# Aff R1 Disclosure

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### 1ac – innovation

#### Parker immunity discourages disruptive healthcare innovation

Sage 17 (William Sage, James R. Dougherty Chair for Faculty Excellence in the School of Law and Professor of Surgery and Perioperative Care in the Dell Medical School, University of Texas at Austin; and David Hyman Professor at Georgetown University School of Law, “Antitrust as Disruptive Innovation in Health Care: Can Limiting State Action Immunity Help Save a Trillion Dollars?” Loyola University Chicago Law Journal, Pages 731-734, modified for ableist language indicated by strikethrough and [brackets])

Physicians possess this power for a simple reason: the body of doctrines and practices that we call “health law” systematically supports it. Laws protect the public from individuals and therapies not controlled by physicians, and discourage medical self-help. Laws fund physicians’ tools and assure their quality—though unfortunately not their value. Laws mandate and subsidize insurance coverage for the treatments physicians recommend. Laws insulate physicians from corporate structures and contractual norms. Laws mediate disputes between physicians and patients based on professional standards. Laws apply medical criteria to most ethical issues. Finally, laws such as those challenged in North Carolina State Board delegate substantial rule making and disciplinary authority to state licensing boards (i.e., to entities populated from, and controlled by, the medical profession). States typically justify this abdication of direct oversight in terms of physicians’ scientific expertise, and their ethical duty to heal, not harm, patients.

Both individually and collectively, these laws profoundly distort competition in health care and severely hamper the market’s ability to generate the benefits of competition that we see in other industries. Production remains fragmented. Prices are both inflated and arbitrary— and price competition is minimal (when it even exists at all). There are many barriers to competitive entry—even to deliver the most basic services. Geographic markets are needlessly small and are surprisingly concentrated. Supply bottlenecks are common, often to the mutual benefit of large health insurers and dominant health care providers. And innovation is limited to the sorts of inputs that fit into existing production processes—mainly drugs, diagnostics, and medical devices.

The result is that our health care system almost never trades in the types of consumer products that dominate other costly, complex, technologically sophisticated industries. Instead of fully assembled products accompanied by a strong performance warranty, patients are expected to pay for disaggregated professional process steps (including procedures and consultations) to which billing codes have been assigned, and for equally atomized inputs and complements to those professional processes (such as diagnostic tests and surgical supplies). Health insurance agglomerates these unstructured procedural steps and physical inputs into “covered benefits,” but it does not assemble them into actual, useful products—and only a few true Health Maintenance Organizations (“HMOs”) provide comprehensive prepaid care.

The past decade has witnessed growing agreement regarding both the necessary attributes of a high-performing health care system,17 and the managerial strategies for achieving them.18 Much less attention has been paid to the legal obstacles that have long hindered attempts to redesign acute and complex care—let alone to moving the locus of basic care “upstream,” where it can be communally or self-administered, rather than professionally controlled. As currently constituted, American health law presents concrete structural impediments to accomplishing these consensus health policy goals, and also creates opportunities for incumbent providers to delay or sabotage such efforts.

C. Anticompetitive Effects of Medical Licensing The deep legal architecture of health care strongly favors physician self-regulation, and furthers physicians’ professional insularity and self interest. Physician-controlled medical licensing boards have attracted criticism for decades. Milton Friedman famously wrote in 1962: I am . . . persuaded that [restrictive] licensure has reduced both the quantity and quality of medical practice; . . . that it has forced the public to pay more for less satisfactory medical service[;] and that it has ~~retarded~~ [slowed] technological development both in medicine itself and in the organization of medical practice.19

At the time he made it, Friedman’s harsh economic critique of occupational licensing was not widely shared (except among other libertarians). Professional elites were thought to represent a progressive, prosperous alternative to industrial commodification and the supposed exploitation of labor. To be sure, there was some recognition that the professions might use ethical codes to pursue their own economic selfinterest.20 But mainstream economists such as Kenneth Arrow still believed that collective professionalism improved the marketability of health care by fostering the trust needed to overcome medical uncertainty and informational asymmetry between physicians and patients.21 More recently, a wide array of voices have questioned the economics, and even the justice, of professional privilege.22 In 2015, the Obama Administration issued a report on occupational licensing, finding that “licensing can . . . reduce employment opportunities and lower wages for excluded workers, and increase costs for consumers,” and that “the costs of licensing fall disproportionately on certain populations.”23

To be sure, medical licensing laws are not solely to blame for health care’s competitive shortcomings. Other federal and state regulations and subsidies bear responsibility as well. Still, licensing boards set the tone for the rest of health law as gatekeepers into the health professions and arbiters of practice once admitted. These boards determine the permitted scope of practice, confer authority to write prescriptions, police departures from conventional patterns of care, respond to complaints by licensees about outsiders, and decide when (and, usually, when not) to take disciplinary action against a licensed professional.

From a health policy perspective, physician-imposed barriers to market entry and innovation—typically enforced by a professional licensing board—are the most pernicious practice. Licensing boards set standards for acceptability and impose discipline on licensees who violate their dictates. Unlicensed practice is a criminal act. These entry barriers not only deter novel approaches from new directions, such as telehealth and various “upstream” self-care modalities, but they also discourage existing competitors from adopting practices introduced to the market by disruptive innovators.

#### Disruptive innovation in healthcare solves pandemics

Shaikh 15 (Affan T. Shaikh, Professor at Emory’s school of public health Lisa Ferland, Robert Hood-Cree, Loren Shaffer, and Scott J. N. McNabb, September 23rd 2015, “Disruptive Innovation Can Prevent the Next Pandemic” NCBI <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4585064/>)

Public health surveillance (PHS) is at a tipping point, where the application of novel processes, technologies, and tools promise to vastly improve efficiency and effectiveness. Yet twentieth century, entrenched ideology and lack of training results in slow uptake and resistance to change. The term disruptive innovation – used to describe advances in technology and processes that change existing markets – is useful to describe the transformation of PHS. Past disruptive innovations used in PHS, such as distance learning, the smart phone, and field-based laboratory testing have outpaced older services, practices, and technologies used in the traditional classroom, governmental offices, and personal communication, respectively. Arguably, the greatest of these is the Internet – an infrastructural innovation that continues to enable exponential benefits in seemingly limitless ways. Considering the Global Health Security Agenda and facing emerging and reemerging infectious disease threats, evolving environmental and behavioral risks, and ever changing epidemiologic trends, PHS must transform. Embracing disruptive innovation in the structures and processes of PHS can be unpredictable. However, it is necessary to strengthen and unlock the potential to prevent, detect, and respond.

Introduction

Fifty-two years ago, Alexander Langmuir articulated our modern understanding of public health surveillance (PHS) – the systematic collection, consolidation and evaluation, and dissemination of data (1). In this workflow process, public health provides epidemiologic intelligence to assess and track conditions of public health importance, define public health priorities, evaluate programs, and conduct public health research (2). However, amid this rapidly changing world, PHS has remained sluggish and hindered by the impediments of siloed, vertical (outcome-specific) systems, inadequate training and technical expertise, different information and communication technology (ICT) standards, concerns over data sharing and confidentiality, poor interoperability, and inadequate analytical approaches and tools (3–7).

Gaps and impediments in PHS have become increasingly evident to the world in the wake of the largest Ebola epidemic ever – in which these challenges impacted our ability to prevent, detect, and respond. Under the looming threat of MERS-CoV, leishmaniasis, influenza, multidrug-resistant tuberculosis, and plague, the global public health community now realizes the urgent need to address shortcomings in PHS. Properly preparing for the next major outbreak hinges on our willingness to transform; the consequences of not doing so are dire.

Transforming PHS to meet the needs of the twenty-first century requires novel approaches. A helpful concept to understand and chart this future is disruptive innovation – a term first introduced by Clayton Christensen to describe innovations in technology and processes that disrupt existing markets (8). Disruptive innovations occur when advances in technologies or processes create markets in existing industries. This differs from sustaining innovations, where existing practices are incrementally improved to meet the demands of existing customers; in contrast, newly introduced innovations with disruptive potential (typically unrefined, simple, and affordable in character) target lower-end market needs or create entirely new market segments. As sustaining innovations improve disrupting technologies or processes, these new innovations will meet increasingly greater needs, capture greater market share, and eventually reshape the industry. Christensen uses the example of increasingly smaller disk sizes in the hard disk drive industry, the introduction of hydraulic technology in the mechanical excavator industry, and the rise of minimills in the steel industry to demonstrate the impact of disruptive innovations (8). Here, we describe the need for disruptive innovation in PHS and identify opportunities for disruption in PHS structures and processes.

#### New pandemics are coming and cause extinction – preventative measures solve

Diamandis 21 (Eleftherios P. Diamandis, Division Head of Clinical Biochemistry at Mount Sinai Hospital and Biochemist-in-Chief at the University Health Network and is Professor & Head, Clinical Biochemistry, Department of Laboratory Medicine and Pathobiology, University of Toronto, Ontario, Canada, April 14th 2021, “The Mother of All Battles: Viruses vs. Humans. Can Humans Avoid Extinction in 50-100 Years?” modified to fix author typo [“could result n” 🡪 “could result in” <https://www.preprints.org/manuscript/202104.0397/v1>)

The recent SARS-CoV-2 pandemic, which is causing COVID 19 disease, has taught us unexpected lessons about the dangers of human extinction through highly contagious and lethal diseases. As the COVID 19 pandemic is now being controlled by various isolation measures, therapeutics and vaccines, it became clear that our current lifestyle and societal functions may not be sustainable in the long term. We now have to start thinking and planning on how to face the next dangerous pandemic, not just overcoming the one that is upon us now. Is there any evidence that even worse pandemics could strike us in the near future and threaten the existence of the human race? The answer **is** unequivocally yes. It is not necessary to get infected by viruses of bats, pangolins and other exotic animals that live in remote forests in order to be in danger. Creditable scientific evidence indicates that the human gut microbiota harbor billions of viruses which are capable of affecting the function of vital human organs such as the immune system, lung, brain, liver, kidney, heart etc. It is possible that the development of pathogenic variants in the gut can lead to contagious viruses which can cause pandemics, leading to destruction of vital organs, causing death or various debilitating diseases such as blindness, respiratory, liver, heart and kidney failures. These diseases could result [in] the complete shutdown of our civilization and probably the extinction of human race. In this essay, I will first provide a few independent pieces of scientific facts and then combine this information to come up with some (but certainly not all) hypothetical scenarios that could cause human race misery, even extinction. I hope that these scary scenarios will trigger preventative measures that could reverse or delay the projected adverse outcomes.

#### Capacity for innovation solves invisible thresholds for existential pandemics – they’re coming now – new 400 year study + statistical methods

Penn 21 (Michael Penn, Director of Communications, Marketing and Alumni Relations, Duke Global Health Initiative, citing William Pan, Ph.D., associate professor of global environmental health at Duke, Marco Marani, adjunct professor at Duke department of Global Health, where he previously was a professor of civil and environmental engineering and Anthony Parolari, Ph.D., of Marquette University, is a former Duke postdoctoral researcher, Gabriel Katul, Ph.D., the Theodore S. Coile Distinguished Professor of Hydrology and Micrometeorology at Duke, “Statistics Say Large Pandemics Are More Likely Than We Thought” Duke Global Health Institute, <https://globalhealth.duke.edu/news/statistics-say-large-pandemics-are-more-likely-we-thought>) CULTIV8

The COVID-19 pandemic may be the deadliest viral outbreak the world has seen in more than a century. But statistically, such extreme events aren’t as rare as we may think, asserts a new analysis of novel disease outbreaks over the past 400 years.

The study, appearing in the Proceedings of the National Academy of Sciences the week of Aug. 23, used a newly assembled record of past outbreaks to estimate the intensity of those events and the yearly probability of them recurring.

It found the probability of a pandemic with similar impact to COVID-19 is about 2% in any year, meaning that someone born in the year 2000 would have about a 38% chance of experiencing one by now. And that probability is only growing, which the authors say highlights the need to adjust perceptions of pandemic risks and expectations for preparedness.

“The most important takeaway is that large pandemics like COVID-19 and the Spanish flu are relatively likely,” said William Pan, Ph.D., associate professor of global environmental health at Duke and one of the paper’s co-authors. Understanding that pandemics aren’t so rare should raise the priority of efforts to prevent and control them in the future, he said.

The study, led by Marco Marani, Ph.D., of the University of Padua in Italy, used new statistical methods to measure the scale and frequency of disease outbreaks for which there was no immediate medical intervention over the past four centuries. Their analysis, which covered a murderer’s row of pathogens including plague, smallpox, cholera, typhus and novel influenza viruses, found considerable variability in the rate at which pandemics have occurred in the past. But they also identified patterns that allowed them to describe the probabilities of similar-scale events happening again.

In the case of the deadliest pandemic in modern history – the Spanish flu, which killed more than 30 million people between 1918 and 1920 -- the probability of a pandemic of similar magnitude occurring ranged from 0.3% to 1.9% per year over the time period studied. Taken another way, those figures mean it is statistically likely that a pandemic of such extreme scale would occur within the next 400 years.

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But the data also show the risk of intense outbreaks is growing rapidly. Based on the increasing rate at which novel pathogens such as SARS-CoV-2 have broken loose in human populations in the past 50 years, the study estimates that the probability of novel disease outbreaks will likely grow three-fold in the next few decades.

Using this increased risk factor, the researchers estimate that a pandemic similar in scale to COVID-19 is likely within a span of 59 years, a result they write is “much lower than intuitively expected.” Although not included in the PNAS paper, they also calculated the probability of a pandemic capable of eliminating all human life, finding it statistically likely within the next 12,000 years.

That is not to say we can count on a 59-year reprieve from a COVID-like pandemic, nor that we’re off the hook for a calamity on the scale of the Spanish flu for another 300 years. Such events are equally probable in any year during the span, said Gabriel Katul, Ph.D., the Theodore S. Coile Distinguished Professor of Hydrology and Micrometeorology at Duke and another of the paper’s authors.

“When a 100-year flood occurs today, one may erroneously presume that one can afford to wait another 100 years before experiencing another such event,” Katul says. “This impression is false. One can get another 100-year flood the next year.”

As an environmental health scientist, Pan can speculate on the reasons outbreaks are becoming more frequent, noting that population growth, changes in food systems, environmental degradation and more frequent contact between humans and disease-harboring animals all may be significant factors. He emphasizes the statistical analysis sought only to characterize the risks, not to explain what is driving them.

But at the same time, he hopes the study will spark deeper exploration of the factors that may be making devastating pandemics more likely – and how to counteract them.

“This points to the importance of early response to disease outbreaks and building capacity for pandemic surveillance at the local and global scales, as well as for setting a research agenda for understanding why large outbreaks are becoming more common,” Pan said.a

#### Health innovation solves ABR – kills 10 million people per year, more market access is key

McMurry-Heath 9/16 (Michelle McMurry-Heath is president and CEO of the Biotechnology Innovation Organization, and lives in Washington, D.C. Tomaras is chief scientific officer at Forge Therapeutics, and lives in San Diego, September 16th 2021, “Opinion: Antibiotic-resistant superbugs are a ticking time bomb in global health care” San Diego Union Tribune, <https://www.sandiegouniontribune.com/opinion/commentary/story/2021-09-16/superbug-drugs-therapy-antibiotics>) MULCH

The global health-care system faces a ticking time bomb.

Deadly bacteria and fungi are evolving to resist all current antimicrobials. If that happens, everything from chemotherapy to routine surgeries will become extraordinarily risky, since patients’ weakened immune systems won’t be able to fight off these dangerous infections, and existing medicines will be of little use. The United Nations estimates that without new antibiotics, by 2050, superbugs could kill 10 million people a year.

We don’t know exactly when our last antibiotics will lose their efficacy. We don’t know which strain of “superbug” will push us past the tipping point. But we do know that America’s small biotechnology firms house some of the brain power to avert this disaster.

These firms and their scientists — many based here in California — are battling hard against this microscopic enemy. But small biotechnology firms are not just fighting microbial evolution; they are also grappling with a broken antibiotics market whose inefficiencies are putting millions of lives at risk.

Antibiotics are expensive to develop, costing upwards of $1 billion per new medicine. But doctors only prescribe advanced new antibiotics sparingly — because every dose gives bacteria a chance to evolve and become resistant. And most patients only need antibiotics for a few days, unlike insulin or statins, which many chronic disease patients need to take every day for years or even decades.

Because of the high research and development costs and low probability of earning a financial return on antibiotics, many large pharmaceutical companies have pivoted away from antibiotics development. Since the 1980s, the number of major drug companies developing new antibiotics has fallen from 18 to three.

#### Antibiotic resistant superbugs and zoonotic viruses are catastrophic risks that guarantee extinction.

Victor 20 — Gavin Victor, Pioneer Journalist and Philosophy Research Assistant for Whitman College, 2020 (“Forget coronavirus: Worry about antibiotic resistance instead,” *Whitman Wire*, March 12th, Available Online at https://whitmanwire.com/opinion/2020/03/12/forget-coronavirus-worry-about-antibiotic-resistance-instead/, Accessed 07-02-2021)

A survey of experts from the “Future of Humanity Institute” at the University of Oxford states that there is a 19 percent chance of human extinction before 2100. If this is the risk of our extinction, then consequently, an extreme decrease in quality of life is much more likely, too. Among the many risks within contemporary life, issues surrounding antibiotic resistance are almost completely unacknowledged, incredibly dangerous and subject to change with only slight cultural and industrial shifts. The WHO claims that, “without urgent action, we are heading towards a post-antibiotic era, in which common infections and minor illnesses can once again kill.” The UN claims that by 2050, ten million people will die every year from antibiotic-resistant diseases – which is more than the current figure for cancer.

Antibiotic resistance stems from the misuse of antibiotics. The more we use antibiotics, the more we allow bacteria to build up a tolerance to them. We have already seen the advent of MRSA and antibiotic-resistant salmonella. The most obvious fix for this is to only prescribe antibiotics when absolutely necessary, which doctors are beginning to do. Humans, however, only use 20 percent of the antibiotics manufactured. The rest are consumed constantly by animals waiting for slaughter in massive feeding operations. Lance Price, an expert on bacteria resistant “superbugs”, claims that our food system’s predication on a constant use of antibiotics for animals is a recipe for disaster, because it uses antibiotics in a way that will inevitably lead to antibiotic resistance.

As with almost all recent disease outbreaks – like Swine-flu, MERS and SARS – COVID-19 is zoonotic, meaning that it originated in animals. Not only did these diseases originate in animals but in a particular species of animals that inhabit unnatural conditions for the sake of humans: including Swine-flu from pigs, MERS from camels, as well as SARS and COVID-19 likely originating from bats. While viruses are not the same problem as is antibiotic resistance, overlap between them indicates that top priority global health issues are stemming from our failure to have a healthy relationship with animals. We get zoonotic diseases as a result of exploitative and unnatural relationships with animals.

We need to use the fear generated by COVID-19 to jump start legitimate action in order to mitigate the fallout from catastrophes right around the corner. The fact that we turn a blind eye to pandemics that are becoming more and more inevitable is a sign that we shouldn’t trust our natural tendency to just “deal with it later.” Dealing with it later, dealing with the pandemics that are coming, doesn’t work. We should be scared – but of much more than COVID-19.

#### Narrowing Parker immunity empowers the FTC to challenge anticompetitive business sanctioned by state regulatory schemes. Those stifle innovation – incumbent regulations are outdated and block new entrants.

Crane 19 [Daniel A. Crane, Frederick Paul Furth Sr. Professor of Law, University of Michigan, 60 Wm. & Mary L. Rev. 1175, 2019, Lexis]

INTRODUCTION

This Article's intended audience holds a common view that state and local governments frequently adopt anticompetitive regulations for the benefit of economic special interests and that these acts of cronyism are pernicious to democracy, consumers, and economic efficiency. 1 In other words, the costs to society of these regulations far outweigh any reasonable benefits. A wise, beneficent, and all-knowing Platonic guardian of the state would have little trouble in striking down such regulations.

A further point of general consensus might relate to the particularly pernicious effect of anticompetitive state and local regulation in stifling new production innovation. In a variety of ways, our constitutional order is stodgy. Its conservatism lends a hand to the beneficiaries of incumbent technologies as they seek to deploy state power to block or to slow the advent of new technologies that may eventually displace the old, thereby preventing a realignment of wealth and position. In recent years, innovative technologies developed by companies such as Tesla, Uber, Lyft, and Airbnb have encountered determined opposition from purveyors of predecessor technologies, who have often used state and local regulation to thwart innovation. 2

So much for the common ground. Where consensus quickly fragments is on the question of what, if anything, to do about such regulations given that wise, beneficent, and all-knowing Platonic guardians of the state are in short supply. In the imperfect messiness that is liberal democracy, we frequently accept a host of comparatively petty inconveniences--political and economic--in order to preserve larger values. Just as we tolerate many market failures because the attempt at a regulatory fix might aggravate matters, we may have to tolerate some political failures on the same grounds.

[\*1178] Much of the difficulty has to do with the fact that while there might be a broad consensus that state and local governments enact many unjustifiable anticompetitive regulations, there is not a clear consensus on which ones they are. The experience with economic substantive due process in the late nineteenth and early twentieth centuries, epitomized in Lochner v. New York, 3 has left the American political psyche gun-shy about permitting judges to strike down protectionist economic regulations on constitutional grounds. Shortly after getting out of the Lochner business, the Supreme Court announced that it would not get into the same business under the guise of the antitrust laws. 4 Over time, the development of the Parker state action doctrine allowed the courts to play a somewhat expanded role with respect to anticompetitive state and local regulations, but the zone of judicial review remains relatively constricted. 5

The purpose of this Article is to compare the deployment of constitutional and antitrust tools to scrutinize potentially anticompetitive state and local regulations against the backdrop of the ubiquitous concern about "Lochnerizing" under the auspices of either constitutional or statutory authority. Here is the question in a nutshell: If one believes that courts (or perhaps federal administrative agencies) should do somewhat more than they currently do to scrutinize and potentially invalidate anticompetitive state and local regulations, which lever should they pull--constitutional doctrines, antitrust preemption, or both? Because there are some overlapping, and some separate, institutional constraints and potential pathologies between constitutional and antitrust law, it is important to compare the two tools before deploying them.

This Article is organized as follows: Part I diagnoses the underlying features of democratic government that produce anticompetitive regulation. Some of this story is quite familiar, but I present some new observations with respect to the role of technological incumbency as a strong factor in invoking regulation to thwart innovation.

[\*1179] Part II explores the historical, ideological, and institutional foundations of the current legal doctrines with respect to constitutional and antitrust scrutiny of anticompetitive regulations. It shows that, despite the narrowing of Parker immunity in recent decades and some recent revival of equal protection and substantive due process as constraints on anticompetitive regulation, a good deal of anticompetitive state and local regulation remains impervious to legal challenge.

Part III compares the potential efficacy and pitfalls of deploying constitutional or antitrust doctrines as checks on anticompetitive state and local regulations. It considers: (1) the reach and domain of constitutional and antitrust theories; (2) the ways in which each theory could accommodate genuine and sufficient justifications for the challenged regulations; (3) ways in which the antitrust and constitutional tools differ substantively and procedurally; and (4) ways in which the two theories might interact.

I. WHY ANTICOMPETITIVE REGULATION SUCCEEDS

This Article opened with the assumption that a wide universe of unjustified state and local anticompetitive regulation exists that a benevolent Platonic guardian of the state would instantly nullify. Given this conceit, the presence of such regulations necessarily represents democratic failures, as democracy should, in principle, strive for laws that confer positive, rather than negative, public benefit. What, then, accounts for the pervasive existence of these undesirable regulations? The answer comes in two parts--a generic (and largely familiar) story concerning anticompetitive regulations as a whole, and a more specific story concerning the battle between incumbent and innovative technologies.

A. The Generic Story

The generic story is largely familiar from public choice theory and the literature on the Parker state action doctrine. Democratic processes systematically fail to overcome two embedded hurdles to matching regulatory schemes to broad public preferences: (1) the asymmetrical distribution of costs and benefits of anticompetitive [\*1180] regulations, and (2) the externalization of costs on populations outside the boundaries of the relevant democratic unit. 6 In tandem, these hurdles to democratic correction of cronyistic dispensations of monopoly power by governmental regulators perpetuate regulatory schemes that a broad majority of citizens would vote to overturn if they understood the issue and were sufficiently motivated to invest political energy in correcting it. 7 The first democratic deficit, well documented in public choice literature, arises because producers typically receive a much more concentrated benefit from anticompetitive regulations in comparison to the relatively unconcentrated cost imposed on consumers. 8 A small band of producers may lobby aggressively to enact or maintain an anticompetitive scheme that permits the producers to collect significant monopoly rents. 9 Those rents, in turn, may be spread across thousands or millions of consumers, each one paying a relatively small increase in rent. 10 Collective action constraints--the cost of mobilizing consumer sentiment and action to oppose the regulation--give the producers a systematic advantage in maintaining the regulation. 11 As John Shepard Wiley explained in bringing public choice theory literature to bear on Parker immunity questions: [I]f the group [of consumers] is large, individual members have little incentive to participate because participation is personally costly and contributes little to the group's chances for successful joint action. Small groups encounter fewer of such problems. If group members behave in this rational self-interested manner, then "there is a systematic tendency for exploitation of the great by the small"; less numerous, more intensely concerned special [\*1181] interests can predictably outmatch more numerous, more mildly concerned consumer or "public" interests in legislative or regulatory fora--even though the actions of special interests impose a net loss on society. 12 The second deficit arises when governmental units--whether state or local--externalize the costs of the anticompetitive regulation outside their jurisdiction. The classic example is Parker itself, in which 90 percent of the raisins subject to California's agricultural cartel mandate were sold outside of California. 13 Out-of-state consumers could not be counted on to mobilize democratically to oppose the California regulation, as they had no political voice in California. 14 Many similar examples of jurisdictional cost externalization have been documented. 15 One arose in an important Supreme Court decision on state action immunity, Town of Hallie v. City of Eau Claire. 16 Hallie, Seymour, Union, and Washington were unincorporated towns adjacent to the city of Eau Claire, Wisconsin. 17 Their citizens could not vote in Eau Claire, but Eau Claire wanted to annex those territories into its boundaries, possibly through coercive means. 18 Eau Claire received federal funds to build a sewage treatment plant in its service area, which covered the four towns, then refused to supply sewage treatment services to the towns. 19 However, the city did agree to provide treatment services to certain homeowners in the towns if a majority of area voters voted by referendum to allow Eau Claire to annex their homes and to commit to use Eau Claire's sewage and transportation services. 20 The towns claimed this scheme was designed to keep the other towns from effectively competing with Eau Claire's sewage collection and transportation services. 21 The scheme also possibly allowed the [\*1182] city to raise costs for nonresidents while at the same time leveraging the higher prices to bring the nonresidents (and presumably their property taxes) into the city. 22 Although the city's motivation was ultimately political rather than narrowly economic, it used an anticompetitive strategy to dump monopoly costs on nonresidents who could not vote to rescind the regulations until they joined the city, at which point the question would be moot. 23 Together, these two deficits--asymmetrical costs and benefits to both producers and consumers and cost externalization--explain why democratic processes often fail to weed out anticompetitive regulations. Without concerted efforts by champions of consumer interests to overcome collective action problems and mobilize support for regulatory reform, the regulatory barriers to competition can linger indefinitely. As discussed next, these failures of democratic self-correction are exacerbated by regulations that entrench incumbent technologies at the expense of innovation.

B. Additional Considerations Affecting Product Market Innovation

Many of the contemporary regulatory battles between old and new technologies (particularly those involving the sharing economy) can be understood as follows. The incumbent regulatory scheme arose many decades ago and may well have been legitimately justified (in the sense of not imposing more costs than benefits) at the time of its adoption. 24 Our hypothesized Platonic guardian might even have approved of it at the time of its adoption. 25 The passage of time and advent of new technologies has now eroded the original basis of the regulation, and our Platonic guardian would therefore want the regulation rescinded or reformed. However, incumbent firms succeed in blocking or slowing innovative competition by circling the wagons around the incumbent regulatory schemes. 26 In [\*1183] these wars, the incumbents have a decisive advantage for at least three structural reasons.

First, if the incumbent regulatory scheme has allowed the incumbent firms to collect monopoly rents, then there may be a sharp asymmetry of incentives between old and new firms. 27 This is the same asymmetry that attends any struggle between incumbent monopolists and new competitive entrants: the monopolist is seeking to protect a large market share at a monopoly price, whereas the new entrant can only hope to gain a smaller market share at a competitive price. 28 Because the incumbent has more to gain than the new entrant has to lose, the incumbent will be willing to spend more to entrench the regulatory monopoly than the new entrant will be to challenge it. 29 This, in turn, discourages potential new entrants from investing in innovative new technologies and mounting political and market-oriented challenges to the incumbents. 30

Second, the incumbents have the advantage of status quo biases and fears about the consequences of technological change. 31 Costs of the existing system--to human safety, for example--may be seen as an inevitable baseline, whereas potential risks from the new technology may be seen as incremental threats. 32 Hence, risks and costs of the existing system may be undercounted or not counted at all, while risks and costs of the new system will be made to bear the full weight of their risks and costs.

For example, in recent months there have been widely reported stories of Uber drivers sexually abusing passengers. 33 These stories rarely report the base rate of abuse by taxi drivers or public transit [\*1184] workers, who might well present similar risks to passengers. 34 Similarly, the news media seem to wait with bated breath to report every accident involving a driverless vehicle 35 --even ones where the vehicle was stationary and hit by another at-fault vehicle--without reporting the base rate of nearly 40,000 deaths a year from human-driven vehicles. 36 The focus of news reporting seems to be on the incremental risks created by automated driving without regard to the baseline number of deaths that automated driving might diminish. 37 In principle, regulators should compare the likely risks of allowing new technologies to those of perpetuating the incumbent technology, but they often default to some version of the precautionary principle, insisting that new technologies prove their safety and efficacy in an absolute rather than comparative sense. 38 Given this baseline asymmetry, proponents of new technologies frequently must overcome significant regulatory hurdles not faced by incumbent technologies. Or, incumbent technologies may persuade regulators to force new technologies to play by rules that favor the incumbent technologies--a form of raising rivals' costs and creating regulatory entry barriers. 39

Finally, incumbents enjoy the generic benefits of incumbency in a structurally conservative constitutional and political system. The multiple "veto gates" to reform legislation--structural factors such as bicameralism, presentment, filibusters, and committee structures 40 --empower technological incumbents to ride the status quo for years or decades after our hypothetical Platonic guardian would have instituted public-minded reforms. 41

[\*1185] In combination, these three factors create additional barriers to the expected flow of democratic processes toward majoritarian equilibria--that is to say, equilibria that favor consumers' interests in competition and innovation over those of producers in capturing monopoly rents. In light of these factors and the collective action and cost externalization factors discussed earlier, 42 it is unsurprising that regulation serves as a barrier to innovation.

C. An Illustration from Automobile Distribution

The ongoing story of Tesla's efforts to break into the American automobile market illustrates the stickiness of incumbent regulations. 43 For a variety of business reasons, when Tesla entered the market in 2012, it decided that it would have to sell its all-electric vehicles (EVs) directly to consumers, meaning that it would have to open its own showrooms and service centers rather than outsourcing that function to franchised dealers. 44 Among other things, Tesla believed that traditional dealerships would be reluctant and ill-positioned to sell EVs and that Tesla therefore could not expect to convince already skeptical customers to buy EVs unless it opened its own retail facilities. 45 Since the mid-twentieth century, however, most states have adopted laws intended to protect dealers from unfair exploitation by manufacturers. 46 Among the provisions in many of these state statutes is a prohibition on a manufacturer opening its own showrooms and service centers. 47 In many states, manufacturers are required to distribute through independent dealers only. 48

Legislatures adopted these direct distribution prohibitions at a time when American car manufacturing was dominated by the "Big Three" (Chrysler, Ford, and General Motors) and many dealers were [\*1186] "mom and pop" businesses. 49 State legislatures were convinced that the dominant manufacturers were taking advantage of their franchisees by selling cars through their company-owned stores at lower prices than the dealers could afford to charge given the wholesale prices charged by the manufacturers. 50 The direct distribution prohibitions were justified as correcting a severe imbalance in bargaining power leading to contracts of adhesion and unfair exploitation in manufacturer-dealer relations. 51

Assuming that dealer protection rationale made sense in circa 1950, its basis has almost entirely vanished today. With the advent of competition from Europe and Asia, the Big Three are no longer dominant. 52 Dealers have many choices of automobile franchisors and hence considerably more power in negotiations over franchise terms. Further, the dealers are no longer mostly mom and pops. 53 Rather, most dealers are organized into multi-dealer groups, many with hundreds of millions or billions of dollars in annual revenue. 54 Indeed, some of the largest dealer groups have more annual revenue than Tesla. 55 Most significantly, the dealer protection rationale has nothing to do with a company such as Tesla that does not seek to distribute through dealers at all. 56 No dealers, no dealer exploitation.

Recognizing that the dealer protection rationale that justified the original statutes no longer works, the dealers have attempted to recast the direct distribution prohibitions as consumer protection decisions. 57 They have argued that forcing consumers to buy automobiles from dealers rather than from manufacturers will lead to more price competition, and hence lower prices, and prevent [\*1187] consumers from manufacturer exploitation. 58 These consumer protection arguments have been roundly rejected by economists, 59 the Federal Trade Commission (FTC), 60 and major proconsumer groups such as the Consumer Federation of America, Consumer Action, Consumers for Automobile Reliability and Safety, and the American Antitrust Institute. 61 Nonetheless, the dealers have succeeded in using the existing structure of dealer protection laws to block or slow Tesla's direct distribution program in a number of states. 62

The Tesla story evidences most of the factors that contribute to the persistence of anticompetitive regulations. The dealers have a concentrated interest in preserving their protected position, while the costs of that protectionism are spread out over millions of consumers. In the state with arguably the most pernicious record with respect to direct distribution reform--Michigan--there is a record of antireform advocacy by a leading incumbent--General Motors--and acquiescence by the political class to protect an in-state champion against an out-of-state challenger. 63 Even though consumers complain more about car dealers than about any other business, indicating the baseline system is not particularly attractive to them, 64 the dealers have invoked fears about the risks of direct distribution in opposition to legislative reforms. And legislative [\*1188] inertia has slowed the consideration of reform bills in some states, extending the incumbent regulatory scheme long past its reasonable expiration date. 65

The structural factors weighing against proconsumer and pro-innovation reforms will not block Tesla forever. The company has already seen significant successes in some state legislatures and courts and is progressively penetrating the market. 66 Yet it would be misguided to consider the company's eventual success a reason not to worry about the structural factors entrenching anticompetitive regulations, especially those foreclosing innovation. No monopoly is permanent--even the most persistent are eventually eroded. 67 Innovative technologies will almost always find a way out eventually, despite incumbent machinations. 68 What incumbents can buy is not monopoly in perpetuity but in extension. 69 Those years or decades of extension are costly to society. They represent significant overcharges to consumers, misallocations of social resources and, in the extreme, impairment to health and safety-- even lives lost. 70

Not every instance of anticompetitive state or local regulation exhibits the full set of explanatory factors discussed in this Article as cleanly as the ongoing Tesla saga does. Yet the Tesla story is more paradigmatic than idiosyncratic. Across the economy, incumbent technologies are structurally advantaged to deploy regulatory forces to stifle or slow innovation.

[\*1189] II. CONSTITUTIONAL AND ANTITRUST PRINCIPLES AS A CHECK ON ANTICOMPETITIVE REGULATION

If democratic processes fail to check anticompetitive state and local regulations on a systematic basis, then what can be done about it? Among the potential tools are institutional efforts to address the quality of legislation and regulation through democratic processes, such as creating governmental competition advocacy bodies within state and local governments or using federal purse strings to incentivize state and local governments to reevaluate their regulations. These democratic options are important, but they often fall prey to the pathologies of democratic decision making identified earlier. 71 Competition advocates--whether in government or in the private sector--often face formidable structural barriers to advancing the procompetition interest: entrenched incumbent monopolies, difficulties in mobilizing consumer support given the often diffuse nature of consumer harm, and institutional biases against change. 72

In addition to the democratic options, there are what could be styled counterdemocratic possibilities, insofar as they involve the use of courts or agencies to strike down anticompetitive statutes and regulations as inconsistent with some overarching norm of federal law, whether statutory or constitutional. 73 These counterdemocratic possibilities often do not run into the same structural status quo biases as the democratic possibilities do. For example, advocates of a legal theory for overruling an anticompetitive state or local regulation do not have to mobilize broad political support for their position or surmount the "veto gates" 74 built into ordinary political processes. Rather, they typically only have to persuade a small set of elite decision makers that their position is legally correct. It is with these counter-democratic possibilities that this Article is primarily interested.

[\*1190] The counterdemocratic or countermajoritarian quality of these deployments of judicial review is what places their use in some doubt, 75 even granting the assumption that they are targeting objectively undesirable regulations. 76 In the arc of American history, the courts have vacillated in their willingness to engage in such judicial review since the mid-twentieth century. Late nineteenth and early twentieth century courts were willing to engage in broad judicial review of economic regulation, 77 but the tide turned strongly against such review in the mid-twentieth century. 78 Only in recent years have glimmers of a return to some form of strong judicial review of anticompetitive regulations made a reappearance. 79

A. Lochner, anti-Lochner, and Parker

The stage for the current constellation of judicial doctrines and attitudes towards federal judicial review of anticompetitive state and local regulations was set through the progression of Lochner-era substantive due process, the anti-Lochner constitutional revolution of 1937, and the extension of anti-Lochner sentiment to federal antitrust law in the creation of Parker's state action immunity doctrine in 1943. 80 In 1905, the Supreme Court in Lochner struck down a New York law regulating bakeshop working hours on substantive due process grounds, 81 over Justice Oliver Wendell Holmes's famous objection that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." 82 During the Progressive and New Deal eras, Lochner and Lochnerism were broadly vilified for interfering with progressive reforms and substituting judges' economic views for those of legislatures. 83 In the New Deal constitutional revolution associated with the year 1937 (although spanning a few years in either direction), the Supreme [\*1191] Court announced it was getting out of the Lochner business--that it would not strike down economic legislation simply on the grounds that it was, in the judgment of the court, ill-considered. 84 Over time, it became clear that the anti-Lochner jurisprudence extended to nakedly anticompetitive regulations adopted to favor economic special interests to the detriment of the consuming public. In cases such as Williamson v. Lee Optical 85 and Ferguson v. Skrupa, 86 there was a fairly apparent record that the regulations in question had been adopted to stifle competition and benefit economic special interests, but the courts refused to create an exception to the anti-Lochner doctrine on those grounds. 87 In Williamson, the Court acknowledged that the "Oklahoma law may exact a needless, wasteful requirement in many cases," but insisted that the "day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." 88 Rather, the Court held that "[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts." 89 In 1943, the Supreme Court in Parker v. Brown also made clear that it would not permit the federal Sherman Act to be used as an end-run around the anti-Lochner cases. 90 Parker involved both dormant commerce clause and Sherman Act challenges to California's Agricultural Prorate Act, which forced farmers into a marketing plan that effectively operated as an output reduction cartel run by farmers. 91 The Supreme Court rejected both challenges. 92 Finding "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature," 93 the Court created a doctrine of state action immunity for anticompetitive state [\*1192] and local laws. 94 The effect of this ruling was to restrict the Sherman Act's coverage solely to purely private conduct. 95 Anticompetitive schemes orchestrated by the state would be excluded from judicial review. 96 As Judge Merrick Garland has observed, Parker is best understood as a continuation of the post-1937 jurisprudence rejecting Lochner: Parker v. Brown was much less a case about judicial faith in economic regulation than it was a case about judicial respect for the political process. Parker was indeed a child of its times, but the most salient element of that historical context was the Court's recent rejection of the Lochner-era doctrine of substantive due process, under which federal courts struck down economic regulations they viewed as unreasonably interfering with the liberty of contract. Having only just determined not to use the Constitution in that manner, the Court was not about to resurrect Lochner in the garb of the Sherman Act. 97

B. The Potential for an Increased Level of Judicial Scrutiny

As of 1943, one would have been justified in believing that, at least from the perspective of federal judicial review, anticompetitive state and local regulations would receive a free pass unless they [\*1193] committed certain egregious violations, such as disadvantaging "discrete and insular minorities" 98 or discriminating against out-of-state commerce. 99 But the judicial impulse to cast a stern glance at perniciously anticompetitive regulations could not be forever stifled, and before long cracks began to appear in the courts' anti-Lochnerian resolve.

Antitrust law and its state action immunity doctrine were the first to move in a significantly more interventionist direction. By the time of the Midcal decision, the state action immunity doctrine had been narrowed to permit judicial scrutiny unless the state regulation met a two-part test: (1) clear and affirmative expression of the anticompetitive policy by the sovereign state itself, and (2) active supervision of the policy's implementation by state actors. 100 Under this structure, the courts have invalidated a number of anticompetitive state regulatory schemes--most recently the practice of delegating regulatory power to occupational licensing boards staffed with potentially self-interested industry participants. 101

The Midcal test invokes a democracy-reinforcement theory of antitrust judicial review. 102 States may enact anticompetitive regulations so long as they take conspicuous responsibility for them. 103 If the state can be obviously identified with the scheme, then perhaps citizens will "vote out the bums" if the costs to consumers are too high. 104 Alas, many anticompetitive regulations escape Midcal's net because of the systemic factors identified in the previous section. 105 Even when a state conspicuously takes ownership of an anticompetitive scheme, democratic processes may fail to provide a remedy because of the asymmetry of costs and benefits [\*1194] between producers and consumers, the externalization of costs outside the voting jurisdiction, and the entrenched advantage of technological incumbency. 106

In light of the limited efficacy of Midcal's regime, one could consider additional ways to increase the level of antitrust scrutiny of anticompetitive state and local regulations. Commentators have proposed various such doctrinal approaches to invigorate antitrust preemption. For example, courts might adopt a cost-externalization test, which would invalidate regulatory schemes that externalize a disproportionate share of monopoly overcharges outside the boundaries of the political district enacting the regulation. 107 Or, as I have proposed elsewhere, they might read the Parker doctrine as entirely inapplicable to enforcement actions by the FTC--a legal question that the Supreme Court has held is still open. 108 In the event that the courts hold Parker inapplicable to the FTC, the Commission might play a significantly enhanced role in checking anticompetitive abuses by state and local governments.

Despite calls for a broader use of federal antitrust law to police anticompetitive state and local regulations, the Supreme Court continues to refine the Parker doctrine with an eye on Lochner. Then-Justice Rehnquist once worried that the Court should not "engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that th[e] Court … properly rejected" in terminating Lochnerism. 109 In his dissenting opinion in Community Communications Co. v. City of Boulder, Justice [\*1195] Rehnquist warned about the risks of opening up antitrust review of municipal regulations in a way that would require cities to justify their regulations, and the courts, in turn, to weigh those justifications. 110 Rehnquist wrote:

If the Rule of Reason were "modified" to permit a municipality to defend its regulation on the basis that its benefits to the community outweigh its anticompetitive effects, the courts will be called upon to review social legislation in a manner reminiscent of the Lochner era. Once again, the federal courts will be called upon to engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected. Instead of "liberty of contract" and "substantive due process," the procompetitive principles of the Sherman Act will be the governing standard by which the reasonableness of all local regulation will be determined. Neither the Due Process Clause nor the Sherman Act authorizes federal courts to invalidate local regulation of the economy simply upon opining that the municipality has acted unwisely. The Sherman Act should not be deemed to authorize federal courts to "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." The federal courts have not been appointed by the Sherman Act to sit as a "superlegislature to weigh the wisdom of legislation." 111

Also in the shadow of Lochner, recent years have shown glimmers of a reinvigoration of constitutional doctrines checking anticompetitive abuses by state and local governments. The negative or dormant commerce clause--limited by the Parker Court on anti-Lochner grounds--has occasionally been deployed to invalidate not only anticompetitive regulatory schemes 112 that discriminated against out-of-state interests, but also, on occasion, those that impose significant burdens on interstate commerce without a sufficient justification. 113 As of this writing, Tesla is testing the limits of these [\*1196] doctrines in its challenge to Michigan's direct distribution law. 114 Its complaint for injunctive relief asserts:

[Michigan's] [p]articularly egregious protectionist legislation … blocks Tesla from pursuing legitimate business activities and subjects it to arbitrary and unreasonable regulation in violation of the Due Process Clause of the Fourteenth Amendment; subjects Tesla to arbitrary and unreasonable classifications in violation of the Equal Protection Clause of the Fourteenth Amendment; and discriminates against interstate commerce and restricts the free flow of goods between states in violation of the dormant Commerce Clause. 115

Thus far, Tesla has survived a motion to dismiss in federal court and won a key discovery motion seeking automobile dealers' communications concerning the Michigan ban on direct distribution. 116

Perhaps even more significant have been a handful of court of appeals decisions applying equal protection principles to invalidate anticompetitive regulations designed solely to protect a discrete group of economic actors from competition--although there remains a circuit split over this practice. Morbidly, the most significant cases have all been related to funeral parlors and casket sales.

In 2004, the Tenth Circuit in Powers v. Harris rejected a constitutional challenge to an Oklahoma statute that limited casket sales to licensed funeral parlors. 117 The court accepted the premise that the statute had no genuine health and safety rationale and was "a classic piece of special interest legislation designed to extract monopoly rents from consumers' pockets and funnel them into the coffers of a small but politically influential group of business people--namely, Oklahoma funeral directors." 118 Nonetheless, the court held its hands were tied by the anti-Lochner cases--particularly [\*1197] Williamson and Ferguson, which also involved (arguably) nakedly parochial anticompetitive regulations. 119

On the other hand, in their own casket cases, the Fifth and Sixth Circuits invalidated the anticompetitive schemes on equal protection grounds, holding that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose" and therefore fails even rational basis review. 120 This exercise of what Judge Ginsburg calls "rational basis with economic bite" could grow into a significant check on anticompetitive state and local regulation if utilized more expansively. 121 If this Article's premise is valid--that regulations designed solely to protect "discrete interest group[s] from economic competition" 122 are pervasive--then the federal courts have their work cut out for them if they take up the casket maxim with seriousness.

However, it is far from certain that they will or should. Despite the movement towards enhanced scrutiny of anticompetitive economic cronyism just described, the ghosts of Lochner continue to loom large. Even judges unsympathetic to the casket regulations may be concerned about the prospect of unelected judges substituting their own economic preferences for those of democratically elected representatives. In Powers, the Tenth Circuit listed a series of classically anti-Lochner rationales (including a rejection of the role of the Platonic guardian hypothesized in this Article) for refusing to embrace the Sixth Circuit's antiparochialism principle:

First, in practical terms, we would ~~paralyze~~ state governments if we undertook a probing review of each of their actions, constantly asking them to "try again." Second, even if we assumed such an exalted role, it would be nothing more than substituting our view of the public good or the general welfare for that chosen by the states. As a creature of politics, the definition of the public good changes with the political winds. There simply is no constitutional or Platonic form against which [\*1198] we can (or could) judge the wisdom of economic regulation. Third, these admonitions ring especially true when we are reviewing the regulatory actions of states, who, in our federal system, merit great respect as separate sovereigns. 123

So here is the question for those who accept this Article's central premise regarding the prevalence of anticompetitive state and local regulation and yet worry, like the Powers court, about a return to Lochner: If one is interested in pulling additional judicial levers to scrutinize anticompetitive state and local regulations, but worried about returning to Lochnernism, how do the constitutional and antitrust levers compare? Are both equally susceptible to misuse and abuse, is one less risky than the other, and are there limits that could be placed on both to cabin their potential risks? This Article's final Part compares the constitutional and antitrust tools as potential foils to anticompetitive state and local regulation to help answer these questions.

III. COMPARING THE RISKS AND LIMITS OF THE CONSTITUTIONAL AND ANTITRUST TOOLS

A. Limiting the Scope of Judicial Review to Regulations Affecting Competition

The fear of a return to Lochnerism is in large part a fear that judicial review of economic regulatory decisions is a Pandora's box that, once open, would quickly unleash a full-scale movement toward a substitution of judicial economic philosophies for those of the democratically responsive branches. 124 Hence, in the current constellation of Lochner-phobia, it is important to explain how any doctrine that invites increased judicial scrutiny of economic regulation would be cabined or restrained by a workable limitation principle. Both the antitrust and constitutional tools under consideration embody such a limitation principle insofar as they do not propose universal federal scrutiny of all undesirable state economic regulation. Instead, they limit the scrutiny to regulations that harm [\*1199] competition for the benefit of identifiable special interests. In other words, the prima facie case in either event requires demonstration of competitive harm as opposed to merely social undesirability. 125 The "competitive harm" limitation principle excludes from judicial review a wide set of regulations and hence limits the range of judicial interference with state regulatory schemes. Many cronyist regulations line the pockets of politically connected special interests without necessarily impairing competition. Consider, for example, a city ordinance that required disposal of a certain kind of medical waste at a pharmacy. Assume further that the waste in question could be safely disposed of through ordinary garbage collection, and the sole purpose of the scheme in question was to provide pharmacies with an opportunity to charge a fee for collecting the waste. Our hypothesized Platonic guardian would wish to overturn that regulation but could not do so on the constitutional or antitrust grounds under consideration because the regulation in question does not limit competition in any important sense. Rather than stifling competition in a legitimate market, it creates a new market for an undesired and unnecessary service. Lochner-phobes may wonder whether this limitation principle is limited enough. Although the limitation carves off a large swath of cronyist regulations from review, it still includes a relatively large universe of regulations, creating the possibility that judges will have a free hand to strike down many important state regulatory programs in the name of enhanced competition. Those less worried about Lochner and more willing to encourage judicial review of economic regulation may worry that the limitation principle is too limited and that it would allow a vast universe of cronyist regulation to escape judicial scrutiny on the same grounds that much cutthroat business behavior escapes antitrust scrutiny today--it may be unethical or undesirable, but does not fall within the purview of the antitrust laws because it does not impair general market competitiveness. 126 [\*1200] Limiting the scope of judicial review to economic regulations impairing competition also raises a question of legal principle. As to antitrust, it is easy to justify such a principle. Notwithstanding Oliver Wendell Holmes's protestation that the Sherman Act "says nothing about competition," 127 a century of judicial construction has oriented the antitrust laws towards a singular focus on competition. 128 On the other hand, it is not obvious that constitutional scrutiny should rise or fall on the effects a cronyist regulation has on competition. It may be true that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose," 129 but it seems equally true that dispensing economic rents to favored discrete interest groups more generally is also not a legitimate government purpose. In either case, the argument for limiting judicial review is not that the set of targeted regulations is constitutionally legitimate, but that the process of separating sheep from goats is fraught with the potential for judicial usurpation.

B. Considering Governmental Justifications for Restraints on Competition

Assuming that judicial review of anticompetitive state and local regulations is to occur with some degree of bite, the fighting question may often become how to evaluate the state's proffered justifications for the restraint on competition. Both antitrust and constitutional tools would need to allow ample room for the state to demonstrate verifiable justifications for the challenged regulations. To put this point in antitrust parlance, there are no per se unlawful state restraints on competition--the state's reasons for regulating will always be up for review in judicial or administrative proceedings challenging their validity. [\*1201] The critical question is how much interrogation into the state's proffered justifications a court or reviewing agency would, could, or should undertake. In conventional post-Lochner terms, economic regulations were subjected to no more than rational basis review--an exceedingly deferential standard of review. 130 The state did not have to advance any empirical support for its proffered justifications and, indeed, did not have to advance any justifications at all. 131 Judges were supposed to uphold the regulation if they could conceive of any justification that might plausibly support it: A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." A statute is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it "is not made with mathematical nicety or because in practice it results in some inequality." 132 That sort of rational basis review is far from the sort of review conducted by the Craigmiles and St. Joseph Abbey courts in striking down the Tennessee and Louisiana casket rules. 133 Those courts required evidentiary support for states' claimed justifications and subjected the states' claims to rigorous cross-examination for logical consistency. 134 In the Sixth Circuit case--Craigmiles--the court rejected the state's arguments that the casket regulation protected casket quality and public health, made it more feasible for casket sellers to advise bereaved families about which casket was most suitable for their needs, and protected against sharp business [\*1202] dealing. 135 The court found these arguments inconsistent with the state's own regulatory practices and unsupported by any record evidence. 136 Similarly, in the Fifth Circuit case--St. Joseph Abbey--the court repeated the familiar proposition that "rational basis review places no affirmative evidentiary burden on the government," but quickly added that "plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality." 137 The court then inquired into evidentiary support for the state's proferred "rational bases." 138 For example, on the ostensible consumer protection rationale for prohibiting casket sales except by licensed funeral parlors, the court observed that the FTC had largely rejected this argument as an empirical matter, noting that the FTC found "insufficient evidence that … third-party sellers of funeral goods are engaged in widespread unfair or deceptive acts or practices" and that the empirical "record [is] 'bereft of evidence indicating significant consumer injury caused by third-party sellers.'" 139 This form of review resembles antitrust litigation, where once a plaintiff raises a prima facie case of anticompetitive effect (outside of per se rules, where no justifications are allowed), the defendant typically can proffer procompetitive justifications but bears the burden of offering evidentiary support. 140 Although giving lip service to the norms of rational basis review, these courts were in fact taking a hard look at the states' proffered justifications once the regulation in question appeared prima facie to meet the description of a measure designed to protect "discrete interest group[s] from economic competition." 141 Inquiries into offsetting justifications for prima facie suspect conduct raise two doctrinal-analytical questions: (1) how tight must the fit between means and ends be in order for the conduct in question to survive scrutiny, and (2) once the conduct has been shown to advance legitimate ends, should its harms be balanced against its [\*1203] benefits, or should it simply be deemed lawful without any balancing? 142 Both constitutional and antitrust tools for addressing anticompetitive regulation would need to address these questions. As to the first question--the required tightness of means-ends fit--both constitutional and antitrust law already contain suitable doctrines. Moving up the ladder of scrutiny from rational basis review, intermediate scrutiny in constitutional law (such as that applicable to content-neutral restrictions on speech) requires that the restriction in question advance important governmental interests and not burden the protected interest (speech in the speech cases, competition in competition cases) more than necessary to further these interests. 143 The fit between means and ends need be only "reasonable," not strictly necessary or essential. 144 Unless the constitutional limitation on anticompetitive cronyism should fall into the more stringent strict scrutiny category--a very doubtful possibility--this sort of fit between regulatory means and ends would seem applicable. Antitrust law shares a similar approach to the less restrictive alternative analysis under the rule of reason, and it too would presumably apply to government restraints on competition under an expanded form of judicial review. 145 As explained in the Justice Department and FTC competitor collaboration guidelines, a reasonable, but not essential, fit between means and ends is required to credit proffered justifications for prima facie anticompetitive agreements: The Agencies consider only those efficiencies for which the relevant agreement is reasonably necessary. An agreement may be "reasonably necessary" without being essential. However, if the participants could have achieved or could achieve similar efficiencies by practical, significantly less restrictive means, then the Agencies conclude that the relevant agreement is not [\*1204] reasonably necessary to their achievement. In making this assessment, the Agencies consider only alternatives that are practical in the business situation faced by the participants; the Agencies do not search for a theoretically less restrictive alternative that is not realistic given business realities. 146 A potential difference between constitutional and antitrust analysis might arise on the second important means-ends question--whether to balance harms against benefits of the regulatory restriction. For example, suppose that a regulation limiting ride-sharing services resulted in some small safety benefit to customers but an arguably much greater harm to customers in the form of diminished choice of service options and higher prices. Should a reviewing court or agency balance the safety enhancements against the harms to competition, or should it rather conclude that, having shown a legitimate reason for its existence, the regulation should stand? Although intermediate scrutiny in constitutional law is often described as a "balancing test," courts do not generally engage in explicit balancing after passing the less restrictive alternatives inquiry. 147 Some degree of value judgment must be embedded in the inquiry into whether the state's interest is sufficiently "important," but it is rare to see a court say, in effect, that although the state's interest is concededly important and the regulation at stake is reasonably related to it, the harms caused by the regulation outweigh its benefits. 148 For purposes of the principle against protecting "discrete interest group[s] from economic competition," it seems apparent that there is no room for balancing at all, as a state [\*1205] regulation that serves some legitimate end by definition is not "simple economic protectionism." 149 By contrast, antitrust law is, in principle, supposed to require open-ended balancing at this final step: "if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." 150 If followed in state action doctrine cases, this sort of balancing could precipitate serious accusations of Lochnerizing, as it would put judges in the position of substituting their own preferences for market outcomes over the state's legitimate regulatory objectives. Fortunately, although antitrust law nominally calls for balancing, courts typically do not engage in it. 151 Even in Microsoft--the case that most explicitly and authoritatively called for final-stage balancing--the D.C. Circuit engaged in very little, if any, true balancing. 152 Perhaps because of the incommensurability between anticompetitive or procompetitive effects or concern about chilling procompetitive conduct, courts tend to exonerate competitive behavior that is necessary to procompetitive effects without asking whether the harms outweigh the benefits. 153 In order to stave off Lochnerizing concerns, any expanded antitrust review of state and local regulations might need to formalize this practice doctrinally: Once a state demonstrates that the regulation in question is reasonably tailored to achieve some legitimate governmental objective, [\*1206] antitrust does not require balancing of the harms to competition against the legitimate governmental objectives. A final question unique to antitrust review is whether, when it comes to means-ends review, the catalogue of permissible ends is limited to those recognized by antitrust law as "procompetitive." One of the important doctrinal and policy structures of antitrust law is a division of the world into virtues that are said to be "procompetitive" and those that are not. 154 To count as a legitimate virtue in the antitrust domain, an effect must be "procompetitive," meaning that it must work to enhance or improve market competition. 155 Supposed benefits of a restraint that assume that competition is itself the problem in need of curtailment are labeled with the epithet of "ruinous competition" theories and are dismissed as inconsistent with the Sherman Act's procompetition policy. 156 While this single-minded devotion to competition may make sense as to the world of private restraints, it is less clear that it can be applied sensibly to governmental regulation. Do governments not have the right to take the view that competition of certain types causes social evils that should be curtailed? For example, many regulatory restrictions on alcohol and tobacco distribution are designed to decrease competition and hence reduce output as compared to that which would be obtained in a competitive market. 157 While it may be undesirable for private actors to limit harmful output through private means, the state's police power surely includes the right to do so, including by limiting competition. 158 This suggests that the range of regulatory interests [\*1207] states might legitimately advance in support of challenged regulations would be broader than those deemed "procompetitive" in conventional antitrust analysis. Opening the door to a wider scope of justifications in cases where the restraint on competition is imposed by governmental rather than private actors would appear on first impression to favor the government. Such a widening of the rule of reason, however, raises precisely the Lochnerizing concern raised by Justice Rehnquist in his previously quoted City of Boulder dissent. 159 If courts were called upon to balance health and safety benefits against traditional competition concerns around prices and innovation, then they might well slip into a Lochnerizing mold. But perhaps such concerns could be abated by limiting the reviewing court or agency's role to determining whether the regulation in question actually supported the state's proffered goals. As long as the goals were permissible (that is, not simply protecting discrete interest groups from competition as a form of political patronage) and the regulations were reasonably related to the goals, the reviewing court or agency would not inquire more broadly into the regulation's overall desirability.

C. Institutional and Procedural Distinctions

Antitrust preemption and constitutional review are differently situated in one significant way: Constitutional equal protection, substantive due process, and dormant commerce clause principles are privately enforceable by any party that meets the Article III standing requirements--which, in this context, means at least anyone directly affected by a regulation impairing competition. 160 Antitrust has its own private right of action standing rules, 161 as well as an additional institutional feature that might significantly limit some of the abuses associated with Lochnerizing. One proposed route for increasing the preemptive scope of federal antitrust law over anticompetitive state and local regulation is to hold the [\*1208] Parker doctrine inapplicable to the FTC. 162 This would give the FTC enhanced power to challenge anticompetitive state and local regulations. Not only would this limit the incidence of challenges to state regulation (the FTC Act is not privately enforceable and only the Commission can initiate an action under the Act), 163 but it would also put the Commission itself, rather than an Article III court, in the position of making an initial decision on the case. An Article III court could ultimately become involved, as adverse Commission decisions are appealable to any federal court of appeal in which the case could have been initially brought. 164 However, lodging the antitrust review function in the FTC would grant the Commission an initial regulatory review function and the power to make factual findings subject to "substantial evidence" review. 165

### Plan

The United States Federal Government should substantially increase prohibitions on anticompetitive business practices by the private sector immunized by application of state action immunity.

### 1ac – federalism

**Nextgen tech is emerging at an exponential rate – effective state regulatory experimentation avoids downsides and maximizes benefits**

**McGinnis 11**(John, George C. Dix Professor of Law, Northwestern Law School, “LAWS FOR LEARNING IN AN AGE OF ACCELERATION,” <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3404&context=wmlr>)

The twenty-first century’s information age has the potential to usher in a more harmonious and productive politics. People often disagree about what policies to adopt, but the cornucopia of data that modern technology generates can allow them to better update their beliefs about policy outcomes on the basis of shared facts. In the long run, convergence on the facts can lead incrementally to more consensus on better policies. More credible factual information should over time also help make for a less divisive society, because partisans cannot as easily stoke social tensions by relying on false facts or exaggerated claims to support conflicting positions. Thus, a central task of contemporary public law is to **accelerate a politics of learning** whereby democracy improves a public reason focused on evaluating policy consequences. Government should be shaped into an instrument that learns from the analysis of policy consequences made available from newly available technologies of information.1 Greater computer capacity is generating more empirical analysis.2 The Internet permits the rise of prediction markets that forecast policy results even before the policies are implemented.3 The Internet also creates a dispersed media that specializes in particular topics and methodologies, gathers diverse information, and funnels salient facts about policy to legislators and citizens.4 But a public reason focused on policy consequences will **improve only if our laws facilitate it**. For instance, constitutional federalism must be reinvigorated to permit greater experimentation across jurisdictions, because with the rise of empiricism, **decentralization** has more value for social learning today than ever before.5 Congress should include mandates for experiments within its own legislation making policy initiatives contain the platforms for their own selfimprovement.6 Creating a contemporary politics of democratic updating on the basis of facts is a matter both of great historical interest and of enormous importance to our future. In the historical sweep of ideas, a government more focused on learning from new information moves toward fulfilling the Enlightenment dream of a politics of reason—but a reason based not on the abstractions of the French Revolution, but instead on the hard facts of the more empirical tradition predominating in Britain. By displacing religion from the center of politics, the Enlightenment removed issues by their nature not susceptible to factual resolution, permitting a focus on policies that could be improved by information.7 The better democratic updating afforded by modern technology can similarly increase social harmony and prosperity by facilitating policies that actually deliver the goods. For the future, a more consequentially informed politics is an **urgent necessity**. The same technological acceleration that potentially creates a more information-rich politics also generates a wide range of technological innovation—from nanotechnology to biotechnology to [AI] artificial intelligence. Although these technologies offer unparalleled benefits to mankind, **they may also create catastrophic risks**, such as rapid environmental degradation and new weapons of mass destruction.8 Only a democracy able to rapidly assimilate the facts is likely to be able to **avoid disaster** and reap the benefits inherent in the technology that is transforming our world at a faster pace than ever before. Every industry that touches on information—book publishing, newspapers, and college education to name just a few—is undergoing a continuous series of revolutionary changes as new technology permits delivery of more information more quickly at lower cost. The same changes that are creating innovation in such private industries can also quickly create innovation in social governance. But the difference between information-intensive private industries and political institutions is that the latter lack the strong competitive framework for these revolutions to occur spontaneously. This Essay thus attempts to set out a blueprint for reform to make better use of some available information technologies. Part I describes the reality of technology acceleration as the acceleration both creates the tools for democratic updating and prompts its necessity. Technological acceleration is the most important development of our time—more important even than globalization. Although technologists have described and discussed its significance, its implications for law and political structure have been barely noticed. Part II briefly discusses how better social knowledge can change political results. A premise of the claim is that some political disagreements revolve about facts, not simply values. As a result, better social knowledge can help democracies design policies to achieve widely shared goals. Social knowledge energizes citizens to act on those encompassing interests, like improved public education, because they come to better recognize the policy instruments to advance those interests. Better social knowledge provides better incentives for citizens to vote on these interests. Part III considers the mechanisms for creating a contemporary politics of democratic updating that begins to meet the needs of the age of accelerating technology. It focuses on two of the new resources that can have substantial synergies in improving social common knowledge and shows how an increase in common knowledge can systematically improve political results by providing better incentives for citizens to work for encompassing social goods. First, Part III considers the improvement in empirical analysis of social policy that flows from increasing computational capacity. It then discusses how specialized and innovative media does much more than disseminate opinions: it widely distributes facts and factual analysis. The combination of these technologies can better discipline experts and representatives, providing stronger incentives for them to update on the basis of new facts. Part IV discusses the information-eliciting rules that will maximize the impact of new technologies of information. These steps include a program of restoring, where possible, governmental structures that permit appropriate **decentralization for experimentation**, empirical testing, and learning. Congress and regulatory agencies should structure legislation and regulations to include social experiments when such experiments would help resolve disputed matters of policy. The Supreme Court should generally refrain from imposing new substantive rights for the nation so that it is easier to evaluate the consequences of different **bundles of rights chosen by the states**. But it should also protect the dispersed media, like blogs, from discriminatory laws, because this dispersed media plays a crucial role in modern policy evaluation. In short, the Supreme Court needs to emphasize a jurisprudence fostering social discovery and the political branches need to create frameworks for better social learning. Constitutive structures encouraging and evaluating experimentation become more valuable in an age where better evaluation of social experiments is possible. I. TECHNOLOGICAL ACCELERATION It is the premise of this Essay that technological acceleration is occurring and that our political system must adapt to the world it is creating. The case for technological acceleration rests on three mutually supporting kinds of evidence. First, from the longest-term perspective, epochal change has sped up: the transitions from hunter-gatherer society to agricultural society to the industrial age each took progressively less time to occur, and our transition to an information society is taking less time still. Second, from a technological perspective, computational power is increasing exponentially, and increasing computational power facilitates the growth of other society-changing technologies like biotechnology and nanotechnology. Third, even from our contemporary perspective, technology now changes the world on a yearly basis both in terms of hard data, like the amount of information created, and in terms of more subjective measures, like the social changes wrought by social media. From the longest-term perspective, it seems clear that technological change is accelerating and, with it, the basic shape of human society and culture is changing.9 Anthropologists suggest that for 100,000 years, members of the human species were hunter-gather- ers.10 About 10,000 years ago humans made a transition to agricultural society.11 With the advent of the Industrial Revolution, the West transformed itself into a society that thrived on manufacturing.12 Since 1950, the world has been rapidly entering the information age.13 Each of the completed epochs has been marked by a transition to substantially higher growth rates.14 The period between each epoch has become very substantially shorter.15 Thus, there is reason to extrapolate to even more and faster transitions in the future. This evolution is consistent with a more fine-grained evaluation of human development. Recently, the historian Ian Morris has rated societies in the last 15,000 years on their level of development through objective benchmarks, such as energy capture.16 The graph shows relatively steady, if modest, growth when plotted on a log linear scale, but in the last 100 years development has jumped to become sharply exponential.17 Morris concludes that these patterns suggest that there may be four times as much social development in the world in the next 100 years than there has been in the last 14,000.18 The inventor and engineer Ray Kurzweil has dubbed this phenomenon of faster transitions “the law of accelerating returns.”19 Seeking to strengthen the case for exponential change, he has looked back to the dawn of life to show that even evolution seems to make transitions to higher organisms ever faster.20 In a more granulated way, he has considered important events of the last 1000 years to show that the periods between extraordinary advances, such as great scientific discoveries and technological inventions, have decreased.21 Thus, both outside and within the great epochs of recorded human history, the story of acceleration is similar. The technology of computation provides the second perspective on accelerating change. The easiest way to grasp this perspective is to consider Moore’s Law. Moore’s Law—named after Gordon Moore, one of the founders of Intel—is the observation that the number of transistors that can be fitted onto a computer chip doubles every eighteen months to two years.22 This prediction, which has been approximately accurate for the last forty years,23 means that almost every aspect of the digital world—from computational calculation power to computer memory—is growing in density at a similarly exponential rate.24 Moore’s Law reflects the rapid rise of computers to become the fundamental engine of mankind in the late twentieth and early twenty-first centuries.25 The power of exponential growth is hard to overstate. As the economist Robert Lucas has said, once you start thinking about exponential growth, it is hard to think about anything else.26 The computational power in a cell phone today is a thousand times greater and a million times less expensive than all the computing power housed at MIT in 1965.27 Projecting forward, the computing power of computers **twenty-five years from now** is likely to prove a million times more powerful than computing power today. To be sure, many people have been predicting the imminent death of Moore’s Law for a substantial period now,29 but it has nevertheless continued. Intel—a company that has a substantial interest in accurately telling software makers what to expect—projects that Moore’s Law will continue at least until 2029.30 Ray Kurzweil shows that Moore’s Law is actually part of a more general exponential computation growth that has been gaining force for over a 100 years.31 Integrated circuits replaced transistors that previously replaced vacuum tubes that in their time had replaced electromechanical methods of computation.32 Through all of these changes in the mechanisms of computation, its power increased at an exponential rate.33 This perspective suggests that other methods under research—from **carbon nanotechnology to optical computing to quantum computing—are likely to continue growing exponentially** even when silicon-based computing reaches its physical limits.34 Focusing on the exponential increase in hardware capability may actually understate the acceleration in computational capacity in two ways. First, a study considering developments in a computer task using a benchmark for measuring computer speed over a fifteen-year period suggests that the improvements in software algorithms improved performance even more than the increase in hardware capability.35 Second, computers are interconnected more than ever before through the Internet, and these connections increase collective capacity, not only because of the increasing density among computer connections, but because of the increasing density of connections among humans made possible by computers. The salient feature of computers’ exponential growth is their tremendous range of application compared to previous improvements. Almost everything in the modern world can be improved by adding an independent source of computational power. That is why computational improvement has a far greater social effect than improvements in technologies of old. Energy, medicine, and communication are now being continually transformed by the increase in computational power.36 As I will discuss in Part II, even the formulation of new hypotheses in natural and social science will likely be aided by computers in the near future. The final perspective on accelerating technology is the experience that the contemporary world provides. Technology changes the whole tenor of life more rapidly than ever before. At the most basic level, technological products change faster.37 Repeated visits to a modern electronics store—or even a grocery store—reveal a whole new line of products within very few years. In contrast, someone visiting a store in 1910 and then again in 1920—let alone in 1810 and 1820—would not have noticed much difference. Even cultural generations move faster. Facebook, for instance, has changed the way college students relate in only a few years,38 whereas the tenor of college life would not have seemed very different to students in 1920 and 1960. Our current subjective sense of accelerating technology is also backed by more objective evidence from the contemporary world. Accelerating amounts of information are being generated.39 Information, of course, is a proxy for knowledge. Consistent with this general observation, we experience exponential growth in practical technical knowledge, as evidenced by the rise in patent applications.40 Thus, the combination of data from our present life, together with the more sweeping historical and technological perspectives, makes a compelling case that technological acceleration is occurring. It is this technological acceleration that creates both the capacity and the need for improving collective decision making. As technology accelerates, it creates new phenomena, from climate change to biotechnology to artificial intelligence of a human-like capacity. **These technologies may themselves have very large positive or negative externalities and may require government decisions** about their prohibition, regulation, or subsidization to forestall harms and capture their full benefits. They may also cause social dislocations, from unemployment to terrorism, that also require certain collective decisions. Society can best handle these crises not only by making better social policy to address them directly but by improving social policy more generally to create both more resources and more social harmony to endure them. Thus, society must deploy information technology in the service of democratic updating if it is to manage technological acceleration

**Strong risk reduction key to prevent AI-driven extinction---it’s uniquely likely, but success solves every impact**

**Pamlin, 15 --** Dennis Pamlin, Executive Project Manager of the Global Risks Global Challenges Foundation, and Stuart Armstrong, James Martin Research Fellow at the Future of Humanity Institute of the Oxford Martin School at University of Oxford, Global Challenges Foundation, February, http://globalchallenges.org/wp-content/uploads/12-Risks-with-infinite-impact.pdf

Despite the uncertainty of when and how AI could be developed, there are reasons to suspect that an AI with human-comparable skills would be a **major risk factor**. AIs would immediately benefit from improvements to computer speed and any computer research. They could be trained in specific professions and **copied at will, thus replacing most human capital in the world, causing potentially great economic disruption**. Through their **advantages in speed and performance**, and through their **better integration** with standard computer software, they could **quickly become extremely intelligent** in one or more domains (research, planning, social skills...). If they became skilled at computer research, the recursive self-improvement could generate what is sometime called a “singularity”, 482 but is perhaps better described as an “intelligence explosion”, 483 with the AI’s intelligence **increasing very rapidly.**484 Such extreme intelligences could **not easily be controlled** (either by the groups creating them, or by some international regulatory regime),485 and would probably act in a way to boost their own intelligence and **acquire maximal resources** for almost all initial AI motivations.486 And if these motivations do not detail 487 the survival and value of humanity in exhaustive detail, the intelligence will be **driven to construct a world without humans** or without meaningful features of human existence. This makes extremely intelligent AIs a **unique risk**,488 in that **extinction is more likely than lesser impacts**. An AI would only turn on humans if it foresaw a likely chance of winning; otherwise it would remain fully integrated into society. And if an AI had been able to successfully engineer a civilisation collapse, for instance, then it **could certainly drive the remaining humans to extinction**. On a more positive note, an intelligence of such power could **easily combat most other risks** in this report, making extremely intelligent AI into a **tool of great positive potential** as well.489 **Whether such an intelligence is developed safely depends on how much effort is invested in AI safety** (“Friendly AI”)490 **as opposed to simply building an AI**.49

**Defense doesn’t assume interactions of multiple simultaneous threats**

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If a safe **a**rtificial **i**ntelligence is developed, this provides a **great resource for improving outcomes and mitigating all types of risk**.585 **A**rtificial **i**ntelligence risks **worsening nanotechnology risks**, by allowing nanomachines and weapons to be designed with intelligence and without centralised control, **overcoming the main potential weaknesses** of these machines586 by putting planning abilities on the other side. **Conversely, nanotechnology abilities worsen artificial intelligence risk**, by giving AI extra tools which it could use for developing its power base.587 Nanotechnology and synthetic biology could allow the efficient creation of vaccines and other tools to **combat global pandemics**.588 Nanotechnology’s increased industrial capacity could allow the creation of large amounts of efficient solar panels to **combat climate change**, or even potentially the efficient scrubbing of CO2 from the atmosphere.589 Nanotechnology and synthetic biology are sufficiently closely related 590 (both dealing with properties on an atomic scale) for methods developed in one to be ported over to the other, potentially **worsening the other risk.** They are sufficiently distinct though (a mainly technological versus a mainly biological approach) for countermeasures in one domain not necessarily to be of help in the other. Uncontrolled or malicious synthetic pathogens could **wreak great damage on the ecosystem**; conversely, controlled and benevolent synthetic creations could act to **improve and heal current ecological damage**.

**Effective state experimentation is vital to secure development of IOT – under or over regulation causes existential threats**

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Today more data—our data, data about us—is in more hands, being used for more purposes than ever before. The Internet economy is fueled by personal information, yet it is largely a black box, whose inputs and outputs are not understood by most individuals or even regulators. One thing we do understand is that organizations that collect other people’s information—online retailers and apps, banks, credit bureaus and even government agencies—often have a hard time keeping a tight grip on it, as evidenced by a steady stream of data breaches.The TJX breach of the credit card numbers of 94 million customers in 2006, Anthem’s breach of the medical information of 79 million in 2015, and the massive Equifax breach reported in 2017 that exposed Social Security numbers, driver’s license numbers, and other sensitive information of over 143 million Americans are just a few of the larger data breaches in recent years.1

Where is all this data coming from? Companies and other organizations are collecting information not only from our visits to websites and our use of mobile apps, along with our travels through the world using credit cards and passing video cameras, but also from inside our very own homes. Smart appliances, burglar alarms, utility meters, and a burgeoning market of connected consumer devices—even toys in the hands of our children2—are collecting data from us and about us: where we are and where we’ve been, whom we’re with or near, what we’re doing, waking or sleeping, around the clock, seven days a week. We’re becoming nodes in the network of everything, with increasingly less ability to disconnect.

The recent Facebook–Cambridge Analytica incident raises many issues about the use of this very personal data in the marketplace. Reporters are still attempting to untangle the web of players who extracted and used the personal data of more than 87 million, and potentially all, Facebook users.3 Among the concerns articulated in news reports are the effectiveness of terms of service, whether the incident constitutes a data breach, and the ethics of online political manipulation. More important—and less talked about—the incident reveals a lack in the United States of legal standards for data privacy as a fundamental human right.

Neither the market nor the law is working to protect privacy in our world of Big Data and complex data flows. In fact, the legal framework to protect privacy in the United States is flimsy and has been outpaced and outdated by technological developments. At the same time, the federal government is actually scaling back regulatory and enforcement actions regarding privacy, as on other consumer protection and civil liberties issues.

In the face of this federal retrenchment, states can and should step up their legislative efforts to protect privacy. The advent of a new privacy regulation in the European Union provides an opportunity for states to “harmonize” or modify key state privacy laws to align better with the standards that most companies that do business online will soon have to meet for their European customers.

Big Data and Its Harms

We live in an increasingly connected and data-driven world. Last year, the market intelligence company IDC forecast that by 2025, the global datasphere of all digital data created will grow to 163 zettabytes, a tenfold increase over the 2016 volume.4 (A zettabyte is 1021 bytes. If everyone in the United States took a digital photo every second of every day for over a month, all of those photos together would amount to about one zettabyte.5)

It’s not just the volume of data collected and stored that makes Big Data big, it’s also the capacity to do things with the data—Big Analytics. Big Analytics visionaries believe that the analysis of large volumes of formerly unavailable data holds the promise of providing new insights into and solutions for individual and societal problems, from personalized medicine to improved energy efficiency, detecting the dispersion of infectious diseases and more effective policing.6

We are part of the datasphere. Over half the world’s population was connected to the Internet in 2017, and estimates for 2025 put the figure at 75 percent.7 And our digital dossiers are growing. From online searches on a PC or mobile phone, to using a GPS in a car, being recorded by an ATM video camera, and heart rate monitoring by a fitness wearable, the average person is estimated to have experienced 218 data-driven interactions per day in 2016, a number projected to increase to nearly 5,000 transactions per day by 2025.8

Dataism

In 2008, Chris Anderson, then-editor of Wired, wrote an article articulating a viewpoint that has come to be called Dataism. Anderson asserted that data had supplanted the scientific method:

This is a world where massive amounts of data and applied mathematics replace every other tool that might be brought to bear. Out with every theory of human behavior, from linguistics to sociology. Forget taxonomy, ontology, and psychology. Who knows why people do what they do? The point is they do it, and we can track and measure it with unprecedented fidelity. With enough data, the numbers speak for themselves.9

Do numbers speak for themselves? Is the invisible hand of dataflow a panacea for all individual and societal ills? There is no doubt that data is transforming our lives, but this phenomenon is taking place in an environment of uncertainty and rapid technological change, and so decisions on how our data can be used has implications for our future. We need to ensure that Big Data works for us, not just on us.

Behind the Electronic Curtain

The basic Internet business model today is to collect all possible information from and about individual users and monetize that data for use in targeting ads at the individual level. Just how this happens is largely invisible to consumers, who are unaware of evolving browser tools and technologies that enable companies to track an individual’s activities across multiple devices such as smartphones, tablets, desktop computers, and other connected devices, and even link that data with offline activities such as purchases in brick-and-mortar stores and information in public records.

One of the touted benefits of data-driven online businesses is that they can deliver personalized content. With the power of Big Analytics, websites and companies can target consumers with content designed to appeal to them, based on their interests as inferred from captured data streams. Of course, the prime objective of this expansive collection of personal information and employment of sophisticated algorithms is profit from targeted advertising. Targeted, data-based advertising is more effective—generates more clicks and sales—than advertising addressed to broad demographic categories of viewers.10

Privacy Harms

Consumers vaguely understand that being inundated with advertisements online is the price of “free” access to the Internet’s trove of information and services, but most are not happy about this deal. In a nationwide survey of adults conducted online by the National Cyber Security Alliance, respondents ranked concern about not knowing how their personal information is being collected or used higher than becoming a victim of crime or not being able to get health care. The same survey found 65 percent of Americans somewhat or strongly agreed that they are not able to control how their information is used or shared online, and two-thirds would accept less personalized content, including fewer discounts, in order to keep their personal information private.11

While some individuals may view advertising “personalized” for them as of more interest or less annoying than non-targeted ads, there are also privacy harms resulting from the use of personal information in this way. Someone who has been followed around the web by an ad for a pair of shoes or Viagra or another product previously clicked on may experience a certain level of discomfort or anxiety from realizing he or she is being surveilled; this is one type of intangible privacy harm.12 Someone who receives ads based on a medical condition revealed by online searches may feel very uncomfortable indeed.

Such concern is not unjustified. Businesses know about all our online activities, but we remain in the dark about what information they’re collecting, what they’re inferring from it, and what they’re doing with it. The results of this information asymmetry can be tangible as well as subjective. Mathematician Cathy O’Neill, author of Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy, warns that companies are using data to direct people to certain goods and services and to offer prices based on how much they think an individual can pay: “Travel sites show fancier hotels to Mac users, auto insurance companies charge more to customers who are less likely to comparison shop, payday lenders focus on people whose search queries show signs of desperation.”13

O’Neil and other researchers also describe the use of secret algorithms to profile and sort individuals into groups based on weaknesses and vulnerabilities identified by their online activities. These individuals may then be targeted with predatory ads for for-profit colleges or payday loans.14 In 2016, the California Attorney General won a $1.1 billion judgment against Corinthian Colleges for their predatory and unlawful practices. The complaint included Corinthian’s practice of targeting a low-income demographic which it describes in internal company documents as composed of “isolated,” “impatient” individuals with “low self-esteem,” who have “few people in their lives who care about them” and who are “stuck” and “unable to see and plan well for future,” through aggressive and persistent internet and telemarketing campaigns and through television ads on daytime shows like Jerry Springer and Maury Povich.15

Big Data can also be used by websites to steer consumers to particular products or to set prices based on their inferred willingness or ability to pay, in ways that can be unfair or even discriminatory. In 2012, a Wall Street Journal investigation found that the Staples website set different prices based on what it inferred to be the user’s location.16 Legal scholar Ryan Calo has written about the power of digital market manipulation, the result of information asymmetry, where companies are able reach out to consumers even before they come to market and use what they know about individuals to take advantage of their vulnerabilities.17

Even when we think we are anonymous online—when we haven’t registered with a website for example—we likely are not. The sheer volume of data coming in from different sources makes it possible to link individual data to specific people, even when some datasets have been intentionally de-identified by removing key elements such as names or Social Security numbers. One example of the process of re-identification was reported by Professor Latanya Sweeney of Harvard. She purchased de-identified hospital discharge data from the State of Washington and was able to correlate that dataset with newspaper accounts of accidents in the same time period. She was able to re-identify 43 percent of a sample of 81 accident victims in the hospital discharge data by matching fields common to both sources. Sweeney also noted that predictive analytic companies were big buyers of publicly available health data.18

In the service of commerce, the algorithms of Big Analytics are increasingly exposing and monetizing some of the most intimate aspects of our lives—details about our health, who we know, what we think, what we do in the privacy of our homes. In the midst of this assault, how do various privacy laws in the United States and abroad attempt to address these invasive practices?

Privacy Law and Market Failure

The majority of nations protect privacy as a fundamental human right, but the U.S. Constitution does not provide an express guarantee of privacy.19 Privacy rights in our Constitution are “penumbral”; that is, they are implied by the Bill of Rights rather than explicitly stated. For example, privacy in speech, reading, and association is seen as being protected by the First Amendment, and the privacy of the home against quartering soldiers and unreasonable search and seizure by the Third and Fourth Amendments. Notably, these individual rights are only protected against government action, not against infringing actions of businesses or other organizations.20

The United States also differs from other developed countries in Europe, Asia, and the Americas in its statutory law on privacy. Many other countries have comprehensive privacy laws, but the United States does not. Since the 1990s, the federal government has avoided enacting broad privacy laws and instead relied on market mechanisms, notably the failed notice-and-choice regime to regulate the Internet and its related businesses.21 (As will be discussed later, “notice and choice” is the practice whereby a website or app notifies consumers of its privacy practices with a posted “privacy policy” statement, and consumers then have some degree of choice about the terms offered.)

Federal privacy law, where it does exist, is narrowly sectoral. It is made up of statutes, regulations, and judicial decisions that apply only to certain industries (such as finance, or health care) or certain types of data (such as children’s data, drivers’ records, video rental data). In the absence of specific privacy laws, the default in the United States is that when it comes to flows of information, the free market prevails, including the market for personal information.

By contrast, the EU considers privacy as a human right essential to the respect for human dignity. In the European Conventions of Human Rights of 1950, privacy is addressed as the “right to respect for private and family life.” Similarly, in the EU Charter of Fundamental Rights in 2000, privacy is conceived as respect for private and family life, the home and communications, as well as the protection of personal data. This right is implemented in comprehensive privacy laws intended to protect the rights of individuals over their own personal data. The default in the EU is that personal data should not be processed (that is, collected, stored, used, and so on). Any data processing that does take place must meet standards of transparency, legitimate purpose, and proportionality.22

An update of EU privacy law, which will take effect on May 25, 2018, seeks to strengthen and harmonize the law across all member nations. The General Data Protection Regulation (GDPR) creates new individual privacy rights and extends its application to companies that process personal data about EU individuals, even when a company is not located in the EU. The new privacy rights include the “right to be forgotten” (have one’s personal data erased in certain situations), data access and rectification (access to or a copy of one’s own personal data and correction of inaccuracies) and data portability (transfer one’s personal data from one company or platform to another).23

While the EU approach has been criticized by some as overly rule-bound, resulting in companies in some countries focusing more on paper compliance than on practical privacy practices,24 it has often proven more effective in protecting data privacy than the U.S. approach of light-touch regulation and reliance on market forces.

Regulatory Failure: Unnoticeable Notice and Illusory Choice

The foundational principles of data privacy law are actually U.S. in origin, first formulated in 1973 by the U.S. Department of Health, Education, and Welfare in its Fair Information Practice Principles (FIPPs).25 The FIPPs were then expanded and codified by the Organisation for Economic Co-operation and Development (OECD) in 1980, with the agreement of member countries, including the United States. Intended to support the control of individuals over their own personal data in the hands of organizations, the FIPPs form the basis of many modern international privacy agreements and national laws. The eight FIPPs in the OECD version are Collection Limitation, Data Quality, Purpose Specification, Use Limitation, Security Safeguards, Openness or Transparency, Individual Participation, and Accountability.26 In most U.S. privacy law, these eight principles have devolved to just two, which have come to be called Notice (Openness or Transparency) and Choice (Use Limitation). A company notifies consumers of its policies and practices regarding personal information, and then consumers choose whether or not to accept the terms. The failure of this approach is evident, both in the privacy notices that are difficult to notice and understand, and in the choices that are illusory. In a best practices guide on crafting meaningful privacy policies, the Office of the California Attorney General described their current shortcomings: Dissatisfaction with the effectiveness of privacy policy statements has grown over time. As the use of personal information in commerce has expanded in scope and complexity, comprehensive privacy policy statements have tended to become lengthier and more legalistic in style, yet often fail to address data handling practices of concern to consumers or offer them meaningful choices about the collection and use of their data. The typical policy’s ineffectiveness as a consumer communication tool has been borne out by research findings that consumers do not understand, and many do not even read, the privacy policies on the web sites they visit. 27 Where they are available, privacy policies usually fail to address critical issues, such as what a company does with the personal information it collects, what entities it shares the information with, what those entities do with it, and how long the information is retained. The choices offered to consumers regarding the collection and use of their personal information generally boil down to take it or leave it, all or nothing. That is, all too often, the only choice consumers are given is either to accept a company’s privacy policy, however unsatisfactory it may be, or decline to use their product. If any specific choice is offered, it tends to be the choice to opt out of allowing the company to share the consumer’s personal information with other companies for use in marketing. But the default is to let companies share the data. Since the consumer is unlikely to have read the policy providing this choice and thus likely to fail to opt out, this lack of action is regarded as consent to sharing of the data. Furthermore, some websites and apps start collecting information the moment a user lands on the site or opens the app, before privacy policy notifications have even been given.

Moving Beyond Notice and Choice

One approach to a new privacy framework beyond unnoticeable notice and illusory choice is to offer consumers a full, robust spectrum of privacy settings to choose from, rather than the all-or-nothing approach. Such a framework would be based on three elements: more privacy choices, default to privacy, and a reasonable standard of care for data. More choices means offering consumers gradations of choice, options between all and nothing. For example, consumers now sometimes have choices about the geolocation information collected by their mobile devices: (1) allowing an app no access to geolocation, (2) allowing access only when the app is being used, or (3) allowing the app to access geolocation data at all times. Rather than simply offering option 3 or nothing, this policy would mean providing additional options as well. Default to privacy means calibrating default settings to limit the collection of personal information. Even when an online service provides a privacy policy, it generally comes too late; only after our information has been collected are we able to learn about it. This “grab it first, explain later” approach seems unfair in the growing network of sensors that are collecting information on us as we move through our neighborhoods and even inside our own homes. A better architecture for choice is to set privacy-respectful defaults and give the user the choice to change the setting. This type of architecture not only gives consumers more real control, but also serves as an incentive for companies to provide a privacy notice that is easier to find and easier to understand than we generally see today. Data security is an essential condition for privacy protection: we can’t have privacy without it. The Internet of Things is increasing the volume of data collected and stored, and daily reports of data breaches have made us all aware of the challenges of securing information and of the costs of failing to do so. A clear articulation of a reasonable standard of care for data, based on existing laws, jurisprudence, and technical standards, would go a long way to define at least a basic level of security. Such a framework could inform efforts to update U.S. privacy laws, to move beyond mere notice and choice.

Market Failure: IoT Insecurity

Security guru Bruce Schneier is among many who have called the insecurity of the Internet of Things (IoT) a market failure, with no market solution, because the insecurity is to a large extent an externality, affecting neither buyers nor sellers but other people.28 Of course, an insecure device can also be turned against the consumer who purchased it, who was focusing on price and features rather than on security.

This is a vitally important matter for privacy (security is a necessary component of privacy) and for cybersecurity. The insecurity of the Internet of Things—made up of smart TVs and toys, electric meters and thermostats, webcams and alarm systems, fitness wearables and smart watches—imperils not just individuals’ personal information, but puts their health and safety and that of society as a whole at risk.

The IoT is also one of the sources contributing to the phenomenal growth of the datasphere. The number of Internet-connected devices has been increasing rapidly in recent years. In early 2017, Gartner, the IT research and advisory firm, estimated that the number of devices would surpass global population that year, with 8.4 billion connected devices for 7.6 billion people. Other estimates put the number of devices even higher, forecasting as many as 20 billion of them by 2025.29

Connected devices are used in business and industry, on streets and highways and in public buildings. But the biggest component of the IoT is consumer devices, connected things in our homes, our cars, and on—or even in—our bodies. These billions of things are collecting and transmitting information in a space traditionally regarded as private and protected. The interaction of all these devices with each other and with the companies that sell them and those that carry their data is making our home networks ever more complex. And we may not realize it, but we are in the position of being the chief information officer (and the chief information security officer and chief privacy officer) of our own networks, a responsibility for which few of us are equipped.

The IoT has significant privacy implications. For example, smart meters collect data about gas and electricity consumption at the household level that can reveal information about activities in the home, including when residents are away and whether the home has an alarm system and how often it is activated.

Siemens in Europe has summarized the privacy threat represented by the smart grid: “We, Siemens, have the technology to record it (energy consumption) every minute, second, microsecond, more or less live. From that we can infer how many people are in the house, what they do, whether they’re upstairs, downstairs, do you have a dog, when do you habitually get up, when did you get up this morning, when do you have a shower: masses of private data.”30

Medical devices and other connected wearables collect very sensitive information, which raises questions of who is getting this data, and what they are doing with it.31 Smart toys, digital personal assistants, TVs and other devices that use speech recognition may record and store conversations in our homes, including those with guests who are unlikely to have consented, even if we passively and unknowingly have.

IoT devices have user interface constraints that make it difficult or impossible to provide notice of privacy practices, consumer choices or controls. Imagine trying to find or read a privacy notice on a router or a smart appliance. Furthermore, the companies that make these devices tend to lack experience with privacy and security. In summer 2017, the possibility that the makers of Roomba, the robot vacuum, would share the floor plans the device makes of the homes its device cleans made headlines. The public reaction led the company to speak to privacy issues, ultimately saying that they would not share data with third parties without the informed consent of customers. Exactly how they might advise consumers of the possibility and get their consent was not disclosed.32

The privacy concerns related to the IoT are not insubstantial, but it is their insecurity that imperils individuals’ health and safety and puts our society as a whole at risk. The Homeland episode in which the vice president is killed by a hacker who remotely manipulates his pacemaker is not pure fiction. In recent years, medical device manufacturers have become aware of security bugs in pacemakers, defibrillators, and insulin pumps. In October 2016, Johnson & Johnson warned patients of security vulnerability in one of its insulin pumps that a hacker could exploit to cause patients to receive a dangerous overdose of insulin.33

Another danger of insecure IoT devices was demonstrated in 2016 by the spread of the Mirai malware that took down websites and entire networks in fall 2016. The large-scale attack was carried out by a botnet of enslaved consumer devices: insecure security cameras, routers, and DVRs whose owners were unware that their devices were responsible for spreading the malware.34

Botnets of insecure IoT devices have the potential to put vast computing power at the disposal of criminals and nation states. The financial services sector, a target because that’s where the money is, recognizes IoT as a top vector for cyber-security attacks.35 The IoT weak link poses a similar threat to other sectors, including the hydroelectric power industry. The vulnerability of the sector to cyberattacks was made public in a March 2016 indictment by U.S. Attorney General Loretta Lynch of Iranian-government-sponsored hackers who were able to penetrate the controls of a small New York dam. The indictment also charges the same Iranian hackers with cyberattacks on major U.S. banks.36

As Schneier explains, the manufacturers of IoT devices have neither the expertise nor the financial incentives to make their products more secure. They are designed and built for features and low price, not for security. And unlike other computer hardware, these devices are not configured to receive updates with security patches. We update our phones and computers by installing patches and we replace them every few years. This is not the case with DVRs, or connected TVs, thermostats, or other appliances; we replace them at much longer intervals. The only feasible way to update most IoT devices is to toss them and buy a new model.

We know what the vulnerabilities of IoT devices are and how they can be addressed. A report published by the Broadband Internet Technical Advisory Group (BITAG) in November of 2016, in the wake of the Mirai botnet, outlined the privacy and security improvements needed to prevent the devices from allowing unauthorized users to take them over, mount cyberattacks, conduct surveillance and monitoring, induce device or system failures, leak data, and harass authorized users.37

It’s not that we don’t know what to do; it’s that the market isn’t letting it happen.

Big Tech and Federal Retrenchment

As discussed above, evidence of the failures of the law and the market to protect privacy abound. The speed of technological evolution outpaces and outdates the law, and the role of the tech industry in resisting efforts to update the law has become significant. In recent years, the tech industry has been active in Washington and increasingly in state legislatures, and has had considerable success in defeating stronger privacy legislation on the grounds that it will stifle innovation.38 For example, in California last year, the tech industry mounted a vigorous campaign that successfully stalled, if it did not quite kill, a privacy bill for Internet service providers (ISPs) that would provide for more effective notice and more meaningful choice.39

The Electronic Communications Privacy Act (ECPA) is a prime example of a law that has been rendered inconsistent and irrational by technological developments. Enacted in 1986, before the Web, the Cloud, and social media existed, ECPA now gives government very broad access to online communications stored on third-party servers, as opposed to, say, private storage devices in an individual’s home. This result is inconsistent with ECPA’s original purpose of achieving “a fair balance between the privacy expectations of citizens and the legitimate needs of law enforcement”; updating the ECPA so that it more closely strikes that balance has been the goal of privacy advocates and tech companies for years.40 Unfortunately, these efforts have been unsuccessful to date, with opposition coming both from law enforcement and from civil agencies.41

Data security, an essential component of privacy protection, is another issue on which industry opposition has long stymied Congressional action. In spite of years of well-publicized data breaches, Congress has not been able to pass legislation setting data security standards for companies that handle personal information. Not only were such proposals opposed by industry, but the Chamber of Commerce resisted even a voluntary program of cybersecurity for critical infrastructure companies developed in response to Executive Order 13636 by President Obama, arguing against any new regulatory regime.42

While Congress has remained gridlocked on addressing the shortcomings in U.S. privacy law, the Trump Administration has been pursuing retrenchment, rolling back existing privacy regulations and reining in enforcement agencies.

The most obvious move to date is the repeal of the broadband privacy rule, which imposed privacy obligations on broadband Internet access service providers (commonly known as ISPs). The rule was adopted by the Federal Communications Commission (FCC) in 2016. Urged by the newly installed FCC chair, Ajit Pai, Congress invoked the Congressional Review Act to hurriedly pass S.J. Res. 34 in March 2017, overturning the broadband privacy rule before it had taken full effect. The repeal also prohibited the FCC from introducing similar rules in the future.

The FCC had adopted the broadband privacy rule after a long battle between cable, telecom, and other technology companies on the one hand, and consumer privacy and civil liberties advocates on the other. The FCC held public hearings and published a draft version that received public comments for six months. The hasty action to nullify the rule, under cover of Congress’s effort to repeal the Affordable Care Act, contrasts strongly with the public deliberation accorded its passage.43

This action was a serious blow to privacy protection. The broadband privacy rule recognized the privileged position ISPs hold as gatekeepers to the Internet, a position that provides them with a broad and deep view into every aspect of their customers’ online activities. The rule outlined a reasonable privacy regime to give individuals strong data security protections and more control over the use of their personal information by their ISPs. As noted in comments from the California Attorney General,

the privacy rule responds to this situation by providing privacy-respectful defaults and more effective user-centric privacy notices, which together enable meaningful customer choices. The schema for customer choice in the proposed rule is based on alignment with customer expectations, with the greatest control granted for uses of customer [personal information] that are not required for the provision of the broadband service and are thus likely to be unexpected by the customer.44

States Can Lead the Way

In the face of inaction and retrenchment at the federal level, can we look to the states to move the ball on privacy? States have been the source of numerous privacy innovations in past years, including laws on identity theft victim rights, data breach notification, limitations on the use of Social Security numbers, cell phone data privacy, cybersecurity, and cyber-exploitation (sometimes known as “revenge porn”). States have served as laboratories in the privacy arena, with legislative innovations that originated in one state often being picked up in other states and sometimes—as in cases of identity theft victim rights, Social Security number restrictions, and data breach notification—in federal laws or regulations.

The new regulatory development occurring in the EU provides an opportunity for states to rebuff the industry critique of state privacy regulation as a patchwork and instead work to harmonize state privacy laws upward. When it takes effect in May 2018, the GDPR will apply not only to any companies based in Europe, but also to many U.S. companies that do business online that results in their collecting, processing, or maintaining information on European residents. With penalties for violation of up to 4 percent of global gross revenues, the GDPR is being taken seriously by U.S. companies.45 As it turns out, the policies and procedures these companies are implementing to protect their European customers and employees can also benefit Americans as well—provided action is taken.

This report does not propose a comprehensive federal privacy law similar to that in the EU. Nor does it propose a new quasi-self-regulatory approach, such as the “information fiduciaries” concept described by Yale law professor Jack M. Balkin and Harvard law professor Jonathan Zittrain. They propose that companies could choose to be governed by a set of privacy practices based on the FIPPs in exchange for exemption from state privacy laws preempted by the federal government.46 Either of these approaches would require significant legislative action at the federal level, which is highly unlikely in the present environment.

Rather, this report recommends that states continue to be innovative in privacy law, crafting legislation with an eye to taking advantage of the GDPR’s requirements to enact stronger state privacy protections. Such an approach could result in a degree of “harmonization upward,” ensuring that proposed legislation provides a level of privacy protection roughly equivalent to that of the GDPR. While this would not constitute a total harmonization—that is, it would not replace tenets of existing U.S. state laws with the rules embodied in the GDPR—it would have the advantage sought in many harmonization efforts of simplifying compliance for any businesses that are subject to EU regulation.

Among the most pressing privacy issues needing to be addressed are broadband privacy, IoT insecurity, and the need for interstate harmonization of data breach notification laws.

Broadband Privacy

Since the repeal of the FCC’s broadband privacy rule in late 2017, nearly half the states have introduced legislation to fill the void, according to the National Conference of State Legislatures.47 Several of the pending bills are patterned generally after the FCC rule, aiming to provide the same level of protection for the broad swath of personal information available to ISPs.48 They would require ISPs to get the consent of their customers before disclosing or selling personal information. States should craft legislation that, rather than seeking the same level of consent for all customer information, should adopt the tiered approach to consent found in the now-repealed FCC rule. Customers should be given greater control over sensitive information, such as precise geolocation, financial and health information, web browsing and app usage history; the use or sharing of this type of information should require the affirmative, opt-in consent of the customer. The use or sharing of non-sensitive personal information, such as email address and type of service, should be allowed, unless the customer says no and opts out. And exceptions should be made for the use of information necessary for providing the contracted service and certain other emergency situations. While this degree of individual control is not currently provided by most U.S. privacy laws, the central and privileged position of ISPs certainly justifies moving in this direction. In other countries, individuals are afforded more control over their own personal information. The GDPR sets a very high standard for consent to the processing of personal data. An individual’s consent must be “freely given, specific, informed and unambiguous” and a clear affirmative action is required.49 The requirements of the former FCC rule regarding the contents of the notice describing the choices available to customers and for the mechanism by which customers can exercise or revoke their choices went a long way to providing for meaningful consent approaching the GDPR level. State broadband privacy laws should incorporate the consent provisions that had been part of the FCC rule. This approach is in line with the new privacy framework outlined above, providing consumers with more choices and setting privacy-respectful defaults.

Securing the IoT

Cybersecurity has been a hot topic in Congress for a number of years, with ever-larger data breaches keeping it on the front burner, but numerous efforts to enact broadly applicable cybersecurity legislation have failed. There have also been some congressional hearings and legislative proposals for cybersecurity for the IoT. Even though the attack of the Mirai botnet of consumer devices increased policy makers’ awareness of the problem, it remains unlikely that Congress will act anytime soon. And the threat that this insecure attack vector poses continues to grow with the increase in the number of connected devices. This is an issue on which states might innovate, looking for legislative approaches to correct the market failure by setting minimum security requirements for connected devices. Legislation might narrow the focus to consumer devices, those intended for “personal, family or household purposes,” in the language of laws regulating consumer products and services. This would exclude IoT used in business, industry, and government, where organizations have far greater resources and expertise to address the security issues than do consumers on their own. A narrower focus would also somewhat reduce the political burden of passing the legislation. Legislation might look to the BITAG report discussed above, which outlines the major security vulnerabilities and recommends current best practices for securing IoT devices. The report’s recommendations include the following: ensure that devices have a mechanism for automated secure software updates, a capability that does not currently exist for most IoT devices; use strong authentication by default, to prevent unauthorized parties from accessing devices or changing their code or configuration; test and harden all possible device configurations, not just the default configuration, to ensure that any customization by consumers is secure; and protect data with security and cryptography best practices, to protect against data leaks both from the cloud and between devices.50 These requirements would constitute privacy defaults and an appropriate standard of care for data, components of the new privacy framework discussed above. The GDPR might also be consulted on this issue. One of its requirements is data protection by design and default, whereby companies must consider data protection at the outset, when designing systems for processing personal data.51 The data security requirement in the GDPR would also be relevant. It is risk-based: organizations must implement appropriate technical and administrative measures to ensure a level of security appropriate to the risk.52

Harmonizing State Data Breach Notification Laws

One of the most innovative and influential privacy laws originated in a state. In 2003, California enacted the first law requiring organizations to notify individuals of a security breach of personal information. The law made an economic adjustment, shifting most of the burden and cost of data insecurity from individual data subjects to the organizations responsible for it. In addition to alerting individuals that their information is at risk so that they can take defensive action, breach notification requirements have provided an incentive for companies and other organizations to pay attention to and devote resources to data security and privacy. California’s law was followed by similar laws in forty-seven other states, as well as federal regulations and guidelines for health care entities and financial institutions.53 It has also been taken up by other countries, and will be a requirement of the impending GDPR.54 Urged by industry complaints about the compliance burden created by multiple laws, Congress has attempted for over a decade to pass a federal data breach notification law that would preempt state laws. In addition to having an overly broad preemptive scope, some of these federal proposals would have negated not just state data breach laws, but also longstanding consumer protection provisions, and thus would have lowered the level of consumer protection and prevented further improvements. In the current situation, the protections of the strongest state laws—the highest common denominator—are generally afforded to the residents of all states in a multi-state breach. In the current situation, the protections of the strongest state laws—the highest common denominator—are generally afforded to the residents of all states in a multi-state breach. State data breach notification laws make a good candidate for harmonization across state jurisdictions, particularly as an alternative to federal preemption,55 because it would not be that difficult to simplify the pattern in the patchwork of state breach laws. State breach laws are in fact very similar, following in most respects the original California law.56 Like California’s, the other state laws require organizations to notify individuals when personal information is breached, prefer notification by mail but allow alternative “substitute notice” in some situations, permit a law enforcement delay, and offer an exemption from notification if the breached data is encrypted. The significant differences between state laws are in three provisions: (1) the notification trigger, (2) notification timing, and (3) the definition of covered information. This is where harmonization efforts should be directed. Such an effort by state policy makers could result in simplifying compliance while preserving consumer protection and other benefits of state regulation. Below is a proposal for approaching the harmonization of state breach laws, with the added benefit of aligning more closely with federal and European breach notification requirements.

Toward a Harmonic Convergence

On the important issue of the trigger for notification, the state laws take one of two approaches: over three quarters of the state laws have a harm trigger, requiring notification only if the breached entity judges that the incident poses a risk of harm to individuals; the others have an acquisition trigger, requiring notification if the data was acquired or reasonably believed to have been acquired by an unauthorized person. In a sense, both approaches are based on a risk of harm, with acquisition by an unauthorized person seen as constituting such a risk. These approaches could be harmonized by using an acquisition trigger and adding a presumption that the breached entity must notify when a breach of personal data has occurred—unless the entity finds through a risk assessment that the incident is very unlikely to result in harm to affected individuals. This would also necessitate reporting incidents to the state Attorney General or other government agency, as is currently required in over half the state laws, which would have the authority to review decisions not to notify. Setting a breach size threshold to trigger reporting to regulators—but not for notifying individuals—would help reviewing agencies to prioritize the deployment of their limited resources. Currently, over half of state breach laws set such a threshold, ranging from 250 to 500 individuals affected. This formulation of a notification trigger would also align with the Health Insurance Portability and Accountability Act (HIPAA) and the GDPR. Since 2009, HIPAA has required covered health care entities and their business associates to notify individuals in case of any impermissible use or disclosure of protected health information, unless the entity conducts a risk assessment and determines that there is a low probability that the information has been compromised. Similarly, the GDPR requires notification to individuals of a breach of personal data if the incident is determined to pose a high risk of harm to individual rights or freedoms. (The GDPR also requires notifying data protection authorities of breaches when there is any likelihood of harm to the rights or freedoms of individuals, even if the higher threshold for notifying individuals has not been reached.) The other factor in a harm-based trigger is the definition of harm, which should be left as a general term to allow for different types of harm posed by different types of personal data and by evolving technologies and business practices. While some states limit harm to identity theft or financial harm, the majority of the state laws with a harm trigger employ a broad concept, using the terms “harm” or “misuse of the data.” The GDPR also speaks broadly of “physical, material, or non-material damage,” including being deprived of control over personal data.57 Harmonizing state laws on the timing of notification should not be difficult. A harmonized law using a formula such as “in the most expedient time possible, without unreasonable delay” could explicitly allow time for securing the system and determining the scope of the breach and for conducting a risk assessment in order to determine whether notification is required. This would align with the GDPR, which requires notification of individuals “without undue delay” and allows time to assess the level of risk to individuals. While existing state laws do not provide for a risk assessment, essentially all of them do require notification “in the most expedient time possible” or “without unreasonable delay” and allow for time to secure the system and determine the scope of the breach. Nine states specify an outer limit of 30 to 90 days from discovery of the breach. Similarly, the HIPAA regulation requires notification “without unreasonable delay,” allowing up to 60 days. The problem with specifying an outside time limit is that it tends to become the norm. The flexibility of a “without unreasonable delay” standard encourages timely notification of very different incidents. What is considered a reasonable delay in the case of notifying of a breach involving a data owner and one or more contracted service providers and many data subjects whose contact information is not readily available would likely be considered an unreasonable delay in the case of a breach of a single system involving fewer data subjects. The pressure to notify promptly is felt by organizations, as they are faced with justifying the time they took to the public when the incident is reported in the news. Harmonizing on the definition of covered information for breach notification laws is more challenging. There is diversity among the states on this point. While all state breach notification laws have basic data types in common (name plus Social Security number, driver’s license number, or financial account number), after these, the picture becomes more complicated. A third of the state laws also include medical information, a third of the laws include biometric data, nearly a third include online account credentials, and the same number add other data elements (such as passport number, taxpayer ID number, mother’s maiden name).

More nimble than Congress, state legislatures have adapted the definition of personal information in breach notification laws to respond to changing circumstances affecting their residents. The original California law contemplated financial identity theft as the risk to be addressed by notification, and therefore limited the types of personal information covered to those sought by identity thieves. Five years later, with the burgeoning of medical privacy and medical identity theft, the definition was expanded to include medical and health insurance information. Two years later, the California law was amended again to add online account credentials to the definition of covered information, in response to the targeting of that data by criminal organizations. This evolution is an example of laboratories of innovation at work.

Allowing continuing updating of the law on this issue is important to keeping breach notification effective. Before adding new types of data, however, states would be wise to consider the purpose served by the law: transparency. While the requirement to notify serves as an incentive to organizations to improve their privacy and security practices, that is a secondary effect of the law. (An information security statute that prescribes specific security standards is another matter.) The authors of the original breach notification law stated that its intent was to give consumers early warning that their personal information was at risk of being abused, allowing them to take action to protect themselves.58 Bearing this purpose in mind, certain types of information might be excluded from or not added to the definition in the state laws, if knowing that it has been breached does not enable individuals to take defensive action.

Certainly differences in state breach laws can complicate compliance for companies that experience a breach affecting residents of many states. In response, charts and matrices of state breach laws have been developed and are readily available to assist in navigating the terrain.59 Smaller companies, such as medical and other professional practices and local merchants, often have personal data only on the residents of their state, and thus need comply with only a single law.

Conclusion

While the present political environment at the federal level is unlikely to produce a radical strengthening of data privacy law, there are privacy problems that should not await federal action at some unknown future date. The lack of privacy protections for the ISPs that have access to the broadest swath of our online activities, the insecurity of the IoT devices in our homes, and the possibility of companies gaining legal justification for hiding some breaches that put our data at risk of misuse are issues that state legislatures can address.

States have been responsible for some of the most innovative and effective privacy laws. Today, states have the opportunity to take advantage of a far-reaching European privacy law to enact laws requiring U.S. companies to provide their domestic customers and employees with at least some of the same privacy protections that they accord Europeans. Functioning as the laboratories of democracy that U.S. Supreme Court Justice Louis Brandeis envisioned, states can respond to changing conditions and evolving technologies with new approaches to privacy protection. They can also learn from each other, adopting provisions and laws that prove effective.

**Secure IoT prevents pollinator collapse---extinction.**

Tash Bandeira 20, Reporter at Ubibots, an Engineering Services Firm, “Saving the Bees with IoT”, Ubidots, 7/15/2020, https://ubidots.com/blog/saving-the-bees-with-iot/

Sometime in late 2006, beekeepers across North America started seeing drastically high losses among their western honey bee colonies. Less dramatic disappearances were also observed in Europe and around the world, causing significant losses in agricultural crops that depend on bee pollination to survive.

Now known as Colony Collapse Disorder (CCD), these sudden losses occur when most of a colony’s worker bees leave their queen and plenty of honey and pollen reserves behind. With few dead bees found nearby, the phenomena didn’t correspond to any previously known causes of bee death.

Without worker bees, hives die out and the repercussions go far beyond honey shortages. We see significant agricultural losses and accompanying economic effects worldwide. Approximately 75% of our food supply depends directly on honey bee pollination, which corresponds to a global worth of hundreds of billions of dollars. And with no end in sight for CCD, there’s a lot at stake in the bee crisis.

Scientists have yet to settle on a single cause for the decline - attributing it to a combination of pesticides, disease, nutritional deficiencies, and commercial beekeeping itself - so it’s unlikely there’ll be a simple resolution. The EU voted to ban the use of neonicotinoid pesticides in 2018 but in lieu of global policy change, innovative IoT solutions have already shown serious promise for helping bees survive.

The Internet of Stings

Being able to know when a colony is in trouble and act quickly is imperative to beekeeping. Traditionally, this has meant regular check-ins with the hive, a practice that comes with some disruption to bee life. But with IoT solutions that incorporate wireless in-hive sensors, beekeepers can better keep tabs on their colonies in real time and from a distance.

At the Polytech Sorbonne University in Paris, a student developed a precision beekeeping box that can take temperature, humidity and weight readings, as well as detect the presence of a queen bee. With the data displayed on their Ubidots dashboard, beekeepers can then take steps to decrease resource consumption and increase productivity.

In Costa Rica, college students developed the Ubidots-powered Internet De Las Abejas, a project aimed at controlling varroa mites. Varroas stick to bees, suck their hemolinph, and spread the diseases they carry - posing a major threat to honey bee health. In better controlling them, beekeepers can improve the quality of life of their hives, while also increasing honey production and pollen mobility.

Another approach, developed by researchers in Manchester, is the tagging of bees with RFID chips to track their movements. With location data, beekeepers can follow their comings and goings to better understand and predict their behavior. Grad students in Canada have also been studying the use of sensor data to listen in on beehives and detect communication patterns in the buzz.

But easily the biggest buzz in IoT-enabled solutions is the development of robot bees, or pollination drones. Straight out of a “Black Mirror” episode, RoboBees were introduced by Harvard University researchers in 2013. While their first iterations were limited to flying and hovering, they can now swim underwater and stick to various surfaces. Robotic bees of the future could potentially work farms like their natural counterparts, pollinating crops and helping offset population losses.

No matter what form our ‘IoBees’ solutions take, the collecting and sharing of data will give us profound insights into their lives. Researchers and IoT Entrepreneurs all over the world are realizing the potential of aggregating this data into IoT dashboards, creating IoT solutions that can be commercially offered to either the farmers or research institutions.

Such array of projects aimed at tackling the bee crisis shows the powerful potential for IoT to help save the bees that feed our world.

**And IoT vulnerabilities cause extinction – critical infrastructure collapse, nuclear conflict, drone warfare, and bioweapon attacks**

Turchin 20 (Alexey Turchin, Global risks expert, graduated from Moscow State University; Dr. David Denkenberger, Ph.D. from the University of Colorado at Boulder in the Building Systems Program, M.S.E. from Princeton in Mechanical and Aerospace Engineering, B.S. from Penn State in Engineering Science, “Classification of global catastrophic risks connected with artificial intelligence,” March 2020, <https://www.researchgate.net/publication/324935393_Classification_of_global_catastrophic_risks_connected_with_artificial_intelligence>, TM)

3. Global catastrophic risks from narrow AI and AI viruses 3.1. Overview Narrow AI may be extremely effective in one particular domain and have superhuman performance within it. If this area of strength can cause harm to human beings, narrow AI could be extremely dangerous. Methods for controlling superintelligent AI would probably not be applicable to the control of narrow AI, as narrow AIs are primarily dependent on humans. 3.2. Risk that viruses with narrow AI could affect hardware globally There are currently few computer control systems that have the ability to directly harm humans. However, increasing automation, combined with the Internet of Things (IoT) will probably create many such systems in the near future. Robots will be vulnerable to computer virus attacks. The idea of computer viruses more sophisticated than those that currently exist, but are not full AI, seems to be underexplored in the literature, while the local risks of civil drones are attracting attention (Velicovich 2017). It seems likely that future viruses will be more sophisticated than contemporary ones and will have some elements of AI. This could include the ability to model the outside world and adapt its behavior to the world. Narrow AI viruses will probably be able to use human language to some extent, and may use it for phishing attacks. Their abilities may be rather primitive compared with those of artificial general intelligence (AGI), but they could be sufficient to trick users via chatbots and to adapt a virus to multiple types of hardware. The threat posed by this type of narrow AI becomes greater if the creation of superintelligent AI is delayed and potentially dangerous hardware is widespread. A narrow AI virus could become a global catastrophic risk (GCR) if the types of hardware it affects are spread across the globe, or if the affected hardware can act globally. The risks depend on the number of hardware systems and their power. For example, if a virus affected nuclear weapon control systems, it would not have to affect many to constitute a GCR. A narrow AI virus may be intentionally created as a weapon capable of producing extreme damage to enemy infrastructure. However, later it could be used against the full globe, perhaps by accident. A “multi-pandemic,” in which many AI viruses appear almost simultaneously, is also a possibility, and one that has been discussed in an article about biological multi-pandemics (Turchin et al. 2017). Addressing the question about who may create such a virus is beyond the scope of this paper, but history shows that the supply of virus creators has always been strong. A very sophisticated virus may be created as an instrument of cyber war by a state actor, as was the case with Stuxnet (Kushner 2013). The further into the future such an attack occurs, the more devastating it could be, as more potentially dangerous hardware will be present. And if the attack is on a very large scale, affecting billions of sophisticated robots with a large degree of autonomy, it may result in human extinction. Some possible future scenarios of a virus attacking hardware are discussed below. Multiple scenarios could happen simultaneously if a virus was universal and adaptive, or if many viruses were released simultaneously. A narrow AI virus could have the ability to adapt itself to multiple platforms and trick many humans into installing it. Many people are tricked by phishing emails even now (Chiew et al. 2018). Narrow AI that could scan a person’s email would be able to compose an email that looks similar to a typical email conversation between two people, e.g. “this is the new version of my article about X.” Recent successes with text generation based on neural nets (Karpathy 2015; Shakirov 2016) show that generation of such emails is possible even if the program does not fully understand human language. One of the properties of narrow AI is that while it does not have general human intelligence, it can still have superhuman abilities in some domains. These domains could include searching for computer vulnerabilities or writing phishing emails. So while narrow AI is not able to self-improve, it could affect a very large amount of hardware. A short overview of the potential targets of such a narrow AI virus and other situations in which narrow AI produces global risks follows. Some items are omitted as they may suggest dangerous ideas to terrorists; the list is intentionally incomplete. 3.2.1. Military AI systems There are a number GCRs associated with military systems. Some potential scenarios: military robotics could become so cheap that drone swarms could cause enormous damage to the human population; a large autonomous army could attack humans because of a command error; billions of nanobots with narrow AI could be created in a terrorist attack and create a global catastrophe (Freitas 2000). In 2017, global attention was attracted to a viral video about “slaughterbots” (Oberhaus 2017), hypothetical small drones able to recognize humans and kill them with explosives. While such a scenario is unlikely to pose a GCR, a combination of cheap AI-powered drone manufacture and high-precision AI-powered targeting could convert clouds of drones into weapons of mass destruction. This could create a “drone swarms” arms race, similar to the nuclear race. Such a race might result in an accidental global war, in which two or more sides attack each other with clouds of small killer drones. It is more likely that drones of this type would contribute to global instability rather than cause a purely drone-based catastrophe. AI-controlled drones could be delivered large distances by a larger vehicle, or they could be solar powered; solar-powered airplanes already exist (Taylor 2017). Some advanced forms of air defense will limit this risk, but drones could also jump (e.g., solar charging interspersed with short flights), crawl, or even move underground like worms. There are fewer barriers to drone war escalation than to nuclear weapons. Drones could also be used anonymously, which might encourage their use under a false flag. Killer drones could also be used to suppress political dissent, perhaps creating global totalitarianism. Other risks of military AI have been previously discussed (Turchin and Denkenberger 2018a). 3.2.2. Stuxnet-style viruses hack global critical infrastructure A narrow AI virus may also affect civilian infrastructure; some, but not all ways in which this could be possible are listed below. Remember that in the case of global catastrophes, the conditions necessary for most catastrophes could exist simultaneously. Several distinctive scenarios of such a catastrophe have been suggested. For example, autopilot-controlled and hacked planes could crash into nuclear power stations. There are around 1000 nuclear facilities in the world, and thousands of large planes are in the air at every moment—most of them have computerized autopilots. Coordinated plane attacks happened in 2001 and a plane has been hacked (Futureworld 2013). Self-driving cars could hunt people, and it is projected that most new cars after 2030 will have some selfdriving capabilities (Anderson 2017). Elon Musk has spoken about the risks of AI living in the Internet; it could start wars by manipulating fake news (Wootson 2017). Computer viruses could also manipulate human behavior using blackmail, as seen in fiction in an episode of Black Mirror (Watkins 2016). Another example is creating suicide ideation, e.g., the recent internet suicide game in Russia, “Blue Whale” (Mullin 2017), which allegedly killed 130 teenagers by sending them tasks of increasing complexity and finally requesting their suicide. The IoT will make home infrastructure vulnerable (Granoff 2016). Home electrical systems could have short circuits and start fires; phones could also catch fire. Other scenarios are also possible: home robots, which may become popular in the next few decades, could start to attack people; infected factories could produce toxic chemicals after being hacked by viruses. Large-scale infrastructure failure may result in the collapse of technological civilization and famine (Hanson 2008; Cole et al. 2016). As industries become increasingly computerized, they will completely depend on proper functioning of computers, while in the past they could continue without them. These industries include power generation, transport, and food production. As the trend continues, turning off computers will leave humans without food, heating, and medication. Many industries become dangerous if their facilities are not intensively maintained, including nuclear plants, spent nuclear fuel storage systems, weapons systems, and water dams. If one compares human civilization with a multicellular organism, one could see that multicellular organisms could die completely, down to the last cell, as the result of a very small intervention. As interconnectedness and computerization of the human civilization grow, we become more and more vulnerable to information-based attacks. 3.2.3. Biohacking viruses Craig Venter recently presented a digital-biological converter (Boles et al. 2017), which could “print” a flu virus without human participation. The genomes of many dangerous biological viruses have been published (Enserink 2011), so such technology should be protected from unauthorized access. A biohacker could use narrow AI to calculate the most dangerous genomes, create many dangerous biological viruses, and start a multipandemic (Turchin et al. 2017). A computer virus could harm human brains via neurointerfaces (Hines 2016). 3.2.4. Ransomware virus paying humans for its improvement In 2017, two large epidemics of ransomware viruses affected the world: WannaCry and Petya (BBC 2017). The appearance of cryptocurrencies (e.g., bitcoin) created the potential for secret transactions and machine-created and machine-owned money (LoPucki 2017). As the IoT grows, the ransomware industry expected to thrive (Schneier 2017). Ransom viruses in the future may possess money and use it to pay people to install ransomware on other people's computers. These viruses could also pay people for adding new capabilities to the viruses. As a result, this could produce self-improving ransomware viruses. We could call such virus a “Bitcoin maximizer.” In a sense, the current bitcoin network is paying humans to build its infrastructure via “mining.” The catastrophic risk here is that such a system is paying humans to exclude humans from the system. In some sense, capitalism as an economic system could do the same, but it is limited by antimonopoly and other laws, as well as by welfare states. 3.2.5. Slaughterbots and the dangers of a robotic army Robotic minds do not require full AGI to have some form of agency: they have goals, subgoals, and a world model, including a model of their place in the world. For example, a robotic car should predict the future situation on a road, including the consequences of its own actions. It also has a main goal—travel from A to B—which constantly results in changes to the subgoal system in the form of route creation. A combination of this type of limited intelligence with limited agency may be used to turn such systems into dangerous self-targeting weapons (Turchin and Denkenberger 2018b). 3.2.6. Commentary on narrow AI viruses It appears that if a narrow AI virus were to affect only one of the above-listed domains, it would not result in an extinction-level catastrophe. However, it is possible that there will be many such viruses, or a multipandemic (Turchin et al. 2017), or one narrow AI that will be able to affect almost all existing computers and computerized systems. In this case, if the virus(es) were deliberately programmed to create maximum damage—which could be in a case of a military grade Narrow AI virus, like the advanced version of Stuxnet (Kushner 2013)—global catastrophe is a possible result. If the appearance of narrow AI viruses is gradual, antivirus companies may be able to prepare for them. Alternatively, humans could turn off the most vulnerable systems in order to avoid a global catastrophe. However, a sudden breakthrough or a synchronized surprise attack could spell doom. 3.3. Failure of nuclear deterrence AI Nuclear weapons are one of the most automated weapon systems. Because they must be launched immediately, almost all decision making has been done in advance. An early warning alert starts a preprogrammed chain of events, where the high-level decision should be made in minutes, which is far from optimal for human decision-making. However, the history of nuclear near misses shows (Blair 2011) that computer mistakes have been one of the main causes, and only quick human intervention has prevented nuclear war, e.g., the actions of Stanislav Petrov in 1983 (Future of Life Institute 2016). We can imagine failure modes of accidental nuclear war resulting from failure of the nuclear weapons control system. They may be similar to the Russian “dead hand” perimeter system (Bender 2014), arising if a strategic planning AI chooses a dangerous plan to “win” a nuclear war, like a Doomsday weapon (Kahn 1959), blackmail, or a pre-emptive strike.

#### Independently, effective regulations solve extinction

Matus 14 [Kira Matus, PhD, Havard University. Associate Head and Associate Professor, Division of Public Policy, Hong Kong University of Science and Technology. "Existential risk: challenges for risk regulation." Risk and Regulation (Winter 2014). https://futureoflife.org/data/documents/Existential%20Risk%20Resources%20(2015-08-24).pdf?x93895]

There is a trend in many areas towards attention to ‘big’ risks. Financial regulation has become increasingly concerned with so‐called systemic risks. Others, and not just Hollywood blockbusters, have been attracted to the study of civilization‐destroying catastrophic risks. Indeed, the OECD has become increasingly interested in ‘high level’ risks and ways in which different national governments seek to prepare for and manage actual events, such as the aftermath of major earthquakes, or the response to a terrorist attack. The notion of ‘existential’ risk might be adding to the cacophony of emerging ‘big’ risk concerns. However, existential risk deserves special attention as it fundamentally adds to our understanding of particular types of risks, and it also challenges common wisdom regarding actions designed to support continued survival.

What is existential risk? We can approach this question by looking at several attributes. The first attribute is what, in fact, is at risk. One set of existential risks are those that threaten survival. These are the acute catastrophes, i.e. the idea that particular events’ impacts are likely to extinguish civilization. Such risks have been identified when it comes to asteroids, nuclear war, and other largescale events that undermine the possibility for survival in general, or, at least, in large regions. A second set is based on the idea that existential risks are not just about physical survival, but about the survival of ways of life. In other words, certain risks are seen as threatening established ways of doing things, cultures, social relationships, and understandings of the ‘good life’. There is, of course, much disagreement about what the good life constitutes, and therefore there will always be disagreement as to what exactly an existential risk constitutes.

A second attribute is the degree to which an existential risk is triggered by a single catastrophic incident. Existential risks arise not merely from one‐off large incidents, such as earthquakes, tsunamis, nuclear meltdowns or, indeed, asteroid hits. Rather, existential risks are about complex, inter‐related processes that result in cascading effects that move across social systems. The overall impact of these system changes could result in the types of physical or cultural destruction that is the focus of the first two perspectives.

Whether triggered by catastrophic events or complex cascades, standard operating procedures are unlikely to be sufficient for dealing with existential risks; instead, this is a space in which improvisation and creativity are required. A third attribute of existential risks is the challenge they present to standard approaches to risk regulation. Existential risks are defined by their cross‐systematic nature; a failure within one system (say, finance) has not just catastrophic implications for the sector in question, but threatens the survival of another system (say, the environment, as funding for particular measures dries up). In other words, the focus of existential risks is not just on the systemic level, it focuses on the cross‐ systemic dimension that is even more difficult to predict and assess than attempts aimed at establishing activities that are of ‘systemic’ relevance by regulatory systems that tend to be narrowly focused and independent from each other. Existential risks are characterized by a fourth feature, namely the idea that existential risks lead to responses based upon fear. Individuals are confronted with fears about their survival (death) and about the meaning of their lives. This aspect of existential risk is particularly troublesome in an age of low trust in authority and, consequently, a political style that is intolerant of ‘blame free’ spaces. In the absence of confidence in public authority, few options remain. For some, the solution will rely on framework plans, pop intellectuals and other fashionable ideas that seem to offer redemption from the fear of extinction. Others will prefer to ‘go it alone’ and seek to develop their own plans for survival, noting that risk taking is, after all, an individual choice. Others, again, will deny the legitimacy of public authority and veer towards those choices that have been legitimized by their own communities. Finally, some will deny that existential risks exist in the first place. In other words, individual responses to existential risks vary considerably and pose challenges for any risk management and communication strategy.

**The Court has recently narrowed Parker immunity to limit deference to the states in antitrust law**

**Allensworth 16** [Rebecca Haw Allensworth, Associate Professor of Law, Vanderbilt Law School; J.D., Harvard Law School; M.Phil, University of Cambridge; B.A., Yale University, October 2016, ARTICLE: THE NEW ANTITRUST FEDERALISM, 102 Va. L. Rev. 1387]

Introduction

IN just three relatively obscure antitrust cases, 1

[Footnote 1] N.C. State Bd. of Dental Exam'rs v. **FTC**, **135** S. Ct. 1101 (2015) [hereinafter NC Dental]; FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013); FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992).

the U.S. Supreme Court has quietly **revolutionized** how states and the federal government share power. These cases addressed a doctrine - unfamiliar to those outside of the field of antitrust law - that grants "state action" immunity from federal antitrust liability 2 and thus marks the **thin line** that insulates state regulation from **wholesale invalidation** through federal antitrust lawsuits. 3 For decades, the Court conceived of this line, and the "antitrust federalism" it effected, as a formal question about where the state ended and antitrust liability began. This was the old antitrust federalism: a boundary-drawing exercise that gave strong deference to state regulation. The Court's state action revolution ushers in a new antitrust federalism, one that all but dispenses with the notion of separate spheres in favor of something **less deferential to the states** - procedural review of state regulation.

Antitrust federalism may be less familiar than its constitutional cousin, but it is just as important - **if not more so** - **to the state-federal balance of power**. The Sherman Act forbids anticompetitive restraints of trade and monopolization of markets, and it does not seem to limit these prohibitions to private citizens and corporations. 4 Because regulation often tinkers with the free market economy and tends to create competitive winners and losers, Sherman Act liability for state conduct would severely restrict a state's ability to regulate within its borders. 5 So when [\*1390] the Court extended the reach of the Sherman Act - along with all federal regulation passed under the Commerce Clause - during the New Deal, 6 it became necessary to define an exemption for "state action" or risk the demise of state regulatory autonomy altogether. And state action immunity from the Sherman Act was born. 7

**But, the current interpretation fails to account for interstate spillovers. Limiting Parker is crucial to establish federal role limiting regulatory externalities**

**Sack 21** [John Sack, J.D., Duke Law School, Class of 2022, B.S. University of Michigan, 2019, 2021 https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1196&context=djclpp\_sidebar]

III. DOCTRINAL CRITICISM

Although the Court has continued to re-affirm Parker v. Brown’s central holding, many have criticized the Parker doctrine. Both scholars and the Federal Trade Commission (FTC) have highlighted problems with the doctrine and offered a number of solutions for how to remedy its faults.63

The first common critique of the doctrine is that it does not account for **out-of-state economic effects**. Unless a regulation runs afoul of another constitutional barrier, no consideration of interstate spillovers applies.64 One need not look farther than Parker itself to see how the state action doctrine can **impose costs** on out-of-state residents, even though those residents have diminished political capital in the state. At the time Parker was decided, between 90 and 95 percent of raisins produced in California entered interstate commerce and California provided almost all of the nation’s raisins.65 Most American raisin consumers lived outside of California and had no political means to oppose the state’s legislative program, yet they bore the costs of California’s state-sanctioned monopoly.66

Second, similar concerns about **political representation** animate critiques of Parker immunity. The policy at issue in Parker restricted output and artificially raised prices, two results federal antitrust law generally seeks to prohibit.67 Although the benefits of such a program were borne almost exclusively by California, the costs of the program were incurred by raisin consumers across the nation.68 The political incentives to promote such a program follow closely with economic costs and benefits.69 California raisin producers have a strong incentive to lobby their own government to install such a program, but it would be nearly impossible for non-California residents to challenge such a policy through the normal political channels.70 The government of California is **not the appropriate body** to properly weigh the benefits to in-state raisin producers with the costs to out-of-state consumers, yet the Parker doctrine grants California per se immunity on federalism grounds.71 Although the California program was implicitly endorsed by Congress, one is just as likely to find similar programs with no similar implicit endorsement.72

The U.S. Constitution embodies a system of **federalism** where the federal government is sovereign in some respects, and the several states are sovereign in others.73 This system of federalism gives states the power to regulate local matters and the federal government the power to regulate issues that states are less suited to regulate.74 **When costs spill over** into other states, **the national government becomes the appropriate body** to regulate the costs and benefits of such a program.75 The Court has recognized such spillover effects, and how political actors, even government entities, can act solely in self-interest.76 Such **state self-interest** can directly harm consumers outside of its territorial jurisdiction.77

Parker immunity, as it stands, **runs counter** to longstanding ideals of **national unity** that harken back to the Founding era. The law has long prohibited states from imposing excessive costs on the nation as a whole, solely for the purpose of furthering its own intrastate policy interests. McCulloch v. Maryland illustrates the Court’s wariness of self-serving state action.78 In McCulloch, Chief Justice Marshall held that states may not tax the national bank, as they would be wielding power against the whole of the United States, even though the whole of the United States is not represented by each state.79 Similar to a state tax being problematic since it is the part acting on the whole, anticompetitive restraints by the states would unduly impose costs on the nation. The people of the United States, acting through Congress, christened competition and free markets through the Sherman Act.80 Just as one state could not tax the resources of the United States, one state should not be allowed to use state policy to **burden** the national economy. Because the potential costs to state-created monopolies are so high,81 federal policy should prohibit states from allocating those costs beyond their borders. Any state that wishes to impose monopoly costs outside of its borders to benefit itself and undermine competition should be **carefully scrutinized** when it does so. This scrutiny would not be fatal-in-fact for the legislation, but it should be enough for states to second-guess an attempt to enrich itself to the detriment of its sister states.

IV. PROPOSED SOLUTIONS

The Sherman Act, and specifically Parker immunity, should be interpreted in light of the above concerns. After all, the Sherman Act is the standard-bearer for the U.S. free market system, and so our interpretation of it should evolve with our understanding of constitutional principles and economic conditions.82 Justice Burger’s concurrence in City of Lafayette elaborates on this point:

Our conceptions of the limits imposed by federalism are bound to evolve, just as our understanding of Congress’ power under the Commerce Clause has evolved. Consequently, since we find it appropriate to allow the ambit of the Sherman Act to expand with evolving perceptions of congressional power under the Commerce Clause, a similar process should occur with respect to “state action” analysis under Parker. That is, we should not treat the result in the Parker case as cast in bronze; rather, the scope of the Sherman Act’s power should parallel the developing concepts of American federalism.83

As states impose costs on each other through state-sanctioned monopolies, the Court’s understanding of federalism and the Commerce Clause counsels scrutiny of the Parker doctrine. An entirely new doctrine is not necessary to curtail Parker immunity. Rather, the issue can be resolved by applying Parker immunity in light of the American dual system of federalism and the Commerce Clause. Modern scholarship critiques the lack of concern for interstate spillovers. By that token, the modern Parker doctrine fails to account for economic efficiency and undermines political representation values meant to be protected by **federalism**.84 So while scholars almost universally recognize that interstate economic spillovers are problematic, there is no consensus on what remedy is most appropriate.

**Failure to hold states accountable for spillovers destroys optimal state experimentation – correctly “right sizing” regulation impossible without accounting for externalities in interjurisdictional competition**

**Adler 20** [Jonathan H. Adler, Case Western University School of Law, 2020 <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=3058&context=faculty_publications>]

The race-to-the-bottom theory presumes that interjurisdictional competition creates a prisoner’s dilemma for states. Each state wants to attract industry for the economic benefits that it provides. Each state also wishes to maintain an optimal level of environmental protection. However, in order to attract industry, the theory holds, states will lower environmental safeguards so as to reduce the regulatory burden they impose upon firms. This competition exerts downward pressure on environmental safeguards as firms seek to locate in states where regulatory burdens are the lowest, and states seek to attract industry by lessening the economic burden of environmental safeguards. Because the potential benefits of lax regulation are concentrated among relatively few firms, these firms can effectively oppose the general public’s preference for environmental protection regulation. This will lead to social welfare losses even if environmental harm does not spill over from one state to another. The result, according to the theory, is the systematic under-regulation of environmental harms, and a need for federal intervention.26

The race-to-the-bottom theory may have had some basis in the 1960s and 1970s, but there is little reason to believe that this dynamic inhibits state regulatory efforts today, particularly given how aggressive many states are in environmental policy. **Empirical evidence** that states race to relax their environmental regulations in pursuit of outside investment **is decidedly lacking**. If the prospect of interstate competition discourages state-level environmental regulation, it is hard to explain why state environmental regulation often preceded federal intervention and why many states adopt more stringent measures than federal regulations require. Numerous studies have been conducted attempting to determine whether a race-to-the-bottom can be observed in the context of environmental regulation, and they have generally failed to find any evidence that environmental quality worsens when states are given more flexibility to set their own priorities.27 Indeed, some studies have \found **precisely the opposite:** that when states have more flexibility to set their own environmental priorities they increase their efforts.28

None of the above should be taken as an argument against all federal environmental regulation. For just as the federal government is overly interventionist in localized environmental concerns, the federal government is unduly absent in areas where a federal presence is most necessary. That is, the undue centralization of some environmental concerns co-exists with substantial federal abdication from concerns the federal government should be addressing. The federal government devotes relatively little of its regulatory resources on those matters for which the federal government possesses a comparative advantage and abdicates its responsibility to provide the data and knowledge base necessary for successful environmental regulation at all levels of government.

It is often remarked that environmental problems do not respect state borders. This is unquestionably true, and the observation provides ample justification for federal measures to address **transboundary pollution problems**.29 Where pollution or other environmental problems span jurisdictional borders there is less reason to believe state and local jurisdictions will respond adequately.

Consider a simple transboundary pollution problem involving two states, A and B. When economic activity in State A causes pollution in State B, State A is unlikely to adopt measures to prevent the resulting environmental harm because it would bear the primary costs of any such regulatory measures, without capturing the primary benefits. Put simply, State A is unlikely to impose costs on itself to benefit State B. Absent some external controls or dispute resolution system, the presence of **interstate spillovers** can actually encourage polices that externalize environmental harms, such as subsidizing development near jurisdictional borders so as to ensure that environmental harms fall disproportionately “downstream.” Policymakers in State B may wish to take action, but they will be unable to control pollution created in State A without State A’s cooperation. Even where polluting activity imposes substantial environmental harm within State A, the **externalization** of a portion of the harm is likely to result in the adoption of **less optimal** environmental **controls**.

**The aff preserves state authority to enforce antitrust but, absent clarification on the transboundary effects, immunity turf wars cause enforcement failures**

**Kobayashi 20** [Bruce H. Kobayashi, George Mason University, Antonin Scalia Law School Professor, 10-4-2020 https://gaidigitalreport.com/2020/10/04/exemptions-and-immunities/#\_ftn92]

B. Spillover Effects and Antitrust Federalism

The current state action doctrine does not enable jurisdictional competition or promote the principles of **federalism** because it does not account for the **spillover effects** of anticompetitive state regulation. Judge Easterbrook examined the Court’s state action holdings and found that the Court’s rulings were indifferent as to whether the effects of the regulation were actually internalized by the regulating state.[91] Allowing states to enact anticompetitive legislation reduced the extent and effectiveness of **competition among the states**, and thereby increased the cost of exit and relocation.[92]

This nature of the spillover effect is exemplified in Parker v. Brown.[93] The state action doctrine was used to uphold a California regulation which authorized a raisin cartel. California raisin growers benefited greatly from that ability to price fix. However, over 90% of the grapes were exported outside of California—nationally and internationally—making the impact of the California raisin regulation reach beyond state lines.[94] The regulation harmed a large number of consumers outside of California while only benefiting a small number of private interest parties within the state.

State action doctrine, although meant to preserve that state’s independence, actually allows the state to reap the benefits of the anticompetitive regulation while displacing the costs onto other states.[95] Therefore, it is worth considering if the current state action doctrine should be thought of differently, in a way that fully takes into accounts issues of federalism. Judge Easterbrook proposes a state action rule which considers the spillover effect of anticompetitive state regulation. Instead of examining clear articulation and active supervision, the Court would uphold an anticompetitive state regulation as long as its anticompetitive effects are internalized by that state’s residents.[96] Aligning state action doctrine with the economics of federalism will not only **maintain states’ roles** in antitrust, but also ensure that state antitrust exemptions have a diminished negative impact on consumer welfare. Analyzing the anticompetitive overcharge of regulations is also more administrable than attempting to analyze the regulations under the dormant Commerce Clause.[97] Considered under Easterbrook’s approach, Parker’s California raisin prorate program would be subject to antitrust scrutiny because the regulation’s costs were not internalized.

State regulation of seemingly local competition is likely to effect more than just the economy of that specific state. When states grant antitrust immunities in situations involving interstate commerce, the state is exporting the anticompetitive effects of its regulations to citizens outside its own borders. Without accounting for the federal interest in an integrated national economy, state action doctrine far surpasses its narrow purpose of supervising local competition.

C. The Appropriate Role of State Attorneys General in Federal Antitrust Disputes

Federalism most often refers to the vertical relationship between the federal government and the states. Divergent viewpoints among antitrust enforcers can **strain the system**, thus comity and deference are **crucial** to efficient antitrust enforcement. A merger or acquisition is often scrutinized by multiple enforcers with multi-dimensional relationships.

For example, the Sprint/T-Mobile merger involved the Antitrust Division and Federal Communications Commission, who share a horizontal relationship, and state attorneys general, with which the federal agencies share a vertical relationship. Disagreement between enforcers may occur at either level.[98] The merger between the two telecommunications firms was cleared by the FCC, the Antitrust Division, and ten state attorneys general.[99] Although a settlement agreement—which required divestitures—was in the process of being approved, several other state attorneys general filed a lawsuit to block the merger anyway.[100] Assistant Attorney General Makan Delrahim questioned the relief sought by the states,[101] citing the federal agencies’ expertise in the matter.[102] He noted that “a minority of states and the District of Columbia” were “trying to undo [the nationwide settlement],” a situation he believed was “odd.”[103] Delrahim reaffirmed states’ rights to sue for antitrust violations but criticized their attempt to seek relief inconsistent with the federal government’s settlement.[104]

States may also enter settlement agreements with merging parties that are repugnant to sound antitrust enforcement. For example, in UnitedHealth Group/Sierra Health Services, the Nevada Attorney General required the merged firm to submit $15 million in charitable contributions which were not related to any antitrust violation.[105] Similarly, Massachusetts entered a settlement agreement with two hospitals that required increased spending on select programs and the creation of other projects and programs unrelated to antitrust concerns.[106]

On the other hand, state antitrust enforcement can play a useful role in supplementing federal antitrust enforcement. First, the use of state autonomy within a federal system allows state and local governments to act as social “laboratories,” where laws and policies are created and tested at the state level of the democratic system, in a manner similar (in theory, at least) to the scientific method.[107] Thus, even if states enter into agreements with merging parties that the federal authorities view as anticompetitive or that impose ineffective remedies for the anticompetitive effects that would be generated by the merger, the information generated by such actions can be invaluable inputs into retrospective analyses of the competitive effects of mergers. These analyses are based on causal empirical designs which require both observation of post-merger price and quality effects from consummated mergers and the ability to compare these effects with a credible control group.[108] For example, state interventions such as COPA or Certificate on Need Laws that allow hospital mergers that generate competitive effects in local geographic markets facilitate retrospective studies of hospital mergers that can be used to validate and improve the economic models and other tools used to predict merger effects.[109]

Second, in a system of federalism, the state enforcement of both the state and federal antitrust laws can be a **valuable** complementary resource that supplements scarce federal resources. **Conflicts** between the federal and state antitrust authorities are generated by the use of a cooperative or “marble cake” approach to federalism, where the tasks of the state and federal agencies are relatively **undefined**, overlapping, and **imperfectly coordinated**. In contrast, a “dual” or “layer cake” federalism approach, where power is divided **ex-ante** between the federal and state governments in clearly defined terms, can mitigate direct conflicts between state and federal authorities discussed above.

#### No link turns – knee-jerk defenses of Parker on federalism grounds are under-theorized – the aff’s links are more robustly aligned with federalism

Meese 21 [Alan J. Meese, Ball Professor of Law, William & Mary Law School and Co-Director, William & Mary Center for the Study of Law and Markets. 16 Va. L. & Bus. Rev. 115, Fall 2021, Lexis]

The Court has repeatedly and unanimously claimed that considerations of "federalism and state sovereignty" justify state action immunity and thus counsel against Sherman Act preemption of state-imposed or state-authorized restraints. Numerous scholars agree. In particular, the Court and its academic defenders claim that applying the Act to state-imposed restraints would unduly interfere with states' ability to serve as laboratories of democracy, choosing how to regulate their own economies, contrary to the principles of federalism. The vast post- Wickard reach of the Sherman Act reinforces this argument, by facilitating application of the Act to local restraints - including those imposed by state governments - that produce no interstate harm. Indeed, aside from Parker itself, all state action controversies that have reached the Supreme Court, including the Court's most recent pronouncement on the topic, involve local restraints that produce harm confined to a single state. 17 Thus, some have claimed that, given the expansive scope of the Sherman Act, application of the Act to state-imposed restraints would implicitly resurrect the Lochner era, during which the Court invalidated state legislation that unduly restricted private economic autonomy. The state action doctrine, it is said, leaves regulatory choices over local economic activity where they belong, with the people's elected representatives instead of federal judges.

Although the Court decided Parker more than seven decades ago, the "federalism and state sovereignty" rationale for state action immunity remains under-theorized. Some academic articulations of this rationale invoke the Constitution itself, suggesting that preemption of state-imposed restraints [\*121] would be unconstitutional. Other articulations by the Court and scholars vaguely invoke "federalism," "state sovereignty," or both, without claiming that the Constitution prevents Sherman Act preemption of state-imposed restraints. Some scholars have suggested that Parker reflects the application of a federalism canon, albeit without identifying any particular canon. Thus, objective evaluation of Parker's state action defense requires scholars to identify the doctrinal vehicles through which federalism and state sovereignty might influence the meaning of the Act and to determine whether Parker and its progeny constitute faithful application of such principles.

This article evaluates and rejects the claim that considerations of federalism and state sovereignty somehow rebut the strong case for Sherman Act preemption of state-imposed restraints. Instead, consistent application of federalism principles bolsters the case for preemption of state-imposed restraints, like those in Parker, that directly burden interstate commerce and impose interstate harm. At the same time, considerations of federalism also counsel retraction of the scope of the Act and concomitant allocation to the states of exclusive authority over restraints that produce only intrastate harm. The resulting allocation of authority over trade restraints would nearly eliminate the potential conflicts between local regulation and the Sherman Act, conflicts that many claim justify the state action doctrine.

The article identifies two broad categories of arguments that supposedly support the state action doctrine. First, Parker's proponents could claim that one or more constitutional doctrines that protect federalism or state sovereignty somehow prohibit outright Sherman Act preemption of state-imposed restraints. Second, these proponents could argue that such considerations find expression in one or more canons of statutory construction and thereby militate against reading the Sherman Act to preempt such restraints, despite Congress's admitted authority to do so.

The article evaluates the arguments in each category and finds all such arguments wanting. Beginning with the first category, the article demonstrates that no doctrine of constitutional law requires Parker's state action doctrine. Indeed, the Supreme Court has repeatedly concluded that the Framers and Ratifiers adopted the Commerce Clause precisely because of their experience with state-imposed restraints that unduly burdened interstate commerce and imposed harm on out-of-state citizens. According to this historical account, the Clause was designed to empower Congress to prohibit such parochial state legislation, thereby removing barriers to a well-functioning national market and establishing free trade as the rule governing interstate commercial activity.

[\*122] While affirmative statutory preemption was relatively rare during the Nineteenth and early Twentieth Centuries, the Supreme Court read the Commerce Clause to authorize implied preemption of otherwise valid state legislation that directly burdens interstate commerce. Moreover, as the scope of the power has expanded over the past several decades, Congress has repeatedly exercised this authority to preempt state laws regulating local matters in numerous settings. To be sure, independent considerations of state sovereignty can constrain Congress's exercise of the commerce power. However, Sherman Act preemption of state-imposed restraints does not interfere with a state's organization or regulation of itself, officers, or employees and thus does not interfere with any cognizable aspect of state sovereignty protected by the Tenth Amendment, Eleventh Amendment, or inferred from the structure of the Constitution. Thus, preemption of state-imposed restraints like those challenged in Parker is a garden-variety exercise of Congress's commerce power.

To evaluate arguments in the second category, the article identifies three canons of statutory construction that could serve as vehicles for implementing concerns regarding federalism and state sovereignty: (1) the avoidance canon; (2) the federal-state balance canon, and (3) the anti-preemption canon. None of these canons, it is shown, supports Parker's state action doctrine. The article concludes that Sherman Act preemption of state-imposed restraints is so plainly constitutional that the avoidance canon is simply inapposite. The article then applies the federal-state balance and anti-preemption canons. Both canons protect traditional state regulatory spheres from inadvertent national intrusion, whether by regulation of local private conduct or preemption of state exercise of historic police powers. Far from bolstering the state action doctrine, the application of these two canons reveals that Parker's invocation of federalism and state sovereignty is selective, purporting to solve a problem that the Court itself created. Consistent application of these canons and the federalism principles that inform them actually strengthens the case for Sherman Act preemption, albeit within a much narrower sphere than the Sherman Act currently operates. The federal-state balance canon addresses statutory regulation of private conduct and thus does not speak directly to state action cases such as Parker, where a state itself displaced free competition. 18The canon could, however, apply to hybrid restraints, private agreements encouraged or enforced by the [\*123] state. Academic and judicial proponents of the state action doctrine have expressed concern about possible Sherman Act preemption of state and municipal regulation, including hybrid restraints, of local activities that produce no interstate harm. Such federal oversight, they say, would deprive state and local governments of their status as laboratories of democracy that try out novel solutions, such as hybrid restraints, to local problems. Application of the federal-state balance canon to prevent preemption of laws authorizing such restraints would apparently vindicate these concerns. However, such concerns have much wider application than Sherman Act treatment of state-imposed or state-encouraged restraints. If states are to be sovereign laboratories that experiment with novel solutions to economic problems, they must also retain discretion regarding how to regulate all private restraints - not just hybrid restraints - that produce no interstate harm. Indeed, principled application of the federal-state balance canon would have required the Court to reject the post- Wickard expansion of the Sherman Act to reach all private restraints that produce no interstate harm. The Court instead ignored this canon, vastly expanding the reach of the Act vis a vis private restraints the state has not authorized. This expansion raised the prospect of Sherman Act preemption of local regulation, including regulation authorizing hybrid restraints. Parker and its progeny thwarted such preemption, protecting - to this extent anyway - traditional state regulatory prerogatives. Consistent application of the federal-state balance canon offers a different and more principled solution, namely, restoration of the pre- Wickard boundary between state and federal power over trade restraints and retraction of the scope of the Sherman Act. Such revision of the boundaries between state and federal authority over such activity would nearly eliminate the potential clash between the Sherman Act and local regulation that purportedly induced Parker and its progeny to announce and maintain the state action doctrine. States would remain free to act as laboratories with respect to such restraints, unmolested by the Sherman Act. Restoration of the original federal-state balance in the antitrust context would not eliminate the prospect of Sherman Act preemption of state-imposed or state-encouraged restraints. States could authorize hybrid restraints that directly burden interstate commerce, thereby injuring out-of-state consumers. However, Sherman Act invalidation of such restraints would in fact protect the original federal-state balance, by interdicting the sort of direct burdens on interstate commerce preempted by the Court's pre- Wickard Commerce Clause jurisprudence. The anti-preemption canon fares no better as a justification for the state action doctrine. To be sure, this canon establishes a presumption against [\*124] applying federal statutes in a manner that supersedes the exercise of "historic police powers" over "an area traditionally regulated by the states." However, this canon would not protect the scheme in Parker itself. The scheme in no way exercised historic police powers but instead regulated a domain - interstate commerce - over which Congress traditionally possessed exclusive authority. California's regulation of the price of interstate raisin sales produced substantial interstate harm and thus would not have survived the doctrine of implied preemption in place when Congress enacted the Sherman Act. Preemption of the Parker scheme would have restored the traditional federal-state balance, by invalidating self-interested legislation that directly burdened interstate commerce and imposed substantial harm on out-of-state citizens. What, though, about Parker-like regulation that produces only intrastate harm? Sherman Act preemption of such restraints would certainly interfere with the exercise of historic police powers. Here again, however, application of the anti-preemption canon would solve a problem the Court itself created when it ignored the federal-state balance canon and applied the Sherman Act to private restraints that produced no interstate harm. As noted above, however, principled application of federalism concerns as reflected in the federal-state balance canon would preclude application of the Sherman Act to such restraints - public or private. Restoration of the Sherman Act to its original and more limited scope would eliminate the putative conflict between federal antitrust law and local regulation producing no interstate harm and thus obviate any need to apply the anti-preemption canon. Application of both federalism canons reveals that federalism in this context should be an all-or-nothing proposition. Consistent regard for federalism requires uniform treatment of private contracts "in restraint of trade" and state-imposed restraints that produce the same results. There are two possible forms of consistent treatment: (1) invalidation of all such local restraints, public or private, "across the board," or (2) reducing the scope of the Sherman Act, so that the Act only reaches those restraints - public or private - that produce interstate harm. Recognition that the Court's Sherman Act jurisprudence reflects inconsistent regard for federalism does not itself reveal which consistent approach the Court should take. The article ends by identifying several considerations suggesting that the Court should resolve the modern inconsistency in favor of federalism. Consistent reduction in the scope of the Sherman Act would produce a regime governing interstate commerce that best replicates the regulatory framework that the 1890 Congress - jealous to protect free competition from all threats - anticipated. Proponents of Parker [\*125] who see states as laboratories for economic experimentation should welcome such reform, which, ironically, would result in less preemption of state-created restraints than current law. Part I of this article reviews the content and scope of the Sherman Act during the pre- Wickard era, when the Supreme Court enforced meaningful limits on the scope of the commerce power and the Sherman Act. Part II describes the facts and holding of Parker as well as subsequent decisions elaborating on the scope of state action immunity. This part also details the considerations of federalism and state sovereignty that both the Court and academic proponents of Parker have invoked. Part III reviews the federalism-based objections to Sherman Act preemption that several scholars have raised. Part IV evaluates and rejects the constitutional arguments against such preemption. Part V evaluates and rejects claims that certain canons of statutory construction counsel in favor of Parker's state action immunity. This part concludes that Parker and its progeny rest on a selective respect for federalism and concludes that a principled Sherman Act jurisprudence would consistently enforce or ignore federalism considerations. Part VI briefly contends that the Court should resolve modern doctrinal inconsistency in favor of federalism and reform the scope of the Sherman Act accordingly.

I. The Commerce Power and the Sherman Act: 1890-Present

Passed in 1890, Section 1 of the Sherman Act forbids "contracts, combinations ... and conspiracyies in restraint of trade or commerce among the several States ..." 19Section 2 prohibits monopolization of any "part of the trade or commerce among the several States." 20Each Sherman Act controversy thus requires courts to resolve two questions. Under Section 1, courts must ask: (1) Is the challenged agreement "in restraint of trade" and (2) does the agreement also restrain "commerce among the several States." 21Under Section 2, courts must ask: (1) does the challenged conduct "monopolize" a relevant market and (2) is that monopolized market "part of the trade or commerce among the several States." 22 [\*126] The Sherman Act was an exercise of the commerce power, and Congress drafted the Act against the backdrop of a well-developed jurisprudence defining the scope and nature of that authority. 23While Congress rarely exercised this power before 1890, the Supreme Court had enforced what became known as the "dormant" Commerce Clause. 24The Court constructed a quasi-statutory framework that invalidated all state legislation that regulated "inherently national" subjects of interstate commerce, even absent Congressional action. 25These decisions inferred from Congressional silence that Congress intended that such subjects be "free and untrammeled" from state regulation. 26 State legislation "regulated" such commerce and thus exercised an exclusive power of Congress if it imposed a "direct burden" on such commerce. 27Impacts were "direct" if they imposed economic harm on citizens in other states, raising the prospect that state regulation would produce self-interested results. 28Legislation that impacted such commerce only "indirectly" exceeded the scope of the commerce power and thus survived this regime. 29The result was the allocation of regulatory authority into mutually exclusive spheres, enforced by a doctrine of implied preemption that invalidated state enactments exercising authority reserved for Congress. 30 [\*127] The Court's earliest Sherman Act decisions drew upon this jurisprudence to answer both questions necessary to resolve Sherman Act controversies. 31Agreements were "in restraint of trade" if they directly impacted commerce by producing supracompetitive prices. 32Such agreements only restrained "commerce among the several States" if these direct impacts injured out-of-state consumers. 33Indeed, in Addyston Pipe & Steel Co. v. United States, the Court opined that the Commerce Clause authorized Congress to regulate private agreements producing such direct effects because these restraints produced the same impact on interstate commerce as analogous state-imposed restraints deemed invalid under the Court's Commerce Clause precedents. 34 In 1911, the Court famously reformulated its interpretation of "restraint of trade," in Standard Oil v. United States. 35There the Court held that the Sherman Act only reaches agreements or conduct that restrain trade "unreasonably." 36Soon thereafter, the Court announced that this same standard governed Section 2 analysis. 37Although a different verbal formulation, this Rule of Reason, like the direct/indirect standard, focused on the propensity of a restraint or conduct to produce monopoly or the consequences of monopoly, namely, higher prices, reduced output, or inferior quality. 38However, the Court retained the direct/indirect standard for [\*128] answering the second question posed in Sherman Act controversies, that is, whether a contract in restraint of trade or monopolistic conduct also restrained "commerce among the several States" or monopolized any "part" of "trade or commerce among the several States." 39Thus, the Act reached only those unreasonable restraints or monopolistic conduct that also directly burdened interstate commerce by exercising market power to the detriment of out-of-state consumers. 40 By 1911, then, the Rule of Reason, combined with the direct/standard governing the Act's scope, protected "the free movement of trade ... in the channels of interstate commerce" 41or, as the Court soon put it, "free competition in interstate commerce," from private restraints. 42At the same time, the Court's quasi-statutory Commerce Clause jurisprudence invalidated state legislation that imposed "direct burdens" on interstate commerce. 43This coherent legal regime protected free interstate trade from threats posed by the self-interested public and private actors. 44Implementation of each regime required the Court to ask the same economic question when applying the direct/indirect standard, viz., did the challenged private conduct or legislation directly obstruct or burden interstate commerce. This regime left states and private parties free to adopt regulations or restraints that imposed [\*129] indirect burdens on such commerce, as such provisions posed no threat to out-of-state consumers. This unified competition-protecting regime survived into the 1930s, invalidating private and public direct burdens on interstate commerce. 45Indeed, the Court had no occasion to consider whether the Sherman Act preempted state legislation that directly burdened interstate commerce precisely because the Court's quasi-statutory Commerce Clause jurisprudence itself preempted such restraints, rendering any Sherman Act involvement superfluous. The Court adjusted application of the direct/indirect standard over time in light of changed facts that suggested the existence of interstate harm that prior Courts had not perceived. 46For instance, early decisions, such as United States v. E.C. Knight, held that the Sherman Act did not reach intrastate monopolies, even if such firms sold products across state lines. 47However, beginning with Standard Oil, the Court read the Act (and the commerce power) to reach activities that, while nominally local, "directly" affected interstate commerce by exercising market power to the detriment of out-of-state consumers, narrowing E.C. Knight accordingly. 48While the effective reach of the commerce power and the Sherman Act changed, the interstate harm principle that governed the boundary between state and national power - and the concomitant economic inquiry - remained fixed and unchanging. 49A robust regime of competitive federalism generated regulatory policy, including antitrust policy, governing economic activity that [\*130] produced no interstate harms and thus fell within the exclusive authority of states. This coherent regime and resulting allocation of regulatory power did not survive the 1940s. In Wickard v. Filburn, the Supreme Court famously jettisoned the direct/indirect test as the standard governing the scope of the commerce power, claiming that the standard was mechanical, formalistic and unduly restricted the authority of Congress. 50Instead, the Court said: the Commerce Clause empowered Congress to reach any activity that produced a "substantial economic effect" on interstate commerce, even if the effect was incidental or indirect. 51This novel standard empowered Congress to regulate conduct that produced no interstate harm and thus could not prompt legislation favoring a state's citizens over those of other states. 52 Wickard also implied that state and federal power over local activity was coextensive and thus not mutually exclusive, as the Court had previously maintained for several decades. 53 Wickard was not an antitrust case. However, before the decade was out, in Mandeville Island Farms v. American Crystal Sugar, the Court engrafted Wickard's substantial effects test onto the Sherman Act, overruling five decades of precedent. 54As a result, the Act reached any restraint of trade that induced a "substantial effect" on interstate commerce, even if the restraint's harms were confined to a single state. The Court has applied the Act to intrastate conspiracies between liquor wholesalers, 55a monopolistic scheme to prevent expansion of a single hospital, 56an agreement between lawyers setting title search fees in one county, 57and a trade association's conspiracy to restrict entry by subcontractors working on local building projects. 58 [\*131] Most recently, the Court affirmed the Federal Trade Commission's condemnation of an agreement excluding some individuals from the practice of teeth whitening in one state. 59The Commission had found that the challenged conduct substantially impacted interstate commerce because some affected firms purchased out-of-state equipment and supplies. 60Numerous other decisions have also involved restraints that produced harmless but fortuitous interstate effects. 61 Mandeville Island Farms read a novel principle into the Act, a principle that authorized application of the statute to restraints that threatened no interstate harm. While initially developed to govern private restraints, Mandeville Island Farms' substantial effects test created broad potential to interdict state-imposed restraints of local trade previously deemed beyond the commerce power. 62

II. Parker and its Progeny

Parker v. Brown evaluated the post- Wickard claim that the Sherman Act preempted anti-competitive state regulation. This part describes the facts and holding of Parker as well as subsequent decisions expanding the scope of state action immunity and elaborating upon its rationale. The part ends by detailing the considerations of federalism and state sovereignty that both the Court and academic proponents of Parker have invoked. A. Parker v. Brown Decided shortly after Wickard but before Mandeville Island Farms, Parker v. Brown considered a challenge to California's "Agricultural Prorate Act," as applied to the state's raisin industry. 63The Court properly described the Act as an effort to "restrict competition among growers and maintain prices in the distribution of their commodities to packers[.]" 64The statute empowered a State Agricultural Prorate Commission to propose to growers so-called "pro-rate marketing plans" limiting output and thus raising the prices of agricultural commodities. Proposals became law if 65 percent of growers owning 51 percent or more of acreage devoted to a particular crop voted to approve it. California farms produced 100 percent of the nation's raisin output, and imports accounted for one-sixth of one percent of national raisin consumption. 65Growers generally sold their output to local "packers," who packaged the raisins and sold 90-95 percent to out-of-state purchasers. 66In 1940, the Commission proposed and producers adopted a raisin pro-rate plan. The plan required the state's growers to deliver 70 percent of their output of "standard raisins" to a "program committee" which could only sell raisins at "prevailing market prices" or hold them off the market indefinitely. 67Growers were free to sell the remaining crop through "ordinary commercial channels" at whatever price they wished, albeit only after purchasing a "marketing certificate" authorizing such sales. 68The Act imposed civil penalties, fines and/or imprisonment for violation. 69Thus, the Act coercively replaced the pre-existing regime of free competition between private individuals with market outcomes determined by the State. A dissenting farmer who was both a grower and a packer challenged the program under the Commerce Clause and the Sherman Act. 70The plaintiff [\*133] sought to enjoin officials from enforcing the Act against him, thereby allowing him to continue setting whatever price and output maximized his profits in a free market. 71He argued that such equitable relief was necessary because the Act's "unusual, oppressive and unreasonable" criminal penalties deterred him from waiting to be prosecuted under state law before invoking the Commerce Clause and Sherman Act as "defensive tactics," i.e., as affirmative defenses. 72In short, the plaintiff invoked two possible sources of federal preemption: the Sherman Act and the Commerce Clause. 73 Writing before Wickard, a three-judge district court enjoined the Act. 74The court held that the Prorate Act, while regulating local activity, directly burdened interstate commerce and thus contravened the quasi-statutory regime of implied preemption derived from the Commerce Clause. 75The court invoked with approval various decisions implementing the pre- Wickard regime dividing authority over commercial subjects between states and the national government. 76Given the court's Commerce Clause holding, it did not address the Sherman Act. 77 California appealed to the Supreme Court, which, after oral argument, ordered re-argument and additional briefing, including from the United States [\*134] as Amicus Curiae, on the possible application of the Sherman Act. 78In a brief co-authored by antitrust hawk Thurmond Arnold, the United States argued that both the Sherman Act and the quasi-statutory regime derived from the Commerce Clause preempted California's scheme. The whole point of the Act, the government said, was to ensure that "competition, not combination, should be the law of trade." 79The "end sought," the government continued, was "the prevention of restraints of free competition in business and commercial transactions, which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers of goods or services." 80While the Sherman Act did not expressly refer to state enactments, the Court's precedents established that a federal statute preempted any state law "that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 81 Invoking pre- Wickard antitrust decisions applying the direct/indirect standard, the government contended that California's regulation of local activity, in fact, monopolized the national raisin market and thus increased ( i.e. regulated) the price of raisins sold in interstate commerce. 82There was "no doubt," the government said that "the plan involved in this case controls the market price," which increased thirty percent one year after the adoption of the scheme. 83It did not matter that the growers sold their output to California packers. 84Sherman Act precedent established that agreements to "restrain or control the supply ... entering and moving in interstate commerce" were "a "direct violation'" of the Act. 85Because the plan reduced output and increased the prices paid by packers, the scheme would "undoubtedly directly affect and restrain the supply and price of raisins in interstate commerce." 86The pro-rate plan was "inconsistent with the policy embodied in the Sherman Act" and thus preempted. 87 [\*135] The government's Commerce Clause argument echoed similar themes. "Inherently national subjects" of interstate commerce, the government said, were subject to exclusive congressional control. 88The Court's precedents "regarded as a matter of great consequence whether the burden of a statute fell primarily upon persons outside of the regulating state." 89"If anything was of national commercial importance," the government continued, "the supply and price level of a commodity moving in interstate commerce falls into that category." 90Moreover, the program plainly regulated that subject, granting to a state agency the power to "monopolize the entire national supply of raisins, determine the quantity to be shipped in interstate commerce, and to control the interstate price structure." 91The benefits of the scheme "accrued to California Producers," with the result that "the action of the state is not likely to be subjected to the normal political restraints upon legislation." 92The program did not merely govern a matter of local concern but instead "determined the quantity of raisins which may go to market - and the market is the national interstate market." 93Based on these and other considerations, the government concluded, "the California raisin program is unconstitutional." 94 A unanimous Court rejected both challenges. The Court properly assumed that the Sherman Act would condemn such a program if adopted and enforced solely by private agreement. 95While the scheme limited the output of "local" crops, the resulting harm fell almost entirely on out-of-state [\*136] citizens. These direct and predictable interstate harms justified application of the Act to nominally "local" conduct, even under pre- Wickard precedents. 96 Beginning with the Sherman Act, the Court conceded for the sake of argument that Congress could preempt state-imposed restraints like California's plan. 97In particular, the Court noted with approval several decisions holding that Congressional legislation had occupied a "legislative field" and thus "suspended" state laws. 98Suspension, of course, was synonymous with preemption, and such decisions exemplified what the Court now calls "field preemption." 99The Court did not mention decisions invoked by the United States recognizing "conflict preemption," which invalidated state laws creating obstacles to the accomplishment of federal objectives. 100 Still, the Court found that the Sherman Act did not "suspend" California's pro-rate plan. The plan was not, the Court said, a private agreement but "derived its authority and its efficacy from the legislative command of the state, and was not intended to operate or become effective without that command." 101Neither the Act's language nor its legislative history, the Court said, evinced any purpose "to restrain a state or its officers or agents from activities directed by its legislature." 102 [\*137] The Court expressly invoked federalism considerations to support this conclusion, contending that the Constitution's division of sovereignty between national and state governments counseled against application of the Sherman Act to such restraints: In a dual system of government in which, under the Constitution, the states are sovereign save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. 103 The statute's legislative history contained no indication that the Act would apply to such state action, the Court said, and the main sponsor of the bill, Senator Sherman, had asserted that it "prevented only "business combinations.'" 104 Having rejected the Sherman Act challenge, the Court went on to reverse the lower court's Commerce Clause holding that invalidated the scheme. 105The Court conceded that California's regulation of "matters of local concern" was "so related to interstate commerce that it also operated as a regulation of that commerce," that is, the interstate sale of raisins. 106Under pre-1890 (and pre- Wickard) case law, this conclusion that a state was regulating the price of interstate transactions or transportation sufficed to invalidate the scheme. 107However, Congress had not, the Court said, exercised its commerce power (given the Court's Sherman Act holding!), with the result that the Court [\*138] should "reconcile[]" Congressional and state power. 108Such "reconciliation," the Court said, required "the accommodation of competing demands of state and national interests involved." 109 Analogizing to Wickard, the Court rejected the direct/indirect standard for assessing the validity of the restraints, signaling that even direct restraints of interstate commerce could survive Commerce Clause scrutiny. 110The inquiry was not, the Court said, whether the restraint was "direct," (as it assuredly was), but instead whether "the matter is one which may appropriately be regulated in the interest of safety, health and well-being of local communities and, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress." 111Because of the activity's "local character," the Court said, there might be a "wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce." 112The Court did not explain why the impact of California's self-interested control over the nation's entire raisin supply was "immaterial." 113Nor did it mention various decisions invalidating state regulation of the price and output of products subsequently sold across state lines because they "directly impacted" such commerce. 114 The Court confined its Sherman Act holding to state-imposed restraints on market actors. Such restraints coercively restricted the rights of individuals to engage in the sort of free competition the Sherman Act [\*139] ensures. 115By contrast, the Court said, a state could not "give immunity to those [private parties] who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 116Nor, Parker said, could a state participate in otherwise unlawful agreements or combinations with private parties. 117The Court thereby conceded that the Act would preempt some state laws, presumably because such state endorsed conduct or conduct of the state itself would nonetheless conflict with federal law. 118 Thus was born antitrust's "state action doctrine," whereby state-imposed restraints of interstate commerce are "immune" from the Sherman Act, regardless of their economic effects. 119 Parker has remained good law without question for more than seven decades, despite the Court's flexible approach to stare decisis in the antitrust context. 120 B. Parker 's Progeny: Hybrid and Municipal Restraints While Parker purported only to immunize restraints imposed by "a state or its officers or agents," subsequent decisions expanded the doctrine. These cases protected restraints that private parties adopted pursuant to otherwise valid state regulatory programs, reasoning that the threat of private antitrust liability would deter parties from participating in such schemes. 121Indeed, [\*140] some such regimes require all parties in a particular industry to adhere to prices set by a subset of the industry's firms. 122For instance, a statute might require liquor dealers to set retail prices equal to wholesale prices plus a specified mark up. 123Some scholars have dubbed such agreements "hybrid restraints," whereby "the government empowers private firms to make choices, or to exercise discretion, as to the nature or level of consumer injury." 124Such restraints "cede[] to private actors "a degree of private regulatory power' that results in a restraint of trade" 125States can immunize such private restraints from the Sherman Act, and thus escape preemption, if: (1) the legislature clearly articulates a policy to restrict competition and (2) the state "actively supervises" the outcomes ( e.g. price and output) of resulting restraints. 126The liquor regulation just described would satisfy the first part of this test because the state has expressly supplanted competition. Thus, the scheme's validity would depend upon how closely the state scrutinized resulting prices. 127 Such "hybrid" restraints are a small subset of the universe of unreasonable private restraints. Indeed, states' own antitrust laws generally ban unreasonable private restraints. 128When it comes to private restraints, hybrid restraints are the exception and not the rule. [\*141] The Court has applied a similar regime to restraints imposed by municipalities, holding that such entities do not possess the sovereignty possessed by states. 129Restraints imposed by municipalities are fully subject to the Sherman Act, unless the state has clearly articulated a policy displacing competition. 130There is, however, no "active supervision" requirement for such restraints. 131 Thus, Parker and its progeny recognize three distinct types of state-created restraints that thwart free competition but may still escape Sherman Act preemption. First, there are cases like Parker itself, where states coercively displace free competition, expressly setting price or output. Such restraints are without exception immune from the Act, and thus escape preemption. Second, there are hybrid restraints, where the state authorizes or compels private actors to engage in anticompetitive behavior. 132These restraints are immune from the Act if the state satisfies the elements of clear articulation and active supervision. Third there are those cases where a municipality coercively displaces free competition. 133Such restraints are immune if the state satisfies the "clear articulation" requirement. 134 Failure to establish the prerequisites of state action immunity for hybrid or municipal restraints results in two legal consequences: (1) Sherman Act liability for private parties who comply with such restraints and (2) preemption of state or local enactments that authorize or compel such agreements. 135It will be useful to distinguish between these categories of [\*142] state action immunity when evaluating the arguments against preemption of state interference with free competition.

C. The Federalism and State Sovereignty Rationales for the State Action Doctrine

The Court has repeatedly reiterated the federalism and state sovereignty rationales for Parker and its progeny , invoking Parker's reference to our "dual system." 136If anything the Court has increased the emphasis on these rationales for the doctrine; modern decisions identify no other normative justification. It is no surprise that jurists supportive of these values in other contexts have invoked such considerations. 137However, jurists hostile to such values in other contexts have also endorsed Parker and its progeny on identical grounds. 138

Numerous scholars have endorsed Parker's understanding of the Sherman Act. 139

[Footnote 139] See, e.g., William H. Page & John E. Lopatka , Parker v. Brown, the Eleventh Amendment, and Anticompetitive State Regulation, 60 WM. L. REV . 1465, 1472 (2019); James R. Saywell, The Six Sides of Federalism in North Carolina Board of Dental Examiners v. FTC, 76 OHIO ST. L. J. FURTHERMORE 1, 4-9 (2015); Jean Wegman Burns, Embracing Both Faces of Antitrust Federalism: Parker and ARC America Corp., 68 ANTITRUST L. J. 29, 38 (2000); Merrick B. Garland, Antitrust and State Action: Economic Efficiency and the Political Process, 96 YALE L. J. 486 (1987); William H. Page, Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption, 61 B.U.L. Rev. 1099, 1101 (1981); Handler, supra note 118, at 19-20; Paul R. Verkuil, State Action, Due Process and Antitrust: Reflections on Parker v. Brown, 75 COLUM. L. REV. 328 (1975).

These scholars echo Parker's invocation of the nation's "dual system" [\*143] and contend that Sherman Act preemption of state-created restraints would trench unduly upon what they characterize as "constitutional" values of state sovereignty and federalism. 140

[Footnote 140] See Page & Lopatka , supra note 139, at 1468-69; Saywell, supra note 139, at 4-9; Burns, supra note 139, at 38-39 (invoking Supreme Court decisions recognizing the "fundamental dual-government structure of the Federal Constitution" to justify Parker); id. (contending that the "dual structure of the federal Constitution ... "requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation [sic].'") (quoting Alden v. Maine, 527 U.S. 706, 709 (1999)); id. at 38 ("When applied to antitrust, these [recent federalism] rulings make crystal clear that, as a practical matter, antitrust federalism is here to stay. Even if Congress tried to override or limit the Parker shield, such an attempt likely would fail."); Page, supra note 139, at 1102-1107 (describing and endorsing "constitutional basis of the Parker doctrine"); id. at 1128-30 (contending that "active supervision" requirement for hybrid restraints contravenes Parker's constitutional foundation); James F. Blumstein & Terry Calvani, State Action as a Shield and a Sword in a Medical Services Antitrust Context: Parker v. Brown in Constitutional Perspective, 1978 DUKE L. J. 389, 419-24 n.193 (grounding state action doctrine in Tenth Amendment case law); Mark L. Davidson & Robert D. Butters, Parker and Usery: Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action, 31 VAND. L. REV. 575, 597-604 (1978) (same); Handler , supra note 118, at 7 n.35 (contending that preemption of state-imposed restraints would "breach[] the basic tenets of the federalism upon which rests our constitutional form of government."); id. at 15 (contending that Sherman Act scrutiny of such restraints "is plainly at war with the fundamental principles of American federalism"); see also Brief Amicus Curiae for the Am. Dental Ass'n, N.C. Bd. of Dental Exam'rs v. FTC, 574 U.S. 494 (2015) (No. 13-534) (criticizing preemption of state's anticompetitive regulation as "trampling upon the sovereignty of the states in our federal system"); Allensworth , supra note 62, at 1402-04 (discussing academic literature contending that Parker rests on constitutional limits on Congress's authority to override state regulation).

Several have also elaborated upon Parker's rationale, contending that the Constitution contemplates that states should be entitled to "regulate their own economies." 141

Several such scholars argue that post- Wickard expansion of the Act to reach local restraints producing no interstate harm bolsters the case for immunity. 142Reversal of Parker, they say , would ensure federal antitrust [\*144] scrutiny of innumerable garden-variety police power regulations, many governing purely local subjects, because such regulations restrain activity with fortuitous but substantial impacts on interstate commerce. 143Federal judicial scrutiny of local regulation would, it is said, replicate the supervision of state economic regulation under the Due Process Clause during the Lochner era. 144These fears have a strong empirical basis. Aside from Parker itself, every Supreme Court decision applying the state action doctrine has involved regulation of local activity that produced only intrastate harm. 145

According to several proponents of Parker, a well-functioning federal system requires states to serve as laboratories of democracy that experiment with various approaches to local economic problems. 146

[Footnote 146] See Saywell, supra note 139, at 7-8 (invoking laboratory metaphor to contend for relaxed definition of active supervision and broader Parker immunity); Burns, supra note 139, at 44 (contending that antitrust federalism, including Parker, protects the existence of "fifty state laboratories, in which ideas can be implemented and tested."); Handler, supra note 118, at 5-6 & n.26 ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.") (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)) ; see also Note, supra note 144, at 2561-62 (arguing that respect for states' role as laboratories militates in favor of respecting diverse state antitrust regimes).

The modern theory [\*145] of competitive federalism predicts that, under certain conditions, rivalry between such sovereigns can produce optimal legislation. 147Preemption, by contrast, would displace these laboratories as sources of novel economic policies responsive to local needs.

Indeed, some have argued that, properly understood, federalism and state sovereignty require more robust immunity from Sherman Act preemption. Some, for instance, have criticized the requirement that states "actively supervise" private parties' implementation of anticompetitive agreements. 148

[Footnote 148] See Saywell, supra note 139, at 6 ("The federal government must respect [state] sovereignty - not redefine it by requiring active supervision of a state's own agencies."); Page, supra note 139, at passim (criticizing this requirement as inconsistent with federalism); Handler, supra note 118, at 9 n.45 and 18 (criticizing proposals that would condition immunity on sufficient "state supervision").

Others contend that restraints imposed by municipalities should enjoy absolute immunity. 149These scholars contend that states should remain free to allocate authority between their respective subdivisions as they see fit, without satisfying procedural requirements imposed under the aegis of the Sherman Act. 150If Parker rests on respect for "federalism and state sovereignty," they say, the Court should respect the otherwise constitutional process that states employ to authorize localities and private parties to impose anticompetitive restraints. 151These arguments would immunize any restraint on competition that a state or its subdivision authorizes under a state's own [\*146] constitutional processes and shield such authorization from Sherman Act preemption. 152

Parker's proponents recognize that anticompetitive state legislation may sometimes impose economic harm on other states. 153Some contend that dormant Commerce Clause jurisprudence will interdict such enactments, obviating any need for Sherman Act intervention, while leaving states free to regulate local activity nominally within the scope of the Act. 154Any succor from the Commerce Clause appears illusory, however. Parker itself rejected the plaintiff's dormant Commerce Clause challenge, even though nearly all the harm produced by the challenged program fell on out-of-state consumers. 155None of these scholars has questioned that holding or identified any decision invalidating Parker-type restraints. Given Parker's deferential Commerce Clause review of state-imposed restraints, the Sherman Act is the only plausible source of preemption. 156Thus, these scholars effectively contend that each state's internal democratic processes should constitute the sole remedy for such wealth-destroying regulation, even when out-of-state voters bear most of the resulting harm. 157

[Footnote 157] See, e.g., Saywell , supra note 139, at 7-8 (contending that Sherman Act preemption of squelches local experimentation and innovation a deprives states of their position as laboratories); Page, supra note 139, at 1107 ("Deference to considered state economic choices thus constitutes the touchstone of the Parker doctrine. This approach draws doctrinal support from the Madisonian model of representative government and dictates judicial restraint as long as the "process of representation' affords interested parties an opportunity to influence the formulation of policy."); Handler, supra note 118, at 19 ("There are democratic processes by which unwarranted laxity of the states can be rectified."); id. at 20 ("I would not substitute preemption for substantive due process to achieve a federal censorship of state legislation; I would turn to the states as the forum for the correction of the mischief[.]").

III. Federalism-Based Objections to Sherman Act Preemption

As the United States explained in its Parker brief, state-imposed restraints of interstate commerce pose obstacles to achieving the central policy of the Sherman Act, namely, reliance upon free competition to allocate the nation's economic resources. 158To be sure, California's scheme imposed significant economic harm on out-of-state citizens, unlike nearly all other state-created restraints. 159However, Mandeville Island Farms expanded the object of the Act to include protecting free competition from local restraints producing no interstate harm. Straight-forward application of the Court's preemption doctrine would thus seem to establish that the Sherman Act preempts all state-created unreasonable restraints - regardless of interstate harm - that produce a substantial effect on interstate commerce, because they pose obstacles to achieving this objective. 160

However, some scholars and the Court contend that principles of constitutional federalism and state sovereignty bolster if not require Parker's rejection of Sherman Act preemption. 161Invocation of "federalism," or "state sovereignty," does not resolve concrete cases. Presumably such considerations must manifest themselves within some doctrinal frameworks, and not as a judicial talking point. The Sherman Act, after all, is a statute, and only the Constitution can restrict its reach.

Still, despite repeated claims that considerations of federalism and state sovereignty justify Parker's state action doctrine, neither the Court nor most of Parker's academic proponents have specified the nature of their federalism or state sovereignty concerns with doctrinal precision. 162

[Footnote 162] See, e.g., Handler, supra note 118, at passim (endorsing Parker without identifying any constitutional doctrine militating against preemption); id. at 7 n.35 (contending that preemption of state economic regulation would "breach[] basic tenets of federalism upon which rests our constitutional form of government is based.").

At best, some proponents have invoked the Tenth and Eleventh Amendments as possible [\*148] sources of such immunity, usually without elaboration. 163

[Footnote 163] See, e.g., Page & Lopatka , supra note 139, at 1468 (the Court has derived the Parker doctrine "from the principle of sovereign immunity"); Burns, supra note 139, at 38 (invoking Supreme Court's then-recent Eleventh Amendment jurisprudence as supporting Parker); Page, supra note 139, at 1105 n.36 (suggesting that Parker could be interpreted as resting upon "the eleventh amendment or, perhaps, ... the tenth amendment."); Davidson & Butters, supra note 140, at 597-604 (contending that Tenth Amendment case law justifies Parker's state action doctrine).

As a result, academic evaluation of the supposed federalism and state sovereignty rationales for Parker's rejection of preemption requires identification of possible doctrinal bases for such concerns, one or more of which could help justify Parker and its progeny.

Such concerns could manifest themselves in two broad categories. First, federal preemption of state-imposed restraints could be outright unconstitutional. 164

[Footnote 164] See Burns, supra note 139, at 38 (asserting that the Tenth and Eleventh amendments prevent Congress from expressly preempting local state legislation otherwise subject to the commerce power); Davidson & Butters, supra note 140, at 597-604.

Second, preemption of such restraints could contradict one or more canons of construction that courts employ to discern the original meaning of ambiguous texts. The remainder of this article will identify and then evaluate the possible arguments in these two categories that may conceivably militate against Sherman Act preemption of state-imposed restraints. As will be seen, evaluation of arguments in the first category will help inform evaluation of arguments that one or more canons of statutory construction justify Parker's interpretation of the Sherman Act.

**Biden’s XO empirically denies any FTC Parker links and more restrictions coming**

**Bulusu 21** [Siri Bulusu, Reporter Bloomberg Law, 7-12-2021 https://news.bloomberglaw.com/antitrust/worker-license-rules-emerge-as-ftc-competition-oversight-priority]

President Joe Biden’s order, signed Friday, calls on the **F**ederal **T**rade **C**ommission to boost labor market competition by **writing new rules** that limit “unnecessary, cumbersome” licensing requirements, often imposed by states’ regulatory boards and quasi-public organizations.

“Some overly restrictive occupational licensing requirements can impede workers’ ability to find jobs and to move between states,” according to the order. The order comes amid a flurry of lawsuits against state or state-backed licensing bodies that accuse them of violating antitrust law by imposing expensive fees or threatening to shut down out-of-state businesses. The text of the order didn’t include specific directions for federal antitrust agencies. But the FTC’s anticipated actions and possible rulemaking could lead to streamlined licensing requirements across states, eliminating demands for worker information unrelated to the job, enforcement of interstate commerce rules, and levying of punitive fines, market watchers say. Licenses are expensive and requirements vary among states, even in the same industry. Reining in the requirements could remove a significant employment barrier, particularly for military families and others who frequently move between states or offer services across state lines. But it also could shift states’ calculations in cracking down on frauds and impostors. Cosmetology licenses can cost up to $15,000 and sometimes years of study, said Dick Carpenter, a senior director of strategic research for the Institute for Justice. Other jobs, ranging from public health and safety positions to interior designers, barbers, and manicurists, also require licensing. “Without any kind of standardization of different licensing requirements—even if you have the same requirements in different jurisdictions—you still have to get a license for each jurisdiction, which impedes an employee’s ability to be mobile,” said Tracey Diamond, a partner at Troutman Pepper LLP’s labor and employment practice.

Potential FTC Moves

The FTC’s options include **writing new rules** or **heightening enforcement** of interstate commerce rules in areas where they overlap with antitrust violations, labor market watchers say. Under this principle, restricting labor through onerous licensing requirements would be tantamount to limiting movement of services across borders.

“In the past, occupational licensing was a matter overseen by the Department of Labor, but they don’t quite have the teeth that the Federal Trade Commission has in terms of working in specific locations,” said Morris Kleiner, a University of Minnesota professor of labor policy.

The FTC could turn its limited resources toward scrutinizing occupational licensing programs that narrow the practice scope of a certain profession and limit competition, Kleiner said.

How the commission interprets which licensing requirements are “unnecessary” could be scrutinized. Those could include common requirements such as citizenship and a clean criminal record, said Bobby Chung, a postdoctoral research associate at the University of Illinois at Urbana-Champaign who focuses on licensing. .

“The required training, education and exams should confer the relevant skill sets,” Chung said. “If not, I would regard those requirements as unnecessary.” The agency also may impose specific guidelines that limit fees or frequency of license renewal, Kleiner said. “But more importantly, the FTC’s guidelines could be aimed specifically at states that have ratcheted up their requirements,” he said.

Gaining Attention

Burdensome licensing requirements have increasingly come under federal scrutiny as the labor market has shifted away from manufacturing jobs to service-oriented professions. States began imposing licensing requirements in order to protect consumers from bad actors and standardize services. “Licenses create a monopoly of workers who can provide a service,” Kleiner said. “But if you provide those services without a license, the police powers of the state can arrest and severely fine those individuals.” In 2020, roughly 23% of workers were required to have a license, according to the Bureau of Labor Statistics. Over the years, many states, including Arizona, Connecticut, Nebraska, and Tennessee, have modified their rules to lower what they considered to be burdensome barriers to obtaining licenses. Biden’s move is part of states’ broader push for changes, Carpenter said. “There is a momentum building to raise awareness to the issue.” Advocates for change also cite underemployment and unemployment stemming from the burdensome licensing requirements, as well as allegations that certain industries create occupational licensing to limit competition. Immigrants also can be affected by the licensing requirements, particularly if they hold foreign degrees but are performing lesser-skilled jobs in the U.S., according to a 2017 study by the Migration Policy Institute. Licensing particularly hurts foreign nationals with temporary work visas whose immigration status impedes them from seeking a license to work within their specialty, Chung said. That in turn impedes their path to permanent residency or citizenship, he said.

State Action

The FTC has struggled to rein in licensing practices with antitrust violations partly because public entities, like state-controlled licensing boards, can claim **state action immunity**. Such immunity authorizes a state to carry out certain legitimate government functions, often in regulated industries that require licensing.

“Many of these state certifications don’t violate antitrust law and that’s because of this doctrine that displaces antitrust law,” said Jesse Markham, a partner at Baker & Miller PLLC’s San Francisco office. “And that’s why these certification requirements exist with impunity.”

In 2015, the Supreme Court ruled in **N**orth **C**arolina State Board of Dental Examiners v. FTC that the state board was operated by market participants. Without active supervision from the state, the board couldn’t claim state action immunity from federal antitrust actions.

The ruling unleashed **“dozens of lawsuits"**—seeking antitrust treble damages—against individual members of licensing boards, according an October 2020 statement from Reps. Mike Conaway (R-Texas), Jamie Raskin (D-Md.), and David Cicilline (D-R.I.) in support of a bill they introduced to shield board members from such suits.

Qualifying for state action immunity largely depends on whether a board is a true government actor or a private market participant. But this delineation becomes more complex if there’s a **blurred line** between a state agency handling its own actions or a private group acting under state guidance.

How the **FTC** handles that **blurred line** will be one issue the agency tackles as it implements the president’s order.

#### Enforcement high now and thumps links

Ingrassia 1-4 [John Ingrassia, Proskauer Rose LLP, 1-4-2022 https://www.law360.com/articles/1452119/how-to-navigate-the-coming-antitrust-policy-tests]

2021 will be remembered in antitrust law. Not since the 1970s has there been so much chatter over the fundamental purposes of antitrust policy, or such potential for actual sea change.

Half a century ago, Robert Bork and the Chicago School argued that antitrust law had lost its way and should focus on consumer welfare. Bork's view was that antitrust enforcement was getting in the way of legitimate competition, and the U.S. Supreme Court was quick to embrace the consumer welfare standard.

Now, Federal Trade Commission Chair Lina Khan and the new Brandeisians argue that antitrust law has again lost its way and must shed the constraints of the consumer welfare standard.

Khan's view is that consolidation has gone unchecked in the American economy, resulting in structural harms to competition that the consumer welfare standard is unable to address.

She believes the agency has historically defined markets too narrowly to effectively police broader economic impacts of sustained consolidation, and favored gerrymandered remedies over outright challenges.

Khan has imposed sweeping changes aimed at chilling merger activity and shaping the future of merger enforcement. Against dissents from Republican Commissioners Christine Wilson and Noah Phillips, and charge of going rogue from the U.S. Chamber of Commerce, the FTC stripped away long-standing exemptions and interpretations that streamlined merger review.

The action came in response to an unprecedented merger wave — 3,845 acquisitions filed with the agencies in the first 11 months of 2021, substantially more than most full years.

The changes are having an impact, making investigations more intrusive, lengthy and less predictable. Still, policy precedes practice, and while the FTC has been heavy on policy, it has yet to test those policies in the courts.

The tests may come in the next year. Meanwhile, we can also expect the FTC and the U.S. Department of Justice under Assistant Attorney General Jonathan Kanter's leadership, to not only continue the trajectory of policy changes but also begin the task of entrenching them in agency practice.

Here, we review the year in FTC policy moves, what they mean and how to navigate the newly laid minefields.

Warning Letters After the Close of HSR Waiting Periods

In an unprecedented move, the FTC recently began issuing letters to parties in transactions the agency may intend to investigate after expiration of the Hart-Scott-Rodino Act waiting period. According to the agency in an Aug. 3, 2021, blog, this is the result of "a tidal wave of merger filings that is straining the agency's capacity to rigorously investigate deals ahead of the statutory deadlines." Wilson, however, said on Twitter on Aug. 12, 2021, that she was "gravely concerned that the carefully crafted HSR framework is suffering a death by a thousand cuts," following her Aug. 9 statement that said "For the HSR Act to retain meaning, it cannot be that the FTC will keep merger investigations open indefinitely, as a matter of routine, every time there is a surge in filings." The FTC's jurisdiction to review transactions is independent of the HSR reporting requirements, with the power to investigate any transaction before or after closing, whether subject to reporting or not, and whether the HSR waiting period has expired or not. There are examples of the agencies reviewing nonreportable transactions, and even investigating reportable transactions after expiration of the HSR waiting period, though they are rare. The warning letters do not assert new authority not already existing under law, but notifying parties that an investigation may remain open post-HSR clearance implicates finality and certainty of investigations, but not every transaction gets a warning letter. Those with no issues go through unscathed. Those with clear issues are investigated. The deals that might pose some issues, but not enough to draw an investigation, might trigger the newly minted warning letter. To show the letters have teeth, the FTC will sooner or later have to challenge a deal post-HSR waiting period, putting it to the test before courts, where it is likely to face hurdles to the extent the deal did not warrant a full investigation in the first instance. Still, the practice is ushering a change in how provisions are drafted in deal documents. A buyer asserting that it is not required to close over the — arguably — still-pending investigation may face an uphill battle depending on how the closing conditions are drafted, for they typically point to the expiration of applicable waiting periods and not the absence of potential ongoing investigations or issuance of warning letters. So careful buyers seek closing requirements that no investigations are threatened and that no warning letters have been issued. Recent examples include the 3D Systems Corp.'s agreement to acquire Oqton Inc. and Universal Corp.'s agreement to buy Shank's Extracts Inc. The parties' agreements provided that if a warning letter is issued, the investigation would be treated as closed 30 days after receipt of such letter. Buyers may want to consider similar provisions until more emerges on how the FTC will proceed with warning letter transactions.

More Intensive Merger Investigations

The FTC announced plans on Aug. 3, 2021, to make the second request process both "more streamlined and more rigorous." The changes include the following: Merger investigations will address additional potentially impacted competition, such as labor markets, cross-market effects, and the impact on incentives of investment firms. Modifications to second requests will be more limited. The agency will require parties to provide more information relating to their use of e- discovery in responding to the investigation. Additional information will be required with respect to privilege claims. The FTC said these changes are in recognition that "an unduly narrow approach to merger review may have created blind spots and enabled unlawful consolidation." Possibly in response to such steeped up investigative techniques and resistance to find common ground with merger parties, Sportsman's Warehouse Holdings Inc. and Great Outdoors Group LLC abandoned their proposed merger at the end of 2021, citing indications that the FTC would be unlikely to approve the outdoor sporting goods transaction. The changes, though, do little to streamline the second request process. They make it more complex, burdensome and time-consuming. Perhaps most notable is the use of the process to delve into labor markets. Republicans Wilson and Phillips argued that FTC leadership may have themselves to blame for the merger review crunch, saying in a Nov. 8, 2021 statement: If the agency is lowering thresholds of concern and broadening theories of harm, this certainly would explain why the FTC is unable to conduct merger reviews in a timely manner while our sister agency remains capable of addressing the same increased filing volumes within statutory timeframes.

More Onerous Consent Decree Provisions

Where merger parties settle a challenge rather than litigate, the consent decree process sets out the parties' obligations. Historically, such consent decrees, among other things, required parties to notify the agency prior to certain future acquisitions. The FTC rescinded this long-standing policy, noting that it: Returns now to its prior practice of routinely requiring merging parties subject to a Commission order to obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged. The agency will also require divestiture buyers to agree to prior approval for any future sale of the assets they acquire. Khan explained the move was to avoid "drain[ing] the already strapped resources of the Commission" on "repeat offenders." The FTC included the new provision in its Oct. 25, 2021, consent decree settling a proposed transaction by DaVita Inc., a dialysis service provider. DaVita is now required to receive prior approval from the FTC of 10 years before any new acquisitions, a dialysis clinic business in Utah being in question. This is a significant change and will chill not only settlements with the FTC, but also M&A transactions at the outset where such provisions are commercially untenable. Wilson and Phillips noted in dissent that "a prior approval requirement imposes significant obligations on merging parties and innocent divestiture buyers." The FTC clearly aims to chill M&A activity, and merger agreements that provide more optionality to abandon deals will become more common, though parties intent on pushing their deal through may see a consent decree with 10-year approval provisions as less palatable than litigating, and force the FTC to cave or go to court.

Withdrawal of the Vertical Merger Guidelines

In another party-line vote, the FTC withdrew the vertical merger guidelines, which were issued just last year. Democratic commissioners criticized the guidelines as based on "unsound economic theories that are unsupported by the law or market realities," and reflecting a "flawed discussion of the purported procompetitive benefits (i.e., efficiencies) of vertical mergers." Vertical transactions are between firms at different levels in the supply chain. Historically, antitrust enforcement of exceptional vertical mergers were rare and difficult given the previously presumed efficiencies. Vertical mergers can eliminate double marginalization, in which firms at each level mark up prices above marginal cost. Elimination of one markup results in lower prices and can be pro-competitive. Khan, however, argues the guidelines' "reliance on [elimination of double marginalization] is theoretically and factually misplaced." Going forward, "the FTC will analyze mergers in accordance with its statutory mandate, which does not presume efficiencies for any category of mergers." This too drew a strong rebuke from the Republican commissioners, who said "The FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them." The commission's challenges to chipmaker Nvidia Corp.'s $40 billion acquisition of U.K. chip design provider Arm Ltd. alleged the transaction would combine one of the largest chip producers with a firm that has essential design technology — critical inputs. In a Dec. 2, 2021, statement, the FTC said the acquisition "would distort Arm's incentives in chip markets and allow the combined firm to unfairly undermine Nvidia's rivals." The FTC's lawsuit should "send a strong signal that we will act aggressively to protect our critical infrastructure markets from illegal vertical mergers that have far-reaching and damaging effects on future innovations," FTC Bureau of Competition Director Holly Vedova said in the statement. Given that vertical mergers will be closely scrutinized as a matter of course, parties need to consider concerns the FTC may identify and prepare strong counters — other than elimination of double marginalization. For example, parties could argue that the transaction expands access to products and expands consumer choice. Parties willing to go the distance with a vertical merger should also remain mindful that the guidelines have never been cited or relied on by a court, and it is the established jurisprudence on vertical transactions that will carry the day.

Rescinding the Consumer Welfare Standard

In July 2021, the FTC rescinded its policy interpreting its statutory mandate to root out "unfair methods of competition" as coterminous with promoting consumer welfare under the Sherman and Clayton Acts. In a July 19, 2021, statement, the FTC called the rescinded policy was "bind[ing] the FTC to liability standards created by generalist judges in private treble-damages actions under the Sherman Act." Still, the consumer welfare standard has been entrenched in antitrust jurisprudence for decades, and the FTC cannot change that. The immediate impact is thus more likely to be seen in administrative actions in the FTC's own court. In a dissenting statement, Republican commissioners countered that FTC leadership does not propose a replacement standard and "that efforts to distance Section 5 from the consumer welfare standard are a recipe for bad policy and adverse court decisions," adding that, "unlike those in academia, the FTC will have to defend its interpretation of Section 5 in court, where it should expect a hostile reception if it cannot offer clear limiting principles."

Labor Market Scrutiny

Government investigations and private litigation relating to no-poach and wage-fixing agreements are ballooning, and criminal indictments are now a reality. Encouraged by President Joe Biden's executive order on competition, the FTC and the DOJ have doubled down on investigating labor markets. Merger investigations now routinely include requests for employee compensation data, inquiries regarding noncompete and nonsolicit agreements, and are more likely to delve into both the merger's effects on labor, and the parties' prior labor practices. The DOJ's challenge to Penguin Random House LLC's proposed acquisition of Simon & Schuster Inc. focuses on harm to the labor market — for authors. In his first public comments, the DOJ's Kanter said: We will fight for American workers including in connection with illegal mergers that substantially lessen competition for laborers. Going forward, you can expect efforts like these not only to continue but to increase. Khan echoed the sentiment, saying: Competition and conduct can hurt us not just as consumers who buy products from a shrinking number of large firms, but also as workers who are especially vulnerable and subject to the whims of a boss we can't equally or practically escape. Antitrust compliance policies now must extend to addressing practices with respect to employee recruiting and compensation. Antitrust compliance training must extend beyond the sales team, and include HR. Businesses are reviewing and revising their compliance policies, and beginning new antitrust training programs to ensure that they are not subjected to claims of depressed wages and barriers to worker mobility.

Looking Ahead to the Year to Come

The year 2021 has been like no other for antitrust enforcement. While the FTC's various policy pronouncements are clearly intended to chill merger activity, it does not appear to have had the intended outcome.

HSR filings continue at off-the-charts levels. Amid this strong showing of M&A activity, the advice is to keep moving transactions forward, stay ahead of the new tacks the agencies might take, and account for newly injected risk and uncertainty.

Looking ahead, expect another energetic year. So far, the FTC's policy changes have not seemed to slow the pace of merger activity, but the frenzy cannot last forever. Nonetheless, merging parties are now going into the merger review process with eyes open, knowing it is likely to be more intense and uncertain. Parties to vertical transactions will no longer ride easy on double marginalization theories, and parties will be handing over their HR and payroll files.

At the same time, the heavy resistance to these changes will continue, if not strengthen, and will play out not just in courts and the halls of Congress, but will also spill into the political mainstream.

The U.S. Chamber of Commerce is planning to spend hundreds of thousands of dollars on an ad campaign across 10 states denouncing what it calls the FTC's overstepping of regulatory authority.

**Only federal legal remedies solve – failure to explicitly narrow Parker over-immunizes private entities and chills state action**

**Weber 16** [Jayme Weber, University of Arizona, James E. Rogers College of Law, J.D., 2016 https://www.cato.org/sites/cato.org/files/pubs/pdf/teladoc-285th-cir-29.pdf]

III. REFUSING SELF-INTERESTED BOARDS IMMUNITY FROM ANTITRUST LIABILITY IS FULLY CONSISTENT WITH FEDERALISM

“Federal antitrust law . . . is ‘as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.’” Dental Exam’rs, 135 S. Ct. at 1109 (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972)). Every business, regardless of its size, is guaranteed the freedom “to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.” Topco, 405 U.S. at 610. Antitrust laws—particularly the Sherman Act—are “the Magna Carta of free enterprise,” and play a crucial role in upholding the national policy of economic freedom for anyone wishing to compete in the marketplace. Id.

In line with this national policy, the states clearly have an interest in preventing anticompetitive behavior and fostering robustly competitive markets within and across their borders. State governments also have an interest in reserving the ability to create regulatory subdivisions to which they can delegate some of their authority to accomplish specific tasks. At times, the states may deem it appropriate to design a regulatory body to deliberately exempt it from antitrust laws to achieve a specialized purpose.

States may confer antitrust liability on regulatory bodies—but only under certain conditions. Applying the state-action immunity doctrine **too broadly** and giving private actors a **limitless ability to claim** antitrust **immunity for themselves** would empower state-created cartels to “make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects,” disrupting the free enterprise system that protects the national policy of economic freedom. Lafayette, 435 U.S. at 408.

Furthermore, broad application of the Parker-immunity doctrine would **actually undermine the states’ ability** to effectively delegate authority to specialized or local regulatory bodies by endowing these bodies with an antitrust immunity that **state governments may have never meant to give** them. “Neither federalism nor political responsibility is well-served by a rule that essential national policies are **displaced** by state regulations intended to achieve more limited ends.” Ticor, 504 U.S. at 636. The doctrine enables states to create regulatory subdivisions that do not interfere with the interest in preserving the benefits of competition. By “adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws,” courts actually increase rather than diminish the states’ regulatory flexibility. Id. State legislatures may wish to make broad delegations of authority to their political subdivisions in order to maximize the benefits of the specialized governance those bodies offer— but that does not necessarily mean that state legislatures **always** want to give those entities the ability to violate the federal antitrust laws.

“When a state grants power to an inferior entity, it presumably grants the power to do the thing contemplated, but not to do so anticompetitively.” Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 225a, at 131 (3d ed. 2006). Relying on the backdrop of the national policy favoring competition, states may enact such broad delegations that are nevertheless intended to create specific and narrow, rather than general and wide-reaching, regulatory schemes. Giving regulatory agencies state-action immunity too readily would **undermine states’ ability to do so**, creating the hazard that legislatures will **inadvertently authorize anticompetitive conduct**. State legislatures cannot possibly anticipate every potential anticompetitive consequence of these delegations of authority and explicitly disavow antitrust immunity for every one. “‘No legislature . . . can be expected to catalog all of the anticipated effects’ of a statute delegating authority to a substate governmental entity.” Phoebe Putney, 133 S. Ct. at 1012 (quoting Hallie, 471 U.S. at 43).

If a state intends a specific anticompetitive result, it may clearly articulate that result—or make it plainly foreseeable, see id. at 1011—giving voters the chance to oppose immunity-creating legislation before it becomes law and making it easier to hold legislators accountable. Otherwise, states would be **impeded in their freedom of action** because they would have to act “in the shadow of state-action immunity whenever they enter[ed] the realm of economic regulation.” Ticor, 504 U.S. at 636. The **limited** and careful **application** of the state-action immunity doctrine gives states **the most freedom** in delegating power and crafting regulatory entities, ensuring legislatures that they will not **accidentally confer immunity** and allow regulatory bodies to go **rogue** with **anticompetitive conduct** that deviates from the states’ interest of preserving robust marketplace competition for the benefit of their residents.

# 2ac ndt round 1

## innovation

### Innovation – A2: Cara 17

#### Cara concludes an ABR crisis is coming and only innovation can solve

MSU = Blue

Cara 17

Ed Cara, science writer for The Atlantic, Newsweek, and Vocativ, Vocactiv, January 27, 2017, “The Attack Of The Superbugs”, http://www.vocativ.com/394419/attack-of-the-superbugs/

Antibiotic-resistant infections kill at least 700,000 people worldwide a year right now, according to an exhaustive report commissioned by the UK in 2014, and without any substantial medical breakthroughs or policy changes that slow down resistance, they may claim some 10 million deaths annually by 2050 — eclipsing cancer in general as a leading cause. These deaths largely won’t come from pan-resistant infections, just tougher ones. A preventable death there, a preventable death here.

Leaving that aside, antibiotics, along with proper sanitation and nutrition, gird our entire way of living. Most every invasive surgery, pregnancy, organ transplant and chemotherapy session we go through will become riskier. Other diseases like HIV, malaria or influenza will become deadlier, since bacteria often exploit the opening in our immune system they leave behind. And already precarious populations like those living with cystic fibrosis, prisoners, and the poor will lose years off their lives.

For all the warranted gloom, though, Farewell does think there are reasons to be hopeful. “I don’t think we are doing enough, but the scientific community along with many governmental and private foundations are very actively involved in finding not only new antibiotics, but new solutions to this problem,” she said. There’s been a noticeable change in attitude and increased urgency surrounding antibiotic resistance, she said, one that she hadn’t seen even five years ago, let alone twenty.

Until recently, that attitude change could be seen from places as high up as the U.S. federal government. In 2014, former President Obama issued an executive order aimed at addressing antibiotic resistance, the first real acknowledgement of the problem from an administration, devoting funding and outlining a national action for combatting resistance. Through its federal agencies, the administration pushed to reduce antibiotic use on farms and encouraged doctors to stop using them in excess.

“There has been a lot of work done the last couple of years, much of it spurred by [Obama’s] National Action Plan,” said Dr. David Hyun, a senior officer for Pew Charitable Trusts’ Antibiotic Resistance Project. The CDC, in particular, has used its funding to open up regional labs that allow them to better detect and respond to antibiotic-resistant outbreaks like the Nevada case, he said. They ultimately hope to create an expansive surveillance system that can easily keep track of resistance rates on a national, state and regional level. A parallel system also exists for monitoring resistance in the food chain, shepherded by the CDC and the U.S. Department of Agriculture.

In fact, it was this sort of cooperation between national and local health agencies that enabled Nevada doctors to stop the worst from happening, said Dr. Lei Chen. The swift identification of a possible CRE strain by the hospital, coupled with the woman’s medical history, led to a precautionary quarantine, while also prompting Chen’s public health department and eventually the CDC into action. And it may help prevent future cases from spilling into the public. According to Chen, the CDC has allocated funding this year to all of Nevada’s state public health departments so they can better detect CRE and other dangerous resistant strains.

Under the Trump administration, there’s no telling how these small victories will hold up or whether they will advance. All references to antibiotics once found on the Whitehouse.gov site have been removed, including a link to the Obama administration’s national action plan, and the fact that they’re already tried to bar USDA scientists from discussing their work with the public while stripping funding from other public health agencies isn’t encouraging.

Even with the best public policy, however, there’s no clear light at the end of the tunnel. Antibiotic resistance has gradually been worsening, even within the last 15 to 20 years, when superbugs like methicillin-resistant Staphylococcus aureus (MRSA) first became widely known, said Hyun. The effort needed to develop new drugs has been in short supply, hamstrung by pharmaceutical companies’ inability to recoup the costs of bringing new antibiotics to market. That’s because, unlike the latest heart medication, any new antibiotics will have to be treated like the last drops of water during a drought, used as little as possible — the exact opposite way to make money off a new product. Yet, much like climate change, the financial toll of not doing anything will total in the trillions years down the road. And it already numbers in the billions now, according to the CDC.

Of course, we need bacteria to survive. And most need or pay no mind to us in return. Even pan-resistant bacteria don’t really mean harm. Some have been found in perfectly healthy people, a fact that’ll either comfort you or keep you awake at night, only causing problems when our immune system wavers. There’s no army of sentient E. coli that will rise up and someday overthrow the human race.

But barring the cavalry showing up, a new fear of ours will learn to settle in, almost unnoticed. It’ll creep in when we pick our heads up from a nasty fall that scrapes our skin open or breaks our bones; when we wave goodbye to our loved ones before they enter an operating room, or when we cradle our newborns into a world teeming with the living infinitesimal, wishing there was still a way to shield them from it as our parents once could for us. A fear of naked vulnerability.

The antibiotic apocalypse will be gentle, if it fully arrives, but it won’t be any less devastating to the human spirit.

## fism

### Privacy – 2AC

#### Effective state regulation of privacy solves existential threats – Overregulation risks advances in climate, disease, and advancement. Under regulation risks network loss and medical device hacking that collapses security – McNabb

### States Key – 2AC

#### Only state experimentation solves – rapidly developing tech makes fed regulation ill-suited to gridlocked Congress – states are more nimble to adapt regs

#### And – fed relies on sector-specific regs that fail – McNabb

## New Aff Scenarios = VI

### Disclosure Theory – 2AC

#### Disclosure is a norm not a rule. In-round enforcement of procedural norms is self-serving, infinitely regressive, and causes judge intervention. Affs should disclose arguments their teams have read before – creates incentives for innovation. Good prep, generics, and instant-fact checking solve their offense.

#### Flow if you want to hear what we say – doc tags are a courtesy

## T - can't be courts

### Can’t Be Courts – 2AC (JCCC)

**The phrase “antitrust laws” is statutory and judicial interpretation – that includes Parker**

**Wallace 92** – Wallace, Goodwin, and Poole, circuit judges. [Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co., 981 F.2d 429 (9th Cir. 1992)]

3 The Act's definition of “antitrust laws” “includes the Sherman Antitrust Act, the Clayton Act, the Federal Trade Commission Act, the Wilson Tariff Act, and the Act of June 19, 1936, chapter 592.” 16 U.S.C. § 2602(1) (citations omitted). The definition's use of the word “includes” suggests that the phrase “antitrust laws” may encompass more than just these statutes. See Highway & City Freight Drivers v. Gordon Transps., Inc., 576 F.2d 1285, 1289 (8th Cir.), cert. denied, 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 678 (1978); American Fed'n of Television & Radio Artists v. NLRB, 462 F.2d 887, 889–90 (D.C.Cir.1972); United States v. Gertz, 249 F.2d 662, 666 (9th Cir.1957). In interpreting another statute, the Supreme Court has held that the term “laws” encompasses both statutes and court decisions. See Illinois v. City of Milwaukee, 406 U.S. 91, 99–100, 92 S.Ct. 1385, 1390–91, 31 L.Ed.2d 712 (1972). We conclude that the phrase “antitrust laws” embraces not only the text of the Sherman Antitrust Act and the other listed statutes, but also the courts' interpretations of them. The state action doctrine is an interpretation of the Sherman Antitrust Act, see Parker, 317 U.S. at 350–51, 63 S.Ct. at 313–14, of which Congress was aware, see Director, Office of Workers' Compensation Programs v. Perini North River Assocs., 459 U.S. 297, 319–20, 103 S.Ct. 634, 648–49, 74 L.Ed.2d 465 (1983), when it chose the phrase “antitrust laws.” The plain meaning of section 2603(1) thus establishes that the Act is to have no effect on the applicability of the state action doctrine to gas and electric utilities like PG & E.

#### Prohibitions prevent “business as usual”

Ward 21 [Christine Ward, judge of the Jefferson County Family Court of the 30th Judicial Circuit in Jefferson County, 3-22-2021 https://www.leechtishman.com/wp-content/uploads/2021/03/Ungarean-Opinion.pdf

This Court is not persuaded by Defendant’s argument that, in order to be entitled to Civil Authority coverage, the action of civil authority must be a complete and total prohibition of all access to Plaintiff’s property by any person for any reason. If this Court were to accept Defendant’s cramped interpretation of the phrase “prohibits access,” it would result in businesses being precluded from coverage in nearly every instance where an action of civil authority effectively closes the business to the vast majority of the general public, but does not necessarily preclude employees, or certain other individuals, from entering the premises to clean, maintain the building, obtain important documents, or to perform other similar functions, which, while important, remain secondary to the activities that actually generate business income.

Once again this Court notes the importance of reading the insurance contract’s provisions as a whole so that all of its parts fit together. In so doing, this Court recognizes that the insurance contract provisions at issue are generally designed to provide business owners with coverage for lost busines income in the event that their business’ operations are suspended. Accordingly, this Court’s primary focus when interpreting the phrase “prohibits access,” at least in the context of this insurance contract, is the extent to which the action of civil authority prevented the insured from accessing its premises in a manner that would normally produce actual and regular business income. Given this understanding of the insurance contract, the fact that some employees, and even some limited number of patients, were still permitted to go to Plaintiff’s property for emergency procedures does not necessarily mean that Plaintiff is altogether precluded from coverage under the Civil Authority provision. The contract merely requires that “an action of civil authority . . . prohibits access to” Plaintiff’s property. It does not clearly and unambiguously state that any such prohibition must completely and totally bar all persons from any form of access to Plaintiff’s property whatsoever.

#### “Prohibitions” occurs before by at least – that phrase clarifies the mechanism that should be use TO increase them – by narrowing scope of Parker, there are more legislative prohibitions

#### It’s best---

#### Education---scope of state action immunity is vital question in antitrust enforcement---Crane & Sack

#### Aff flex---prohibiting the aff from being the courts leaves the aff as a sitting duck for tiresome process strats and destroys solvency

#### Overlimits---they box out nuanced, specific debates and house them with the neg which elides in-depth discussion and makes every an aff a referendum on their “Congress key” advantage

#### Solves ground---their links are about plan’s effect which our interp solves

#### Functional limits check---few advocates, advantages, and short list of “core” legislation

#### Reasonability best – competing interps cause a race to the bottom and substance crowd-out

## Crane cp

### Crane Constitution CP – 2AC

#### Perm – do both

#### Perm – do the counterplan – the counterplan increases prohibitions on ACBP – the counterplan is a way that could be done

#### Both categories increase prohibitions on anticompetitive conduct

Crane 19 (Daniel A. "Scrutinizing Anticompetitive State Regulations Through Constitutional and Antitrust Lenses." Wm. & Mary L. Rev. 60, no. 4 (2019): 1175-214)

MSU = Blue

The purpose of this Article is to compare the deployment of constitutional and antitrust tools to scrutinize potentially anticompetitive state and local regulations against the backdrop of the ubiquitous concern about “Lochnerizing” under the auspices of either constitutional or statutory authority. Here is the question in a nutshell: If one believes that courts (or perhaps federal administrative agencies) should do somewhat more than they currently do to scrutinize and potentially invalidate anticompetitive state and local regulations, which lever should they pull—constitutional doctrines, antitrust preemption, or both? Because there are some overlapping, and some separate, institutional constraints and potential pathologies between constitutional and antitrust law, it is important to compare the two tools before deploying them.

This Article is organized as follows: Part I diagnoses the underlying features of democratic government that produce anticompetitive regulation. Some of this story is quite familiar, but I present some new observations with respect to the role of technological incumbency as a strong factor in invoking regulation to thwart innovation.

#### This counterplan misunderstands the context – Crane says there are two ways to increase prohibitions – either the Court can do the counterplan or the Court apply constitutional principles. Both limit Parker immunity and expand the scope of core antitrust laws. They’re also both enforced by the FTC.

#### Constitutional protection fails

Edlin 14 [Aaron Edlin & Rebecca Haw 14, Edlin is Richard Jennings Professor of Law and Professor of Economics, University of California, Berkeley; Research Associate, National Bureau of Economic Research; J.D., Stanford University; Ph.D., Economics, Stanford University; Haw is Professor of Law, Vanderbilt University Law School; J.D., Harvard University, “CARTELS BY ANOTHER NAME: SHOULD LICENSED OCCUPATIONS FACE ANTITRUST SCRUTINY?,” 162 U. Pa. L. Rev. 1093, Lexis]

2. The Common Route to Challenging State Licensing Restraints: Due Process and Equal Protection

With powerful antitrust immunities in place, the only viable avenue for consumers or would-be professionals seeking to challenge the actions of state licensing boards is to make a constitutional claim. 207 Like all state regulation, professional licensing restrictions must not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Due process prevents a state from denying someone his liberty interest in professional work if doing so has no rational relation to a legitimate state interest. 208 Similarly, equal protection requires that states distinguish licensed professionals from those excluded from practice on some rational basis related to a legitimate state goal. 209 The two analyses typically conflate into one question: Did the licensing restriction serve, even indirectly or inefficiently, some legitimate state interest? 210

[\*1128] That burden is easy to meet, as illustrated by the leading Supreme Court case on the constitutionality of professional licensing schemes. In Williamson v. Lee Optical, the Supreme Court upheld a state statute preventing opticians from fitting patients' existing lenses in new frames without a prescription from an ophthalmologist or optometrist. 211 The Williamson plaintiffs sued on the theory that the scheme was designed to artificially increase demand for optometry services and therefore violated the Due Process and Equal Protection Clauses. 212 The Court implicitly recognized a liberty right under the Due Process Clause to pursue one's chosen occupation. 213 But since that right is not sufficiently "fundamental" to give rise to strict scrutiny 214 and because opticians are not a protected class under the Equal Protection Clause, both claims were subject only to rationality review. 215 The Court rejected the plaintiffs' challenge, making clear that any possible justification for the restriction, however thin, was enough. 216 Other cases have further held that the proffered justification need not have actually motivated the legislature to survive rationality review; it may be post-hoc and prepared only for litigation. 217

The Supreme Court has only once found an occupational licensing restriction to fail rationality review, in Schware v. Board of Bar Examiners of New Mexico, 218 and then only because an otherwise valid licensing requirement was unlawfully applied to an individual. Like most states, New [\*1129] Mexico requires attorneys to exhibit good moral character in order to sit for the bar exam. In Schware, the Court found a rational basis for such a requirement on its face, but it held that the New Mexico Supreme Court did not have a rational justification for denying a former communist permission to sit for the exam. 219 Because of its politically charged subject matter, Schware has largely been limited to its facts. In any case, it expressly approved of a state's ability to require its bar applicants to possess a quality as subjective as "good moral character." 220

In applying Schware to the activity of state licensing boards, lower courts have found even extremely thin justifications for anticompetitive licensing restrictions to suffice for rationality review. In Meadows v. Odom, a Louisiana district court accepted the state board's contention that licensing florists helped promote health and safety by decreasing the risk of pricks by wires in haphazardly arranged bouquets. 221 Similarly, a California district court upheld the California Structural Pest Control Board's requirement that exterminators of rats, mice, and pigeons - but not those of skunks and squirrels - obtain a state license. 222

One circuit has even held that insulating professionals from competition is itself a legitimate state interest, making matters even more difficult for plaintiffs alleging harm to competition. The Tenth Circuit in Powers v. Harris distinguished intrastate protectionism, which it considered constitutionally permissible, from interstate protectionism, which it acknowledged was illegitimate under the Dormant Commerce Clause. 223

Contrary holdings are rare. The Sixth Circuit gave the campaign to invalidate anticompetitive state licensing on constitutional grounds 224 its [\*1130] most significant victory in Craigmiles v. Giles. 225 Using reasoning that was explicitly rejected in Powers, the Craigmiles court invalidated Tennessee's restriction on unlicensed casket sales. 226 The court was unusually skeptical about the justifications advanced by the state board, which argued that shoddy caskets presented a public health risk. 227 The court found that only one justification did not reek with "the force of a five-week-old, unrefrigerated fish" 228: the scheme would allow funeral directors to collect monopolistic profits in selling coffins. 229 Unlike the Powers court, the Sixth Circuit deemed such economic protectionism "illegitimate" and invalidated the restrictions because they failed even "the slight review required by rational basis review." 230

#### Perm – do the plan as an outcome of the CP

### Crane Constitution CP – Doesn’t Solve – FTC – 2AC

#### CP sidelines the FTC

Crane 19 [Daniel A. Crane, Frederick Paul Furth Sr. Professor of Law, University of Michigan, "Scrutinizing Anticompetitive State Regulations Through Constitutional and Antitrust Lenses." Wm. & Mary L. Rev. 60, no. 4 (2019): 1175-214]

C. Institutional and Procedural Distinctions

Antitrust preemption and constitutional review are differently situated in one significant way: Constitutional equal protection, substantive due process, and dormant commerce clause principles are privately enforceable by any party that meets the Article III standing requirements—which, in this context, means at least anyone directly affected by a regulation impairing competition.160 Antitrust has its own private right of action standing rules,161 as well as an additional institutional feature that might significantly limit some of the abuses associated with Lochnerizing. One proposed route for increasing the preemptive scope of federal antitrust law over anticompetitive state and local regulation is to hold the Parker doctrine inapplicable to the FTC.162 This would give the FTC enhanced power to challenge anticompetitive state and local regulations. Not only would this limit the incidence of challenges to state regulation (the FTC Act is not privately enforceable and only the Commission can initiate an action under the Act),163 but it would also put the Commission itself, rather than an Article III court, in the position of making an initial decision on the case. An Article III court could ultimately become involved, as adverse Commission decisions are appealable to any federal court of appeal in which the case could have been initially brought.164 However, lodging the antitrust review function in the FTC would grant the Commission an initial regulatory review function and the power to make factual findings subject to “substantial evidence” review.165

#### Narrow FTC enforcement under the FTCA are modeled globally – causes nationalist competition regimes

Nam 18 [Steven S. Nam - Distinguished Practitioner, Center for East Asian Studies, Stanford University. Steven is also a Commission member of the Model International Mobility Treaty Commission under Columbia University's Global Policy Initiative. He is a member of the Antitrust Section of the American Bar Association and earned his B.A. at Yale and his J.D. and M.A. degrees at Columbia – “OUR COUNTRY, RIGHT OR WRONG: THE FTC ACT’S INFLUENCE ON NATIONAL SILOS IN ANTITRUST ENFORCEMENT” – University of Pennsylvania Journal of Business Law, Vol. 20, No. 1, 2018 - – No text omitted – but the Table of Contents – which comes after the Abstract - was not included – modified for language that may offend - https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1555&context=jbl]

ABSTRACT:

The Federal Trade Commission Act of 1914 (“FTC Act”), a model for many other countries that set up their own competition agencies, combines the control afforded by presidential appointment and removal powers over FTC commissioners with an exceedingly discretionary mandate. This Article contends that the FTC Act’s outmoded openness to strong presidential direction, where adapted abroad, has helped detract from antitrust regulator independence. Even advanced players in the liberal international economic order such as South Korea have made use of the United States’ original blueprint for unitary executive-stamped antitrust enforcement without sharing a long historical evolution of counterbalancing regulatory norms, e.g. the judicial check that was Humphrey’s Executor v. United States, 295 U.S. 602 (1935).

Strong executive direction in antitrust enforcement is particularly suited to capitalist economies helmed by administrations with mercantilist policies, given their belief that the state and big business must cooperate in the face of zero-sum international competition. South Korean President Lee MyungBak’s term (2008-2013) serves as an apt recent case study, featuring dirigiste calibration of antitrust enforcement against a backdrop of global recession. This Article examines the parallels between the FTC Act and the South Korean Monopoly Regulation and Fair Trade Act (“MRFTA”) before scrutinizing the enabled silo-like enforcement patterns of the Korean Fair Trade Commission under the Lee administration. Increasingly widespread erosion of public confidence in free and competitive trade demands a better understanding of the forces preventing global convergence in antitrust enforcement, and of their roots.

We have created, in the Federal Trade Commission, a means of inquiry and of accommodation in the field of commerce which ought both to coordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law. —President Woodrow Wilson, September 1916

[Our companies] are fighting with unfavorable conditions amid competition in the global economy. To do so, they must be allowed to escape various regulations. Let’s take just a half step forward to move beyond the pace of change in the global economy. —South Korean President Lee Myung-bak, March 2008

It is clear that, at the beginning of the 21st century, we cannot afford to operate, to enforce our competition laws, in national or regional silos. We must not remain isolated from what happens in other jurisdictions. Even if markets often remain regional or national in terms of competitive assessment, fostering global convergence in our legal and economic analysis is essential to ensuring effectiveness of our enforcement and creating a level playing field for businesses across our jurisdictions. —Joaquín Almunia, Vice-President of the European Commission for Competition Policy, April 2010

The [U.S.] Agencies do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties. Nor do the Agencies employ their statutory authority to further nonantitrust goals. —The U.S. Department of Justice and the Federal Trade Commission, April 1995

INTRODUCTION

The International Competition Network’s founding in October 2001, with the aim of “formulat[ing] proposals for procedural and substantive convergence” among its stated goals,5 sought to usher in a future with more cosmopolitan and coherent global antitrust enforcement. Although U.S. regulatory leadership maintained that “consistently sound antitrust enforcement policy cannot be defined and decreed for others by the U.S., the EU, or anyone else,” many countries (turned) ~~looked~~ to the U.S. as a role model while developing their competition regimes.6 It is ironic, then, that to this day a central obstacle to the aspired international “culture of competition” can be found in none other than the influence of the U.S.’s own FTC Act.7

American antitrust priorities around the time of the legislation’s passage oscillated between tempering trusts and shepherding business to further national economic strength, all towards the domestic interest. They shaped a regulatory environment that would reemerge abroad in many later-developing countries.

The deepening global retreat from internationalism and free market principles in the present day, with the specter of trade wars looming, is exacerbated by nationalist competition regimes that are derivative of a U.S. model predating the modern world economy. Domestic critics of open markets often overlook the U.S.’s own past vis-à-vis protectionist governments today. Illiberal or nominally liberal, they walk the kind of dirigiste path once treaded by the American School through the early twentieth century.8

#### Extinction

Arctic, space, prolif, conflict, climate, geo-engineerin

Langan-Riekhof 21 [et al; Maria Langan-Riekhof is the Lead Author and is the new Director of the Strategic Futures Group at the National Intelligence Council, leading the Intelligence Community’s assessment of global dynamics and charged with producing the quadrennial Global Trends product for the incoming or returning administration. She has spent more than 27 years in the intelligence community as both a senior analyst and manager, serving at the CIA and on the NIC. She brings a background in Middle East studies and has spent more than half her career analyzing regional dynamics. Her leadership roles include: Chief of the CIA’s Red Cell, founder and director of the CIA’s Strategic Insight Department, and research director for the Middle East. She was one of the DNI’s Exceptional Analysts in 2008-09 and the Agency’s fellow at the Brookings Institution in 2016-17. She is a member of the Senior Analytic Service and the Senior Intelligence Service and hold degrees from the University of Chicago and the University of Denver - National Intelligence Council - Global Trends 2040 – Form the section: “Scenario Four – Separate Silos” - MARCH 2021 - https://www.dni.gov/files/ODNI/documents/assessments/GlobalTrends\_2040.pdf]

With the trade and financial connections that defined the prior era of globalization disrupted, economic and security blocs formed around the United States, China, the EU, Russia, and India. Smaller powers and other states joined these blocs for protection, to pool resources, and to maintain at least some economic efficiencies. Advances in AI, energy technologies, and additive manufacturing helped some states adapt and make the blocs economically viable, but prices for consumer goods rose dramatically. States unable to join a bloc were left behind and cut off.

Security links did not disappear completely. States threatened by powerful neighbors sought out security links with other powers for their own protection or accelerated their own programs to develop nuclear weapons, as the ultimate guarantor of their security. Small conflicts occurred at the edges of these new blocs, particularly over scarce resources or emerging opportunities, like the Arctic and space. Poorer countries became increasingly unstable, and with no interest by major powers or the United Nations in intervening to help restore order, conflicts became endemic, exacerbating other problems. Lacking coordinated, multilateral efforts to mitigate emissions and address climate changes, little was done to slow greenhouse gas emissions, and some states experimented with geoengineering with disastrous consequences.

## Self-regs cp

### 2ac cp

#### Perm do cp

#### Perm do both

#### Links to NB

#### This card is about Taiwanese companies and compliance because of threat of enforcement – doesn’t work for state action immunity – blocks enforcement now (we = green)

Hung Hao Chang and Daniel Sokol 20, Chang is Professor, Department of Agricultural Economics, National Taiwan University, Sokol is Professor, University of Florida Levin College of Law and Senior Advisor, White & Case LLP, “Advocacy versus Enforcement in Antitrust Compliance Programs,” Jnl of Competition Law & Economics (2020) 16(1): 36-62, March 2020, lexis.

\*ACPs=Antitrust Compliance Programs

Abstract: We focus on the question of why firms self-regulate to avoid more severe public regulation in the area of antitrust compliance. We distinguish the effects of an antitrust authority's outreach and enforcement on firms' adoption of antitrust compliance programs. Furthermore, we examine the mechanism that may drive an antitrust authority's actions on firms' decisions to adopt compliance programs. Using a 2-year survey of 432 firms drawn from the top 300 Taiwanese enterprises and applying mediation analysis, we find that "voluntary" self-regulation actions, encouraged by the antitrust authority to promote compliance programs through advocacy, significantly increase the creation of antitrust compliance programs. Moreover, "coercive" actions of the antitrust authority in terms of enforcement are less effective than voluntary actions for firms' compliance program creation. Within "coercive" actions, large fines are more likely to lead to the adoption of antitrust compliance programs relative to other forms of government prosecution. JEL: K21; L41; L13; L11 Competition Law I. Introduction Jnl of Competition Law & Economics (2020) 16(1): 36-62, Jnl of Competition Law & Economics (2020) 16(1): 36-62 Compliance plays an increasingly important role in business strategy and behavior. This paper studies the role of compliance in the field of antitrust. Antitrust compliance and the creation of antitrust compliance programs have become important for firms due to increased enforcement in Europe, the United States, and Asia 1 , for example, fines for collusion in auto parts, LIBOR, and capacitors by antitrust authorities in the United States and Europe total billions of dollars. 2 Antitrust is a form of regulation that addresses the unlawful exercise of monopoly power through exclusion, collusion, or predation. 3 These behaviors occur both ex ante, in the context of mergers, as well as ex post, in terms of conduct involving one or more firms. Much of international antitrust enforcement has focused on issues of collusion, which global norms have pushed to the forefront of enforcement 4 in addition to mergers and noncollusion conduct cases. Many of the largest penalties in terms of financial sanctions and incarceration (for some countries, most notably the United States) have been the result of collusion-price fixing, output and territorial restrictions, and bid rigging. For example, the fines per cartel average have been higher in the past fifteen years in both the European Union and the United States than any prior period. 5 It is primarily due to concerns about collusion that a number of antitrust authorities have set up compliance guidelines to assist firms in compliance efforts. This paper examines the determinants of a firm's adoption of antitrust compliance programs (ACPs). In particular, it focuses on the role of the antitrust authority's action on firms' adoption of ACPs. The specific objective of this paper is to provide answers to the following four questions: (1) does the antitrust authority's action affect a firm's adoption of ACPs?; (2) does the antitrust authority's action have effects on different types of ACPs?; (3) do the "voluntary" (through outreach and advocacy) and "coercive" (through law enforcement) actions by the antitrust authority result in different impacts on a firm's adoption of an ACP?; and (4) what is the mechanism or pathway that can link the antitrust authority's action to firms' ACPs adoption? Put another way, the final question asks how the antitrust authority's action can have an impact on a firm's decision to adopt an ACP. Although there is a sizable body of literature that has focused on a firm's adoption of corporate compliance programs, 6 to the best of our knowledge, this study is among the first to empirically answer the above questions on a firm's behavior or decisions regarding the adoption of antitrust compliance programs. To answer our research questions, we collected a sample of **432 firms** in 2012 and 2016, drawn from the top 300 Taiwanese enterprises. We estimate a mediation model to quantify the effects of the antitrust authority's actions on a firm's propensity to adopt an ACP. The mediation model can empirically test whether a proposed mediator can have statistical power to explain the program effect on the outcome of interest. 7 Moreover, how much the mediator contributes to the overall program effect can be further quantified. 8 To apply the mediation model to antitrust compliance programs, the outcome variable of interest is defined as the decision of the firm to adopt an antitrust compliance program. We consider two different types of an antitrust authority's actions: the voluntary actions, encouragement through advocacy and outreach programs, and the coercive actions through agency enforcement. The awareness or knowledge of the firm about antitrust law is used as the mediator that links the effects of antitrust authority actions to firms' adoption of ACPs. Our empirical analysis reveals some interesting findings. First, we find a positive effect of antitrust authority actions on firm adoption of ACPs. Furthermore, voluntary self-regulation actions by firms due to efforts made by the antitrust authority to promote compliance through advocacy have a stronger effect on antitrust compliance program creation than do coercive actions. Next, the awareness or knowledge of a firm of antitrust law can be seen as a mediator. That is, the antitrust authority's voluntary or coercive actions can increase the awareness or knowledge of a firm regarding antitrust law. The competition authority's actions subsequently increase a firm's likelihood to adopt an ACP. We infer a number of policy implications from our findings. To promote firms' adoption of ACPs, voluntary actions through advocacy and outreach programs may be more effective than coercive actions through antitrust case investigations. II. Contributions of this Study Our study is relevant to the specific question of why firms self-regulate to avoid more severe public regulation. 9 This line of research explores the complexity of public interest and its interrelationship with private interests. This includes how addressing policy issues such as enforcement of law may create strategies for firms. 10

#### private compliance with antitrust removes pressure for necessary government actions

Mann 21 (Michael Mann, Distinguished Professor of Atmospheric Science and the Director of the Penn State Earth System Science Center at Pennsylvania State University, “How Companies Denied Their Role In Climate Change,” Science Friday, 1-15-2021, https://www.sciencefriday.com/articles/michael-mann-climate-change/)

The enemy has masterfully executed a deflection campaign—inspired by those of the gun lobby, the tobacco industry, and beverage companies—aimed at shifting responsibility from corporations to individuals. Personal actions, from going vegan to avoiding flying, are increasingly touted as the primary solution to the climate crisis. Though these actions are worth taking, a fixation on voluntary action alone takes the pressure off of the push for governmental policies to hold corporate polluters accountable. In fact, one recent study suggests that the emphasis on small personal actions can actually undermine support for the substantive climate policies needed. That’s quite convenient for fossil fuel companies like ExxonMobil, Shell, and BP, which continue to make record profits every day that we remain, to quote former president George W. Bush, “addicted to fossil fuels.”

The deflection campaign also provides an opportunity for the enemy to employ a “wedge” strategy dividing the climate advocacy community, exploiting a preexisting rift between climate advocates more focused on individual action and those emphasizing collective and policy action.

Using online bots and trolls, manipulating social media and Internet search engines, the enemy has deployed the sort of cyber-weaponry honed during the 2016 U.S. presidential election. They are the same tactics that gave us a climate-change-denying U.S. president in Donald Trump. Malice, hatred, jealousy, fear, rage, bigotry, all of the most base, reptilian brain impulses—corporate polluters and their allies have waged a campaign to tap into all of that, seeking to sow division within the climate movement while generating fear and outrage on the part of their “base”—the disaffected right.

Meanwhile, these forces of inaction have effectively opposed measures to regulate or price carbon emissions, attacked viable alternatives like renewable energy, and advocated instead false solutions, such as coal burning with carbon capture, or unproven and potentially dangerous “geo-engineering” schemes that involve massive manipulation of our planetary environment. Hypothetical future “innovations,” the argument goes, will somehow save us, so there’s no need for any current policy intervention. We can just throw a few dollars at “managing” the risks while we continue to pollute.

#### Doesn’t solve healthcare –

#### 1. Circumvention – they’ll exploit ambiguity if they have immunity – dominance regulations post NC Dental prove

Allensworth 17 (Rebecca Haw Allensworth, professor of Law, Vanderbilt Law School; “Foxes at the Henhouse: Occupational Licensing Boards Up Close” California Law Review, Vol. 105, No. 6 December 2017, Page 1577-1579, DOI: <https://dx.doi.org/10.15779/Z38CJ87K75>) MULCH

Using statutory requirements to measure dominance may also understate professional control because of ambiguity in the statutory language. Some statutes are clear that the nonprofessional seats must be held by individuals without a license,40 but others establish a floor on the number of licensee members without setting a ceiling. These boards were not coded as dominated because the statute did not technically require dominance, but many of these boards are de facto dominated. For example, the licensing statute for real estate professionals in Hawaii states that "at least four" board members must be licensed real estate brokers; in reality, seven of the nine members are licensees.41 The statute establishing the Indiana Board of Respiratory Care Practitioners requires two licensees, but permits three, to serve on a board of five.42 At present, three respiratory care practitioners serve. With vacancies in the two remaining nonprofessional seats, this board is 100 percent dominated in fact, while according to its statute it is nondominated by law.43

Examples of statutory membership understating professional dominance are easy to find, but it is difficult to know how far the problem goes - not just because there are almost 1,800 boards at work in the U.S., each typically meeting several times a year. The bigger problem is that boards tend to be opaque about their activities. For example, many boards do not post their minutes online;44 those that do are often incomplete or not up-to-date.45 My research was further hindered by many boards' failure to list their current members and professional statuses.46 Some states provided the option of looking up a licensee by name, but in many cases I had to resort to an internet search to determine a board member's professional status.47

Worse still, my research revealed that boards do not always follow the laws that created them. In my limited inquiry into the minutes of a small fraction of the licensing boards in the United States, I found three such instances; in all cases, the violations were in favor of more extreme and entrenched professional involvement in board activity.48 If the boards do not follow their own statutes, it is impossible to know just how much worse the problem is in fact than it appears by law.

#### 2. Market entry – Parker immunity is government-sanctioned gatekeeping that ensures that only innovation that benefits big insurance companies and providers ever reaches market, only antitrust solves and NC Dental proves minor changes to licensing boards is insufficient- Sage

#### Or the CP causes massive delays – effective reform and supervision *necessarily* produces inefficiencies

Allensworth 17 (Rebecca Haw Allensworth, professor of Law, Vanderbilt Law School; “Foxes at the Henhouse: Occupational Licensing Boards Up Close” California Law Review, Vol. 105, No. 6 December 2017, Page 1603, DOI: <https://dx.doi.org/10.15779/Z38CJ87K75>) MULCH

Finally, supervision may be an unattractive alternative because it could be perceived as adding to delay and ossification in occupational regulation. An extra layer of review will may make professional regulation slower and less nimble than states prefer. Substantive supervision necessarily involves some duplication of effort and analysis, creating the risk of inefficiencies.182 In states where small government is prized, supervisory structures may be seen as adding another layer of red tape.

## Tax cp

### Taxation CP – 2AC

#### Perm – do both – solves the “tax good” args

#### Perm – do the counterplan – prohibitions inhibit behavior – it’s a way the plan could be done

#### Normal means competition is bad – CP’s must compete on a mandate of the plan – anything else forces the aff to research infinite abnormal means and kills the search for the best policy option because the neg can just agree

#### Tax fails

Yent 21 [Kellen Yent, Senior Tax Associate, PwC (Washington, D.C.), A Response to “A New Corporate Tax”, 2021 https://taxprof.typepad.com/taxprof\_blog/2021/10/a-response-to-avi-yonahs-a-new-corporate-tax.html]

Avi-Yonah proposes that the CIT should revert back to its original purpose from when it was proposed in 1909, which was the limitation and regulation of corporate behavior and, in a narrower sense, monopolistic tendencies. 10 This is in contrast with what Avi-Yonah calls the “traditional aim,” which is the indirect taxation of rich shareholders (i.e. the aim in which this paper has chosen to evaluate all other justifications and modifications of the CIT). 11 The current CIT provides a tax when income is earned through the corporation (i.e. the shareholders), and not just when those shareholders earn a dividend.12 The current CIT therefore maintains the idea that the income inside the corporation cannot just be held passively by rich shareholders and deferred until it is earned to them through a distribution of dividends, but that it will be taxed as earned to the corporation (i.e. the controllers of the corporation). Taxation on earnings realized is one of the main pillars of US taxation, and can be best exemplified through I.R.C. §1001 (gain on amounts realized). 13 Avi-Yonah, however, suggests that because of the incidence problem mentioned above, there are better ways to target those wealthy shareholders, thus mitigating the incidence issue.14 In his view, the corporate tax was instituted in the early 20th century in order to regulate monopolistic behavior and the accumulation of wealth, by incentivizing corporations to engage in antimonopolistic behavior. 15 Avi-Yonah proposes a completely new corporate tax with such antitrust incentives in mind: the new tax base will be large corporations, the shareholders will be taxed on a mark to market basis, and there will be a tax on the distribution of dividends.16 Importantly, the tax will be highly progressive so as to restrain such large, mega-corporations corporations from forming (and incentivize them to break up). Avi-Yonah states: I would suggest that the effective tax rate on normal corporate profits…be zero. On super-normal returns, since the main concern is monopolies and quasi-monopolies, the tax should be progressive, with a very high tax rate (e.g., 80%) for profits above a very high threshold (e.g., $10 billion). In between, there should be a series of graduated tax rates, similar to the individual rate schedule before 1980.17

This rate structure would allow very little tax to be paid by the normal/small corporations, thus effectively eliminating corporate tax on that end of the profits spectrum. However, the highly progressive structure captures those massive corporations (such as Big Tech, Big Pharma, etc.) in such a high tax rate that there is little incentive to get so big (or stay so big). Furthermore, under this structure, only the corporations with “super-normal returns” (rents) will be targeted by such a policy, as it is those major corporations who have super-normal returns. This means that anything that is not a return on capital (i.e. normal return) should be taxed. Though Avi-Yonah’s modification to the CIT would still target wealthy stakeholders, it would only target those wealthy stakeholders of monopolies or near monopolies (or those large enough to generate rents). This means that a wealthy shareholder of a medium to small sized corporation with just returns on capital will go untaxed on corporate profits, thus going against this paper’s accepted justification for the CIT: to tax all wealthy shareholders.

The fact that Avi-Yonah’s new corporate will give effectively zero corporate tax on those smaller corporations, or those who only have normal returns on capital, is not inadmissible. Interestingly, some critics of the current CIT would agree with this part of his proposal, and would go further to suggest a total elimination of the CIT or a replacement with something more direct, in the hopes of curbing the aforementioned incidence problems. 18 Entin argues that the incidence of the CIT falls on labor to a large extent.19 He suggests that the classical modeling of incidence misses the allocation of burden falling onto labor, which suppresses investment, productivity, and wages. He also takes issue with how the traditional models use “super-normal” returns to apportion incidence between labor and capital, suggesting that these models include portions that should not be attributed to such “supernormal” returns and which are actually highly sensitive to tax.20 In light of this data, it may be questioned whether a tax on “super-normal” returns is proper for the CIT.

Gordon and Sarada have analyzed the traditional concept of taxing super normal returns in order to come up with a new and improved CIT which better maintains productive efficiency while better taxing the realization of gains to corporations (i.e. to mitigate the deferral factor), suggesting that the role of the corporate tax is solely to mitigate deferral of corporate earned profits. 21 They propose that, in a fully closed economy, corporate tax should be set at a rate that harmonizes with personal income tax, thus eliminating the benefit of deferral to the corporate shareholders. In an open economy, however, productive efficiency will only be maintained if the overall rate of the firm’s income is the same regardless of the jurisdiction in which it is reported.22 Thus, the anti-deferral regimes, which militate towards a higher percentage of profits brought back into the US jurisdiction for taxation purposes, help to increase the effectiveness of the CIT. Gordon and Sarada argue, though, that the distortion between the CIT and personal income tax has lowered the overall effectiveness of income tax as a source of revenue.23 They are instead in favor of a consumption tax as a replacement to personal taxation, and, therefore, the CIT. This would limit the ability to shift personal income into the corporate sector, where the income gets reduced tax rates or deferral, thus capturing those wealthy shareholders much better. 24 This proposal has its merits, as consumption taxes are said to be more direct and just, taxing people on what they consume, instead of what income is earned. Thus, the wealthy, who spend more on expensive or luxury items will be taxed in proportion to their spending. The consumption tax is outside of the scope of this paper, but it should be noted that this approach does have merit.

II. Other Traditional Justifications: Revenue Raising and Distributive Justice?

Other rationales for taxing wealthy shareholders indirectly through the CIT include revenue raising and distributive justice. According the to the Tax Policy Center, the corporate income tax raised $230.2 billion in 2019, which equates to about 6.6% of the total federal revenue raised.26 This equates to anywhere between 4-10% of revenue raised in any given year.27 Furthermore, this only equates to about 1-7% of GDP per annum.28 In comparison to the personal income tax and the payroll tax, the CIT brings in substantially less revenue.29 These figures are surprising given its popularity, which Norton suggests may be due to the fact that it does indeed raise revenue, no matter how small in relation to the income tax. However, he suggests that the most compelling reason for the CIT’s popularity is the fact that the incidence, as stated, is not known: because no one political constituency actually sees itself as the primary taxpayer, none are willing to lobby for change.30 This may be a stretch given that 52% of Americans are in favor of high CIT rates, suggesting that the proponents of the CIT may be winning. 31 It should also be noted that the incumbent Biden administration have proposed increase for the CIT rates, solidifying the idea that the CIT is probably here to stay.32 Overall, while there is strong evidence that the CIT is popular, there is also equally strong evidence that such tax does not actually fall on the correct target (i.e. the wealthy), and further that the CIT is not as strong of a revenue raiser as most might believe. Thus, the revenue raising justification might not be particularly on point.

The argument against distributive justice being the primary justification for the CIT is much within the same vein. Distributive justice justifications for the CIT insinuate that such tax is present in order to promote equity and fairness within the tax system. The Tax Justice Network is very concerned with the CIT and states adamantly that the CIT is necessary for a just and democratic society.33 They further suggest the CIT regime helps to curb political and economic inequalities and rebalance distorted economies.34 These are large claims and very hard to measure. However, the evidence provided above on revenue raising indicates that distributive justice (i.e. rebalancing economies) may not be the CIT’s main goal. The amount of revenue raised as a percentage of GDP is incredibly small, and, as stated, the incidence is not actually known, suggesting that fairness considerations are not presently shown, or are at least very muddled.35

III. Is there a correct justification for corporate tax policy aims?

As discussed, it is very hard to find cohesive justifications for the CIT, signifying that there may not be one specific justification for the CIT, or that the CIT may be based on a multitude of rationale. Brauner agrees with the former, stating that any justifications for the current CIT are not convincing given the stated incidence problems and the low percentage of revenue raised. 36 While some are completely against the corporate tax altogether, others like Brauner advocate for a corporate tax in a different form.37 He suggests a “tax on the appreciation of stakes (shares) in publicly traded corporations” with a mirroring look-though tax for shareholders of non-publicly traded corporations.38 This would eliminate the double layer of tax, and put all of the corporate tax liability on the wealthy shareholders, thus eliminating the stated incidence problems. While this system might have the advantage of clearly allocating the burden of the tax to those who should be the target of the CIT (i.e. the wealthy shareholders), there are certain practical problems that might stand in the way.

Looking past the fact that that this would mean a total overhaul of the CIT regime as it stands presently, there may be a conflict with the traditional principles of tax law, namely the concept of taxation upon realized gain (i.e. income earned). 39 This tax would be placed on the appreciation of shares held by an investor or corporate owner. Appreciation on shares is not earned, it is just passive growth of a share price. The income becomes earned when there is an event in which such appreciation can be realized (i.e. sale or other disposition).40 Moreover, even if timing issues are solved (i.e. when such gain on appreciation is to be “realized”), there may be issues with valuation, as publicly traded corporations have volatile market valuations. Closely held corporations might have an even more difficult time in valuing their shares, as there is not a general public valuations index like seen with publicly traded corporations in the stock market; though these private business could be valued at their asset basis potentially. These two issues can be easily solved with conventions,41 but it may be more difficult to deal with issues of depreciation. Manipulating the price of a corporate stock in order to evade tax in certain years may be difficult to regulate and enforce against. Overall, this method of taxation could be implemented with conventions and regulation on the shareholders, which is compelling, given its advantages in fixing the incidence problem. Therefore, this could be a better tool for the taxation of rich shareholders than the current CIT.

IV. Other considerations when revising corporate tax policy?

It might be worth considering the effect of CIT policy in the wider international context. Because the CIT is such a competitive tax, incentivizing production and capital movement based on lower tax rates, any proposed changes to the CIT may have to be instituted internationally. Such reforms are generally organized through the Organization for Economic Cooperation and Development.42 It would be very hard, in a practical sense, for any major change in CIT structure to happen nationally, as there would be major incentives for corporations to flee the newly reformed area in search of more competitive rates, especially if the newly reconstructed CIT would have the effect of better capturing corporate income (or income earned by shareholders). On April 5, 2021, US Treasury Secretary Janet Yellen advocated for a global minimum corporate tax.43 Politically this message was conveyed to ensure a decrease in jobs shifting overseas and a “race to the bottom on corporate tax rates.”44 In fact, just two days after Yellen’s address, the G-20 announced that it hopes to come to an agreement on global minimum low tax rates by mid-2020.45 This does suggest that a major overhaul of the national corporate tax regime in accordance with the aim of taxing shareholders more directly would be more doable, as it looks like there is going to be a major reconfiguration of the global corporate tax regime. Furthermore, after such international reforms, there would be less incentive to move outside of the US in search of marginally lower rates, even if the US tax regime was more efficient at taxing wealthy shareholders.

V. Conclusion

In light of the above discussion on the CIT’s justifications, given the stated aim of taxing wealthy shareholders, it can be seen that there is no one true justification for placing an indirect tax on shareholders through the earning of corporate profits. Though the aim is to tax wealthy shareholders, it can be seen that justifications for such tax do not fall directly within a revenue raising or distributive justice rationale. The further problem of who bears the ultimate burden of this tax muddles matters even further: does it actually meet the aim of taxing these wealthy shareholders if economists are unsure of where the incidence lies? Lastly, modifications proposed to the CIT by Avi-Yonah may fall short of the ultimate aim of taxing the wealthy corporate owners, as only those at the top of the profit’s spectrum will be captured by his anti-monopolistic corporate tax. All of this said, major changes to the global corporate tax regime may be coming, which may give policy makers in the future the chance they need to recalibrate the CIT or eliminate it completely, in favor of taxes like those proposed by Brauner or maybe even a consumption tax.

#### Doesn’t solve experimentation – even if they stop behavior, it doesn’t balance spillovers in the Parker doctrine - Crane & Adler

#### Perm – do the plan as the outcome of the counterplan

#### They leave Parker immunity on the books in context of antitrust laws – providing shield for private entities and chilling states

Squire 6 [Richard Squire Fordham University School of Law Professor, 2006 https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1066&context=faculty\_scholarship]

My proposed rules would be judge-made, which raises a threshold question. The preemptive scope of federal antitrust law is ultimately a question of congressional intent (at least to the extent that Congress does not overreach the Commerce Clause). And Congress unlike courts is not bound under principles of stare decisis to pay deference to previous judicial interpretations of the Sherman Act. Why then do I propose new judge-made rules rather than new legislation?

Despite the superficial merits of a congressional solution, I believe that a judicial fix is both possible and preferable. It is possible because, the dignity of precedent notwithstanding, courts that have tangled themselves in confused doctrine are not permitted simply to sit down and wait for Congress to rescue them. They must soldier on, cutting through thickets of their own creation if necessary. It is for this reason that principles of stare decisis permit courts to depart from precedent that is "badly reasoned," 10 7 marked by "indeterminacy," 1 08 or a "continuing source of confusion.'" 0 9

[Footnote 109] 109. Dixon, 509 U.S. at 710; see also Nichols v. United States, 511 U.S. 738, 744-45 (1994) (noting that precedent may be overruled if it lacks a "coherent rationale" and creates "confusion in the lower courts").

And there are few surer recipes for confusion and indeterminacy than the Court's violation requirement, which is contradicted by the facts of every state-action immunity case in which the Court has blocked enforcement of state law, and which causes judges to ignore basic questions such as whether a litigant wishes federal or state law declared unenforceable. Also, adherence to precedent is supposed to promote "reliance on judicial decisions,"' 1 0 but no good can come from reliance on jurisprudence that is inherently misleading. State legislators who searched for antitrust cases in which the Supreme Court actually mentions preemption would find only those decisions (such as Rice) in which the Court faithfully applies the violation requirement to uphold the state law in question. The decisions (such as Midcal) that are most relevant to legislators-in which the Court strikes down state law despite the lack of a violation-do not even mention preemption, and thus lie as traps for the unwary. And even these decisions do not announce that the violation requirement is a fiction; legislators can detect this crucial fact only if they also understand the complicated antitrust definition of a vertical price-fixing agreement. Finally, legislators who discover the truth about the violation requirement are not thereby rewarded with clear drafting instructions: not even the best-informed lawmakers could reliably legislate around the type of open-ended judicial analysis seen in Hertz.

### Taxation CP – NB – 2AC

#### No spillover – international carbon taxes and other US regulatory taxes prove one-shot regulatory tax fails

Countries with a carbon tax implemented: Argentina, Canada, Chile, China, Colombia, Denmark, the European Union (27 countries), Japan, Kazakhstan, Korea, Mexico, New Zealand, Norway, Singapore, South Africa, Sweden, the UK, and Ukraine.

#### Perm – do the plan and expand the application of its laws enforced by applying a substantial progressive tax on rents from those practices – logical, limited intrinsicness justified by artificial net benefit – proves it’s not an opportunity cost to the plan

#### Market complexity wrecks tax-based approaches to ecological harms

Roberts 16 – David, writer on energy and climate change for Vox, formerly of Grist, 4/22/16, “Putting a price on carbon is a fine idea. It's not the end-all be-all,” http://www.vox.com/2016/4/22/11446232/price-on-carbon-fine

Carbon taxes are meant to remedy one market failure: unpriced carbon emissions. But those familiar with US energy markets will attest that they are ridden with such failures. They bear virtually no resemblance to idealized neoclassical markets.

The US electricity sector, for instance, is a Rube Goldberg contraption of overlapping jurisdictions, regulated monopolies, and quasi-markets. Coal, oil, and gas are extracted from public land and transported over public right-of-ways, leaving behind an array of local pollutants. At every stage from extraction/production to transportation to consumption, all forms of energy are heavily regulated and dependent on public subsidies and public infrastructure.

In fact, there are so many market failures in energy, one almost wonders whether beginning with an idealized market and working backward through its "failures" is a fruitful way to approach policy thinking. Hmm.

Unpriced carbon is a market failure, if you want to look at it that way. But real-life markets, not just in energy but in transportation and agriculture, are failures all the way down — irrational behaviors, asymmetrical information, barriers to entry, monopoly control, and more. Then layer on top of that complicated regulatory systems, legacy policies and infrastructure, and the distorting influence of status quo interests, and you've got quite a mess.

One can look at the task ahead as painstakingly correcting an almost endless series of market failures. Or one can look at it as actively shaping and designing new markets to produce better social outcomes.

Either way, the "set it and forget it" schemes of hardcore tax advocates are a fantasy. It's a blunt-force tool. It will do wonders in some sectors (driving coal out of electricity) but very little in others (driving oil out of transportation). It will not do all the necessary work in any sector. Different markets are different; they have their own idiosyncrasies, their own failures.

#### Perm – do the plan and create a system of environmental taxation (as per their Bachus ev)

#### Aff solves – creates a system of state regulatory experimentation that right-sizes response – Adler

#### No impact

Kareiva 12 (Peter Kareiva et. al, – Chief Scientist and Vice President of the Nature Conservancy, Michelle Marvier, Robert Lalasz, “Conservation in the Anthropocene Beyond Solitude and Fragility”, The Breakthrough, http://thebreakthrough.org/index.php/journal/past-issues/issue-2/conservation-in-the-anthropocene/)

As conservation became a global enterprise in the 1970s and 1980s, the movement's justification for saving nature shifted from spiritual and aesthetic values to focus on biodiversity. Nature was described as primeval, fragile, and at risk of collapse from too much human use and abuse. And indeed, there are consequences when humans convert landscapes for mining, logging, intensive agriculture, and urban development and when key species or ecosystems are lost.

But ecologists and conservationists have grossly overstated the fragility of nature, frequently arguing that once an ecosystem is altered, it is gone forever. Some ecologists suggest that if a single species is lost, a whole ecosystem will be in danger of collapse, and that if too much biodiversity is lost, spaceship Earth will start to come apart. Everything, from the expansion of agriculture to rainforest destruction to changing waterways, has been painted as a threat to the delicate inner-workings of our planetary ecosystem.

The fragility trope dates back, at least, to Rachel Carson, who wrote plaintively in Silent Spring of the delicate web of life and warned that perturbing the intricate balance of nature could have disastrous consequences.22 Al Gore made a similar argument in his 1992 book, Earth in the Balance.23 And the 2005 Millennium Ecosystem Assessment warned darkly that, while the expansion of agriculture and other forms of development have been overwhelmingly positive for the world's poor, ecosystem degradation was simultaneously putting systems in jeopardy of collapse.24

The trouble for conservation is that the data simply do not support the idea of a fragile nature at risk of collapse. Ecologists now know that the disappearance of one species does not necessarily lead to the extinction of any others, much less all others in the same ecosystem. In many circumstances, the demise of formerly abundant species can be inconsequential to ecosystem function. The American chestnut, once a dominant tree in eastern North America, has been extinguished by a foreign disease, yet the forest ecosystem is surprisingly unaffected. The passenger pigeon, once so abundant that its flocks darkened the sky, went extinct, along with countless other species from the Steller's sea cow to the dodo, with no catastrophic or even measurable effects.

These stories of resilience are not isolated examples -- a thorough review of the scientific literature identified 240 studies of ecosystems following major disturbances such as deforestation, mining, oil spills, and other types  of pollution. The abundance of plant and animal species as well as other measures of ecosystem function recovered, at least partially, in 173 (72 percent) of these studies.25

While global forest cover is continuing to decline, it is rising in the Northern Hemisphere, where "nature" is returning to former agricultural lands.26 Something similar is likely to occur in the Southern Hemisphere, after poor countries achieve a similar level of economic development. A 2010 report concluded that rainforests that have grown back over abandoned agricultural land had 40 to 70 percent of the species of the original forests.27 Even Indonesian orangutans, which were widely thought to be able to survive only in pristine forests, have been found in surprising numbers in oil palm plantations and degraded lands.28

Nature is so resilient that it can recover rapidly from even the most powerful human disturbances. Around the Chernobyl nuclear facility, which melted down in 1986, wildlife is thriving, despite the high levels of radiation.29 In the Bikini Atoll, the site of multiple nuclear bomb tests, including the 1954 hydrogen bomb test that boiled the water in the area, the number of coral species has actually increased relative to before the explosions.30 More recently, the massive 2010 oil spill in the Gulf of Mexico was degraded and consumed by bacteria at a remarkably fast rate.31

## Biz Con

### Econ – 2AC

#### No link – Parker immunity has narrow applicability – zero evidence it broadly collapses certainty

#### Biden FTC makes link inevitable

Clayton 21 [E. Steele Clayton, IV Bass, Berry & Sims PLC University of Tennessee College of Law - J.D. 8-10-2021 https://www.jdsupra.com/legalnews/be-prepared-aggressive-antitrust-8939761/]

This summer has seen a flurry of bold antitrust announcements from the Biden administration. By issuing a sweeping executive order calling for numerous changes to antitrust enforcement and by naming progressive favorites and prominent Big Tech critics to head the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ), President Biden has signaled that federal antitrust policy is entering a new era.

The FTC has already begun carrying out its mandate to reshape antitrust policy. Under the leadership of new Chairwoman Lina Khan, the FTC has moved quickly to eliminate checks on its antitrust enforcement powers. A majority of the FTC’s commissioners have expressly disavowed the agency’s longstanding approaches to policing antitrust violations and have given the new chair unprecedented authority over investigations and rulemakings.

Collectively, the Biden administration and the FTC have sent a clear message to the business community: aggressive antitrust enforcement is back. Companies should expect to see an increase in antitrust investigations, stiffer penalties for violations, more burdensome merger reviews, and new rules targeting a range of industry practices. In this environment, effective antitrust counseling and compliance programs are more important than ever.

#### COVID wrecks certainty links

#### Turn – aff reduces harmful state regulation

Meese 15 [Alan J. Meese, Ball Professor of Law and Cabell Research Professor, William and Mary Law School, 2015 https://ilr.law.uiowa.edu/assets/Uploads/ILR-100-5-Meese.pdf]

Like Professor Hovenkamp, I too am uncomfortable with the Parker, Exxon, and ARC America trio. As others have noted, Parker arose when serious people believed that state-enforced cartelization or monopolization could help stabilize the macro economy—a claim that only politicians make today. All three decisions countenance some regulation by political entities that do not internalize the full costs of their actions. The predictable result will be too many state-imposed restraints and too much state antitrust regulation. Such overregulation, of course, will distort the allocation of resources and reduce national wealth. Moreover, to the extent that such regulation reduces price flexibility, Parker and its progeny interfere with the process of natural economic adjustment and thus exacerbate recessions. Far from destroying the ability of states to engage in regulation, reversal of such decisions would simply confine states to “reasonable” regulation, just as the Sherman Act confines private parties to reasonable restraints of trade. Federal preemption of state-imposed cartels, for instance, would leave states perfectly free to combat externalities, produce public goods, and redistribute income via taxing and spending.

#### NC Dental litigation causes confusion – only a risk the aff solves

Hittinger 19 [Carl W Hittinger, BakerHostetler’s antitrust and competition practice national team leader, J.D., Temple University Beasley School of Law, September 2019 https://www.bakerlaw.com/webfiles/Litigation/2019/Alerts/GCR-Private-Antitrust-Litigation.pdf]

As for private litigation, multiple cases following North Carolina Dental have identified open issues and emerging trends for antitrust actions involving government bodies. One important threshold issue confronted by private litigants is whether claims may be dismissed at the very onset of litigation due to application of state action immunity. Some courts have denied motions to dismiss claims pursuant to Federal Rule of Civil Procedure 12(b)(6), as long as the complaints plausibly allege the immunity is not established. In a case similar to North Carolina Dental, for example, a district court recently ruled it would be ‘premature’ to dismiss an antitrust claim against the Board of Dental Examiners of Alabama where the complaint plausibly alleged that the board was not actively supervised by the state.34 Other courts have implicitly rejected the notion that parties can plead away application of the immunity. In one such recent case, a district court dismissed an antitrust claim against a public utilities body based on South Carolina’s statutes reflecting a clearly articulated policy of displacing competition in and active supervision of the sale of electricity, notwithstanding complaint allegations that the body had exceeded its authority and was inadequately supervised by the state.35

Courts have also diverged on whether rulings on the dismissal of claims under state action immunity are immediately appealable. After North Carolina Dental, the Ninth Circuit held that a lower court order denying a dismissal motion based on state action immunity is not immediately appealable.36 The Ninth Circuit accepted that the Fifth and Eleventh Circuits ‘have reached the opposite conclusion’, but explained that disallowing immediate appeals of the rejection of the immunity defence is ‘the better view’ given, among other reasons, the Supreme Court’s caution against broad assertions of immunity against suits.37 Similarly, the DOJ has submitted an amicus brief arguing that refusing to dismiss under state action immunity is not immediately appealable.38

The most challenging issue since North Carolina Dental may continue to be whether the particular facts of individual cases can satisfy the application of state action immunity to government bodies with private actors. The Supreme Court implicitly acknowledged there would be uncertainty when recognising that application of the doctrine requires a ‘flexible and contextspecific’ analysis. Justice Samuel Alito’s dissent put a finer point on the uncertainty, identifying the lack of clarity on what constitutes ‘active market participants’ or how to define the markets in which they participate.39 One FTC commissioner agreed that these are ‘key questions that need to be addressed’.40 And they have been, somewhat, in recent years.

As Justice Alito forecasted, litigants and courts have laboured with determining whether government entities include sufficient private participants to require such entities to prove satisfaction of both the ‘clearly articulated state policy’ and ‘active state supervision’ state action immunity prongs (as opposed to only the first).41 A developing approach to this issue among courts focuses on whether the private participants actually exercised control over the governmental entities in question. For instance, following North Carolina Dental, the Third Circuit reasoned that a state university does not need to satisfy the active state supervision prong because the private party with which the university allegedly conspired in real estate dealings had not dominated the university’s real estate decisions.42 More recently, a district court determined that a state agency tasked with overseeing certain healthcare programmes, with a board consisting of five healthcare providers and six members who were not healthcare providers, was excused from satisfying the active state supervision prong because the board was not ‘controlled’ by the private participants who comprised ‘only a minority’ of the agency board.43

A related issue that has proven to be equally challenging is whether the state itself must provide the required active supervision. To illustrate, the Ninth Circuit recently held that ‘active supervision must be “by the State itself ”’ and, consequently, the court ruled that Seattle’s ordinance regulating ride-hailing services (eg, Uber) was not eligible for state action immunity because the city of Seattle, rather than the state of Washington, supervised and enforced the ordinance.44 At the same time, other courts have found active supervision satisfied where provided by municipalities alone.45 As these and similar cases progress through the courts, further clarity on areas of uncertainty about state action immunity should be realised.

Conclusion

The Supreme Court’s decision in North Carolina Dental not only provides valuable guidance for the application of state action immunity, it also sets the stage for continued development of the doctrine. In the nearly five years since the decision, government antitrust enforcers have relied on it for broadening their enforcement of the federal antitrust laws against quasi-government actors. Private litigants have also relied on it in pursuing cases that portend widespread impact on state and local government operations. All who believe they operate with state action immunity should proceed with caution and consider reviewing their conformity with the principles explained by the Supreme Court, in addition to assessing whether they remain eligible for immunity

#### Antitrust increases business confidence and growth broadly

OECD 14, Organization for Economic Cooperation and Development, “Factsheet on how competition policy affects macro-economic outcomes”, OECD, October 2014, https://www.oecd.org/daf/competition/2014-competition-factsheet-iv-en.pdf

Most importantly, it is clear that industries where there is greater competition experience faster productivity growth. This has been confirmed in a wide variety of empirical studies, on an industry-by-industry, or even firm-by-firm, basis. Some studies seek to explain differences in productivity growth between industries using measures of the intensity of competition they face. Others look at the effects of specific pro-competitive interventions, particularly trade liberalisation or the introduction of competition into a previously regulated, monopoly sector (such as electricity).

This finding is not confined to “Western” economies, but emerges from studies of the Japanese and South Korean experiences, as well as from developing countries.

The effects of stronger competition can be felt in sectors other than those in which the competition occurs. In particular, vigorous competition in upstream sectors can ‘cascade’ to improve productivity and employment in downstream sectors and so through the economy more widely.

The main reason seems to be that competition leads to an improvement in allocative efficiency by allowing more efficient firms to enter and gain market share, at the expense of less efficient firms (the so called between-firms effect). Regulations, or anti-competitive behaviour preventing entry and expansion, may therefore be particularly damaging for economic growth. Competition also improves the productive efficiency of firms (the so called within-firms effects), as firms facing competition seem to be better managed. This can even apply in sectors with important social as well as economic outcomes: for example, there is increasing evidence that competition in the provision of healthcare can improve quality outcomes.

There is also evidence that intervening to promote competition will increase innovation. Firms facing competitive rivals innovate more than monopolies (although after such competition a firm may of course end up with a monopoly through a patent). The relationship is not simple: it is possible that moderately competitive markets innovate the most, with both monopoly and highly competitive markets showing weaker innovation. However, as competition policy does not focus on making moderately competitive markets hyper-competitive, but rather on introducing or strengthening competition in markets where it does not work well, this would still imply that most competition policies serve to promote innovation.

Because more competitive markets result in higher productivity growth, policies that lead to markets operating more competitively, such as enforcement of competition law and removal of regulations that hinder competition, will result in faster economic growth.

Is there evidence that pro-competitive policies are effective?

In addition to this evidence that competition promotes growth, there have been studies directly of the effects of competition law itself, and of product market deregulation. Although it is difficult to distinguish the effects of individual policy changes, there are some studies showing that introducing competition law raises productivity. Conversely, the selective suspension of antitrust laws in the USA during the 1930s seems to have delayed recovery.

Many studies of the effect of competition law use international comparisons of different countries’ experiences, to assess whether countries with competition laws (or longer-standing, or more effective competition laws) achieve faster economic growth. The task is a difficult one because of many other factors that affect the overall economic growth rate, including other policies introduced at the same time (e.g. Eastern Europe’s transformation after 1989). Some studies find no effect, but the overwhelming majority of such studies do find a positive effect of competition law on economic growth. Most ascribe this effect to increased productivity, although there may also be an effect on investment, especially in developing countries, perhaps because competition laws boost business confidence and reduce corruption.

### Econ – Impact– 2AC

#### Ukraine thumps econ

Lynch 22 [David J. Lynch joined The Washington Post in November 2017 from the Financial Times, where he covered white-collar crime 3-5-2022 https://www.washingtonpost.com/business/2022/03/05/global-economy-russia-ukraine/]

Russia’s invasion of Ukraine and the financial reckoning imposed on Moscow in response are proof that the triumphant globalization campaign that began more than 30 years ago has reached a dead end.

Fallout from the fighting in Ukraine will take a meaningful bite out of the global economic recovery this year, with the greatest impact in Europe, economists said. A spike in oil prices to more than $110 per barrel and renewed supply chain disruptions — including fresh headaches for the auto industry — also are likely to aggravate U.S. inflation, already at a 40-year high.

#### No collapse – other countries fill in and IMF and fed can bailout

#### Econ’s resilient

Palha 17 – Sol Palha, Head Financial Analyst at Tactical Investor, Writer at The Street, Contributor at Huffington Post, Master’s Degree in Psychology from Columbia University, Lecturer at Pasiad International, “Is A Spectacular Stock Market Crash Just Around the Corner?”, 2017, http://www.huffingtonpost.com/entry/is-a-spectacular-stock-market-crash-just-around-the\_us\_599dbd8fe4b056057bddd035

The stock market crash story is getting boring and annoying to a large degree. Since 2009, there has been a constant drumbeat of the market is going to crash stories. In 2009, many experts felt that the market had rallied too strongly and that it needed to pull back sharply before moving higher up. They were calling for 15%-20% correction. Ten years later and most of them are still waiting for this so-called crash. A stock market crash is a possibility but the possibility is not the same thing as certainty, and this is what seems to elude most of the naysayers. One day they will get it right as even a broken clock is correct twice a day. In the interim waiting for this stock market crash has cost these experts a fortune, both in lost capital gains and actual booked losses if they shorted this market.

It’s 2017, and the markets are overbought, and we agree that they need to let out some steam, but as for a crash that will only occur when sentiment turns bullish. The crowd has not embraced this market and until they do corrections but not crashes is what we should expect. In fact, we penned an article titled “Dow Could Trade to 30K But not before This Happens”, where we discussed the possibility of the Dow trading to 30k before it crashes. The one factor that could alter this outlook would be for the masses to turn bullish suddenly.

This market will experience a spectacular crash one day; nothing can trend upwards forever and eventually the market has to revert to the mean. Markets never crash on a sour note; the crowd is chanting in joy when the markets suddenly change direction. A simple look at previous bubbles will prove this; the housing bubble, for example, did not end on a note of fear; the crowd was ecstatic. Even the Tulip bubble that lasted from 1634-1637 ended on a note of extreme joy.

Jim Rogers states that the next crash will be the worst one we have seen in our lifetimes.

We’ve had financial problems in America — let’s use America — every four to seven years, since the beginning of the republic. Well, it’s been over eight since the last one. This is the longest or second-longest in recorded history, so it’s coming. And the next time it comes — you know, in 2008, we had a problem because of debt. Henry, the debt now, that debt is nothing compared to what’s happening now.

In 2008, the Chinese had a lot of money saved for a rainy day. It started raining. They started spending the money. Now even the Chinese have debt, and the debt is much higher. The federal reserves, the central bank in America, the balance sheet is up over five times since 2008. It’s going to be the worst in your lifetime — my lifetime too. Be worried Business Insider

In a broad manner of speaking, he is right, but the proverbial question as always is “when”; so far the naysayers have missed the mark by 1000 miles. This entire rally has been based on the fact that the Fed artificially propped the markets by keeping rates low for an insanely long period and infusing billions of dollars into the markets. One day the pied piper is going to collect but as we have stated over and over again over the years, that until the masses embrace this market, a crash is unlikely. A strong correction is, however, a certainty; it’s just a matter of time.

The market has defied every call, and even some of the most ardent of bulls are now nervous; we stated this would occur over two years ago. The Market has put in over 36 new highs this year and is living up to the new name we gave it late in 2016. Up to that point, we referred to this market as the most hated bull market of all time; after that, we started to refer to this market as the most Insane Stock Market Bull of all time. Insanity by definition has no pattern so expect this market to do things no other market has ever done before.

The markets will crash one day but these so-called experts have no idea of this event will occur

#### U.S. not key

Molavi 11 – Afshin Molavi, Senior Fellow and Co-Director of the World Economic Roundtable at the New America Foundation, “US Economic Power is Part of a Healthier Global Order”, The National, 7-4, http://www.thenational.ae/thenationalconversation/comment/us-economic-power-is-part-of-a-healthier-global-order#full

Thus, the world faces the prospect of America slipping quietly into a "lost decade" of sluggish growth - of America sneezing and wheezing and coughing, but not facing a crisis moment. What will this mean for the world? Japan's growth throughout the 1970s and 1980s bolstered many of their Asian trading partners. Japan's demand was a boon. But Japan's lost decade in the 1990s did not stop the Asian tigers from rising. In some cases, countries such as South Korea and Taiwan even benefited from the Japanese slowdown, stealing away market share in key industries. The same may happen with an American "lost decade". A World Bank report in late 2009 noted that Latin American countries - the most exposed to American contagion - did not feel severe effects from the American crisis. The same goes for other emerging markets. So, perhaps the world will shrug off a steady American economic decline over the next five years. This is partly because the global economic pie is not a fixed size. As "the rest" rise, it grows. Thus, America controlled a quarter of the world's GDP in 1970 - roughly the same as today. But the pie is much bigger. Global GDP has tripled since 1970 and Asia today accounts for a quarter of global GDP. The pie is not only larger, but it is more balanced. Will there even be a "lost decade" after all? American corporations are sitting on large piles of cash. The problems with the economy have as much (perhaps more) to do with business confidence as with fundamentals. That could change. To be sure, the world is better off when America grows and produces and innovates. But if the declinists prove correct, then the cliché of "when American sneezes" will truly be tested once and for all. Or perhaps the world will be too busy to notice: emerging markets will be growing their middle classes, oil-rich Middle East states will be bolstering ties to Asia, and Chinese investments will flow across Africa and Latin America. And that sneezing $14 trillion (Dh51.4 trillion) economy would still be the envy of most countries around the world. We can put the cliché to rest: an American sneeze might not breed a global cold after all.

#### Collapse doesn’t cause war

Walt 20 [Dr. Stephen M. Walt, Robert and Renée Belfer Professor of International Relations at Harvard University, PhD in International Relations (with Distinction) from Stanford University, MA in Political Science from the University of California, Berkeley, “Will a Global Depression Trigger Another World War?”, Foreign Policy, 5/13/2020, https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/]

On balance, however, I do not think that even the extraordinary economic conditions we are witnessing today are going to have much impact on the likelihood of war. Why? First of all, if depressions were a powerful cause of war, there would be a lot more of the latter. To take one example, the United States has suffered 40 or more recessions since the country was founded, yet it has fought perhaps 20 interstate wars, most of them unrelated to the state of the economy. To paraphrase the economist Paul Samuelson’s famous quip about the stock market, if recessions were a powerful cause of war, they would have predicted “nine out of the last five (or fewer).”

#### Economy wrecked – predictive

Bartash 12-18 [Jeffry Bartash, Reporter, MarketWatch, "Sticky Inflation, Bigger Paychecks, Fading Stimulus," MarketWatch, 12/18/2021, <https://www.marketwatch.com/story/sticky-inflation-bigger-paychecks-fading-stimulus-how-the-u-s-economy-is-shaping-up-for-2022-11639758215>]

Americans are likely to face more big surprises in 2022. MarketWatch spoke with a handful of economists around the country about the big questions facing the U.S. as it enters a third year of the pandemic. Here’s what they had to say.

Omicron

The pandemic is still the biggest influencer of the economy by far.

“The virus is still boss. There is no guarantee that a worse variant won’t come along,” said corporate economist Robert Frick of Navy Federal Credit Union in northern Virginia. “Everyone wants to put the pandemic behind them, but it’s still the major factor.”

The good news is, the U.S. economy has largely adapted to the coronavirus and managed to keep expanding. “I do think wave upon wave, people are learning to live with this,” Federal Reserve Chairman Jerome Powell said last week.

The problem? No one knows what’s next. Take the omicron. It’s spreading faster than any other variant and is igniting a panic in Europe.

Omicron appears less deadly, but the U.S. will very learn soon just how much damage it can do by watching what happens in the United Kingdom, where it spread earlier and more rapidly.

End of stimulus

The Biden White House’s ambitious $2 trillion social-spending plan called Build Back Better appears stalled and might not pass at all.

Some economists contend the end of fiscal stimulus could lead to withdrawal symptoms in 2022. “We have been living off the government for two years now,” said Joel Naroff of Naroff Economic Advisors in Holland, Pa.

Still, most economists think the U.S. is primed to grow a frothy 3% to 4%.

How come? Americans amassed big savings during the pandemic, for one thing. Wages are also rising as at the fastest pace in decades because of a major labor shortage, putting even more money in people’s pockets.

Businesses, for their part, are investing heavily in technology to get around the labor shortage and to boost production.

“Just re-stocking the shelves is going to contribute significantly to U.S. growth,” said Luke Tilley, chief economist at Wilmington Trust in Philadelphia. “That’s an undercovered story.”

Inflation

The biggest increase in U.S. inflation in 2021 in almost 40 years caught Wall Street DJIA and Washington by big surprise. The yearly rate of inflation hit 6.8% by one measure and 5% by another.

The Fed is now scrambling to get ahead of the problem and reassure investors that price pressures will subside in the next year.

Pretty much every economist thinks inflation will slow, and slow sharply, next year. But few are on board with the Fed’s forecast that the rate of inflation will ease to 2.6% in 2022.

“I do think we will see inflation pressures ease over time, but I don’t think we are heading back to the sub-2% inflation rates that we have been accustomed to,” said Jim Baird, chief investment officer of Plante Moran Financial Advisors in Southfield, Mich.

Naroff agrees. “What is the new trend? The Fed keeps saying 2%. I don’t think that’s realistic.”

Interest rates

The combination of higher inflation and the Fed moving to phase out its own massive monetary stimulus for the economy is bound to nudge interest rates higher in 2022.

The central bank appears on track in 2022 to raise a key short-term rate its kept near zero during the pandemic for the first time since 2018.

Higher borrowing costs are likely to exert a small drag on the economy. The 30-year mortgage rate, for example, could climb to 3.75% from around 3% right now. Car loans could also become more costly.

Frick thinks higher rates will kill off the frenzy of home refinancing and restrain home sales. On the flip side, savers who took a beating during the pandemic could finally make a little money on CDs and bank deposits if inflation nosedives.

“A lot of people are being crushed by low rates and high inflation,” Frick said.

Labor shortage

Six months ago, just about every forecaster expected the millions of people who lost a job or left the labor force early in the pandemic to return to work. It didn’t happen.

Now many wonder if several million workers have left the labor force for good. Lots of baby boomers retired and record stock market gains have made it easier for them to stay at home.

“A lot of people have permanently removed themselves from the labor market,” Tilley said.

If he’s right, the labor shortage is not going way. But it’s not all a bad thing. Businesses might struggle to fill a near record number of open jobs, but workers will have more money in their pockets to spend.

Rising wages

One of the silver linings of the pandemic-induced labor shortage is that workers are reaping the bigger increase in paychecks in decades. Average hourly wages, for instance, have climbed almost 5% in the past year.

By contrast, wage gains barely grew more than 2% a year in the prior decade.

That’s not a bad thing, economists say. After all, corporate profits are at an all-time high. They can afford to pay more.

Even more important, consumer spending is the main engine of U.S. growth. It accounts for about 70% of all economic activity.

“Businesses are going to complain about it, but in the long run that is great for the economy,” Frick said. “People were getting used to a sub -2% economy. If we want to get back to 3%, we need to pay people more.”

Supply shortages

A series of bottlenecks — clogged ports, lack of warehouse space, too few truck drivers — have spawned the biggest supply shortages in decades. The gridlock is expected to fade eventually, but the problems will persist well into 2022.

The coronavirus is still a major disruptor, for one thing, and there’s too many weak links in the chain, so to speak, to iron out the problems quickly. Even the Fed can’t do much.

“You can raise interest rates to reduce demand, but you can’t raise interest rates to unload cargo ships or speed up production in Asia,” Baird said.

Many companies are plotting ways to secure more stable sources of supply. Some are even considering moving operations back to the U.S. from other countries like China. But that’s no quick fix, either.

“You can’t bring it all back to the U.S. very quickly,” Naroff said.

The unknown unknowns

Former U.S. Defense Secretary Donald Rumsfeld once quipped it was impossible to know what would happen in the future because of “unknown unknowns.”

Economists have been humbled by the past year — they were wrong a lot and missed many major developments. They will almost assuredly err again.

## FTC OS - alogrithmic bias, health

### FTC OS – AI – Algorithmic Bias – 2AC

#### Tons of alt causes – law enforcement, global use, and national security

#### No impact---Fears of algorithmic bias are overblown

Rainie 17 [Director of internet and technology research at Pew Research Center, quoting various leading AI experts Lee Rainie and Janna Anderson, Theme 2: Good things lie ahead in Code-Dependent: Pros and Cons of the Algorithm Age, Pew Research Center, 2017, <https://www.pewresearch.org/internet/2017/02/08/theme-2-good-things-lie-ahead/>]

Some respondents who predicted a mostly positive future said algorithms are unfairly criticized, noting they outperform human capabilities, accomplish great feats and can always be improved.

An anonymous professor who works at New York University said algorithm-based systems are a requirement of our times and mostly work out for the best. “Automated filtering and management of information and decisions is a move forced on us by complexity,” he wrote. “False positives and false negatives will remain a problem, but they will be edge cases.”

An anonymous chief scientist wrote, “Whenever algorithms replace illogical human decision-making, the result is likely to be an improvement.” And an anonymous principal consultant at a top consulting firm wrote, “Fear of algorithms is ridiculously overblown. Algorithms don’t have to be perfect, they just have to be better than people.”

### FTC OS – 2AC

#### Doesn’t force spillover – aff gives FTC the option to pursue immunity cases but doesn’t require burdensome enforcement

#### No link – FTC capacity is high and already closely review state immunity cases

Crane 16 [Daniel A. Crane Frederick Paul Furth Sr. Professor of Law, University of Michigan Law School Adam Hester J.D., May 2016, University of Michigan Law School, 2016, State-Action Immunity and Section 5 of the FTC Act, 115 MICH. L. REV. 365, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1510&context=mlr]

B. Institutional Constraints and Capacities

Beyond the core concerns about the anti-democratic and pro-laissez faire tendencies of economic substantive due process, there lurk questions about institutional constraints and capacities. Allowing the Sherman Act to become an aggressive anti-regulatory charter would pose considerable risks of unwieldy and excessive challenges to state regulatory regimes and state sovereignty, since the Sherman Act is privately enforceable.251 Further, the federal courts may lack the expertise and fact-finding processes to make well-informed decisions over whether state regulatory decisions reflect exercises of police power in the public interest, or, rather, naked pork-barreling for the benefit of concentrated economic interests. On these scores, FTC enforcement under Section 5 of the FTC Act enjoys a considerable advantage over the Sherman Act.

First, Section 5 of the FTC Act is enforceable only by the FTC, not by private plaintiffs.252 Superior preemption under Section 5 would not lead to a flood of private challenges against state regulations, nor would it injure state interests by forcing the states to constantly defend anti-regulatory actions by private interests. (Recall that Parker itself involved a private challenge to state law, as have many of the important state-action immunity cases since).253 Rather, preemption of state law would depend on an administrative decision by a majority of the FTC commissioners to bring an action or otherwise declare a state law preempted. Preemption would not flow directly from the statute, but from a decision of the FTC to enforce the statute in a particular context. The burden of the intrusion on federalism interests and state sovereignty would therefore be considerably lower than if the Sherman Act were read to directly preempt anticompetitive state laws, permitting private plaintiffs to seek invalidation of state laws whenever the laws infringed on competition.

Second, and relatedly, the FTC enjoys a much greater capacity to evaluate the range of competing interests entailed by state regulations than does a federal court. Not only does the commission employ a large staff of expert economists,254 but it wields broad investigatory powers to investigate trade conditions through mandatory processes such as document requests and depositions.255 The FTC already serves the states in a consultative capacity, giving advice on proposed legislation and engaging in competition advocacy by issuing reports on various competition issues or intervening as amicus curiae in litigation.256 Unlike generalist federal courts, the FTC has the capacity to study the competitive effects and justifications for state regulatory schemes, consult formally or informally with state officials and other interested parties, and bring to bear its economic expertise in mediating competing claims about the effects of regulations on consumers or other interests.

#### Overstretch inevitable or increased funding solves

Klar 3-29 [Rebecca Klar, Staff Writer at the Hill, 3-29-2022 https://thehill.com/policy/technology/600270-biden-administration-boosts-support-for-antitrust-efforts]

The Biden administration is throwing its weight behind efforts to boost antitrust enforcement as federal agencies take on the market power of tech giants.

President Biden’s $5.8 trillion budget proposal requests $227 million in increased funding for the Federal Trade Commission (FTC) and the Department of Justice (DOJ) combined — a bump advocates and agency leaders say is needed to tackle cases against the nation’s wealthiest companies.

In addition to the request for increased funding, the DOJ sent letters to top lawmakers on the House and Senate Judiciary committees endorsing a key antitrust bill, a move that some advocates said could sway lawmakers who are hesitant to back the seemingly stalled legislation.

“It’s very significant and it’s definitely a step in the right direction. I think the thing that’s been dogging any antitrust enforcement efforts, whether that’s at the FTC or the Department of Justice, for decades is really a lack of capacity,” Matt Kent, a competition policy advocate at Public Citizen told The Hill.

The DOJ and the FTC enforce antitrust laws, which means that they face dominant companies — not just in the tech industry — with access to some of the best legal representation and monetary resources in the nation.

Advocates say that the boost in funding would put the administration on a more equal playing field with big corporations.

The 2023 budget proposal would increase the DOJ’s antitrust division funding by $88 million and the FTC’s funding by $139 million.

“It would represent a serious step toward closing the huge funding gap that the agencies confront today,” said Daniel Francis, a Harvard Law School lecturer and former deputy director of the FTC competition bureau.

“It would go a long way to help the agencies complete timely evaluations of proposed deals, giving consumers comfort that their interests are being protected, and giving businesses comfort that the agencies have been able to take a real look at transactions before they close,” he added.

The additional resources would also help offset what Robyn Shapiro, director of communications at the American Economic Liberties Project, called an “unprecedented merger wave.”

“Very simply, the DOJ and the FTC need more money to do their jobs,” she said.

One high-profile acquisition, Microsoft’s purchase of gaming publisher Activision Blizzard for $70 billion, is under review by the FTC, Bloomberg reported earlier this year. The agencies are also in the middle of active antitrust cases against Google and Facebook.

The funding increase could also help the agencies keep nonmerger investigations moving forward at an “appropriate pace” when they often can “take a back seat” to merger reviews subject to a timed deadline, Francis said.

#### No tradeoff – newest resolution creates more capacity

Gehl 9-24 (Kate, Senior Counsel for Foley and Lardner LLP, Elizabeth A. N. Haas, Partner, Alan D. Rutenberg, Partner, H. Holden Brooks, Partner, Benjamin R. Dryden, Partner, Foley and Lardner LLP“A Divided FTC Approves Omnibus Resolutions to Step Up Enforcement Actions and Votes to Withdraw the 2020 Vertical Merger Guidelines” [https://www.foley.com/en/insights/publications/2021/09/divided-ftc-approves-omnibus-resolutions Published 9-24-2021](https://www.foley.com/en/insights/publications/2021/09/divided-ftc-approves-omnibus-resolutions%20Published%209-24-2021), MSU-MJS)

According to the FTC’s press release, the resolutions are aimed at broadening its ability “to obtain evidence in critical investigations on key areas where the FTC’s work can make the most impact.” The resolutions also will purportedly permit the FTC to “better utilize its limited resources” to quickly investigate potential misconduct. The FTC views the resolutions as one method to increase efficiency at the FTC, which certain Commissioners believe has become necessary due to the “increased volume of investigatory work” caused by a “surge” in merger filings in recent months.

In practice, these resolutions allow a single Commissioner, instead of a majority of sitting Commissioners, to approve compulsory process requests in any investigation within the scope of the resolution for the next 10 years. What practical effect these resolutions will have remains to be seen; however, businesses engaged in conduct that may be implicated by the resolutions should be aware that FTC staff will now have an expedited ability to carry out compulsory process requests, which will very likely increase the number and scope of investigations conducted by the FTC.

#### Funding is normal means – AND boosts are coming

Byers 21 (Dylan Byers, senior media reporter for NBC News; **internally citing George Washington University professor and former FTC chair William Kovacic**; “Is Facebook untouchable? It's complicated,” NBC News, 7-1-2021, https://www.nbcnews.com/tech/tech-news/facebook-untouchable-complicated-rcna1323)

The House Judiciary Committee recently advanced six bills that would bolster the government's ability to regulate Big Tech. They range from simple budgeting measures — one would give more funding to the FTC and the Department of Justice for their antitrust enforcement efforts — to profound reforms — one that would stop platform companies from preferencing their products over those of their competitors and another that would make it illegal for companies to eliminate competitors through acquisitions.

This legislative package faces an arduous road ahead. House Majority Leader Steny Hoyer, who sets the House floor schedule, has said none of the six bills are ready for a vote, which suggests they don't have broad bipartisan support. If and when they do make it through the House, they face an even harder battle in the Senate.

"It's hard to imagine that the larger legislative package is accomplished this year," Kovacic said, though he predicted a few of the less-threatening bills — budgeting, for example — are likely to pass on their own.

"The funding for the FTC and DOJ antitrust divisions, it's nearly 100 percent likely that Congress will pass that law," he said. He said another bill, which would block the tech firms from moving court hearings to more favorable states, was also likely to pass.

#### Other entities can enforce.

Jones 20 [Alison Jones & William E. Kovacic, Jones is a professor at King’s College London; Kovacic is Global Competition Professor of Law and Policy, The George Washington University Law School, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy,” The Antitrust Bulletin, vol. 65, no. 2, SAGE Publications Inc, 06/01/2020, pp. 227–255]

C. Improving Capability: Agency Cooperation and Project Selection

The U.S. antitrust system is famous for its decentralization of the power to prosecute, giving many entities – public agencies (at both the federal and state levels), consumers, and businesses – competence to enforce the federal antitrust laws. The federal enforcement regime also coexists with state antitrust laws and with sectoral regulation, at the national and state levels, that include competition policy mandates.

The extraordinary decentralization and multiplicity of enforcement mechanisms supply valuable possibilities for experimentation and provide safeguards in case any single enforcement agent is ~~disabled~~ [hamstrung](e.g., due to capture, resource austerity, or corruption).75 Among public agencies, there is also the possibility that federal and state government institutions, while preserving the benefits of experimentation and redundancy, could improve performance through cooperation that allows them to perform tasks collectively that each could accomplish with great difficulty, or not at all, if they act in isolation. In the discussion below, we suggest approaches that preserve the multiplicity of actors in the existing U.S. regime but also promise to improve the performance of the entire system through better inter-agency cooperation – to integrate operations more fully “by contract” rather than a formal consolidation of functions in a smaller number of institutions.

#### States fill-in

Wisking et al 20 (Stephen Wisking, Kyriakos Fountoukakos and Marcel Nuys, Herbert Smith Freehills LLP, “Digital Competition 2021,” Law Business Research Ltd., October 2020, https://docplayer.net/201129322-Digital-competition-2021.html)

There is a clear trend towards increased antitrust scrutiny of digital markets by federal and state antitrust enforcers and the US Congress. In July 2019, the DOJ announced it was reviewing the practices of market-leading online platforms and in October 2020 filed suit against Google. The FTC formed a Technology Enforcement Division in 2019 that is actively conducting investigations and the agency is reportedly on the verge of bringing a suit against Facebook. State Attorneys General of all or nearly all 50 states have had active investigations of Google and of Facebook, and investigations of other technology firms have recently been initiated. Eleven states joined the DOJ in its suit against Google, while other states indicated that they may pursue other claims against Google, and still others are reportedly considering a suit with or without the FTC against Facebook. In Congress, both the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law and the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights have held antitrust hearings on digital markets. And in October 2020, the majority staff of the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law issued a digital markets report recommending numerous proposals to restore competition in digital markets and to strengthen antitrust law and enforcement generally. Legislators have proposed legislation aimed at strengthening antitrust enforcement. Developments among litigated cases before courts are mixed. In 2020, the DOJ lost its effort to block Sabre’s acquisition of an allegedly nascent competitor, Farelogix, but the DOJ later had the decision vacated on appeal after the parties abandoned their transaction. In 2019, the Supreme Court ruled against Apple, finding that iPhone owners had standing to sue Apple for federal antitrust violations regarding the App Store. Individual companies are increasingly filing private litigation against some of the largest technology firms as well.

# 1AR

## T – Courts

### Can’t Be Courts – 1AR

#### Requiring the aff to change statutory or judicial interpretations the crux of the topic and the ONLY unique change from the squo

ABA 7 (American Bar Association, ABA Section of Antitrust Law, Monograph 24, “Chapter 1 Introduction,” *Federal Statutory Exemptions from Antitrust Law*, American Bar Association, 2007, ISBN: 978-1-59031-864-5, pp.4-7)

A. Background: The Broad Scope of Antitrust, and an Introduction to Statutory Exemptions

Because this monograph concerns statutory constraints on the reach of antitrust law, a word is in order about the broad scope of antitrust principles.

Sherman Act sections 1 and 2 apply to “trade or commerce among the several States, or with foreign nations,”11 but the act leaves that phrase undefined. The Clayton and Federal Trade Commission Acts both define the “commerce” to which they apply,12 but give it only a jurisdictional meaning similar to that under the Commerce Clause of the federal Constitution.13 The courts have thus been left to decide just how broadly antitrust applies. Despite some uncertainty in the first half of the twentieth century,14 and with one lingering exception,15

**[FOOTNOTE 15]**

15. Namely, neither the Court nor Congress has ever overruled the Court’s sui generis 1922 rule that professional baseball is not “commerce.” See Fed. Club. 259 U.S. at 209.

**[FOOTNOTE 15]**

modem courts define this scope very broadly. The inclusive modem definition is perhaps the natural culmination of the Supreme Court’s long-held belief that “Congress intended to strike as broadly as it could in Section 1 of the Sherman Act,”16 a view it developed because “[l]anguage more comprehensive” than that in Section 1 “is difficult to conceive.”17

This view probably also reflects the broad definition given to the terms “trade” and “commerce” for various purposes at common law, as some courts have explicitly held that antitrust was meant to incorporate those ideas." Thus, the courts have held generally that any exchange of money for a good or service, between any persons, is in ‘trade or commerce,”19 and the Supreme Court itself has described “commerce” to include any “exchange of...a service for money.’00 Indeed only in very limited, and sometimes exotic, circumstances have modem courts found conduct to be outside the scope of antitrust.21

**[FOOTNOTE 21]**

21. See. e.g., Dedication & Everlasting Love to Animals v. Humane Soc’y of the U.S., 50 F.3d 710 (9th Cir. 1995) (holding that solicitation of gratuitous charitable donations is not trade or commerce).

**[FOOTNOTE 21]**

Therefore, in the absence of an explicit statutory exemption or a judicially created immunity, and so long as it is in the interstate or foreign commerce of the United States, the giving of essentially anything in return for money or barter is subject to federal antitrust.

Understanding the scope of modem antitrust also requires recognition of contemporary developments that affect enforcement of antitrust and its substantive reach. The United States is one of the few of more than 100 nations with competition laws that permit private antitrust suits.22 U.S. antitrust has permitted those suits dating from the initial adoption of the Sherman Act in 1890,23 and they comprise by far the largest component of antitrust enforcement.24 However, recent caselaw developments may increase barriers to the private lawsuits on which U.S. enforcement heavily depends. During the past thirty years or so, the federal courts have gradually raised doctrinal barriers to private enforcement of federal antitrust law, particularly through the rule of antitrust injury and the developing doctrine of antitrust standing.25 Partly as a result of these developments, private enforcement has declined.26

#### And – there’s a clear and manageable caselist which we’ll insert here

Garza et al 7 (Deborah A. Garza, Chair of the Antitrust Modernization Commission, partner in Fried, Frank, Harris, Shriver & Jacobson LLP’s Washington, D.C., office, formerly served in the Antitrust Division of the Department of Justice as Chief of Staff and Counselor, and as Special Assistant to the Assistant Attorney General for Antitrust, JD University of Chicago Law School, BS Northern Illinois University; Jonathan R. Yarowsky, Vice-Chair of the Antitrust Modernization Commission, partner in Patton Boggs LLP’s Washington, D.C., office, former Special Associate Counsel to President Clinton, advising on antitrust, former General Counsel to the House Committee on the Judiciary, and Chief Counsel to the House Judiciary Subcommittee on Economic and Commercial Law, JD UCLA Law School, MS Cornell University, AB University of Michigan; Bobby R. Burchfield, W. Stephen Cannon, Dennis W. Carlton, Makan Delrahim, Jonathan M. Jacobson, Donald G. Kempf, Jr., Sanford M. Litvack, John H. Shenefield, Debra A. Valentine, and John L. Warden, all Commissioners of the Antitrust Modernization Commission; “Report and Recommendations,” the **final report of the Antitrust Modernization Commission, as required by the Antitrust Modernization Commission Act of 2002**, April 2007, p.378, https://govinfo.library.unt.edu/amc/report\_recommendation/amc\_final\_report.pdf)

ANNEX A

**Exemptions from the Antitrust Laws**

Statutory Exemptions **from the Antitrust Laws**

Agricultural Marketing Agreement Act, 7 U.S.C. §§ 608b–608c

Anti-Hog-Cholera Serum and Hog-Cholera Virus Act, 7 U.S.C. § 852

Capper-Volstead Act, 7 U.S.C. §§ 291–92

Charitable Donation Antitrust Immunity Act, 15 U.S.C. §§ 37–37a

Defense Production Act exemption, 50 U.S.C. app. § 2158

Export Trading Company Act, 15 U.S.C. §§ 4001–21

Fishermen’s Collective Marketing Act, 15 U.S.C. §§ 521–22

Health Care Quality Improvement Act, 42 U.S.C. §§ 11101–52

Labor exemptions (statutory and non-statutory), 15 U.S.C. § 17; 29 U.S.C. §§ 52, 101–15, 151–69; (and common law)

Local Government Antitrust Act, 15 U.S.C. §§ 34–36

Medical resident matching program exemption, 15 U.S.C. § 37b

National Cooperative Research and Production Act, 15 U.S.C. §§ 4301–06

Need-Based Educational Aid Act, 15 U.S.C. § 1 note

Newspaper Preservation Act, 15 U.S.C. §§ 1801–04

Non-profit agricultural cooperatives exemption, 15 U.S.C. § 17

Small Business Act exemption, 15 U.S.C. §§ 638(d), 640

Soft Drink Interbrand Competition Act, 15 U.S.C. §§ 3501–03

Sports Broadcasting Act, 15 U.S.C. §§ 1291–95

Standard Setting Development Organization Advancement Act, 15 U.S.C. §§ 4301–05, 4301 note

Webb-Pomerene Export Act, 15 U.S.C. §§ 61–66

**Statutory Exemptions Created as Part of a Regulatory Regime**

Air transportation exemption, 49 U.S.C. §§ 41308–09, 42111

McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15

Motor transportation exemption, 49 U.S.C. §§ 13703, 14302–03

Natural Gas Policy Act exemption, 15 U.S.C. § 3364(e)

Railroad transportation exemption, 49 U.S.C. §§ 10706, 11321(a)

Shipping Act, 46 U.S.C. app. §§ 1701–19

Judicial**ly Created** Exemptions

Baseball exemption

Filed-rate/Keogh doctrine

Noerr-Pennington Immunity

State Action Doctrine

Various implied immunities created in specific regulatory settings

### A2: Scope

**Courts “define the scope”**

**Kades 19** [Michael Kades, “The State of U.S. Federal Antitrust Enforcement,” Washington Center for Equitable Growth, 9—17—19, https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true, accessed 6-2-21]

Antitrust enforcement is also often treated as a single entity, but multiple forces affect both the intensity and effectiveness of enforcement: enforcement activity (the number and type of cases that enforcers bring), the resources Congress provides for antitrust enforcement, and, in the federal system, the merger filing-fee system that has become the primary source of antitrust funding. These are not the only factors that affect antitrust enforcement. In the United States, judicial interpretationsdefine the scopeof the antitrust laws. The individuals running the antitrust agencies have broad discretion to determine which cases to pursue.

#### Courts on aff is better – they still get tons of process CPs but allow aff to actually solve

### Can’t Be Courts – Prohibitions – 1AR

#### We meet prohibitions – the way the resolution is worded says “increase prohibitions by at least expanding the scope” – it’s meant to be an effect of the plan

#### We meet Hill – by expanding scope of Sherman, more legislative prohibitions are in effect

Their card for reference. MSU = Blue.

Benjamin Hill 7, Judge on the Georgia Appeals Court, “Rose v. State”, Court of Appeals of Georgia, 1 Ga. App. 596, 601-602, 58 S.E. 20, 22-23, 1907 Ga. App. LEXIS 47, 4/11/1907

The words "otherwise prohibited," relied on by the State, really mean nothing in this statute. When the legislature used the words "prohibited by law," it exhausted the subject, and the addition of the words "high license or [\*\*\*11] otherwise" was "wasteful and ridiculous excess." These general words are sometimes added to specific enumeration in statutes out of abundance of caution, but they usually mean nothing. Certainly such words must be "restricted to the same genus as the things enumerated," and the use of the word "otherwise," following the words "prohibited by law," meant that the "otherwise" prohibition of the sale of liquor was to be a legal prohibition, that is, prohibited by the law of high license, or otherwise prohibited by law. But we do not think this general word means anything in this statute. Whatever it was intended to mean, it could not by any rule of logic give to the failure of the commissioners to grant licenses the force and effect of a positive enactment prohibiting the sale. The word "prohibit" is an active, transitive verb. As defined by the Standard Dictionary, it means "to forbid, especially by authority or legal enactment; interdict; as, to prohibit liquor-selling, or a person from selling liquor." The word "prohibit," [\*\*23] in its legal sense, implies some legislative enactment forbidding something. "The laws of England, from the early Plantagenets, sternly prohibited the [\*\*\*12] conversion of malt into alcohol." "Prohibition," in the United States, specifically means "the forbidding [\*602] by legislative enactment of the manufacture and sale of alcoholic liquors for use as beverage." Giving, therefore, to the word "prohibited" its ordinary signification and its technical meaning, as applied to the particular subject-matter of the sale of spirituous liquors, it must involve some positive act done by authority.

### A2: Resolve

#### Narrowing Parker immunity exposes more ACPB to legislative prohibitions

#### LSA defines “resolution” not “resolved

[Their card. MSU = Blue]

‘Resolved’ demands a legislative instrument.

LSA ‘5 [Louisiana State Legislature; 2005; Governing body of the state of Louisiana; Louisiana State Legislature, “Legislative Glossary,” <https://www.legis.la.gov/legis/Glossary.aspx>]

Resolution

A legislative instrument that generally is used for making declarations, stating policies, and making decisions where some other form is not required. A bill includes the constitutionally required enacting clause; a resolution uses the term "resolved". Not subject to a time limit for introduction nor to governor's veto. (Const. Art. III, §17(B) and House Rules 8.11, 13.1, 6.8, and 7.4 and Senate Rules 10.9, 13.5 and 15.1)

## Crane cp

#### Case turns warming - geoengineering overcompensates – fails and causes extinction.

#### Baum ‘13

Et al; Dr. Seth Baum is an American researcher involved in the field of risk research. He is the executive director of the Global Catastrophic Risk Institute (GCRI), a think tank focused on existential risk. He is also affiliated with the Blue Marble Space Institute of Science and the Columbia University Center for Research on Environmental Decisions. He holds a PhD in Geography and authored his dissertation on climate change policy: “Double catastrophe: intermittent stratospheric geoengineering induced by societal collapse” - Source: Environment Systems & Decisions - vol.33, no.1 pp. 168-180 - #E&F – available via: https://pubag.nal.usda.gov/catalog/122717

Perceived failure to reduce greenhouse gas emissions has prompted interest in avoiding the harms of climate change via geoengineering, that is, the intentional manipulation of Earth system processes. Perhaps the most promising geoengineering technique is stratospheric aerosol injection (SAI), which reflects incoming solar radiation, thereby lowering surface temperatures. This paper analyzes a scenario in which SAI brings great harm on its own. The scenario is based on the issue of SAI intermittency, in which aerosol injection is halted, sending temperatures rapidly back toward where they would have been without SAI. The rapid temperature increase could be quite damaging, which in turn creates a strong incentive to avoid intermittency. In the scenario, a catastrophic societal collapse eliminates society’s ability to continue SAI, despite the incentive. The collapse could be caused by a pandemic, nuclear war, or other global catastrophe. The ensuing intermittency hits a population that is already vulnerable from the initial collapse, making for a double catastrophe. While the outcomes of the double catastrophe are difficult to predict, plausible worst-case scenarios include human extinction. The decision to implement SAI is found to depend on whether global catastrophe is more likely from double catastrophe or from climate change alone. The SAI double catastrophe scenario also strengthens arguments for greenhouse gas emissions reductions and against SAI, as well as for building communities that could be self-sufficient during global catastrophes. Finally, the paper demonstrates the value of integrative, systems-based global catastrophic risk analysis.

**Interaction is inevitable—even without free trade, people will still travel, and goods will still move. It is just a question of whether those interactions should have structure or be dominated by regional blocs**

#### Critiques of free trade are resolvable within multilateral free trade, but abandonment guarantees the impact

Charnovitz 20 Steve Charnovitz George Washington University - Law School Associate Professor. "Solving the Challenges to World Trade." GWU Legal Studies Research Paper 2020-78 (2020). <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736069> {DK}

World trade faces fundamental challenges. While the social and economic benefits gained through exchange have been apparent to humans since antiquity, the litany of political complaints about cross-border commerce may be more extensive and louder than ever before. As always, the market recognizes the importance of international trade to prosperity. Yet many politicians express doubt as to when participation in international trade enhances the national interest. One of the biggest indicators of diminishing support for trade is the moribund status of the leading institution of the trading system, the World Trade Organization (WTO) in Geneva. There are three branches of WTO governance and all three are in trouble: The Trump Administration has discombobulated the judicial branch by refusing to agree to new judges for the Appellate Body. The post of the WTO Director-General, who heads the executive branch, has been vacant since August 2020. The topmost body of the WTO’s legislative branch, the Ministerial Conference, has failed to meet since 2017. Overall, the WTO’s decrepitude demonstrates “constitutional failure.” Globalization and the governance of globalization will survive. The transborder movement of goods, services, capital, technology, and people will survive because most countries are not attracted to the deprivation that would be entailed by an alternative strategy of national (or subnational) self-sufficiency. The WTO will (probably) also survive now that the Trump Administration will soon pack its bags. The WTO survives because lawmakers and influential economic and social actors on the world stage know that international law and international rules are needed to restrain beggar-thy-neighbor trade politics. Around the world, many countries continue to be interested in enhancing mutual commitments to deepen trade ties as reflected most recently in the November 2020 signing of the Regional Comprehensive Economic Partnership (RCEP) The underperformance of the WTO, of course, is hardly the biggest policy dysfunction on Earth. Our biggest problems include an unchecked viral pandemic, worsening global warming, widespread poverty, and a proliferation of nuclear ballistics in states with malign intentions. As governments address such conditions, a basic question arises as to whether international trade is part of the solution or part of the problem. Seventy-five years ago, the conventional wisdom was that trade was part of the solution for peace1 , economic growth, and social development. In my view, that conventional wisdom remains convincing today. Yet the dialectics of the cosmopolitan conversation have led to reassessments of many economic, social, and political practices within each society and between countries. Are existing trade patterns supportive of solutions to the most pressing problems facing the planet? Under what conditions does trade undermine optimal solutions, especially to the challenges of global warming and underemployment? Although trade per se is conceptually distinct from the international supervision of trade policies, these two phenomena are difficult to disentangle. Voluntary international trade makes traders better off and so too does global commerce enhance the wealth of nations. The freedom to engage in transnational commerce promotes social progress and enables bottom-up prosperity. Nevertheless, from Aristotle onward, some trade theorists have argued for economic autarky and other top-down controls over individual liberty and transborder exchange. Acting on the evidence that international trade enriches societies, leading publicists have championed intellectual justifications for free trade — in the 16th century Hugo Grotius, in the 17th century Dudley North, in the 18th century Adam Smith, and in the 19th century David Ricardo. Nevertheless, those liberal philosophies were often ignored by political arguments that states have a right to and should control trade in order to promote mercantilist, diplomatic, industrial or security objectives. Yet the domestic political debate on trade, however edifying, was necessarily imperfect and incomplete because other countries (the other side of the transaction) were not equal participants in that debate. To gain the greatest benefits from mutual market access, the political debate on trade has to occur on two levels, the international and the domestic.

#### \*Interdependence prevents full escalation---conflict emerges as trade wars, not full conflict---our ev presupposes their warrants

Lee 18 Yaechan Lee Summer in the Field Fellow, 2021 Ph.D. Candidate, Political Science, Boston University, USA MA, International Relations, Peking University, China BA, Economics, Waseda University, Japan. “Economic Interdependence and Peace: a Case Comparison Between the US-China and US-Japan Trade Disputes.” *East Asia* 35, 215–232 (2018). <https://doi.org/10.1007/s12140-018-9298-1> {DK}

Immanuel Kant had argued in his treatise on perpetual peace that economic interdependence reinforces constraints and liberal norms by creating transnational ties that encourage accommodation rather than conflict [30]. Free trade was historically seen as a remedy to war as expanded trade will bring together countries under common interests, creating interdependence which will serve as a deterrent. The establishment of the World Trade Organization (WTO) following the Second World War and its advocation for free trade speak for the world’s unilateral positive perception on trade as a war deterrent [51]. Thus far, limited to military conflicts, interdependence seems to have been an effective deterrent among great powers. Since the end of the Second World War, there has not been a war among great powers, despite the Cold War that lasted several decades. Yet, some contend that such tension was also wrought by the lack of economic, personnel exchange between the two powers [2].

Gelpi and Grieco argue, through their research on the impact of trade on peace, that although previous research suggests that trade can promote peace among democratic leaders, who value policy success as necessary for extending their tenure, trade itself can also promote peace among autocratic rulers [23]. Goldsmith also argued that, when searching for evidence of a potential liberal peace in Asia, his findings suggest that there is a liberal peace extant primarily based on economic interdependence but he denies that a democratic peace exists, which is another core liberal theory [25].

Realists, such as Waltz, have acknowledged such contribution of interdependence on peace but also contended that it simultaneously promotes war. Waltz asserted that “Close interdependence is a condition in which one party can scarcely move without jostling others; a small push ripples through society” [53]. In other words, intimacy multiplies the occasions of conflicts as there are more areas of potential conflict. Katherine Barbieri had also concluded through her extensive research on bilateral relationships from 1870 to 1938 that the relationship between interdependence and conflict is curvilinear, where moderate interdependence decreases conflict, but extensive dependence increases the chances of conflict [4].

Despite such contentions by the realists, it cannot be denied that no major military conflict has occurred among great powers since the Second World War. It must also be noted, however, that conflicts other than military conflicts did occur. As Baldwin had argued in his study of economic statecraft, economic conflicts have now become an effective alternative to traditional military conflicts [3]. The scope of what defines conflict, therefore, must now be expanded as Keohane and Nye have also recognized that “relative to cost, there is no guarantee that military means will be more effective than economic ones to achieve a given purpose” [31].

In answer to such needs, Dale Copeland drew from both liberalist and realist perspectives and demonstrated a “trade expectations theory” where peace is determined by the positivity or negativity of expectations on future trade environments. In Copeland’s definition, the absence of peace does not connote military conflict. Trade wars, like that between the US and China now and the US and Japan before, are also considered to be in states of conflict [15]. Under this definition of conflict, increased interdependence has not prevented conflict but rather increased conflict frequency, as it will be shown in the later parts of this article. The US initially sought peace with Japan and with China as its expectations on prospects of trade with the respective countries were positive. However, as expectations deteriorated with increasing trade imbalance, the US began to initiate crises, such as waging trade wars, to protect its commercial interests. Both the Japanese and Chinese case demonstrated similar processes of turning from initial cordiality to later hostility, thus increasing the frequency of conflicts along with higher interdependence.

Of course, the positive relationship between the increase in trade volume and conflicts may be credited to other factors, such as the US’s rising intolerance for China and Japan’s protectionist policies, or in case of China, the multiple traditional security-related issues at stake. Nevertheless, as aforementioned, neither the US nor China is actively seeking to resort to traditional means to handle their diverging interests. Increased interdependence, therefore, has become an attractive alternative for either country, even for handling domestic interests such as leaders’ electoral concerns. Engaging conflict becomes less costly and more accessible than traditional conflicts with increased interdependence. Therefore, the sole **fact that trade war became one of the potentials and most effective means to tackle a breach in interests signifies that increased interdependence spurs further conflict by making conflict more accessible and inexpensive**. Susan Macmillan has contended that the relationship between interdependence and peace deserves a multifaceted approach and that either peace or conflict comes not only from the presence or absence of interdependence but also from other complex factors, such as political factors as well [34]. However, while acknowledging the impact of such factors, this paper will limit its focus to the economic realm and assert a direct correlation between increase in economic interdependence and trade conflict through making comparative empirical analysis on the trade conflict cases between US and China and US and Japan.

#### No impact

Kareiva 12 (Peter Kareiva et. al, – Chief Scientist and Vice President of the Nature Conservancy, Michelle Marvier, Robert Lalasz, “Conservation in the Anthropocene Beyond Solitude and Fragility”, The Breakthrough, http://thebreakthrough.org/index.php/journal/past-issues/issue-2/conservation-in-the-anthropocene/)

As conservation became a global enterprise in the 1970s and 1980s, the movement's justification for saving nature shifted from spiritual and aesthetic values to focus on biodiversity. Nature was described as primeval, fragile, and at risk of collapse from too much human use and abuse. And indeed, there are consequences when humans convert landscapes for mining, logging, intensive agriculture, and urban development and when key species or ecosystems are lost.

But ecologists and conservationists have grossly overstated the fragility of nature, frequently arguing that once an ecosystem is altered, it is gone forever. Some ecologists suggest that if a single species is lost, a whole ecosystem will be in danger of collapse, and that if too much biodiversity is lost, spaceship Earth will start to come apart. Everything, from the expansion of agriculture to rainforest destruction to changing waterways, has been painted as a threat to the delicate inner-workings of our planetary ecosystem.

The fragility trope dates back, at least, to Rachel Carson, who wrote plaintively in Silent Spring of the delicate web of life and warned that perturbing the intricate balance of nature could have disastrous consequences.22 Al Gore made a similar argument in his 1992 book, Earth in the Balance.23 And the 2005 Millennium Ecosystem Assessment warned darkly that, while the expansion of agriculture and other forms of development have been overwhelmingly positive for the world's poor, ecosystem degradation was simultaneously putting systems in jeopardy of collapse.24

The trouble for conservation is that the data simply do not support the idea of a fragile nature at risk of collapse. Ecologists now know that the disappearance of one species does not necessarily lead to the extinction of any others, much less all others in the same ecosystem. In many circumstances, the demise of formerly abundant species can be inconsequential to ecosystem function. The American chestnut, once a dominant tree in eastern North America, has been extinguished by a foreign disease, yet the forest ecosystem is surprisingly unaffected. The passenger pigeon, once so abundant that its flocks darkened the sky, went extinct, along with countless other species from the Steller's sea cow to the dodo, with no catastrophic or even measurable effects.

These stories of resilience are not isolated examples -- a thorough review of the scientific literature identified 240 studies of ecosystems following major disturbances such as deforestation, mining, oil spills, and other types  of pollution. The abundance of plant and animal species as well as other measures of ecosystem function recovered, at least partially, in 173 (72 percent) of these studies.25

While global forest cover is continuing to decline, it is rising in the Northern Hemisphere, where "nature" is returning to former agricultural lands.26 Something similar is likely to occur in the Southern Hemisphere, after poor countries achieve a similar level of economic development. A 2010 report concluded that rainforests that have grown back over abandoned agricultural land had 40 to 70 percent of the species of the original forests.27 Even Indonesian orangutans, which were widely thought to be able to survive only in pristine forests, have been found in surprising numbers in oil palm plantations and degraded lands.28

Nature is so resilient that it can recover rapidly from even the most powerful human disturbances. Around the Chernobyl nuclear facility, which melted down in 1986, wildlife is thriving, despite the high levels of radiation.29 In the Bikini Atoll, the site of multiple nuclear bomb tests, including the 1954 hydrogen bomb test that boiled the water in the area, the number of coral species has actually increased relative to before the explosions.30 More recently, the massive 2010 oil spill in the Gulf of Mexico was degraded and consumed by bacteria at a remarkably fast rate.31

**Deforestation**

**We turn it---their ev assumes a world with total unrestricted free trade---that is not the impact, rather our argument is free trade needs a global governing presence, but that the absence of that presence cements a North/South split of a small set of trading blocs that strip resources from the rest of the world**

**No impact to deforestation** – species resilient, pessimism pervades their stats, reseeding fills-in, and local protectors ensure survival

**Pearce citing Martin 15** ---- Fred, environment consultant for New Scientist Magazine, syndicated columnist featured in The Guardian/The Independent/Foreign Policy/Popular Science/Time, the text cites Claude Martin who was the former Director General of WWF International and is the current Chancellor of the International University in Geneva, “A Welcome Dose of Environmental Optimism,” 7/1, https://www.newscientist.com/article/mg22730280-500-a-welcome-dose-of-environmental-optimism/

**Optimism is in the air.** Some environmentalists are **shrugging off their perennial doom** and gloom, and daring to think the possible – that **we are not done for**. After half a century of despair since the publication of Silent Spring, The Limits to Growth and The Population Bomb, the green shoots of ecological redemption can sometimes be seen between hard covers. It is a welcome relief.

In On The Edge, Claude Martin, former director of environmental group WWF International, remembers that back in the 1980s, forest biologists **like him** warned that the loss of pristine rainforests was driving tens of thousands of species to extinction. **Yet it wasn’t so**. His magisterial review of the state of those forests concedes that the “pessimistic projections”, which assumed that species would be lost as fast as forest area, **have proved false**.

**Most** species in these habitats survive **even in the face of rampant deforestation**. Puerto Rico lost 99 per cent of its primary forests but just seven bird species, and today **has more species than before**, he says. And thanks in part to reseeding by alien species, **old forests are starting to grow again**.

The Anthropocene geological epoch, it turns out, **is not** a one-way trip to ecological disaster. Nature **clings on and fights back**: the trick is to find ways to help. That means cosseting the vast amount of nature that persists in logged and degraded forests that conservationists traditionally snub as not “pristine”. And it also means embracing people who were once seen as enemies of conservation.

## Tax CP

### Taxation CP – PDCP – 1AR

#### Prohibitions prevent “business as usual”

Ward 21 --- Christine Ward, judge on the Allegheny County Court of Common Pleas, COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA, 3/22/2021, https://www.leechtishman.com/wp-content/uploads/2021/03/Ungarean-Opinion.pdf

This Court is not persuaded by Defendant’s argument that, in order to be entitled to Civil Authority coverage, the action of civil authority must be a complete and total prohibition of all access to Plaintiff’s property by any person for any reason. If this Court were to accept Defendant’s cramped interpretation of the phrase “prohibits access,” it would result in businesses being precluded from coverage in nearly every instance where an action of civil authority effectively closes the business to the vast majority of the general public, but does not necessarily preclude employees, or certain other individuals, from entering the premises to clean, maintain the building, obtain important documents, or to perform other similar functions, which, while important, remain secondary to the activities that actually generate business income.

Once again this Court notes the importance of reading the insurance contract’s provisions as a whole so that all of its parts fit together. In so doing, this Court recognizes that the insurance contract provisions at issue are generally designed to provide business owners with coverage for lost busines income in the event that their business’ operations are suspended. Accordingly, this Court’s primary focus when interpreting the phrase “prohibits access,” at least in the context of this insurance contract, is the extent to which the action of civil authority prevented the insured from accessing its premises in a manner that would normally produce actual and regular business income. Given this understanding of the insurance contract, the fact that some employees, and even some limited number of patients, were still permitted to go to Plaintiff’s property for emergency procedures does not necessarily mean that Plaintiff is altogether precluded from coverage under the Civil Authority provision. The contract merely requires that “an action of civil authority . . . prohibits access to” Plaintiff’s property. It does not clearly and unambiguously state that any such prohibition must completely and totally bar all persons from any form of access to Plaintiff’s property whatsoever.

#### They overlimit and make the aff a sitting duck for PICs – stable direction of increasing prohibitions ensures links

#### No definitions of tax are mutually exclusive with prohibitions – taxes CAN enforce prohibition absent count-evidence

### Taxation CP – NB – Taxes Fail – 1AR

#### Ecological taxes doomed to fail

Weishaar 14- Stephan Weishaar is a Professor of Law and Economics at the University of Groningen in the Netherlands, “Emissions Trading Design A Critical Overview” page 23

1. While the price burden of the carbon tax is known to undertakings, the environmental effectiveness of the tax scheme is uncertain. Emission levels among companies may vary, which may imply that environmental targets will not be reached.

2. A tax rate should be set in such a way that the marginal benefits of pollution equal the marginal costs of pollution. Failure to set an appropriate rate undermines the effectiveness of the tax in achieving a full internalization of the externalities. The Pigouvian tax is a simple incentive-based mechanism that is capable of inducing behavioural changes. To set an optimal tax rate, however, governments require detailed information, which will not always be available. If a tax is set too high, companies may downsize or even shift production abroad. Similar concerns arise with emissions trading systems that employ too stringent targets. Here, the shifting of production abroad is referred to as carbon leakage.

3. The effectiveness of the tax depends heavily on demand and supply. Only when the demand and supply curves are flat (that is, elastic) will a price increase lead to a significant change in consumption or supply patterns and make the tax effective. If either supply or demand, or both, are highly inelastic, the effect of a tax will be very minimal; it will then not change consumption or production patterns.

4. The use of a flat rate tax is not fully consistent with the idea of a Pigouvian tax. As companies have different marginal cost functions, a flat rate will not provide appropriate incentives for emissions reduction at all.

### Taxation CP – A2: Follow-On

#### Judicial nullification wrecks solvency – uniformly read down liability to protect big business

Crane 20 [Daniel A. Crane, Frederick Paul Furth, Sr. Professor of Law, University of Michigan, 3-1-2020 https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3561870]

Judges and scholars frequently describe antitrust as a common law system predicated on open-textured statutes, but that description fails to capture a historically persistent phenomenon; judicial disregard of the plain meaning of the statutory texts and manifest purposes of Congress. This pattern of judicial nullification is not evenly distributed: When the courts have deviated from the plain meaning or Congressional purpose, they have uniformly done so to limit the reach of antitrust liability or curtail the labor exemption to the benefit of industrial interests. This phenomenon cannot be explained solely or even primarily as a tug-of-war between a progressive Congress and conservative courts. The judges responsible for these decisions were far from uniformly conservative, Congress has not mobilized to overturn the judicial precedents, nor, despite opportunities to do so, have the courts constitutionalized their holdings to prevent Congressional overriding. Antitrust antitextualism is best understood as an implicit political arrangement in which Congress writes broad statutes expressing anti-bigness republican idealism, and then the courts read down the statutes pragmatically to accommodate competing demands for efficiency and industrial progress.