in the Tesla class actions and the FTC's complaint process, fail to provide consumers with an adequate theory of relief for harm suffered by vehicle repair restrictions.<sup>46</sup> Part IV sets forth a proposal to amend the FTC Act with a right-to-sue letter provision to better carry out the Repair Bill or any future federal right to repair law. This proposed amendment will model the right-to-sue provision and procedure in the EEOA with the same statutory deadlines for an aggrieved consumer to start a civil suit. This Part concludes by addressing possible counterarguments to the proposal. Finally, in Part V, this Article reiterates the importance of having both public enforcement by the FTC and private enforcement by individuals for automotive right to repair.

## *II. A History of Automotive Right to Repair in the United States and Tesla's Involvement*

The right to repair movement is premised on the idea that consumers should be given the choice to repair their own products or take them to a

---

passage of the EEOA. Emily K. Leiker, Comment, *When Will It End? Whether the Right-to-Sue Letter Effectively Limits the EEOC's Investigative Authority*, 68 U. KAN. L. REV. 167, 167 (2019).

44. See *infra* Section IV.A.

45. See *infra* Part IV.

46. E.g., Tesla Complaint, *supra* note 19, at 31-38; see *infra* Part III. This Article will explain why these class actions will face obstacles using private enforcement of antitrust and warranty law. See *infra* Part III.

third-party technician.<sup>47</sup> The Repair Association, founded in 2013, is the leading non-profit organization that works to lobby for repair-friendly legislation to protect consumers.<sup>48</sup> Since early 2001, there has been an effort to federalize a right to repair for automobiles with the proposal of the Motor Vehicle Owners' Right to Repair Act.<sup>49</sup> However, like many other right to repair bills, car manufacturers lobbied Congress and the bill died on the Senate floor.<sup>50</sup> Not surprisingly, right to repair has encountered similar pushback from manufacturers of electronics and agricultural equipment.<sup>51</sup> Subpart A begins by explaining what automotive right to repair means and the movement's benefits with its respective downsides. This Subpart will also compare the automotive right to repair with other right to repair initiatives, such as those for electronic and agricultural products. Subpart B will explain how automotive right to repair has progressed throughout different states and how Tesla has fought against those initiatives. Finally, Subpart C will explain the federal measures that have been taken to protect automotive right to repair.

#### A. *What Is Vehicle Right to Repair?*

For automobiles, the right to repair means that every consumer has the right to have their vehicle serviced at any repair shop of their choice. The right also requires that every independent repair shop has the same access to tools, parts, and service information that a franchised dealer has.<sup>52</sup> Additionally, a manufacturer cannot condition warranties on the consumer's

---

47. See Thorin Klosowski, *What You Should Know About Right to Repair*, N.Y. TIMES: WIRECUTTER (July 15, 2021), <https://www.nytimes.com/wirecutter/blog/what-is-right-to-repair> [<https://perma.cc/5D2V-4F6L>].

48. See *Our Mission and History*, REPAIR ASS'N, <https://www.repair.org/history> [<https://perma.cc/9P8L-S2D4>] (last visited Sept. 15, 2023).

49. Motor Vehicle Owners' Right to Repair, S. 2617, 107th Cong. (2001).

50. See Mark, *supra* note 31, at 389 & n.37; see also Daniel Cadia, Note, *Fix Me: Copyright, Antitrust, and the Restriction on Independent Repairs*, 52 U.C. DAVIS. L. REV. 1701, 1708 (2019) (discussing that electronic manufacturers, like Apple, have engaged in lobbying efforts to hinder the progress of right to repair bills).

51. See, e.g., Jon Keegan, *New York State's "Right to Repair" Law Could Have a Ripple Effect*, MARKUP (June 13, 2022, 8:00 PM), <https://themarkup.org/the-breakdown/2022/06/13/new-york-states-right-to-repair-law-could-have-a-ripple-effect> [<https://perma.cc/UR5B-M7E5>]; see also *Why Is John Deere So Opposed to Letting Farmers Fix Their Stuff?*, REPAIR ASS'N (Feb. 18, 2022), <https://www.repair.org/blog/2022/2/18/ioc5617121rv9myy69qinw87jhzhei> [<https://perma.cc/UQW7-SZ34>].

52. See *Massachusetts Right to Repair*, AUTO. CARE ASS'N, <https://www.autocare.org/government-relations/current-issues/right-to-repair> [<https://perma.cc/86QN-4BYE>] (last visited Sept. 15, 2023).

use of a particular service, such as an independent repair shop.<sup>53</sup> Essentially, the right to repair “transfers the power” to repair a vehicle from manufacturers to consumers.<sup>54</sup> In the context of Tesla, this means that someone like Daniel Bone has the opportunity to seek a third-party technician, like Rich Benoit at Electrified Garage, without facing expensive repairs from Tesla-authorized service shops and retaliation from the manufacturer.<sup>55</sup> Relatedly, for the Smith family, this means that Tesla cannot disable supercharging after another shop has repaired the car or charge them for work that should be under warranty.<sup>56</sup>

### *1. Advantages of Vehicle Right to Repair*

The benefits of vehicle right to repair can be divided into three categories: (1) economic, (2) environmental, and (3) social.<sup>57</sup> First, repairing vehicles is a smart financial decision; consumers can save money by extending the lives of their vehicles and eventually selling them in the secondary market rather than purchasing a new car as soon as repairs are needed.<sup>58</sup> Not only do consumers spend a vast amount of money buying new cars, but they also tend to overpay for repairs to their vehicles.<sup>59</sup> A right to repair would give

---

53. See FED. TRADE COMM’N, NIXING THE FIX, *supra* note 33, at 7. This conduct is prohibited by federal warranty law. See 15 U.S.C. § 2302(c). For a discussion on this law and how it relates to the right to repair, see *infra* Section III.A.2.

54. Mark, *supra* note 31, at 386.

55. See Gustavo H. Ruffo, *A Repair Would Cost \$16,000 at Tesla: The Electrified Garage Did It for \$700*, AUTOEVOLUTION (Dec. 28, 2021, 8:47 AM), <https://www.autoevolution.com/news/a-repair-would-cost-16000-at-tesla-the-electrified-garage-did-it-for-700-165107.html> [<https://perma.cc/P9RJ-ANTT>]. Although Bone saved thousands of dollars by bringing his Tesla to a third-party shop, he fears that Tesla may disable his supercharging feature since the repair was not performed by a Tesla-authorized servicer. See *id.*

56. See Rebuilds, *Has Tesla Gone Too Far?*, *supra* note 6.

57. See AARON PERZANOWSKI, THE RIGHT TO REPAIR: RECLAIMING THE THINGS WE OWN 17-18 (2022).

58. *Id.* at 18. Consumers spend roughly \$3 trillion every year buying new cars—more money than almost any other product. See *id.* To compare, consumers spend \$500 billion a year on new smartphones and appliances. *Id.*

59. See *id.* at 23. According to the United States Bureau of Labor Statistics, prices for motor vehicle maintenance and repair were more than ninety-four percent higher in 2022 than in 2000. See *Prices for Car Maintenance, 2000-2022 (\$500)*, OFFICIALDATA, <https://www.officialdata.org/Motor-vehicle-maintenance-and-repair/price-inflation/2000-to-2022?amount=500> [<https://perma.cc/9JP4-5HJ8>] (last visited Sept. 15, 2023). Not surprisingly, “car parts and services account for nearly half of car dealer profits in the United States, more than either new or used vehicle sales.” PERZANOWSKI, *supra* note 57, at 23. Outside the car industry, repairs by the manufacturer John Deere are five times more profitable than its farm equipment

consumers the opportunity to offset these costs by retaining the ability to sell their repaired vehicle on the secondary market, such as on Craigslist.<sup>60</sup> Most importantly, consumers would get more affordable and timely repair services since they would not need to rely on costly, dealer-authorized technicians.<sup>61</sup>

Second, without the right to repair, more vehicles would end up in landfills, which would increase greenhouse gas emissions.<sup>62</sup> Though irreparable cars have their parts stripped and salvaged, about twenty-five percent of every car ends up in a landfill.<sup>63</sup> Other products, such as phones and appliances, are infamous for producing immense amounts of electronic waste (“e-waste”).<sup>64</sup> With the rise in EVs, e-waste will overwhelm landfills

---

sales. *Id.* This can be explained in part by the rising cost of parts that are often patented. *Id.*; see also Jim Gorzelany, *Soaring Cost of Parts Means Your Car Is More Likely to Be Totaled in an Accident*, FORBES (Feb. 15, 2018, 2:10 PM), <https://www.forbes.com/sites/jimgorzelany/2018/02/15/the-sum-not-the-whole-is-greater-when-it-comes-to-the-skyrocketing-cost-of-car-parts/#41b3685253df> [<https://perma.cc/EBM8-KDCQ>]. The FTC has concluded in a report that the assertion of these patent rights on parts are overbroad and unlawful. See Fed. Trade Comm’n, *Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers 1* (July 21, 2021) [hereinafter Fed. Trade Comm’n, *Policy Statement*], [https://www.ftc.gov/system/files/documents/public\\_statements/1592330/p194400repairrestrictionspolicystatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1592330/p194400repairrestrictionspolicystatement.pdf) [<https://perma.cc/LTL3-B823>]. Since parts are becoming more expensive with new safety features, like cameras embedded inside bumpers and fenders of vehicles, crashed cars are more likely to be considered totaled. Gorzelany, *supra*. Generally, a car is deemed “totaled” by an insurance company when the cost of repair exceeds the pre-accident value of the car. *Id.*

60. See PERZANOWSKI, *supra* note 57, at 20-21. In fact, selling these cars in the secondary market also helps individuals in economically marginalized communities who lack the resources to buy brand new vehicles. *Id.* at 21. Thus, “when repair is restricted or unaffordable, it is often the poor who suffer the most.” *Id.* at 22. These restrictions also burden communities of color. FED. TRADE COMM’N, *NIXING THE FIX*, *supra* note 33, at 3-4.

61. Mark, *supra* note 31, at 392. Specifically with Tesla, over 1,000 consumer complaints were filed with the FTC because of inadequate number of service centers, limited stock of replacement parts, and long wait times for repair appointments. Rebecca Heilweil, *Missing Parts, Long Waits, and a Dead Mouse: The Perils of Getting a Tesla Fixed*, VOX (Aug. 24, 2022, 6:00 AM), <https://www.vox.com/recode/23318725/tesla-repair-mechanic-delay-electric-vehicles-ev> [<https://perma.cc/EG88-ZEMP>]. As the classic aphorism goes, “time is money.” Kyle Chayka, *Time Is Money, but That Doesn’t Mean You Need to Work Non-Stop*, PAC. STANDARD (June 14, 2017), <https://psmag.com/economics/time-money-doesnt-mean-need-work-non-stop-81438> [<https://perma.cc/ERS6-L3HW>].

62. See Leah C. Grinvald & Ofer Tur-Sinai, *Smart Cars, Telematics, and Repair*, 54 U. MICH. J. L. REFORM 283, 291-92 (2021).

63. *Id.* at 292.

64. See PERZANOWSKI, *supra* note 57, at 27-28. By 2030, the projected annual total of e-waste is seventy-five million metric tons. *Id.* at 28. E-waste is dangerous “because it contains

if consumers cannot repair their vehicles.<sup>65</sup>

Third, the right to repair reinforces social interactions with the community by preserving personal autonomy, enhancing problem solving skills, and incentivizing innovation.<sup>66</sup> Consumers' freedom to choose either to repair the cars they own or bring them to an independent repair shop ultimately strengthens their independence, as these choices are "extensions of ourselves."<sup>67</sup> These choices may even strengthen analytical skills and stimulate innovation.<sup>68</sup> Repair is not a straightforward procedure; it is a challenging process that requires intuition, experience, awareness, and trial and error.<sup>69</sup> The repair process can sometimes open the door to invention, facilitating new methods of repair; new and improved diagnostic and repair

---

high levels of heavy metals, like arsenic, lead, and mercury," which pollute the air and contaminate groundwater and surrounding soil when they are burned. *Id.*; see also Joshua Turiel, Note, *Consumer Electronic Right to Repair Laws: Focusing on an Environmental Foundation*, 45 WM. & MARY ENV'T L. & POL'Y REV. 579, 583 (2021). Exposure to this toxicity is correlated with reduced lung and thyroid function, cognitive impairments, and birth abnormalities. See PERZANOWSKI, *supra* note 57, at 28. Racial minorities and the poor are more likely to face these adverse health effects since they live near landfills. *Id.* at 29.

65. See Katie Hunt, *The Rapid Rise of Electric Vehicles Could Lead to a Mountain of Battery Waste*, CNN: BUSINESS (Nov. 6, 2019, 1:06 PM), <https://www.cnn.com/2019/11/06/business/electric-vehicles-battery-waste-scn> [<https://perma.cc/G2HJ-Y2QE>]. EVs contain lithium-ion batteries—composed of lithium and cobalt—and emit toxic chemicals into the environment. *Id.* Though Tesla has announced implementing cobalt-free batteries in its cars, this will drive the demand for nickel—another metal that has its own environmental dangers. PERZANOWSKI, *supra* note 57, at 36. Beside the concern with landfill toxicity when vehicles are broken down, the manufacturing and shipping of vehicles emit greenhouse gases, such as carbon and sulfur dioxide. *Id.* at 34-35.

66. PERZANOWSKI, *supra* note 57, at 41-45.

67. *Id.* at 42. When our devices or vehicles break down, repairing them presents an opportunity to not only appreciate our self-reliance, but to understand the world around our bodies. *Id.* at 42-43. This decision is especially important since most consumers choose independent repair shops for the relationships they have with their mechanics. See *Consumers Trust Independent Shops over Dealerships for Car Repairs: Pricing Is Key Issue, According to New Survey*, CISION PR NEWSWIRE (Jan. 23, 2013, 8:00 AM), <https://www.prnewswire.com/news-releases/consumers-trust-independent-shops-over-dealerships-for-car-repairs-pricing-is-key-issue-according-to-new-survey-188025161.html> [<https://perma.cc/YD94-3ZWL>]. Not being able to choose puts the consumer at the whim of the manufacturer who dictates how we live our lives. See PERZANOWSKI, *supra* note 57, at 42 ("Without repair, we are dependent on the companies that sell those products to ensure that we can commute to work, communicate with our loved ones, heat our homes, cook our food, and stay alive.").

68. See PERZANOWSKI, *supra* note 57, at 43-45.

69. *Id.* at 44. When your car does not start, you ponder and take time figuring out what could be wrong: a dead battery, a snapped timing belt, or even a bad fuel pump. *Id.*

tools; and user-generated tips, manuals, and kits.<sup>70</sup>

## 2. Disadvantages of Vehicle Right to Repair

Manufacturers argue that the right to repair carries several risks including (1) consumer safety, (2) data privacy exposure, and (3) threats to manufacturers' intellectual property.<sup>71</sup> First, automotive right to repair legislation can increase consumer injuries resulting from improper or unauthorized repairs.<sup>72</sup> For instance, Tesla vehicles contain lithium-ion batteries that are highly flammable and dangerous.<sup>73</sup> Improper handling of these batteries may lead to catastrophic injury, so manufacturers often require authorized technicians to perform any repair.<sup>74</sup>

Second, vehicle right to repair may lead to cybersecurity risks and data privacy leaks.<sup>75</sup> Consumers that provide vehicle diagnostic information to independent repair shops risk leaving their personal data—such as driving habits, call records, contact information, and addresses that may be stored within the car's engine control unit network—vulnerable to discovery and misuse.<sup>76</sup> The Coalition for Safe and Secure Data acknowledged that

---

70. *Id.* at 44-45; Grinvald & Tur-Sinai, *supra* note 62, at 292-93. Detailed in one ethnography, Willie, a skilled and experienced mechanic, designed a more durable car door handle after countless repairs on a Saab vehicle. See DOUGLAS HARPER, WORKING KNOWLEDGE: SKILL AND COMMUNITY IN A SMALL SHOP 62 (1987).

71. FED. TRADE COMM'N, NIXING THE FIX, *supra* note 33, at 24-38.

72. *Id.* at 26.

73. See discussion and sources cited *supra* note 65; see also Anjani Trivedi, *Tesla's Big Batteries Aren't the Fire Problem. Lithium Is*, WASH. POST (Sept. 27, 2022, 2:42 AM), [https://www.washingtonpost.com/business/energy/teslas-big-batteries-arent-the-fire-problem-lithium-is/2022/09/26/b7a0a29e-3ddf-11ed-8c6e-9386bd7cd826\\_story.html](https://www.washingtonpost.com/business/energy/teslas-big-batteries-arent-the-fire-problem-lithium-is/2022/09/26/b7a0a29e-3ddf-11ed-8c6e-9386bd7cd826_story.html) [<https://perma.cc/86QY-ZEBC>] (discussing the combustible ingredients of Tesla lithium-ion batteries and several fires that have occurred across the globe).

74. See FED. TRADE COMM'N, NIXING THE FIX, *supra* note 33, at 26-27 (discussing the experience and skills technicians have that justify repair restrictions). The Computing Technology Industry Association ("CompTIA") explained that the improper alteration or handling of lithium-ion batteries can lead to burns and blindness. *Id.* Similar batteries are found in iPhones and if punctured during unauthorized repair, they may catch fire, explode, or shock the repairer. See Marissa MacAneney, Note, *If It Is Broken, You Should Not Fix It: The Threat Fair Repair Legislation Poses to the Manufacturer and the Consumer*, 92 ST. JOHN'S L. REV. 331, 341 (2018). For a deeper analysis of right to repair in the field of electronics, see *infra* Section II.A.3.

75. See FED. TRADE COMM'N, NIXING THE FIX, *supra* note 33, at 30.

76. *Id.* The CompTIA found that for connected devices, including automobiles, insecure repair "can place numerous other connected devices and the data they hold at risk because . . . 'criminals could more easily circumvent security protections, harming not only the product

plugging on-board diagnostic scanner tools into vehicles can compromise the information therein.<sup>77</sup>

The final, and most often cited, downside to the right to repair is the exploitation of protected intellectual property—copyrights, patents, trademarks, and trade secrets.<sup>78</sup> Manufacturers argue that a robust right to repair scheme would give consumers and independent repair shops access to proprietary information, parts, tools, and equipment.<sup>79</sup> Manufacturers continue to utilize their intellectual property rights to restrict repair and have even filed lawsuits to protect their products.<sup>80</sup>

### 3. Similarity of Electronic and Agricultural Right to Repair

Just like with automobiles, the right to repair is a ubiquitous concern in the context of Apple iPhones and John Deere tractors.<sup>81</sup> In 2016, iPhone users complained that Apple was purposely giving their phones an “Error 53” message and “bricking” their phones after they brought them to a third-party

---

owner but also everyone who shares their network.” *Id.* at 31 (quoting a public comment from CompTIA).

77. See Mathew Gault, *Auto Industry TV Ads Claim Right to Repair Benefits ‘Sexual Predators’*, VICE (Sept. 1, 2020, 1:49 PM), <https://www.vice.com/en/article/qj4ayw/auto-industry-tv-ads-claim-right-to-repair-benefits-sexual-predators> [https://perma.cc/24ZF-ND2Q]. On-board diagnostic scan tools are tools that are plugged into a specific port on a car that allow the repairer to retrieve error codes and other diagnostic information from the car, identify issues with the car, and ultimately clear the codes once the issues are fixed. Grinvald & Tur-Sinai, *supra* note 62, at 295. For a discussion on actions opponents of the right to repair have taken to address these risks, see *infra* Section II.B.1.

78. See PERZANOWSKI, *supra* note 57, at 110 (describing intellectual property as the “arsenal of weapons” manufacturers use in the war on repair).

79. FED. TRADE COMM’N, NIXING THE FIX, *supra* note 33, at 25. Manufacturers have an interest in protecting the investment in the development of the product they create and to foster innovation. See *id.* at 24-25. Manufacturers fear that giving this access will allow service providers, without contractual safeguards, to compromise products, codes, tools, and secrets. *Id.* at 25.

80. See Leah C. Grinvald & Ofer Tur-Sinai, *Intellectual Property Law and the Right to Repair*, 88 FORDHAM L. REV. 63, 74 (2019). In one case, Ford sued New World International Inc., a distributor of aftermarket automotive parts, for infringing its design patents on original equipment designs for the Ford F-150 truck and Mustang. *Ford Glob. Techs., LLC v. New World Int’l, Inc.*, No. 17-CV-3201-N, 2018 U.S. Dist. LEXIS 188709, at \*2 (N.D. Tex. Apr. 22, 2021), *aff’d*, 810 F. App’x 909 (5th Cir. 2020). The United States District Court for the Northern District of Texas granted Ford’s summary judgment motion for patent infringement, holding that the aftermarket parts were substantially similar to the original Ford designs. *Id.* at \*5-10.

81. See Mirr, *supra* note 28, at 2397. This article also mentions that Keurig went as far as asserting Digital Rights Management (“DRM”) rights to prevent consumers from using “unauthorized” coffee pods. *Id.* at 2398.

technician for repair.<sup>82</sup> Since there was no software to fix these malfunctioning phones, consumers were forced to purchase new ones.<sup>83</sup> Apple claimed that this error was a “security check” to protect iPhone’s fingerprint sensor from exploitation.<sup>84</sup> After several complaints, Apple released a software update which removed the “Error 53” message and restored the consumers’ phones to proper working order.<sup>85</sup> However, Apple continues to face lawsuits for unjustly restricting independent repair.<sup>86</sup>

John Deere similarly tried preventing farmers from performing their own repairs on their tractors.<sup>87</sup> In 2016, John Deere modified its EULA<sup>88</sup> with consumers, requiring that only Deere-authorized technicians could make repairs to tractors.<sup>89</sup> Like Apple, John Deere argued that allowing independent repair could lead to “pirates and other third parties” violating Deere’s copyrighted expression.<sup>90</sup> In March 2022, however, several farmers’ unions and advocacy groups challenged Deere’s actions and filed a lengthy complaint with the FTC to enjoin the company from its restrictions on repair.<sup>91</sup>

---

82. *Id.* at 2397; Cadia, *supra* note 50, at 1740. Error 53 was a message that would appear after an iOS 9 software install when the consumer brought their iPhone to a non-Apple repair shop for service. See Miles Brignall, ‘Error 53’ Fury Mounts as Apple Software Update Threatens to Kill Your iPhone 6, *GUARDIAN* (Feb. 5, 2016, 1:59 PM), <https://www.theguardian.com/money/2016/feb/05/error-53-apple-iphone-software-update-handset-worthless-third-party-repair> [<https://perma.cc/9ETY-EC4P>]. Bricking means the phone is rendered useless and thus turns into the equivalent of a physical brick. *Mirr*, *supra* note 28, at 2397.

83. See Cadia, *supra* note 50, at 1740.

84. *Mirr*, *supra* note 28, at 2397.

85. *Id.*

86. Blumberg, *supra* note 24. In one case, the complaint alleges that Apple has made independent repair impossible and would rather have consumers replace their phones than repair them. Complaint at 1, *Granato v. Apple Inc.*, No. 22-CV-02316 (N.D. Cal. filed Apr. 13, 2022). “Apple’s prices are purposefully set so high that it is often in consumers’ best interests to simply buy a brand-new device, leading to more sales and more revenue for Apple that it could otherwise generate.” *Id.*

87. See *Mirr*, *supra* note 28, at 2397.

88. *Id.* “A EULA is a type of ‘contract between software publishers and end users . . . [that] prescribe what consumers may or may not do with the product.’” *Id.*

89. See Hanley, *supra* note 23.

90. See Cadia, *supra* note 50, at 1708.

91. See Nat’l Farmers Union et al., Complaint, *supra* note 37, at 1. In the complaint, the parties allege that John Deere’s practices violate both section 5 of the FTC Act and sections 1 and 2 of the Sherman Antitrust Act. *Id.* at 3. By restricting access to necessary software tools to only authorized dealers and requiring a EULA forbidding farmers from modifying the equipment, the complainants contend that Deere is engaging in unfair methods of competition and is monopolizing the market. *Id.* at 12-13, 28-39.



### B. The States' Approach to Vehicle Right to Repair

In 2012, Massachusetts became the first state to enact an automotive right to repair law requiring manufacturers to provide diagnostic information and tools to independent repair shops.<sup>92</sup> The bill was highly controversial and was one of the most heavily lobbied pieces of legislation the Massachusetts Senate has seen.<sup>93</sup> Car manufacturers and independent repair shops had differing views on the bill's effect and ultimately failed to settle the issue before it was sent to the ballot.<sup>94</sup> The proposed law—set to take effect in the car model year 2015—required auto manufacturers to provide consumers and independent repair shops “access to the same diagnostic and repair information . . . available to [car] dealers and authorized repair facilities.”<sup>95</sup> Most importantly, this Massachusetts law treated a violation as “an unfair method of competition and an unfair or deceptive act or practice”—as

---

92. Murphy, *supra* note 29; MASS. GEN. LAWS ch. 93J (2012) (repealed 2013). This ballot initiative was approved by almost ninety percent of Massachusetts voters with a total of 2,353,603 votes. See *Massachusetts “Right to Repair” Initiative, Question 1 (2012)*, BALLOTPEDIA, [https://ballotpedia.org/Massachusetts\\_%22Right\\_to\\_Repair%22\\_Initiative,\\_Question\\_1\\_\(2012\)](https://ballotpedia.org/Massachusetts_%22Right_to_Repair%22_Initiative,_Question_1_(2012)) [https://perma.cc/K2MV-DFEP] (last visited Sept. 17, 2023).

93. See Murphy, *supra* note 29.

94. *Id.* On the one hand, manufacturers and opponents of the bill argued that it was unnecessary as repair shops already had access to diagnostic information. *Id.* They also feared that the initiative was a “‘power grab’ by after-market parts manufacturers to seize proprietary information” and divulge trade secrets. *Id.* On the other hand, independent shops and proponents of the bill argued that this was a pro-consumer initiative that would finally give consumers a choice in having their cars repaired by independent mechanics who would finally have access to the same data and tools as authorized repair facilities. *Id.*

95. See MASS. GEN. LAWS ch. 93J, § 2 (2012) (repealed 2013). The requirement also applied to vehicles manufactured from model year 2002 to 2014 and to the availability of diagnostic repair tools. *Id.* § 3. If a consumer or independent repair shop wanted to access diagnostic information through a computer system, the manufacturer may sell it “on an hourly, daily, monthly, or yearly subscription basis,” but only at costs and terms “no greater than fair market value.” *Id.* § 3. This would prevent manufacturers from discriminating against non-authorized repair facilities and charging more than they would for dealers or authorized facilities. See *id.*

prohibited by the FTC Act under section 5.<sup>96</sup> This law was repealed in 2013 and replaced with a similar law.<sup>97</sup>

Though Massachusetts is the only state with an automotive right to repair law, other states have proposed similar bills.<sup>98</sup> One notable example is New York's recent automotive right to repair bill.<sup>99</sup> As with the 2012 Massachusetts law, this bill requires original equipment manufacturers to make available to independent repair shops and consumers the same diagnostic and repair information given to authorized repair providers.<sup>100</sup> With the recent enactment of New York's Digital Fair Repair Act,<sup>101</sup> an automotive right to repair law is in the foreseeable future.<sup>102</sup>

The remainder of this Subpart will discuss the current Massachusetts right to repair law, which contours the landscape of an automotive right to repair in other states. Unlike the 2012 Massachusetts law, the 2020 law introduces a new requirement regarding access to a car's telematics systems.<sup>103</sup> Finally, this Subpart will conclude with Tesla's response to automotive right to repair efforts.

---

96. *Id.* § 6 (“Any violation of this chapter shall be deemed to be an unfair method of competition and an unfair or deceptive act or practice in the conduct of trade or commerce in violation of section 2 of chapter 93A.”). Chapter 93A states that in construing unfair methods of competition and unfair or deceptive acts or practices, “courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act.” MASS. GEN. LAWS ch. 93A, § 2(b) (2023); *see also* 15 U.S.C. § 45(a). For a discussion of why having a violation of this statute treated as a violation of section 5 of the FTC Act is important, *see infra* Section III.B (explaining what section 5 covers).

97. *See* An Act Relative to Automotive Repair, ch. 165, 2013 Mass. Acts (“Chapter 93J of the General Laws . . . is hereby repealed.”). This law exempts telematics diagnostic and repair information from its requirements. *See infra* Section II.B.1.

98. *See* Proctor, *supra* note 27 (showing that over half of U.S. states have proposed right to repair bills, at least one with an automotive right to repair bill).

99. *See* S.B. S149, 2021-2022 Gen. Assemb., Reg. Sess. (N.Y. 2021).

100. *See id.* § 2(b). An OEM, as defined under this bill, is “any person or business who, in the ordinary course of his or her business, is engaged in the business of selling or leasing new equipment to any person or business and is engaged in the diagnosis, service, maintenance, or repair of equipment.” *Id.* § 2(a)(10). OEMs are required to sell parts and updates to diagnostic software “upon fair and reasonable terms.” *Id.* § 2(b)(1)(ii).

101. S.B. S4104A, 2021-2022 Reg. Sess. (N.Y. 2021) (enacted).

102. *See* Andrew Cunningham, *New York Governor Signs Modified Right-to-Repair Bill at the Last Minute*, ARS TECHNICA (Dec. 29, 2022, 12:27 PM), <https://arstechnica.com/gadgets/2022/12/weakened-right-to-repair-bill-is-signed-into-law-by-new-yorks-governor> [<https://perma.cc/D5SX-CZ9L>]. This is the first right to repair law in the United States that has passed for the electronics industry. *Id.*

103. *See infra* Section II.B.1.

### 1. The Battle with “Question 1”

In 2020, Massachusetts overwhelmingly passed a new right to repair law known as “Question 1.”<sup>104</sup> Unlike the previous 2012 law, Question 1 allows third-party repairers to access a car’s telematics.<sup>105</sup> Thus, this new statute “close[d] a loophole in the 2012 law [which] exempted wireless diagnostics” from being disclosed, and now puts manufacturers like Tesla on the hook for compliance in the state.<sup>106</sup> Starting with model year 2022, manufacturers dealing in the state are mandated to comply with this new open system requirement.<sup>107</sup>

In an effort to halt the passage of Question 1, several automotive manufacturers ran negative ads alleging that the law would give “sexual predators” access to personal data.<sup>108</sup> Despite spending over \$26 million running the ads, the Alliance for Automotive Innovation, representing several automakers, was unsuccessful, showing the electorate’s desire for an automotive right to repair.<sup>109</sup> Car manufacturers are not giving up, however, and are challenging the Massachusetts law in federal court.<sup>110</sup> The complaint

---

104. Samir Ferdowsi, *Massachusetts Voters Overwhelmingly Pass Car Right-to-Repair Ballot Initiative*, VICE: MOTHERBOARD (Nov. 4, 2020, 1:08 PM), <https://www.vice.com/en/article/bvxxq3/massachusetts-voters-overwhelmingly-pass-car-right-to-repair-ballot-initiative> [<https://perma.cc/25Z8-THD6>].

105. See *Massachusetts Right to Repair*, *supra* note 52. Telematics is the data transmitted wirelessly from the vehicle to the manufacturer and is found in many new vehicles today. *Id.*; Grinvald & Tur-Sinai, *supra* note 62, at 285. Compare MASS. GEN. LAWS ch. 93K, § 2(f) (2013) (“With the exception of telematics diagnostic and repair information that is provided to dealers . . . nothing in this chapter shall apply to telematics services . . .”), with MASS. GEN. LAWS ch. 93K, § 2(f) (2023) (“Commencing in model year 2022 and thereafter a manufacturer of motor vehicles sold in the Commonwealth . . . that utilizes a telematics system shall be required to equip such vehicles with an inter-operable, standardized and open access platform across all of the manufacturer’s makes and models.”).

106. Ferdowsi, *supra* note 104; see also Gault, *supra* note 30.

107. MASS. GEN. LAWS ch. 93K, § 2(f) (2023).

108. See Gault, *supra* note 77. One ad showed a woman approaching her car in a dark, empty parking garage. *Id.* The camera gets closer to her as she is opening her car door where suddenly, a stalker attacks her and the screen goes black. *Id.* The narrator says, “If question 1 passes in Massachusetts, anyone could access the most personal data stored in your vehicle . . . Domestic violence advocates say a sexual predator could use the data to stalk their victims. Pinpoint exactly where you are . . . Vote NO on 1.” *Id.*

109. See Matthew Gault, *Car Companies Argue that Right-to-Repair Law Is Unconstitutional*, VICE: MOTHERBOARD (Jan. 12, 2022, 9:02 AM), <https://www.vice.com/en/article/g5q5zq/car-companies-argue-that-right-to-repair-law-is-unconstitutional> [<https://perma.cc/7SSK-YKYV>]. The Alliance for Automotive Innovation is made up of, among others, Ford, Honda, Hyundai, and GM. *Id.*

110. See DeGeurin, *supra* note 29.

in *Alliance for Automotive Innovation v. Healey*<sup>111</sup> alleges that Question 1 is not only preempted by federal consumer safety and intellectual property law, but it also violates the Fifth Amendment by requiring the seizure of private property without just compensation.<sup>112</sup> This suit is ongoing, but its outcome will be vital to the automotive right to repair scheme.<sup>113</sup>

## 2. Tesla's Response to Vehicle Repair

Tesla has long opposed right to repair initiatives.<sup>114</sup> Before Question 1 was passed in Massachusetts, Tesla contacted consumers via email urging them

---

111. No. 20-CV-12090, 2020 WL 10141195 (D. Mass. filed Nov. 20, 2020).

112. *Id.* at 8. The complaint refers to Question 1 as the “Data Law.” *Id.* at 1. First, some of the laws that allegedly preempt Question 1 include the National Traffic and Motor Vehicle Safety Act, the National Highway Traffic Safety Administration regulations, the Clean Air Act, the Copyright Act, the Defend Trade Secrets Act, the Computer Fraud and Abuse Act, and the Digital Millennium Copyright Act. *Id.* at 33-48. Under the Supremacy Clause of the U.S. Constitution, “the laws of the United States . . . shall be the supreme law of the land.” U.S. CONST. art. VI. Thus, state laws that conflict with federal law are deemed preempted. *See, e.g., Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983). Such conflict arises when compliance with both federal and state is physically impossible. *Id.* Second, the Fifth Amendment of the U.S. Constitution states that “private property” cannot be taken for “public use, without just compensation.” U.S. CONST. amend. V. The U.S. Supreme Court has never expressly held that all intellectual property is protected by the Fifth Amendment eminent domain protection. *See* Leroy J. Ellis, *Copyright and Federalism: Why State Waiver of Sovereign Immunity Is the Best Remedy for State Copyright Infringement*, 20 NW. J. TECH. & INTELL. PROP. 1, 9-12 (2022). However, the U.S. Supreme Court held that the Fifth Amendment eminent domain protection applies to trade secrets. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984). Third, the automotive organization argues that Question 1 requires an impossible timeframe to comply with and that the law’s requirements force manufacturers to give unrestrained access to a car’s “open access” system—threatening cybersecurity and protected proprietary data. Complaint at 16-20, *Healey*, 2020 WL 10141195 (No. 20-CV-12090). The timeframe required manufacturers of cars starting with model year 2022—which were weeks away from release—to provide the “open access” system. *Id.* at 17. This open platform may give third parties access to *use and alter* proprietary data on the vehicles’ systems. *Id.* at 18.

113. *See* Dave LaChance, *ACA May Hold ‘Especially Important’ Evidence in Mass. Data Access Case, AAI Argues*, REPAIRER DRIVEN NEWS (Dec. 14, 2022), <https://www.repairerdrivennews.com/2022/12/14/aca-may-hold-especially-important-evidence-in-mass-data-access-case-aai-argues> [<https://perma.cc/YE5P-4L5D>].

114. *See* Heilweil, *supra* note 61. *But see* Fred Lambert, *Tesla Fights New ‘Right to Repair’ Initiative Over Cybersecurity Concerns*, ELECTREK (Oct. 14, 2020, 12:47 PM), <https://electrek.co/2020/10/14/tesla-fights-right-to-repair-initiative-over-cybersecurity-concerns> [<https://perma.cc/DDZ4-XGPK>] (indicating that although Tesla has fought against right to repair, “Tesla released the parts catalog for its vehicles to the public” and “released new Do It Yourself maintenance instructions for its cars”).

to vote against the measure.<sup>115</sup> The manufacturer’s rationale for its strong disapproval was cybersecurity concerns.<sup>116</sup> Not only do these justifications lack merit,<sup>117</sup> but consumers have made over one thousand complaints to the FTC about Tesla’s problems with service, delays, and parts.<sup>118</sup> These complaints involve growing frustration with Tesla’s approach to maintenance and repair, including the Policy. Consumers have expressed these complaints on online forums and in the March 2023 class actions.<sup>119</sup>

### C. The Federal Approach to Vehicle Repair

Due to the lack of success among various state legislatures in guaranteeing the automotive right to repair,<sup>120</sup> various entities—including the federal government—have taken action to respond to right to repair concerns.<sup>121</sup> To begin, this Subpart discusses the national agreement vehicle manufacturers entered into after the 2012 Massachusetts right to repair law and the ways it regulates Tesla’s conduct.<sup>122</sup> Next, this Subpart breaks down President

---

115. Lambert, *supra* note 114 (“As you go to the polls this fall, Tesla asks that you vote no on Question 1. Tesla has long applied an open source philosophy to our patented intellectual property for electric vehicles. In this spirit, we provide public access to our service, parts, and body repair manuals, wiring diagrams, service bulletins, labor codes and times, and other information used to perform mechanical, electrical, and collision repair work on our vehicles. Question 1 goes well beyond what is necessary to perform this work, and it potentially jeopardizes vehicle and data security.”).

116. *See id.*

117. *See infra* Section IV.B.1.

118. *See* Heilweil, *supra* note 61. One complaint alleges that the company delivered a Tesla “with a coolant leak and then fail[ed] to address the problem promptly.” *Id.* This explains why several independent mechanics, like Rich Benoit, have stepped up to pick up the slack. *Id.*

119. *See id.* With respect to the Policy, one reddit user stated that, “Tesla just lowered the value of any Tesla car. I see a lawsuit in Tesla’s future – something along the lines of what farmers will be doing to tractor companies.” alienpresence, Comment to *Tesla Will Disable Supercharging in Salvaged Vehicles*, REDDIT (Feb. 12, 2020, 9:03 AM), [https://www.reddit.com/r/teslamotors/comments/f2shme/comment/fhh42zq/?utm\\_source=reddit&utm\\_medium=web2x&context=3](https://www.reddit.com/r/teslamotors/comments/f2shme/comment/fhh42zq/?utm_source=reddit&utm_medium=web2x&context=3) [<https://perma.cc/YS9X-5BAA>]. Another user replied indicating that the supercharging ban would further increase insurance premiums and that Tesla simply does not support third-party repair. steffenfrost, Comment to *Tesla Will Disable Supercharging in Salvaged Vehicles*, REDDIT (Feb. 12, 2020, 9:03 AM), [https://www.reddit.com/r/teslamotors/comments/f2shme/comment/fhh42zq/?utm\\_source=reddit&utm\\_medium=web2x&context=3](https://www.reddit.com/r/teslamotors/comments/f2shme/comment/fhh42zq/?utm_source=reddit&utm_medium=web2x&context=3) [<https://perma.cc/YS9X-5BAA>]. This frustration is reflected in the class action filed on March 15, 2023. Tesla Complaint, *supra* note 19, at 22-25 (discussing the Policy, inflated repair prices, and burdensome wait times for repairs).

120. Mirr, *supra* note 28, at 2416.

121. *See infra* Sections II.C.1-4.

122. *See infra* Section II.C.1.

Biden’s executive order on repair restrictions and the federal government’s increased concern for right to repair.<sup>123</sup> Then, this Subpart considers how the FTC has responded to the right to repair and its subsequent report to Congress.<sup>124</sup> Lastly, this Subpart analyzes the recent Repair Bill for vehicular right to repair and breaks down its components.<sup>125</sup>

### 1. *The Memorandum of Understanding*

Shortly after the 2012 Massachusetts right to repair law, car manufacturers that make up the Aftermarket Industry Association, the Coalition for Auto Repair Equality, the Alliance of Automobile Manufacturers, and the Association of Global Automakers executed a memorandum of understanding (“MOU”): a de-facto, national, self-regulating law mirroring the Massachusetts statute to make diagnostic information and tools available to third-party shops and consumers.<sup>126</sup> Similar to the 2012 Massachusetts law, the MOU did not cover telematics.<sup>127</sup> Coincidentally, Tesla, the pioneer of “over-the-air” software repairs,<sup>128</sup> did not sign the MOU—a fact which the FTC acknowledged—and skirted its implications and the 2012 Massachusetts law by way of a loophole.<sup>129</sup>

---

123. *See infra* Section II.C.2.

124. *See infra* Section II.C.3.

125. *See infra* Section II.C.4.

126. Grinvald & Tur-Sinai, *supra* note 62, at 294; Memorandum of Understanding Among Automotive Aftermarket Industry Association, Coalition for Auto Repair Equality, Alliance of Automobile Manufacturers, and Association of Global Automakers (Jan. 15, 2014) [hereinafter Memorandum of Understanding], <https://wanada.org/wp-content/uploads/2021/01/R2R-MOU-and-Agreement-SIGNED.pdf> [https://perma.cc/EV4J-WCVU]. A MOU is not a legally binding contract, but acts as an agreement or negotiation between parties. *See* Will Kenton, *Memorandum of Understanding (MOU) Defined, What’s in It, Pros/Cons, MOU vs. MOA*, INVESTOPEDIA (May 2, 2023), <https://www.investopedia.com/terms/m/mou.asp> [https://perma.cc/J4FJ-WBRH].

127. Grinvald & Tur-Sinai, *supra* note 62, at 296; Memorandum of Understanding, *supra* note 126, § 2(e) (“[N]othing in this agreement shall apply to telematic services or any other remote or information service . . .”).

128. Grinvald & Tur-Sinai, *supra* note 62, at 327-28.

129. FED. TRADE COMM’N, *NIXING THE FIX*, *supra* note 33, at 45 n.249; Gault, *supra* note 30 (explaining that Tesla evaded the Massachusetts law because they do not have dealers in the state). Under the Massachusetts right to repair law, a dealer is defined as any person or business who, in the ordinary course of its business, sells or leases new motor vehicles to consumers or other end users pursuant to a franchise agreement and who has obtained a class 1 license pursuant to sections 58 and 59 of chapter 140 and diagnoses, services, maintains or repairs motor vehicles or motor vehicle engines pursuant to said franchise agreement.

## 2. Biden's Executive Order

In response to the pervasive, monopolistic conduct of manufacturers throughout the country, President Biden signed an executive order to increase competition and address right to repair.<sup>130</sup> In the order, Biden emphasized that an open and competitive market is the “cornerstone of the American economy.”<sup>131</sup> An open and competitive market promises many things to consumers: diverse options, improved service, and lower prices.<sup>132</sup> Having a closed and concentrated market, however, threatens economic freedom and the welfare of consumers.<sup>133</sup> Realizing this issue, Biden's order sought stricter antitrust enforcement to combat the harmful effects of monopoly powers in repair markets, and it called on the FTC to make this happen.<sup>134</sup>

---

MASS. GEN. LAWS ch. 93K, § 1 (2023) (emphasis added). The Massachusetts Supreme Court has held that neither Tesla nor its Massachusetts subsidiary are dealers under Massachusetts law because they are not “engaged in the business of selling new Tesla vehicles in Massachusetts ‘pursuant to a franchise agreement.’” *Mass. State Auto. Dealers Ass’n, Inc. v. Tesla Motors MA, Inc.*, 15 N.E.3d 1152, 1157 (Mass. 2014). Thus, the high court of the state dismissed the plaintiff's complaint, on jurisdictional grounds, alleging that Tesla operated dealerships without the required licenses. *Id.* at 1153-54. This allowed Tesla to get away “scot free.” Bozi Tatarevic, *Tesla Doesn't Want You to Work on Its Cars*, THE TRUTH ABOUT CARS (Oct. 16, 2015, 7:43 AM), <https://www.thetruthaboutcars.com/2015/10/tesla-doesnt-want-work-cars> [<https://perma.cc/M8KC-QAJQ>].

130. *See* Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36987-88 (July 9, 2021). For an antitrust analysis of other industries that the EO addresses outside the scope of right to repair, see Herbert Hovenkamp, *President Biden's Executive Order on Competition: An Antitrust Analysis*, 64 ARIZ. L. REV. 383, 390-410, 414-16 (2022) (discussing internet platforms and marketplaces, firm mergers, employee noncompetition agreements, and patent agreements).

131. Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36987 (July 9, 2021).

132. *See id.* Diverse options and lower prices are some benefits to easing restrictions on repair mentioned earlier in this Article. *See supra* Section II.A.1. A competitive market of vehicle repair may also provide better service. *See, e.g.*, Letter from Kristy Babb, Exec. Dir., Auto. Oil Change Ass'n (AOCA), to April Tabor, Acting Sec'y, Fed. Trade Comm'n, Regarding the FTC's Call for Comments 41 (Sept. 16, 2019) (contending that authorized car dealers' repair and maintenance services are not superior, and that consumers generally complain more about service at authorized dealers than at independent repair shops), [https://cdn.ymaws.com/www.aoca.org/resource/resmgr/files/comments\\_to\\_ftc\\_nixing\\_the\\_f.pdf](https://cdn.ymaws.com/www.aoca.org/resource/resmgr/files/comments_to_ftc_nixing_the_f.pdf) [<https://perma.cc/F2ND-LZBD>].

133. *See* Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36987 (July 9, 2021).

134. *See id.* at 36992 (“To address persistent and recurrent practices that inhibit competition, the Chair of the FTC . . . is also encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority . . . in areas such as . . . unfair anticompetitive restrictions on third-party repair or self-repair . . .”).

### 3. *The FTC's Enforcement*

Beginning in the early twentieth century, Congress sought to create an interstate trade commission that provided clear guidance in eradicating antitrust and unfair practices after the judiciary's failure to formulate remedial measures for antitrust violations necessitated the creation of this agency.<sup>135</sup> Thus, the FTC was created and empowered to enforce consumer protection laws that protect against fraud, deception, and unfair business practices.<sup>136</sup>

More than one hundred years later, and pursuant to a directive from Congress, the FTC conducted empirical research on repair restrictions in the United States.<sup>137</sup> In 2019, the FTC convened a workshop on "Nixing the Fix" and sought public input from consumers, independent businesses, manufacturers, and others regarding anticompetitive practices in the repair market.<sup>138</sup> The report revealed that manufacturers were restricting independent repair in a variety of ways that have harmed countless consumers.<sup>139</sup> To combat these restrictions, the FTC promised not only to ramp up its rulemaking efforts and enforcement of federal law but also to work with legislators; it also urged the public to submit more complaints.<sup>140</sup>

---

135. PETER C. WARD, *The Federal Trade Commission Act: Historical Context, Legislative History, and Amendments*, in FEDERAL TRADE COMMISSION: LAW, PRACTICE AND PROCEDURE 1-1, 1-5 to 1-7 (2005 ed.) (discussing U.S. Supreme Court cases that fell short in solving antitrust issues).

136. *Enforcement*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement> [<https://perma.cc/3M9S-YFC5>] (last visited Sept. 17, 2023). The FTC also enforces federal antitrust laws. *Id.*

137. *See* Fed. Trade Comm'n, Policy Statement, *supra* note 59.

138. *See* FED. TRADE COMM'N, NIXING THE FIX, *supra* note 33, at 3.

139. *Id.* at 6. Manufacturers do this through: (1) "Product designs that complicate or prevent repair;" (2) "Unavailability of parts and repair information;" (3) "Designs that make independent repairs less safe;" (4) "Policies or statements that steer consumers to manufacturer repair networks;" (5) "Application of patent rights and enforcement of trademarks;" (6) "Disparagement of non-OEM parts and independent repair;" (7) "Software locks and firmware updates; or" (8) EULAs. *Id.* The report states that repair restrictions may have burdened communities of color and lower-income communities the most. *Id.* at 3. The COVID-19 pandemic has exacerbated these effects as it "made it harder to get broken devices fixed, as many big chain stores . . . ceased offering on-site repairs." *Id.* at 4.

140. *See* Fed. Trade Comm'n, Policy Statement, *supra* note 59. For an analysis of the federal laws that the FTC enforces and promises to enforce more to address right to repair, see *infra* Sections III.A-B. Though the FTC calls for the submission of more complaints, this will not fix the issue. *See infra* Section III.B.



#### 4. The Federal Bill on Vehicle Repair

In February 2022, the Repair Bill was proposed to nationalize a vehicle right to repair.<sup>141</sup> The Repair Bill, proposed by Bobby Rush (D-Ill.), enjoyed the support of several car associations that seek to promote consumer choice and safeguard a free and fair repair market.<sup>142</sup> Among other things, the Repair Bill prohibits vehicle manufacturers from withholding tools, critical repair information, and data—including access to telematics—from independent repair shops and consumers.<sup>143</sup> In addition, the Repair Bill purports to create an Advisory Committee that grants the FTC authority to appoint eleven individuals to represent various automotive sectors.<sup>144</sup> The Repair Bill also grants the FTC exclusive authority to enforce the provisions of the bill and the regulations set by the National Highway Traffic Safety Administration (“NHTSA”) as an unfair or deceptive act or practice violation.<sup>145</sup> Though any person may file a complaint with the FTC if a violation occurs, no individual has the private right to sue.<sup>146</sup>

---

141. Right to Equitable and Professional Auto Industry Repair Act, H.R. 6570, 117th Cong. (2022).

142. See News Release, Automotive Aftermarket Suppliers Ass’n et al., U.S. Representative Bobby Rush (D-Ill.) Introduces ‘Right to Equitable and Professional Auto Industry Repair’ Act (REPAIR Act) (Feb. 3, 2022), <https://carcoalition.com/wp-content/uploads/2022/02/CAR-Coalition-Appraises-Introduction-of-REPAIR-ACT.pdf> [<https://perma.cc/Z3TH-4DLA>].

143. H.R. 6570 § 3. The inclusion of telematics is important to bind Tesla to the bill’s requirements. See *supra* Section II.C.1.

144. See H.R. 6570 § 4(a)-(b). These individuals, to name some, include representatives of independent repair facilities, OEMs, vehicle manufacturers, and aftermarket tools manufacturers. *Id.* § 4(b)(3)(A)-(K). This Advisory Committee is responsible for coordinating with the representatives of the automotive industry and giving “assessment[s] of existing and emerging barriers to vehicle repair” and respective recommendations to the FTC. See *id.* § 4(c)-(f).

145. *Id.* § 6(a). The NHTSA is given the authority under this bill to issue regulations establishing standards to access vehicle-generated data and ensure its security. *Id.* § 5(a). Violations are treated the same as a violation of the FTC Act under section 5 and other applicable sections. See *supra* note 35 and accompanying text.

146. See H.R. 6570 § 6(c) (lacking a private right of action). First, the individual files a complaint with the FTC stating the facts of the alleged violation. *Id.* § 6(c)(1). Then, the FTC forwards the complaint to the manufacturer and requests the manufacturer to answer the complaint within a reasonable time. *Id.* § 6(c)(2). If the manufacturer “cease[s] the conduct that is the subject of the complaint,” the manufacturer is relieved of liability. *Id.* § 6(c)(3). However, if the “manufacturer does not satisfy the complaint within the time specified,” the FTC will commence an investigation. *Id.* The FTC has a five-month deadline from the date the complaint was filed to issue an order ending the investigation. *Id.*

### *III. Current Protections Are Failing the Automotive Consumer*

Contemporary state and federal laws are inadequate to properly protect and compensate consumers and independent repair shops for vehicle repair restrictions—even with the FTC’s oversight.<sup>147</sup> Though state laws are important to the discussion, this Article will focus primarily on federal laws when addressing the automotive right to repair.<sup>148</sup> Subpart A discusses the main federal laws relevant to an automotive right to repair and explain why they fall short in stopping vehicle manufacturers from enforcing repair restrictions. These setbacks highlight why federal legislation, such as the Repair Bill, is required to appropriately respond to the issue.<sup>149</sup> However, the Repair Bill gives the FTC exclusive enforcement power under the FTC Act to prosecute violations; Subpart B explains why this power structure is faulty and analyzes the FTC Act and why the Act, left unamended, cannot make consumers whole.

#### *A. Federal Law Fails to Give Consumers Protection for Repair Restrictions*

The FTC’s Nixing the Fix report indicates that there are a slew of federal laws, including some of which the FTC enforces, that apply when addressing

---

147. *See infra* Sections III.A-B.

148. *See infra* Sections III.A-B. To briefly note one state law issue, contract law inadequately addresses right to repair because using unconscionability and public policy doctrines to strike down post-sale restrictions on repair will lead to uncertain results and potentially more liability for consumers. Grinvald & Tur-Sinai, *supra* note 80, at 102. Even if a consumer sought to invalidate a contract on these grounds, the “consumer would need to be prepared to dispute the terms.” *Id.* This is problematic because most contracts with manufacturers contain mandatory arbitration clauses and prevent class actions. *Id.* at 102 n.213. Applying this to Tesla, consumer remedies are limited because disabling supercharging is a post-sale restriction and Tesla has mandatory arbitration clauses in its contracts with only a minor exception for small claims. *See Lambert, supra* note 21 (discussing that Tesla should not disable superchargers because “removing a feature that was paid for in the car” is unreasonable); *see also Full Service Driving Capability Subscription Agreement, TESLA, INC.* <https://www.tesla.com/legal/additional-resources#full-self-driving-capability-subscription-agreement> (last visited Sept. 17, 2023) (“If not resolved within 60 days, you agree that any dispute arising out of or relating to any aspect of the relationship between you and Tesla will not be decided by a judge or jury but instead by a single arbitrator in an arbitration administered by the American Arbitration Association . . .”).

149. *See Mirr, supra* note 28, at 2416 (“The best course of action for ensuring that customers and third-party repair businesses have their right to repair protected is not to hope states individually pass legislation, but instead for Congress to intervene and provide protection nationwide.”).

manufacturers' restrictions on repair.<sup>150</sup> This Subpart breaks down these various laws and how they fail to protect vehicle right to repair. The following sections explain antitrust, warranty, and copyright law and discuss why none of these areas of law provide consumers and independent repair shops the proper theory of recovery.

### 1. Antitrust Law Fails

In its Nixing the Fix report, the FTC stated that repair restrictions can be scrutinized by enforcing antitrust laws—both the Sherman Antitrust Act and the Clayton Act.<sup>151</sup> For example, the Sherman Antitrust Act<sup>152</sup> prohibits a manufacturer from tying arrangements, which involve the selling of one product (the tying product) on the condition that the consumer also purchases a second product (the tied product) from the same entity.<sup>153</sup> Further, the Sherman Antitrust Act prohibits monopolistic activities by imposing both civil and criminal penalties on any person that monopolizes or attempts to

---

150. See Fed. Trade Comm'n, Policy Statement, *supra* note 59, at 2 (“[T]he Commission will now prioritize investigations into unlawful repair restrictions under relevant statutes . . .”).

151. See FED. TRADE COMM’N, NIXING THE FIX, *supra* note 33, at 11.

152. 15 U.S.C. §§ 1-38.

153. FED. TRADE COMM’N, NIXING THE FIX, *supra* note 33, at 12. For example, in the automotive industry, a manufacturer may “unlawfully tie[] the availability of replacement parts to the purchase of its repair service.” See *id.* A Sherman Antitrust section 1 claim exists if the plaintiff shows the tying arrangement and two other factors: (1) economic power to control prices and output and (2) the tying “arrangement affects a substantial volume of commerce in the tied market.” *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461-62 (1992). In *Eastman Kodak*, several independent service organizations (“ISOs”) sued Kodak for unlawfully tying “the sale of service for Kodak machines to the sale of parts, in violation of § 1 of the Sherman Act.” *Id.* at 459. These ISOs serviced Kodak photocopying equipment at cheaper prices than Kodak charged and were attractive to many customers. *Id.* at 457. Kodak then implemented policies making replacement parts available to only purchasers of Kodak equipment, persuading OEMs to sell parts exclusively to Kodak, and pressuring Kodak equipment owners and independent parts distributors not to sell Kodak parts to ISOs. *Id.* at 458. The Court ruled that there was a tying arrangement for tying the availability of parts to service by Kodak. *Id.* at 463-64. Kodak conceded that its arrangement affected a substantial volume of interstate commerce. *Id.* at 462. Further, the Court found that Kodak had sufficient market power because it could raise prices and drive out competition of ISOs that could not obtain parts. *Id.* at 465, 477. The Court then allowed the ISOs’ section 1 tying claim to survive summary judgment. *Id.* at 479. In fact, the farmer unions and advocacy organizations are alleging the same tying violation in their complaint to the FTC on John Deere’s practices. See Nat’l Farmers Union et al., Complaint, *supra* note 37, at 28-36. The same goes for the class actions against Tesla. Tesla Complaint, *supra* note 19, at 35-36.

monopolize any part of trade or commerce among the states.<sup>154</sup> Though these avenues seem applicable to addressing repair restrictions, courts have limited their application, resulting in no remedy for consumers or independent servicers.<sup>155</sup>

The Clayton Act<sup>156</sup> is another antitrust statute with the capacity to address repair restrictions.<sup>157</sup> Though this statute gives an express private right of action for antitrust claims,<sup>158</sup> there are procedural roadblocks (i.e. standing) when a private individual asserts a violation.<sup>159</sup> For instance, in *Apple Inc. v. Pepper*,<sup>160</sup> consumers sued Apple alleging that Apple charged too much for

---

154. 15 U.S.C. § 2. To succeed on this claim, a plaintiff must show: “(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). This violation is alleged in the class actions against Tesla. *Tesla Complaint*, *supra* note 19, at 31-35.

155. *See* FED. TRADE COMM’N, NIXING THE FIX, *supra* note 33, at 12 (“Since *Kodak*, however, courts have imposed a number of requirements for a finding of liability in connection with tying restraints . . .”). For example, courts now engage in extensive inquiries into market power. *See, e.g.*, *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 104 n.26 (1984) (“Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct.”). In other circumstances, courts have foreclosed imposing antitrust liability when a seller asserts intellectual property rights. *See, e.g.*, *CSU, L.L.C. v. Xerox Corp.*, 203 F.3d 1322, 1329 (Fed. Cir. 2000) (holding that Xerox’s refusal to sell or license its copyrighted works was within its rights granted by Congress and did not constitute antitrust law violations). This can be problematic for a consumer or independent shop suing a vehicle manufacturer, like Tesla which has over 3,300 patents, seventy-five of them on chargers. *See Tesla Patents – Insights & Stats*, INSIGHTS, <https://insights.greyb.com/tesla-patents> [<https://perma.cc/9G6L-LAEA>] (last visited Sept. 17, 2023).

156. 15 U.S.C. §§ 12-27.

157. *See* FED. TRADE COMM’N, NIXING THE FIX, *supra* note 33, at 11 (“Section 3 of the Clayton Act . . . prohibits certain contractual arrangements (such as tying or exclusivity arrangements) involving goods . . . that may substantially lessen competition or tend to create a monopoly . . .” (citing 15 U.S.C. § 14)).

158. 15 U.S.C. § 15. As discussed, giving consumers the private right to sue is central to this Article. *See supra* Part I; *see also* *Cadia*, *supra* note 50, at 1734 (“Section Two of the [Sherman] Act is helpful in the ‘right to repair’ context for several reasons. First, it grants broad civil enforcement powers to private parties. Independent repair shops will have the tools to enforce and recover against a large corporation like Apple.” (footnote omitted)).

159. *See* *Cadia*, *supra* note 50, at 1734 n.270 (“This limitation may come into play if third-party repair providers seek to recover from alleged unfair practices of an electronics manufacturer, since they may not be defined as ‘direct purchasers’ of the product.”).

160. 139 S. Ct. 1514 (2019).

its apps and that it monopolized the apps aftermarket.<sup>161</sup> Apple moved to dismiss the complaint on the grounds that the iPhone owners were not “direct purchasers” from Apple since the app developers set the purchase price and consumers buy from them.<sup>162</sup> Apple drew from *Illinois Brick Co. v. Illinois*,<sup>163</sup> arguing that the consumers lacked standing to sue.<sup>164</sup> The Court, however, disagreed with Apple and found that the consumers had standing because they “purchase apps directly from the retailer Apple,” rather than an intermediary party.<sup>165</sup> In light of Tesla’s motion to dismiss the class action lawsuits filed on December 22, 2023, this same issue is common in cases where vehicle manufacturers restrict repair and the individual’s link in the chain of distribution is attenuated.<sup>166</sup>

## 2. Warranty Law Fails

The Magnuson-Moss Warranty Act (“MMWA”)<sup>167</sup> is another federal consumer protection statute enforced by the FTC that governs the warranties used in marketing products to consumers.<sup>168</sup> Under the MMWA’s anti-tying provision,<sup>169</sup> manufacturers cannot “condition[] warranty coverage on the consumer’s use of an article or service identified by brand, trade, or corporate name, unless the warrantor provides that article or service without charge or

---

161. *Id.* at 1518-19.

162. *Id.* at 1519.

163. 431 U.S. 720 (1977). In this case, the U.S. Supreme Court refused to allow “all ‘those within the defendant’s chain of distribution’” from bringing an antitrust suit since compensating victims extends mostly to direct purchasers. *Id.* at 746-47 (quoting *id.* at 761 (Brennan, J., dissenting)).

164. *Apple, Inc.*, 139 S. Ct. at 1519.

165. *Id.* at 1521.

166. *See supra* note 159 and accompanying text. Though the Smith family may have a plausible antitrust tying claim considering Tesla tied the supercharging rectification to service costing over \$10,000, they may face this jurisdictional hurdle since they purchased their salvaged vehicle at auction, not directly from Tesla. *See Rebuilds, Has Tesla Gone Too Far?*, *supra* note 6. One of the class actions against Tesla specifically alleges this supercharging issue, so some of the plaintiffs in the class risk their case on this procedural requirement. *See Tesla Complaint, supra* note 19, at 22. In its motion to dismiss, Tesla argues that the class action plaintiffs are indirect purchasers and lack antitrust standing because they received services and parts from a Tesla-approved collision center, not from Tesla directly. Motion to Dismiss at 3 n.6, *Lambrix v. Tesla, Inc.*, No. 23-CV-01145-TLT (N.D. Cal. filed Dec. 22, 2023).

167. 15 U.S.C. §§ 2301-2312.

168. *See* FED. TRADE COMM’N, NIXING THE FIX, *supra* note 33, at 7.

169. 15 U.S.C. § 2302(c); *see also* 16 C.F.R. § 700.10(c) (2015).

the warrantor has received a waiver from the Commission.”<sup>170</sup> For cars, manufacturers are barred “from voiding a warranty if a consumer has scheduled automobile maintenance performed by someone other than a dealer” or authorized servicer.<sup>171</sup>

Unfortunately, the MMWA has failed to give consumers the redress they need.<sup>172</sup> Courts have interpreted the MMWA in an anti-consumer way; not only have they limited the MMWA’s application and the private remedies available, courts have also imposed harsh jurisdictional requirements in federal court.<sup>173</sup> Additionally, the FTC has not actively enforced the anti-

---

170. FED. TRADE COMM’N, NIXING THE FIX, *supra* note 33, at 7; *see also* 15 U.S.C. § 2302(c); 16 C.F.R. § 700.10(c).

171. FED. TRADE COMM’N, NIXING THE FIX, *supra* note 33, at 5. This seems to be a concern for Daniel Bone if Tesla discovers that he had the battery pack serviced by independent repairers. *See* Stumpf, *supra* note 19.

172. *See* Janet W. Steverson, *The Unfulfilled Promise of the Magnuson-Moss Warranty Act*, 18 LEWIS & CLARK L. REV. 155, 169 (2014).

173. *Id.* First, the prohibition on binding arbitration is an important protection for consumers who are not satisfied with the results of informal dispute resolution proceedings and want to seek private enforcement of their rights in courts. *See id.* at 173-75 (discussing that the FTC and Congress have recognized the significance of protecting consumers and their choice to seek legal remedies in court). However, several courts have held that the MMWA does not prohibit binding arbitration. *See, e.g.,* Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 476-79 (5th Cir. 2002). Second, courts have misinterpreted § 2310(d) of the MMWA which allows consumers to sue for breaches of state created implied warranties. *See* Steverson, *supra* note 172, at 179; *see also* McNamara v. Nomeco Bldg. Specialties, 26 F. Supp. 2d 1168, 1172-75 (D. Minn. 1998). Third, though the language of the MMWA seems to allow recovery for personal injury damages caused by a breach of warranty, many courts have refused to award these damages. *See* Steverson, *supra* note 172, at 194; *see, e.g.,* Gorman v. Saf-T-Mate, Inc., 513 F. Supp. 1028, 1035 (N.D. Ind. 1981) (discussing that the MMWA limits damages to direct damages only). This remedy limitation has reduced the number of claims that can be brought in federal court because MMWA claims require an amount in controversy of \$50,000 or more exclusive of interests and costs. 15 U.S.C. § 2310(d)(3)(B); *see also* Steverson, *supra* note 172, at 196-97 (“Thus without the personal injury component, no warranty claims could be brought in federal court that involved typical household appliances, electronics, and automobiles.”). Fourth, and most applicable to the class actions against Tesla which allege an anti-tying claim under the MMWA, some courts have had difficulty determining what conduct is prohibited under this provision because the statute does not clearly define “what it means to use an article or service ‘in connection with such product’ or specify whether ‘using in connection with’ applies to parts or services that the consumer must pay for in the process of redeeming the warranty benefits.” *McGarvey v. Penske Auto Grp., Inc.*, 486 F. App’x 276, 281 (3d Cir. 2012) (quoting 15 U.S.C. § 2302(c)). The *McGarvey* court, relying on an FTC Opinion Letter, suggested that in certain cases where the warrantor pays a portion of the labor cost under the warranty, “it may specify the labor service to be used.” *Id.* at 281 (emphasis added) (affirming the lower court dismissing the plaintiffs’ MMWA anti-tying claim for a vehicle warranty).

tying provision of the MMWA, and manufacturers continue to void warranties because of unauthorized repairs.<sup>174</sup>

The Education Fund of the U.S. Public Interest Research Groups (“PIRG”) conducted a study in 2018 and found that forty-five out of fifty companies violated the anti-tying provision of the MMWA.<sup>175</sup> In its study, PIRG concluded that the FTC should more actively enforce the MMWA, but that the best solution is to pass right to repair legislation to properly protect consumers against loophole-ridden warranties.<sup>176</sup>

---

174. See FED. TRADE COMM’N, NIXING THE FIX, *supra* note 33, at 12-13 (naming Kodak as an example of a company restricting repairs). In the past decade, the FTC has only brought *one* case alleging an anti-tying violation of the MMWA. Fed. Trade Comm’n, Policy Statement, *supra* note 59, at 2 n.4 (citing *In re* BMW of N. Am., LLC, No. 132-3150, 2015 FTC LEXIS 66 (Fed. Trade. Comm’n Feb. 5, 2015) (agreement containing consent order)). Yet organizations, such as the Specialty Equipment Market Association, “regularly receive[] complaints that automobile dealerships void automobile warranties if the dealership finds a specialty part . . . had been installed on the automobile, regardless of whether the specialty part caused the automobile to malfunction.” FED. TRADE COMM’N, NIXING THE FIX, *supra* note 33, at 8. For a description of complaints where manufacturers void warranties for the use of aftermarket parts that may not cause the malfunction of a vehicle, see generally Letter from Joanna L. Johnson, Johnson Pol’y Assocs., Inc. for the Auto. Oil Change Ass’n (AOCA), to April Tabor, Acting Sec’y, Fed. Trade Comm’n, Regarding the FTC’s Call for Empirical Research (Apr. 30, 2019), [https://downloads.regulations.gov/FTC-2019-00130014/attachment\\_1.pdf](https://downloads.regulations.gov/FTC-2019-00130014/attachment_1.pdf) [<https://perma.cc/MRP8-JGRM>]. Though the FTC urges the public to submit more complaints to aid in the “greater enforcement” of the MMWA, *see* Fed. Trade Comm’n, Policy Statement, *supra* note 59, at 2, this will only exacerbate the issue. *See also infra* Section III.B.

175. FED. TRADE COMM’N, NIXING THE FIX, *supra* note 33, at 8.

176. See NATHAN PROCTOR, U.S. PIRG EDUC. FUND, WARRANTIES IN THE VOID 17-18 (2018), <https://publicinterestnetwork.org/wp-content/uploads/2018/10/Warranties-in-the-Void-U.S.-PIRG-Education-Fund-Oct2018.pdf> [<https://perma.cc/C8JQ-MHPZ>]. This study found that manufacturers have clauses clearly violating the MMWA, such as one stating, “If you choose to have someone other than an authorized service provider work on your Product, THIS WARRANTY WILL AUTOMATICALLY BECOME NULL AND VOID.” *Id.* at 10 (quoting Bosch, Use and Care Manual, Installation Instructions 46 (n.d.)), [https://drive.google.com/file/d/1PvTMW7ja\\_mgdokjE4Oq-7v1-2\\_DVznsq/view?pli=1](https://drive.google.com/file/d/1PvTMW7ja_mgdokjE4Oq-7v1-2_DVznsq/view?pli=1)). Tesla has a similar warranty policy for its vehicles. *See, e.g.*, TESLA, INC., MODEL S, MODEL X, MODEL 3, MODEL Y: NEW VEHICLE LIMITED WARRANTY 11 (effective Mar. 22, 2021), <https://www.tesla.com/sites/default/files/downloads/tesla-new-vehicle-limited-warranty-en-us.pdf> [<https://perma.cc/94KV-69FA>] (“Although Tesla does not require you to perform all service or repairs at a Tesla Service Center or Tesla authorized repair facility, this New Vehicle Limited Warranty *may be voided* . . . due to improper maintenance, service or repairs.”) (emphasis added).

### 3. Copyright Law Fails

The Digital Millennium Copyright Act (“DMCA”)<sup>177</sup> was enacted in 1998 to address copyright violations in the digital age.<sup>178</sup> This law prevents individuals from circumventing technological protection measures (“TPMs”) and has effectively hindered the independent repair process.<sup>179</sup> However, under the DMCA, the Librarian of Congress, with suggestions from the Register of Copyrights, can grant exemptions to the circumvention, preventing liability for copyright violations in the repair industry.<sup>180</sup> Unfortunately, an exemption is temporary, and an independent repairer or consumer would need to renew any exemption to bypass the software locks after three years.<sup>181</sup> Further, the Librarian of Congress only grants narrow exemptions, so repairs attempting to circumvent copyright software locks by manufacturers are more likely to be classified as a copyright violation.<sup>182</sup>

Even in the slim chance an exemption is granted, consumers and independent shops still face a problem. A recent Copyright Office report detailed that agreements involving software-enabled products can be enforced through contracts and EULAs to inhibit repair, regardless of copyright law.<sup>183</sup> Thus, violating the agreement would constitute copyright infringement *and* breach of contract.<sup>184</sup> In *ProCD, Inc. v. Zeidenberg*,<sup>185</sup> the Seventh Circuit Court of Appeals held that a shrink-wrap EULA of phonebook software could be enforced as a matter of contract law without

---

177. 17 U.S.C. §§ 1201-1205.

178. *See* *Mirr*, *supra* note 28, at 2407.

179. *Id.* (“By creating sanctions for TPM circumvention, § 1201 stifled the independent repair process by limiting the steps individuals can take to repair their own devices or to help others repair their devices.”). A TPM “effectively controls access to a work,” so a user attempting to bypass the measure must be given the authority of the copyright owner to gain access. 17 U.S.C. § 1201(a)(3)(B). A consumer thus cannot disable or bypass this “digital lock” without being liable under § 1201. *Grinvald & Tur-Sinai*, *supra* note 80, at 104.

180. *Mirr*, *supra* note 28, at 2407-08; 17 U.S.C. § 1201(a)(1)(C). However, these exemptions do not apply to “trafficking” in TPM circumvention tools. *Mirr*, *supra* note 28, at 2409. Thus, one can develop circumvention tools to repair a product but cannot distribute the tool to others. *Id.* Since many do not have the “skill, time, or will” to repair their own products, this limitation hinders repairs. *Grinvald & Tur-Sinai*, *supra* note 80, at 106.

181. *Cadia*, *supra* note 50, at 1710-12; *see also* *Grinvald & Tur-Sinai*, *supra* note 80, at 105-06.

182. *Cadia*, *supra* note 50, at 1709-10.

183. *See* U.S. COPYRIGHT OFF., SOFTWARE-ENABLED CONSUMER PRODUCTS: A REPORT OF THE REGISTER OF COPYRIGHTS 63 (2016), <https://www.copyright.gov/policy/software/software-full-report.pdf> [<https://perma.cc/2YVB-XBFT>].

184. *Id.*

185. 86 F.3d 1447 (7th Cir. 1996).



being preempted by copyright law.<sup>186</sup> Therefore, manufacturers can restrict vehicle repair through the use of EULAs even if consumers evade copyright infringement liability by obtaining an exemption.<sup>187</sup>

*B. FTC's Complaint Process Leaves Consumers Without Redress*

Another core federal consumer protection law that addresses right to repair is section 5 of the FTC Act (“section 5”).<sup>188</sup> Section 5 grants the FTC the authority to enforce the Act’s provisions against persons, corporations, or partnerships for engaging in unfair methods of competition and unfair or deceptive acts or practices that affect commerce.<sup>189</sup> Not only that, but the FTC can enforce antitrust laws under section 5’s unfair methods of competition standard without adhering to the technical and strict requirements of those antitrust statutes.<sup>190</sup> Following its report to Congress, the FTC pledged to use its authority under section 5 and other statutes to “scrutinize repair restrictions” as unfair methods of competition or deceptive acts or practices.<sup>191</sup> Considering the language of Massachusetts’s Question 1 law and the federal Repair Bill, it seems that legislatures intend to enforce the automotive right to repair laws as section 5 violations.<sup>192</sup> Even so, the

---

186. *Id.* at 1453-55.

187. *Mirr*, *supra* note 28, at 2409-10. A study conducted by the Repair Association concluded that 100% of manufacturers restrict repairs with EULAs. FED. TRADE COMM’N, NIXING THE FIX, *supra* note 33, at 24. Tesla controls the use of its supercharging through a license. *See Supercharger Fair Use Policy*, TESLA, INC., <https://www.tesla.com/legal/terms#supercharger-fair-use-policy> [<https://perma.cc/2N5X-WTC8>] (last visited Sept. 19, 2023). General Motors, a car manufacturer, has stated that consumers “mistakenly conflate ownership of a vehicle with ownership of the underlying computer software in the vehicle.” Aaron Perzanowski & Jason Schultz, *Op-Ed: Do You Own the Software That Runs Your Tesla?*, L.A. TIMES (Nov. 4, 2016, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-perzanowski-schultz-tesla-software-ownership-20161104-story.html> [<https://perma.cc/YWA6-K8GG>]. Several right to repair activists have fought for legislation to protect against this problem with software-enabled vehicles, like Teslas. *See id.*

188. 15 U.S.C. § 45; Fed. Trade Comm’n, Policy Statement, *supra* note 59, at 2.

189. 15 U.S.C. § 45(a)(2).

190. *See* FED. TRADE COMM’N, NIXING THE FIX, *supra* note 33, at 11; *see, e.g.*, Fed. Trade Comm’n v. Cement Inst., 333 U.S. 683, 690 (1948) (reaffirming the Court’s interpretation of section 5 as encompassing antitrust violations). *See supra* Section III.A.1 for a discussion of the rigid requirements of antitrust laws.

191. *See* Fed. Trade Comm’n, Policy Statement, *supra* note 59.

192. *See* MASS. GEN. LAWS ch. 93K, § 6(a) (2023) (“[A] violation of this chapter shall be deemed to be an unfair method of competition and an unfair or deceptive act or practice.”); *see also* Right to Equitable and Professional Auto Industry Repair Act, H.R. 6570, 117th Cong. § 6(a) (2022) (“A violation of this Act or a regulation issued under section 5 shall be

FTC is given exclusive enforcement power and the agency cannot handle such a duty alone. This inadequacy leaves consumers and independent shops without redress, as this Subpart will discuss.

First, the FTC Act is enforced solely by the FTC and does not grant a private right of action; in addition, courts have consistently refused to interpret an implied right from the statute.<sup>193</sup> In *Holloway v. Bristol-Myers Corp.*,<sup>194</sup> the D.C. Circuit Court of Appeals refused to interpret an implied private right of action from section 5 because it would be contrary to Congress's legislative design in giving enforcement power to the FTC.<sup>195</sup> The court reasoned that not only was this central to furthering congressional intent, but giving the FTC sole enforcement power provides "centralized and orderly development of precedent."<sup>196</sup> Thus, consumers must rely on the FTC to enforce violations of unfair practices and resign themselves to the efficiency of the complaint process.<sup>197</sup>

---

treated as a violation of . . . the Federal Trade Commission Act regarding unfair or deceptive acts or practices.") (citation omitted).

193. See, e.g., *Wisniewski v. Rodale, Inc.*, 406 F. Supp. 2d 550, 557 (E.D. Pa. 2005), *aff'd*, 510 F.3d 294 (3d Cir. 2007); see generally *Kroeze, supra* note 36 (explaining that the FTC Act does not have an express private right of action and courts have generally not implied one).

194. 485 F.2d 986 (D.C. Cir. 1973).

195. *Id.* at 1002. Courts normally apply four factors to determine whether or not it is appropriate to imply a private right of action: (1) if the plaintiff belongs in a class for whom the statute was enacted to protect; (2) if "there [is] any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; (3) if it is consistent with "the legislative scheme to imply such a remedy for the plaintiff"; and (4) if the cause of action is one "traditionally relegated to state law," making it inappropriate to infer one solely on federal law. *Cort v. Ash*, 422 U.S. 66, 78 (1975). Thus, statutory intent must support the creation of the private right of action and remedy. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). If it does not, courts cannot create a private right of action, "no matter how desirable that may be as a policy matter." *Id.* at 286-87.

196. *Holloway*, 485 F.2d at 998. Citizen suits under a private right of action place cases before inexperienced courts which can establish adverse and inconsistent precedents that complicate government enforcement efforts. See Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 119 (2005).

197. See *Kroeze, supra* note 36, at 237-38 ("Congress crafted the FTC to enforce Section 5 as a more flexible standard . . . [and gave it] the sole authority to enforce it."). Consumers can file complaints on the FTC website. FED. TRADE COMM'N: REPORTFRAUD.FTC.GOV, <https://reportfraud.ftc.gov> [<https://perma.cc/QT5E-7KJ3>] (last visited Sept. 19, 2023). Once on the website, an individual can click "Report Now." *Id.* The FTC gives an option to report "Auto sale, repair" issues, which one would presumably do for vehicle right to repair

Unfortunately for consumers, the FTC has limited resources to investigate and deter right to repair violations, so its resources are best used to develop policy through informal proceedings and rulemaking.<sup>198</sup> Since its inception, “the FTC [has] incurred repeated criticism for inordinate delay in investigating and prosecuting alleged violations” for many consumers.<sup>199</sup> Courts too have acknowledged that the FTC prosecutes only a small number of complaints, and only a small percentage of those complaints result in a cease-and-desist letter.<sup>200</sup> The agency itself concedes that it cannot resolve individual complaints.<sup>201</sup>

Once the FTC decides, if at all, to investigate a complaint, it must first perform preliminary research to determine if an entity has violated a consumer protection law.<sup>202</sup> Then, an investigation begins, and the staff and commissioners deliberate and exercise discretion to pursue an enforcement action.<sup>203</sup> This discretion, coupled with budgetary and political limitations, often leads to arbitrary enforcement and the non-pursuit of many cases of

---

problems. *See id.* Complaints may also be forwarded to the FTC by the Better Business Bureau (“BBB”). Christie Grymes Thompson, *FTC Consumer Protection Investigations and Enforcement*, KELLEY DRYE 1 (Feb. 5, 2014), <https://s3.amazonaws.com/cdn.kelleydrye.com/content/uploads/attachments/FTC-Consumer-Protection-Investigations-and-Enforcement.pdf>. The FTC also monitors social media posts, television showings, news articles, and petitions from consumer advocacy groups. *Id.* at 2.

198. Michael Isaac Miller, Comment, *The Class Action (Un)Fairness Act of 2005: Could It Spell the End of the Multi-State Consumer Class Action?*, 36 PEPP. L. REV. 879, 928 (2009). Two commentators have said that because of budgetary and political constraints, the FTC engages in selective enforcement leading “the gap between policy and enforcement efforts that directly benefit consumers [to] widen.” Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 554 (1980).

199. Miller, *supra* note 198, at 928 (citation omitted).

200. Kroeze, *supra* note 36, at 249; *Guernsey v. Rich Plan of the Midwest*, 408 F. Supp. 582, 586 (N.D. Ind. 1976) (“The Federal Trade Commission currently receives about 9,000 complaints a year and is only able to investigate one out of eight or nine of these, and, of the small fraction investigated, only one in ten results in a cease and desist order.”).

201. FED. TRADE COMM’N: REPORTFRAUD.FTC.GOV, *supra* note 197 (“We can’t resolve your individual report, but we use reports to investigate and bring cases against fraud, scams, and bad business practices.”).

202. Thompson, *supra* note 197, at 2.

203. *Id.* at 3, 6. The FTC staff may also send the alleged violator “a draft complaint and a proposed settlement called a consent order.” *Id.* at 6. Alleged violators can meet with the Director of the Bureau of Consumer Protection and persuade the Director to end the investigation. *Id.* “The Director has considerable discretion” on how the matter proceeds which can slow the investigation process, and ultimately the processing of complaints. *Id.*

consumer protection violations.<sup>204</sup> For the right to repair, this means that consumers like the Smith family who file a complaint with the FTC about Tesla's conduct may never have their case investigated, or even considered.<sup>205</sup>

#### *IV. Let's Stop Tesla: Providing a Theory of Consumer Redress*

To ensure that consumers and independent repair shops have an avenue of recovery against manufacturers that restrict vehicle repair, Congress should amend the FTC Act to mimic the EEOC's right-to-sue letter procedure in the EEOA.<sup>206</sup> This entails giving the FTC a statutory deadline to investigate a complaint, file a civil action, or enter into an agreement with the violator before it serves a right-to-sue letter to the consumer or independent repair shop.<sup>207</sup> Then, the consumer or independent repair shop will have a similar deadline to file a civil action upon being notified of the letter.<sup>208</sup>

This Part will explain why this amendment to the FTC Act will allow the new Repair Bill, or future, federal right to repair legislation, to adequately support the interests of Congress and the private consumer. Subpart A will discuss the *Guernsey* decision and why its reasoning is important in providing a notice of right-to-sue provision in the FTC Act. Further, this Subpart will outline the amendment and how it should be reflected in the FTC Act. Subpart B will raise opponents' arguments to this amendment and discuss why they lack merit. These arguments are divided into a general opposition to a federal right to repair and a notice of right-to-sue provision.

##### *A. Furthering Congressional Intent and the Rights of Consumers: Amending the FTC Act to Include a Notice-of-Right-to-Sue Provision*

In amending the FTC Act, there must be a balance of public and private enforcement of section 5 so that the intent of the statute's framers is preserved while also allowing consumers to obtain relief for repair restrictions.<sup>209</sup> For instance, a private right of action affords individuals the right to commence a lawsuit on their own behalf, effectively giving them the opportunity to seek

---

204. Leaffer & Lipson, *supra* note 198, at 554.

205. See Rebuilds, *Has Tesla Gone Too Far?*, *supra* note 6. Though consumers filed over 1,000 complaints with the FTC about Tesla service, delays, parts, and repair, it remains unclear if these complaints will provide consumers the redress they deserve. See Heilweil, *supra* note 61.

206. See *infra* Section IV.A.

207. See *infra* Section IV.A.

208. See *infra* Section IV.A.

209. See *infra* Section IV.A.

compensation for their harm.<sup>210</sup> In fact, the 2001 Motor Vehicle Owners Right to Repair Act expressly provided a private right of action to both consumers and independent repair shops suing for vehicle repair restrictions.<sup>211</sup> Legislative history of the bill shows that its framers' intent was to afford a level playing field to protect the "little guy" and curb blatantly unfair business practices.<sup>212</sup>

As previously discussed, courts have refused to interpret an implied private right of action from the FTC Act because it would be contrary to Congress's legislative scheme.<sup>213</sup> However, in *Guernsey v. Rich Plan of the Midwest*,<sup>214</sup> the United States District Court for the Northern District of Indiana held that an implied private right of action existed under the FTC Act. The court rejected the notion that the FTC is in a better position than a private litigant to determine an injury of an unfair or deceptive practice, concluding that such an outcome would run afoul of the principles of a free enterprise economy.<sup>215</sup> This is the only court in the country to find such a right.<sup>216</sup>

Though *Guernsey's* reasoning is pro-consumer and exposes the problem of the FTC's exclusive jurisdiction,<sup>217</sup> a notice of right-to-sue is the better approach.<sup>218</sup> First, the FTC Act's framers expressly disfavored an absolute

---

210. Kroeze, *supra* note 36, at 265 ("A private right of action would effectively alleviate the problem for consumers who are left with limited state consumer protection law redress."). This is especially important given that Massachusetts is the only state that has a vehicle right to repair law where a consumer can sue for violations. See Proctor, *supra* note 27 (showing that many states have right to repair bills and laws).

211. Motor Vehicle Owners' Right to Repair, S. 2617, 107th Cong. § 5 (2002) ("A vehicle owner or repair facility may bring a civil action."). Only an injunction and costs of litigation (attorney and expert witness fees) were available remedies. *Id.* A violation of this bill's provisions was deemed a section 5 FTC Act violation. *Id.* § 4.

212. See *Customer Choice in Automotive Repair Shops: Hearing on S. 2617 Before the Subcomm. on Consumer Aff., Foreign Com. & Tourism of the Comm. on Com., Sci., & Transp.*, 107th Cong. 4-5 (2002) (statement of Sen. Paul Wellstone).

213. See *supra* Section III.B.

214. 408 F. Supp. 582 (N.D. Ind. 1976).

215. *Id.* at 588. The court reasoned that giving enforcement authority solely to the FTC to deter consumer fraud is "suspect." See *id.* at 586.

216. See, e.g., *Hill v. Burgeon Legal Grp., Co.*, No. 19-CV-12783-NLH-AMD, 2020 U.S. Dist. LEXIS 4333, at \*9 (D.N.J. Jan. 10, 2020) ("[Guernsey is] a lone outlier case cited by Plaintiffs here that recognized a private right of action under the FTC [Act].").

217. See Kroeze, *supra* note 36, at 262-63.

218. See *infra* notes 219-22 and accompanying text.

private right of action under section 5 without the agency first acting.<sup>219</sup> During the Senate debate, senators adamantly argued that the FTC's congressional authorization to determine what unfair competition and order violators to cease and desist is "all we have empowered this commission to do."<sup>220</sup> More importantly though, the debates show that the Act's framers favored giving a private individual the right to sue at least *after* the FTC investigated and determined a certain action violated section 5.<sup>221</sup> Accordingly, the right-to-sue letter procedure will properly strike this balance by furthering Congress's intent of promoting the public interest and effectively enforcing private rights after an individual exhausts administrative remedies.<sup>222</sup>

Section 5 should be modeled after the EEOC right-to-sue procedure, beginning with the filing of a formal complaint.<sup>223</sup> The following amendment to section 5 reflects this proposal:

**Civil actions for recovery of penalties for knowing violations  
of rules and cease and desist orders respecting unfair or  
deceptive acts or practices . . . .**

(1)(A) The Commission may commence a civil action . . . against  
any person, partnership, or corporation which violates any rule

219. WARD, *supra* note 152, at 1-9 to 1-10. Senators believed that this proposal would undercut the operation of an administrative agency setting the appropriate standard of behavior companies had to comply with. *Id.*

220. *E.g.*, 51 CONG. REC. 13144 (1914) (statement of Sen. Frank Brandegee).

221. *E.g.*, *id.* at 13145 (statement of Sen. James Clarke) ("I think full justice would require that after the commission had declared a certain practice to be unfair competition, there should be a right of action on the part of all who have suffered from that particular form of unfair trade . . . ."). *Guernsey* also acknowledged that Congress gave the FTC primary, rather than exclusive authority under the FTC Act. *Guernsey v. Rich Plan of the Midwest*, 408 F. Supp. 582, 588 (N.D. Ind. 1976).

222. *See Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 325-26 (1980) (discussing the dual function of the EEOC of protecting both public and private interests with its right-to-sue procedure); *see also* CHRISTINE J. BACK, CONG. RSCH. SERV., R46534, THE CIVIL RIGHTS ACT OF 1964: AN OVERVIEW 83 (2020), <https://crsreports.congress.gov/product/pdf/R/R46534> [<https://perma.cc/Z94G-KWBH>] (discussing an individual's duty to exhaust administrative remedies before seeking a private right of action).

223. *See Overview of Federal Sector EEO Complaint Process*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/federal-sector/overview-federal-sector-eeo-complaint-process> [<https://perma.cc/CQM7-XBLU>] (last visited Sept. 19, 2023). The individual has 180 days from the time of the alleged discrimination to file a complaint. 42 U.S.C. § 2000e-5(e)(1). The EEOC requires that an individual seek EEO counseling or alternative dispute resolution prior to filing a formal complaint, but that is not advocated here. *See Overview of Federal Sector EEO Complaint, supra.*

under this subchapter respecting unfair or deceptive acts or practices . . . . *If a complaint filed with the Commission is dismissed by the Commission, or if within one hundred and eighty days from the filing of such complaint, the Commission has not filed a civil action under this section, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the complaint by the person claiming to be aggrieved.*<sup>224</sup>

To clarify, if the aggrieved party timely filed a complaint, the FTC, with a procedure just like the EEOC's, would have a 180-day deadline from the time the complaint was filed to conduct and complete an investigation.<sup>225</sup> If the investigation ended within the time specified, the FTC would notify the aggrieved party to either request a hearing before an FTC administrative law judge or ask the FTC to issue a decision as to whether an unfair method of competition or unfair or deceptive act or practice took place.<sup>226</sup> If the FTC had not issued a decision from the investigation, or if the FTC failed to enter into a negotiation with the right to repair violator after the 180 days, it would promptly deliver a notice of the aggrieved party's right to sue.<sup>227</sup> Similarly, if the FTC issued a decision with which the aggrieved party was not satisfied, the aggrieved party would either be able to either appeal the decision or be given a right-to-sue letter to challenge the decision in federal court.<sup>228</sup>

With this amendment, consumers and independent repair shops that incur damages and harm from repair restrictions can seek remedies in court pursuant to section 5 for the FTC's selective enforcement and inability to handle voluminous complaints and subsequent investigations.<sup>229</sup> This is consistent with the intent of the framers of the FTC Act.<sup>230</sup> Since the Repair

---

224. This amendment combines introductory language from 15 U.S.C. § 45(m)(1)(A) with the author's proposed additions, the latter shown in italics. Though not specifically proposed here, the FTC can promulgate rules to carry out this amendment effectively. *See Legal Research: A Guide to Administrative Law: Rules and Rulemaking*, LIBR. OF CONG., <https://guides.loc.gov/administrative-law/rules> [<https://perma.cc/4ZXF-485F>] (last visited Sept. 19, 2023) (explaining the role rulemaking plays).

225. 15 U.S.C. § 45(m)(1)(A); 42 U.S.C. § 2000e-5(f)(1).

226. *See Overview of Federal Sector EEO Complaint*, *supra* note 223.

227. *Id.*; 42 U.S.C. § 2000e-5(f)(1).

228. *See Overview of Federal Sector EEO Complaint*, *supra* note 223. The aggrieved party has ninety days to file its civil action upon delivery of the right-to-sue letter. *Id.*

229. *See* Leaffer & Lipson, *supra* note 198, at 554 n.216.

230. *See supra* note 221 and accompanying text.

Bill is enforced on the same terms and jurisdiction as section 5 of the FTC Act, this amendment will promote greater enforcement of consumer choice and competition.<sup>231</sup>

*B. Opposing a Federal Right to Repair and a Notice of Right-to-Sue Provision*

This Subpart will briefly discuss the counterarguments to a federal right to repair and notice of right-to-sue provision in the FTC Act. First, it will discuss the arguments against a right to repair in general. These mostly concern intellectual property and safety risks. Next, this Subpart will discuss arguments against a possible right-to-sue provision under the FTC Act. Proponents of these arguments believe that a right-to-sue provision may hinder the agency's enforcement authority.

*1. Fighting Against a Right to Repair*

As detailed, right to repair legislation comes with downsides that manufacturers use to defend repair restrictions—mainly with claims that such laws create safety and cybersecurity risks and jeopardize intellectual property.<sup>232</sup> Following its report to Congress, however, the FTC concluded that manufacturers' restrictions on repairs are without reasonable justification and lack evidentiary support.<sup>233</sup> Regarding consumer safety and quality repairs, manufacturers have provided almost no data to support the claim that third-party or consumer repair leads to increased injury.<sup>234</sup> Further,

---

231. See Right to Equitable and Professional Auto Industry Repair Act, H.R. 6570, 117th Cong. § 6(a) (2022). The plain text of the bill shows the framers' intent to promote consumer choice and foster competition in the automotive industry. *Id.* § 2(5).

232. See *supra* Section II.A.2; see generally MacAneney, *supra* note 74 (arguing that right to repair legislation jeopardizes "consumer safety and security, brand reputation, product quality, and intellectual property").

233. Fed. Trade Comm'n, Policy Statement, *supra* note 59.

234. See FED. TRADE COMM'N, NIXING THE FIX, *supra* note 33, at 28. Gay Gordon-Byrne of the Repair Association commented that the automotive industry has demonstrated that consumers and independent repair shops are able to repair cars everyday even though cars are diverse pieces of machinery that contain many dangerous chemicals and components. *Id.* at 29. Manufacturers also argue that right to repair would lead to inferior service, but this too has been discredited by the FTC's report discussing that consumers are more satisfied with independent shop repairs. *Id.* at 36-38. For example, Rich Benoit interviewed another customer who received the same independent repair service as Daniel Bone 30,000 miles ago on his Tesla and reported no problems. See Paul Roberts, *Tesla Is a Vocal Opponent of the Right to Repair. Now We Know Why.*, FIGHT TO REPAIR (July 19, 2021), <https://fighttorepair.substack.com/p/teslas-a-vocal-opponent-of-the-right> [<https://perma.cc/KU6Z-AA3X>].



the FTC's report indicated that no empirical evidence suggests that independent repair shops are more or less likely to exploit consumer data.<sup>235</sup> As for intellectual property rights, the FTC's research finds that manufacturers assert patent rights and enforce trademarks in "an unlawful, overbroad manner."<sup>236</sup> Manufacturers asserting intellectual property rights, such as patents, also have other avenues to protect their rights to prevent unauthorized repairs.<sup>237</sup> Overall, since none of these counterarguments are adequately supported, right to repair legislation should be considered with the assistance of the FTC and this Article's proposed solution.<sup>238</sup>

## 2. Fighting Against a Right-to-Sue Letter

Although there is currently no scholarship attacking a right-to-sue letter for the right to repair under the FTC Act, there is some discussion of the letter's setbacks in the EEOA's legislative history.<sup>239</sup> One commentator argues that the right-to-sue provision hinders the enforcement authority of the agency.<sup>240</sup> That is, it is unclear whether the EEOC, for instance, has authority to continue investigating claims after issuing a right-to-sue letter.<sup>241</sup>

---

235. FED. TRADE COMM'N, NIXING THE FIX, *supra* note 33, at 31. According to Gay Gordon-Byrne, having access to an aftermarket part to replace an OEM part is "unlikely to create a cybersecurity threat." *Id.*

236. Fed. Trade Comm'n, Policy Statement, *supra* note 59, at 1.

237. *See supra* Section III.A.3 (discussing a manufacturer's theory of recovery based on state contract law and EULAs for unauthorized repairs that infringe copyright protections). Manufacturers can assert patent rights through post-sale restrictions and non-repair clauses under state contract law. *See Grinvald & Tur-Sinai, supra* note 80, at 101. In *Impression Products*, the U.S. Supreme Court held that the patent exhaustion doctrine did not limit a manufacturer's ability to license a product to a user and control the use of the product through state contract law. *Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 581 U.S. 360, 376 (2017). The patent exhaustion doctrine proscribes a patent holder from suing for patent infringement after selling the product to a purchaser who may use and resell it. *Id.* at 374-75.

238. FED. TRADE COMM'N, NIXING THE FIX, *supra* note 33, at 54; *see supra* Section IV.A.

239. *Equal Employment Opportunities Enforcement Act: Hearing on S. 2453 Before the Subcomm. on Lab. of the Comm. on Lab. & Pub. Welfare*, 91st Cong. 43 (1969) (statement of William H. Brown III, Chairman, Equal Emp. Opportunity Comm'n) ("Absent the filing of a pattern or practice suit by the Attorney General, enforcement is left to the initiative and resources of the aggrieved individual, who can seek relief in the District Court. This is to place the burden precisely where it should not lie.").

240. *See Leiker, supra* note 43, at 175.

241. *Id.* EEOC regulations allow the EEOC to continue processing and investigating a discrimination charge. *See* 29 C.F.R. § 1601.28(a)(3) (1978). However, the validity of this regulation and whether it exceeds the EEOC's authority under Title VII of the Civil Rights Act of 1964 has not been determined. *See Leiker, supra* note 43, at 175.

A complicated circuit split has reached different outcomes.<sup>242</sup> Though the U.S. Supreme Court has yet to address this issue, Justice Thomas suggested that the EEOC oversteps its authority in investigating a claim after it has issued the aggrieved party a right-to-sue letter.<sup>243</sup>

Despite Justice Thomas's analysis and his views on administrative authority regarding *Chevron* deference, some scholars believe agency deference is consistent with both Article I and Article III of the U.S. Constitution; thus the EEOC has the authority to investigate complaints after issuing a right-to-sue letter.<sup>244</sup> Similarly, under this Article's proposal, a court may rule that the FTC does not forego its enforcement authority after delivering a consumer or third-party repair shop a right-to-sue letter.<sup>245</sup> Assuming the Court does not overrule *Chevron* in an upcoming case,<sup>246</sup> under

---

242. See Leiker, *supra* note 43, at 175. The Fifth Circuit Court of Appeals held that the EEOC may not investigate after issuing a right-to-sue letter because allowing so would disrupt Congress's structure of the EEOC's enforcement procedure—filing and notice of charge, investigation, conference and conciliation, and enforcement. *EEOC v. Hearst Corp.*, 103 F.3d 462, 468-69 (5th Cir. 1997). On the other hand, the Ninth Circuit Court of Appeals held that the EEOC may investigate a claim after the aggrieved party has commenced a civil action because doing so fulfills the purpose of Title VII since the EEOC is the “master of the case.” *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 852 (9th Cir. 2009). Similarly, the Seventh Circuit Court of Appeals held that the EEOC may continue its investigation after delivering a right-to-sue letter because the plain text of the statute and its amendments confirms the agency's broad authority to address employment discrimination. *EEOC v. Union Pac. R.R. Co.*, 867 F.3d 843, 849 (7th Cir. 2017).

243. See *VF Jeanswear LP v. EEOC*, 140 S. Ct. 1202, 1202 (2020) (Thomas, J., dissenting from denial of certiorari). Here, Justice Thomas argues that the Ninth Circuit's view is erroneous for failing to consider the plain text of Title VII of the Civil Rights Act. *Id.* at 1204. Further, Justice Thomas explained that prior precedent that gives an agency deference in interpreting its own enabling statute does not apply under the Ninth Circuit's view. *Id.* (discussing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

244. See Kent Barnett, *How Chevron Deference Fits into Article III*, 89 GEO. WASH. L. REV. 1143, 1151, 1154-55 (2021); Leiker, *supra* note 43, at 187 (discussing the appropriate level of deference the Court would apply). Using this deferential standard, Leiker argues, the Court would find that the EEOC may continue investigating a claim after issuing the right-to-sue letter. *Id.* at 188-200.

245. See *infra* notes 247-48 and accompanying text. The court's analysis may likely reach the same conclusion as the Seventh Circuit did for the EEOC when discussing the agency's broad authority under the statute. See *Union Pac.*, 867 F.3d at 850. Congress has given the FTC broad authority under the FTC Act to enforce violations. See *infra* note 248 and accompanying text.

246. See *Loper Bright Enters. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2023). Legal commentators believe that the Court will not completely do away with *Chevron* deference in this case. See, e.g., Pamela King, *Chevron Doctrine: Not*

this deference analysis,<sup>247</sup> the FTC will still be able to investigate repair restrictions after issuing a right-to-sue letter for a section 5 violation because: (1) Congress has given the FTC broad authority to proscribe unfair competition and deceptive acts or practices; and (2) it would be reasonable for the FTC to do so given the FTC Act's history and its main objective to eliminate anticompetitive and unfair conduct.<sup>248</sup> Assuming otherwise, Congress can sidestep this issue entirely when implementing this Article's proposed solution by making the statutory text in the FTC Act clear that the FTC may investigate claims after issuing a right-to-sue letter.

### V. Conclusion

As products and vehicles become harder to fix and maintain, consumers' choices and rights are increasingly limited. Tesla has long opposed right to repair initiatives, seeking to limit an individual's ability to fix one's own vehicle or have it brought to a mechanic of their choice. Authorized by Congress, the FTC launched a workshop to uncover and investigate manufacturers' efforts to restrict repair by limiting the availability of parts, tools, and diagnostic software and by asserting intellectual property rights in an overbroad manner. Though the Repair Bill is a step in the right direction in federalizing a right to repair, the FTC cannot effectively enforce it alone.

In 2022, the FTC announced its first enforcement action against manufacturers since it adopted its policy statement on repair restrictions

---

*Dead Yet*, E&E NEWS (May 24, 2023, 1:33 PM), <https://www.eenews.net/articles/chevron-doctrine-not-dead-yet> [<https://perma.cc/8UBJ-5E6N>].

247. *Chevron*, 467 U.S. at 842-43. In determining the amount of deference to give an agency in interpreting its own statutory authority, courts are confronted with two questions. *Id.* at 842. First, the court must answer whether the statute "is silent or ambiguous with respect to the specific issue." *Id.* If Congress has not spoken on the issue and the statute is silent, the court must then answer whether the agency's interpretation is a reasonable or permissible construction of the statute. *Id.* at 843.

248. See WARD, *supra* note 135, at 1-7 to 1-8 (discussing Congress's intent in giving the FTC vast enforcement authority to eradicate monopolies); see also Justin Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 228-29, 262-63 (2014) (discussing that Congress and courts have given vast deference to the FTC for constructions of section 5 violations considering the history of the statute); FED. TRADE COMM'N, NIXING THE FIX, *supra* note 33, at 3 (discussing Congress's interest and recommendation to the FTC to address repair restrictions with an emphasis on mobile phones and vehicles). In light of the U.S. Supreme Court's recent decision on administrative authority, the FTC likely can still investigate a complaint after issuing a right-to-sue letter because the agency has been given "clear congressional authorization" to investigate repair restrictions. *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022); FED. TRADE COMM'N, NIXING THE FIX, *supra* note 33, at 3.

following the Nixing the Fix report.<sup>249</sup> In this action, the FTC charged motorcycle manufacturer Harley-Davidson (among others) for violating the MMWA and conditioning warranties on the use of authorized parts.<sup>250</sup> It seems that the FTC is finally committing itself to eradicating repair restrictions in the United States.<sup>251</sup> Nevertheless, when considering the agency's voluminous caseload and the fact that it brought its first action against a manufacturer nearly *one year* after enacting its policy statement, progress may prove slow-going.<sup>252</sup>

In September 2022, Congress began entertaining the public's arguments for legislative measures on repair restrictions.<sup>253</sup> The House Committee on Small Business invited several right to repair advocates to discuss their encounters with repair restrictions and express their desire for congressional action.<sup>254</sup> In a subsequent House Rules Committee hearing, one advocate called on Congress to empower the FTC to seek not just injunctions but also monetary penalties against violators of the MMWA.<sup>255</sup> But as this Article has argued, giving the FTC even broader enforcement power—rather than shifting some of it to individual repair shops and consumers—can result in miscarriages of justice.<sup>256</sup> Further, on April 14, 2023, the U.S. Supreme Court ruled on a decision that fortifies this Article's central theme: that individuals should have their claims heard in a federal court without the delays and burdens of administrative procedures.<sup>257</sup>

---

249. Fed. Trade Comm'n, Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter in the Matter of Harley-Davidson Motor Company Group, LLC and MWE Investments, LLC 1 n.1 (June 22, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2223012\\_2123140HarleyMWEChairStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2223012_2123140HarleyMWEChairStatement.pdf) [<https://perma.cc/JKN2-AQ6K>].

250. *Id.* at 1.

251. *Id.* at 1-2 (“Today’s enforcement actions . . . mark an important step forward, demonstrating our commitment to vigorously protecting Americans’ right to repair.”).

252. *Id.*; see *supra* Section III.B.

253. See Elizabeth Chamberlain, *Small Business Owners Fight for the Right to Repair in the US House This Week*, iFixIT (Sept. 15, 2022), <https://www.ifixit.com/News/64817/small-business-owners-fight-for-the-right-to-repair-in-the-us-house-this-week> [<https://perma.cc/9NV5-QUQ4>].

254. *Id.*

255. Sandeep Vaheesan, Right to Repair: Legislative and Budgetary Solutions to Unfair Restrictions on Repair 7 (Sept. 21, 2022), <https://docs.house.gov/meetings/RU/RU02/20220921/115137/HHRG-117-RU02-Wstate-VaheesanS-20220921.pdf> [<https://perma.cc/KAY7-HUNT>].

256. See *supra* Section III.B.

257. See *Axon Enter. v. FTC*, 143 S. Ct. 890, 906 (2023) (holding that a district court could review the petitioners’ constitutional claim on the agencies’ authority and that they could

Given the FTC's slow progress addressing thousands of consumer complaints regarding Tesla's actions and restrictions on repair,<sup>258</sup> class action plaintiffs have taken initiative and filed their own lawsuits.<sup>259</sup> On March 14 and 15, 2023, two class action suits were filed in federal court in San Francisco, California—both alleging that Tesla unlawfully curbed competition by designing its EVs, warranties, and repair policies to discourage independent repair.<sup>260</sup> Both suits allege six violations, five under antitrust law and one under the anti-tying provision of the MMWA.<sup>261</sup> Unfortunately, these lawsuits will likely encounter roadblocks with the direct-purchaser rule under antitrust law as well as courts' strict applications of warranty law—especially under the anti-tying provision.<sup>262</sup>

By introducing a notice of right-to-sue procedure to the FTC Act, individual consumers and independent repair shops can avoid these hurdles and receive quicker judicial relief from the anti-consumer practices of vehicle

---

sidestep agency enforcement proceedings). Justice Thomas believes that it is unconstitutional to give administrative agencies primary authority to decide “core private rights.” *Id.* at 906-07 (Thomas, J., concurring). Most notably, Justice Gorsuch argued that Congress can preclude jurisdiction in Article III courts unless it “carve[s] out some exception.” *Id.* at 914 (Gorsuch, J., concurring). Justice Gorsuch dispenses with the FTC's argument that section 5(c) precludes Article III review because that only applies when there has been a formal cease and desist order—which was lacking here. *Id.* at 914-15. From this reasoning, an individual consumer or repair shop is not precluded from district court review, especially when the FTC has only investigated into a right to repair complaint, but has not issued a formal cease and desist order. *See id.*; *see also supra* note 203 and accompanying text (discussing that a consumer protection complaint with the FTC does not always proceed further down the review process).

258. *See Heilweil, supra* note 61.

259. Scarcella, *supra* note 19.

260. *Id.* The lawsuits do not specify the amount of damages, but the amount could reach “hundreds of millions of dollars,” considering that “the potential class includes hundreds of thousands of Tesla owners and lessees.” *Id.*

261. Tesla Complaint, *supra* note 19, at 31-38; *see also* Complaint at 29-36, *Lambrix v. Tesla, Inc.*, No. 23-CV-01145-TLT (N.D. Cal. filed Mar. 14, 2023).

262. *See supra* Sections III.A.1-2. In fact, the Northern District of California dismissed the plaintiffs' first amended complaint's MMWA claim for failing to have at least 100 named plaintiffs. *Lambrix v. Tesla, Inc.*, No. 23-CV-01145-TLT, 2023 U.S. Dist. LEXIS 214731, at \*26 (N.D. Cal. Nov. 17, 2023); *see* 15 U.S.C. § 2310(d)(3)(C). These class action suits also face issues regarding rigid certification requirements. *See* KEVIN M. LEWIS, CONG. RSCH. SERV.: LEGAL SIDEBAR, LSB10091, HOW HARD SHOULD IT BE TO BRING A CLASS ACTION? 1-2 (2018), <https://crsreports.congress.gov/product/pdf/LSB/LSB10091> [<https://perma.cc/TF8N-5U3D>]. Further, class actions are not always the answer as some attorneys abuse the process and do not act in the best interests of the individual plaintiffs. *Id.* at 1. This Article's solution combats this concern by giving a right-to-sue letter to an individual consumer or independent repair shop who does not need to depend on a class action. *See supra* Section IV.A.

manufacturers.<sup>263</sup> Under this procedure, the Smith family could have their day in court against Tesla, confronting the company's Policy of permanently disabling supercharging for unsupported vehicles that are not serviced by those few authorized technicians who charge a hefty sum for the repair.<sup>264</sup> Daniel Bone could also seek redress from Tesla if the manufacturer arbitrarily decides to disable his car's features because he brought his Tesla to an independent repair shop where he paid a fraction of the manufacturer's price for the repair.<sup>265</sup> With more Tesla and similarly autonomous vehicles on the horizon, the ubiquity of wireless repairs and subsequent restrictions should prepare everyone—consumers, independent repair shops, legislators, and the FTC—to be more vigilant in securing a functional right to repair.<sup>266</sup>

---

263. See *supra* Part III, Section IV.A.

264. See Rebuilds, *Has Tesla Gone Too Far?*, *supra* note 6.

265. See Rebuilds, *Tesla Wanted \$16,000*, *supra* note 14.

266. See Grinvald & Tur-Sinai, *supra* note 62, at 327; see also Tyler, *supra* note 1. As Professor James J. Sample would always say in my federal courts class, Chief Justice Marshall made it clear that “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . .” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).