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### Rural Health Adv

#### Advantage One: Rural Health

#### Broad state action immunity drives hyper-consolidated health markets – especially for hospital mergers

Koller 21 (Christopher, adjunct professor of community health in the School of Public Health at Brown University, and Liam Bendicksen, research assistant at the Program On Regulation, Therapeutics, And Law (PORTAL) in the Division of Pharmacoepidemiology and Pharmacoeconomics at Brigham and Women’s Hospital, “The Risk Of Repeal: Examining The Use Of State-Action Immunity For Hospital Mergers,” August 10th, 2021, <https://www.healthaffairs.org/do/10.1377/forefront.20210806.481073/full/)//NRG>

The US hospital industry has consolidated at an expedited pace in the last decade, charging ahead despite evidence that horizontal consolidation leads to increased commercial prices and has a mixed or negative effect on care quality. While federal antitrust authorities have become increasingly litigious in prospectively addressing anticompetitive hospital transactions in recent years, research suggests that the judicial remedies such as consent decrees sought by this type of enforcement are poorly equipped to foster healthy hospital markets.

Rather than relying on court orders to promote competition, some state legislatures have instead experimented with immunizing hospital transactions from antitrust scrutiny in exchange for concessions like mandated investments in community health. Using the proposed formation of an academic medical center consisting of Lifespan, Care New England (CNE), and Brown University’s Warren Alpert Medical School in Rhode Island as a case study, this post reviews the risks of implementing such state-action immunity policies.

The proposed merger in Rhode Island would create a hyper-consolidated hospital market, concentrating more than two-thirds of the acute care beds in the state under the control of a single health system. Former governor Gina Raimondo personally championed the deal in spite of the risk it poses to competition, arguing that “a unified academic health system is in the best interest of Rhode Islanders.” The Federal Trade Commission’s recent legal actions contesting similar mergers suggest that the outcome of this transaction and future hospital mergers in other states may hinge on the willingness of state legislatures to immunize these deals from federal antitrust scrutiny. We argue that the risks of state-action immunity policies for hospital mergers outweigh the potential benefits and propose the alternative approach of price controls targeted at systems with dominant market power.

State-Action Immunity For Hospital Mergers

In the past three decades, at least eight states have experimented with a legal framework known as state-action immunity to oversee their hospital markets (see exhibit 1). Under this framework, which the Supreme Court reaffirmed in 2012, states may enact policies that insulate hospitals from the enforcement of federal antitrust law so long as those policies “displace competition” in the service of other regulatory objectives. In exchange for blocking antitrust scrutiny, these states impose conditions on the behavior of merging hospitals, such as limiting cost growth and requiring that health systems keep rural facilities in operation. State legislatures have implemented these schemes, known as Certificates of Public Advantage (COPAs) or cooperative agreements depending on their design, either directly through legislation or by authorizing state-level agencies to do so. Four of these policies remain in place in South Carolina, Virginia, Tennessee, and West Virginia respectively.

The Federal Trade Commission vehemently opposes the use of state-action immunity policies, arguing that these anticompetitive schemes “are likely to harm communities through higher healthcare prices and lower healthcare quality.” According to a 2016 estimate, thirteen states currently have laws on the books that could be used to trigger state-action immunity, either in the form of so-called certificate of public advantage laws or analogous cooperative agreements.

The Risk Of Regulating In Perpetuity

While the prospect of saving rural health systems or keeping care local might tempt lawmakers to rescue mergers from federal antitrust review using state-action immunity, legislators should only pursue such a policy after thoroughly considering the potential consequences.

Crucially for patients and state health care systems, a limited but growing body of evidence suggests that state-action immunity policies tend to lead to increased costs without substantially impacting care quality. This is almost entirely due to states’ track record of repealing state-action immunity policies after several years, as exhibit 1 illustrates. In many cases, repealing these policies creates a state-sanctioned, deregulated near-monopoly that is largely insulated from antitrust scrutiny. Unsurprisingly, sudden deregulation typically enables hospitals to raise prices for commercial payers.

One apparent flaw of state-action immunity policies is that hospital systems have a massive interest in repealing the legislation that regulates their activity. The allure of doing business in an uncompetitive market, largely free from after-the-fact antitrust enforcement, is all too appealing even for tax-exempt hospital systems. The literature on the rent-seeking behavior of hospitals, including nonprofits, supports the notion that health systems regulated under state-action immunity policies will exert substantial pressure on state legislatures to reverse these policies.

If approved, for example, the Lifespan-CNE system would become far and away the largest employer in Rhode Island. Hospitals are already the largest employers in roughly 17 states and drive substantial economic activity in communities nationwide. This sort of economic significance translates into enormous influence at state capitals, heightening the risk that health systems can lobby for deregulation, including the rollback of state-action immunity policies.

Empirical analyses have documented the economic havoc that repealed state-action immunity policies wreak on hospital markets. According to a study conducted by Christopher Garmon and Kishan Blatt, commercial prices for inpatient services at Benefis Health increased 20 percent on average relative to controls after Montana repealed its state-action immunity policy. This finding is broadly consistent with a consensus in the health economics literature that commercial price hikes generally ensue as hospitals gain market power.

While Rhode Island and many other states have a range of policy tools at their disposal to navigate health system mergers, the repeal of a previously instituted certificate of public advantage or the legislation authorizing its use could nonetheless devastate most states’ delivery systems. Payer-side regulations such as Rhode Island’s hospital rate caps do not target providers’ for the roughly 61 percent of people in the US with employer-sponsored health insurance who are covered by self-insured plans, a group that makes up around 43 percent of Rhode Islanders. Except in cases like Maryland’s all-payer system in which states directly manage providers’ ability to set prices and generate increased utilization, states’ payer-based regulations will largely not prevent merged systems from driving profits through increased utilization among the self-insured population. The only operative restraint on health systems’ profits after the repeal of a state-action immunity policy is their implausible desire to curb their own earnings.

Some states, such as Tennessee, have attempted to require immunized hospitals to constantly maintain a plan for reverting to split operations and ownership in case officials wish to walk back a merger approved using a state-action immunity scheme. If lawmakers in Rhode Island and other states are committed to forging ahead with state-action immunity despite the risks, this strategy is worth exploring, though no real-world evidence yet exists to endorse this course of action.

Alternatives For States

Given the risks of state-action immunity policies, state policymakers should resist the siren call of consolidation and focus on alternative policy strategies with better prospects for containing costs and maximizing quality in hospital markets.

As many scholars have recommended, states could introduce upper limits on the prices that health systems with dominant market power may charge to commercial insurers. Regulators in Rhode Island have already proposed such a policy. As the National Academy of Social Insurance has suggested, policymakers in other states could tie this payment ceiling to Medicare rates as a benchmark. Payment ceiling-style approaches like this confront hospitals’ ability to gouge ever-higher commercial prices at the source but do not require the sort of extensive regulatory infrastructure needed to support a state-action immunity policy. States can also leverage Medicaid reimbursement policies, health insurer oversight and bulk purchasing of public employee benefits to accelerate the adoption of population-based payment designs.

Risks remain, however: health systems can still vertically consolidate or merge with regional and national hospital chains or systems, thus removing local accountability. Legislation granting state officials the authority to reject unfavorable mergers, such as Rhode Island’s Hospital Conversions Act, can mitigate these risks.

Policymakers in Rhode Island and beyond should allow federal and state antitrust authorities to enjoin mergers they deem anticompetitive. The risks of instituting and later repealing a state-action immunity policy are too great; the experience of other states indicates that merged systems will, per their incentives, find a way to obtain a deregulated near-monopoly down the line. In the long term, state-action immunity policies for hospital markets seem bound to crumble under the weight of intense provider lobbying and the bureaucratic strains of permanent oversight. States should instead focus on promoting provider competition within their borders, allowing federal antitrust oversight of anticompetitive mergers to proceed unabated, and regulating the pricing practices of hospitals with dominant market power.

#### Narrowing immunity solves rural health – FTC antitrust authority solves physician shortages – allows the FTC to challenge “scope of practice” restrictions on nurse practitioners

McMichael 20 [Benjamin J. McMichael, Assistant Professor of Law, University of Alabama School of Law, December, 2020, “Occupational Licensing and the Opioid Crisis” 54 U.C. Davis L. Rev. 887]

This example illustrates the importance of access to healthcare providers in addition to access to health insurance. 5 And access to providers is far from given, with many areas of the country experiencing shortages of healthcare providers that experts expect to worsen over the next decade. 6 The New York Times example also highlights both a viable policy option to address these shortages - the increased use of NPs to provide care - and an important obstacle to implementing this policy - restrictive laws.

NPs are registered nurses who have undergone additional training to provide healthcare services historically provided by physicians. 7 They represent the principal source of care in many geographic areas 8 and are more likely than physicians to practice in rural and underserved communities. 9 This makes the 200,600 practicing NPs a natural option to address chronic, critical, and worsening physician shortages across the country. 10 While NPs provide healthcare services across the country, their ability to do so is not equal in all areas. State scope-of-practice ("SOP") laws - a subset of the occupational licensing laws that govern NPs and many other professionals - determine what services [\*891] NPs may provide and the conditions under which they may provide those services.

States often justify SOP laws as necessary to ensure patient safety by preventing unqualified individuals from providing care. 11 Though these laws can further this goal, excessively restrictive SOP laws undermine the ability of NPs to care for patients. Prior work has shown that eliminating restrictive SOP laws and allowing NPs to practice independently of physicians can facilitate access to care, 12 improve the quality of care, 13 reduce the use of intensive medical procedures, 14 and reduce the price of some healthcare services. 15 Based on this evidence, the Obama and Trump administrations along with the National Academy of Medicine and other organizations have urged states to relax their SOP laws. 16 A minority of states have responded by granting NPs the authority to practice independently, but the ongoing debate and [\*892] political battle over SOP laws has only intensified over the last decade. 17 Physician organizations, in particular, vigorously oppose the relaxation of these laws and have been successful in discouraging states from granting NPs independence. 18

When opposing NP independence, physician groups often argue that requiring physician supervision promotes patient safety and the delivery of high-quality care. 19 Although existing clinical evidence undermines these claims, 20 physician groups have recently emphasized the troubling possibility that allowing NPs to practice independently will increase opioid prescriptions. 21 The reasoning offered is straightforward: If NPs can prescribe opioids without physician supervision, then they will inappropriately overprescribe opioids and deepen the ongoing opioid crisis. 22 This Article engages with the debate [\*893] over NP SOP laws by empirically analyzing the impact these laws have on opioid prescriptions. Given the severity of the ongoing opioid crisis, the claim that allowing NP independence will deepen that crisis by increasing opioid prescriptions warrants careful consideration. On one hand, allowing NPs to practice independently can address critical access-to-care issues and improve the healthcare system in other important ways. On the other hand, restricting the practices of NPs may be justified despite these benefits if doing so avoids exacerbating the opioid crisis. This Article provides critical new evidence on the effect that NP SOP laws have on opioid prescriptions. Specifically, I analyze a dataset of approximately 1.5 billion individual opioid prescriptions, which represent approximately 90% of all opioid prescriptions filled at outpatient pharmacies between 2011 and 2018. This dataset provides unprecedented insight into the ongoing opioid epidemic and the role of healthcare providers in that epidemic. Because this dataset covers nearly the universe of opioid prescriptions in the United States over eight years and is organized at the individual-prescription level, I am able to develop more complete and more granular evidence on the role of NP SOP laws in opioid prescriptions than has previously been possible. The analysis reveals that allowing NPs to practice independently reduces the quantity of opioids prescribed across all physicians and NPs by approximately 4.4%. 23 In contrast to physician groups' claims, the evidence developed here suggests that relaxing NP SOP laws reduces opioid prescriptions. Thus, this Article demonstrates that, rather than exacerbating the opioid crisis, granting NPs independence is a valid policy option for addressing that crisis. These results can inform the ongoing debates over both NP SOP laws and the opioid epidemic more generally, and this Article uses this evidence to recontextualize the debate over SOP laws and offer specific policy recommendations. In addition to joining various scholars and [\*894] organizations in urging states to reform their SOP laws, this Article engages with potential federal policy options that can both address the dire healthcare provider shortages across the country while ameliorating the opioid crisis. Federal options, such as the ones discussed below, will become increasingly relevant as state legislation has proven difficult to obtain in certain states. 24 This Article proceeds in four parts. Part I details the contributions that NPs make to the healthcare system and the ways SOP laws impact their ability to do so. 25 Part II provides context for the empirical analysis that is the focus of the Article by detailing the progression of the opioid crisis. 26 Part III discusses the empirical methodology and reports the results of the empirical analysis. 27 Part IV engages with the policy implications stemming from the results of that analysis, 28 and a brief conclusion follows.

I. REGULATING HEALTHCARE PROVIDERS

Historically, physicians have delivered most of the healthcare in the United States. While other providers, such as registered nurses, have always played important roles in healthcare, physicians have been responsible for directing most care delivery. Physician dominance, however, has begun to recede as NPs and other types of healthcare providers are providing "[a] growing share of health care services." 29 And this trend will likely continue because the growth rate of NPs outstrips that of physicians, 30 which only adds urgency to resolving the debate over NP SOP laws. To provide context to that debate, this Part [\*895] begins by discussing the role of NPs in the healthcare system before outlining the contours of the debate over the SOP laws that regulate NPs.

A. Nurse Practitioners and the Laws that Govern Them

To qualify as an NP, an individual must first become a registered nurse, which often involves completing a bachelor's degree in nursing. 31 Most registered nurses practice for several years before returning to complete a master's or doctoral degree to become an NP. 32 Their training involves clinical and didactic courses that prepare future NPs to diagnose and treat patients, order and interpret tests, and prescribe medication. 33 Following their training, NPs practice in a wide variety of medical settings, but over 60% choose to provide some form of primary care. 34 With this training, NPs provide care alongside physicians across the country, 35 but where they choose to practice and which patients they choose to care for often differs substantially from the choices made by physicians. Relative to physicians, NPs more often choose to practice in primary care and to care for underserved populations, including Medicaid patients. 36 They also provide care in rural or underserved areas to a [\*896] greater extent than physicians. 37 The predilection of NPs to practice in isolated areas and care for patients who have difficulty accessing care is particularly important in an era of worsening physician shortages. For example, the Association of American Medical Colleges estimates that, by 2032, the United States will face a physician shortage of between 46,900 and 121,900. 38 Such a shortage has implications for the country generally, but it will impact rural areas to a greater degree. Recent estimates suggest that the number of physicians practicing in these areas could decline by 23% by 2030. 39 With approximately 200,600 NPs delivering care in 2019 40 NPs can alleviate physician shortages in rural and other areas. Indeed, NPs outnumber primary care physicians, 41 practice in convenient locations like retail and urgent care clinics, 42 and represent the principal source of healthcare in many parts of the country. 43 However, the ability of NPs to function as the principal source of healthcare depends heavily on the SOP laws in place. Prior work has [\*897] classified NP SOP laws in slightly different ways. 44 Each classification system has advantages and disadvantages, but I adopt a classification scheme based on two recent studies that that focus on specific statutory and regulatory language. 45 Where necessary, I updated the classifications based on more recent statutory and regulatory information. This approach to classification eliminates the risk of mis-classification that can occur by relying on inconsistent secondary sources. It also isolates the specific statutes and regulations that policymakers may change to achieve specific results in their healthcare systems. 46 Using these statutes and regulations, I classify each state in each year as either allowing NPs to practice independently or restricting the practices of NPs. To be classified as allowing "independent practice," a state must (1) have no requirement that physicians supervise NPs and (2) grant NPs full prescriptive authority, i.e., allow NPs to prescribe the same range of medications as physicians. 47 States that either require physician supervision of NPs or restrict their prescriptive authority fall into the "restricted practice" category. [\*898] Figure 1 provides an overview of NP SOP laws during the time period analyzed here. In 2011, fourteen states allowed NPs to practice independently, and thirty-seven states restricted the practices of NPs. 48 Of the thirty-seven states restricting NP practice, fourteen changed their laws prior to the end of 2018 to allow NPs to practice independently. 49 Figure 1 separately highlights each of the states that always allowed NPs to practice independently, always restricted NP practice, and changed from restricted to independent practice. As Figure 1 illustrates, the trend among states decidedly favors NP independence, with half of all states that currently allow independent practice adopting a law to that effect in the last decade. This trend has not emerged without opposition, however, and the debate between opponents of relaxing NP SOP laws and advocates of greater NP autonomy has become quite heated. The next subpart engages with this [\*899] ongoing debating, tracing the contours of each side's arguments and the evidence that supports their arguments.

B. The Scope-of-Practice Debate

As NPs have assumed greater roles in the delivery of care, some groups have objected to liberalizing the SOP laws that govern NPs to allow them to provide more services and practice with greater autonomy. Principal among the opponents of relaxing NP SOP laws are physician groups, with the American Medical Association ("AMA") offering some of the strongest resistance to granting NPs greater independence. 50 Advocates of greater NP autonomy include nursing groups, policy think tanks of various political orientations, the National Academy of Medicine, and the Obama and Trump administrations. 51 Opponents of greater NP autonomy often emphasize the greater education completed by physicians and argue that NPs cannot provide safe or high-quality care without physician supervision. 52 Proponents often respond that NPs deliver care of similar quality as physicians and that allowing greater NP autonomy lowers the cost of care and improves access to care. 53 This Part engages with each of these sets of arguments in turn.

1. Independent Nurse Practitioners and the Quality of Care

Perhaps the most contentious point in the debate over NP SOP laws concerns the ability of NPs to deliver high-quality care without physician oversight. Opponents of NP independence generally argue that, without physician supervision, NPs cannot safely care for patients. For example, the California Medical Association has stated that it "opposes any attempts to remove physician oversight over [NPs] and believes that doing so would put the health and safety of patients at risk." 54 Some groups frame their arguments about quality of care in [\*900] terms of the different levels of education completed by NPs and physicians. 55 These arguments require the additional inferential step that more education is required to provide the type of care delivered by NPs, but they are effectively equivalent to statements that unsupervised NPs cannot safely care for patients. 56 Advocates of greater NP autonomy respond to these arguments by pointing to the available evidence that demonstrates NPs generally deliver care of comparable quality to that delivered by physicians. 57 Multiple studies have investigated the ability of NPs to deliver high-quality care, often comparing NP-supplied care to physician-supplied care. 58 A recent comprehensive analysis compared the quality of care delivered to Medicare beneficiaries by NPs and physicians and found that physicians perform better on certain quality measures and NPs perform better on other measures. 59 Related work has found no meaningful differences between NPs and physicians in caring for HIV [\*901] patients, 60 managing diabetes, 61 providing primary care, 62 prescribing medications, 63 or providing critical care. 64 Reviewing the evidence, the National Academy of Medicine concluded "that access to quality care can be greatly expanded by increasing the use of ... [NPs] in primary, chronic, and transitional care." 65 Opponents of broader NP SOP laws have criticized this evidence as irrelevant because these studies are often "performed in a setting of physician oversight and collaboration." 66 They argue that "using data from studies of nurse practitioners working under physician supervision to demand independent practice is a flawed practice, as there is no proof that nurse practitioner care without physician oversight is either safe or effective." 67 However, studies that have explicitly examined the role of relaxing NP SOP laws - as opposed to the role of NPs generally - in promoting the delivery of high-quality care have concluded that NP independence either improves or has little effect on the quality of care delivered. A 2017 study found that NP "independence had no statistically significant effect on any of the three [clinically verified indicators of [\*902] healthcare quality] studied." 68 In contrast to claims that NP SOP laws are necessary for the protection of patients, 69 this study "did not substantiate the use of [SOP] restrictions for the sole purpose of consumer protection." 70 A separate study "cast[] further doubt on the theory that state regulations limiting NPs practice are associated with quality of care." 71 Examining patient-reported quality across many years of a nationally representative dataset, a recent study found that NP independence increases the probability that patients report being in excellent health. 72 Another study found that NP independence had no effect on infant mortality rates, an important indicator of healthcare quality. 73 Overall, existing evidence does not support the contention that unsupervised NPs provide unsafe or low-quality care. To be sure, physician groups are correct in their assertion that NPs are not trained to provide the same range of services as physicians - NPs do not perform surgery, for example. Within the scope of their training, however, the evidence demonstrates that NPs perform similarly to physicians.

2. Scope-of-Practice Laws and the Cost of Healthcare

Though healthcare quality tends to receive the most attention from experts within the SOP law debate, concerns over the cost of care predominate among the patients who are most affected. Indeed, the health policy conversation over the last two decades has focused heavily [\*903] on the ability of patients to obtain affordable care. 74 Advocates of greater NP autonomy have argued that removing restrictive SOP laws will facilitate the use of lower cost providers and ultimately reduce costs within that system. For example, Kathleen Adams and Sara Markowitz have explained that "achieving productivity gains is one way to reduce cost pressures throughout the health-care system" and that such gains can be realized "by using lower-cost sources of labor to achieve the same or better outcomes." 75 The "high payment rates for physicians in the United States" makes the increased use of NPs a particularly appealing strategy for cost-reduction. 76 Recent research has demonstrated that abrogating restrictive SOP laws can reduce costs within the healthcare system to the benefit of patients and the public. A study by Morris Kleiner and others found that granting NPs independence reduces the price of a common medical examination by between 3% and 16%. 77 A separate economic evaluation estimated that liberalizing SOP laws would save approximately $ 543 million annually in emergency department visits alone. 78 Though specific to certified nurse midwives instead of NPs, a recent study found that eliminating restrictive SOP laws for nurse midwives would save $ 101 million by reducing reliance on more intensive forms of care during birth. 79 Other studies have found that payments in connection with Medicare beneficiaries cared for by NPs were between 11% and 29% lower than those cared for by physicians, 80 the savings achieved by using retail health clinics in lieu of emergency departments are higher when NPs have more independence, 81 and Medicaid costs either decrease or remain flat when NPs are granted more autonomy. 82 On the other side of the debate, opponents of NP independence can point to some evidence that NPs and SOP laws allowing them to practice independently may increase healthcare costs. In a recent report, the [\*904] Medicare Payment Advisory Commission ("MedPAC") highlighted several studies finding that NPs tend to increase costs. 83 One study found that NPs utilized more healthcare resources in caring for patients than physicians, suggesting that more extensive use of NPs may increase costs. 84 A separate study found that NPs order more medical imaging services than physicians in primary care settings. 85 Medical imaging, such as magnetic resonance imaging ("MRI") and computed tomography ("CT") scans can be expensive, so this study suggests that NP independence may increase costs over time. More recent work that examines a larger population contradicts these results, however. Examining data on Medicare and commercial insurance claims, a 2017 study found that NP independence does not result in more medical imaging and does not increase healthcare costs. 86 Similarly, research conducted by economists at the Federal Trade Commission ("FTC") revealed no evidence that relaxing NP SOP laws increases healthcare costs or prices. 87 Overall, a growing body of research suggests that allowing NPs to practice independently can reduce costs and the prices patients must pay for care, while only a few studies have found evidence to the contrary. 88

3. Nurse Practitioners and Access to Healthcare

Turning to the debate over the role of SOP laws in access to healthcare, the evidence more heavily favors advocates of greater NP autonomy than it does in either the cost or quality debates. Advocates of greater NP autonomy have argued that "by unnecessarily limiting the tasks that qualified [NPs] can perform, SOP restrictions exacerbate [healthcare provider] shortages and limit access to care." 89 An Obama administration report noted that "easing scope of practice laws for APRNs represents a viable means of increasing access to certain primary care services," 90 and the evidence generally supports this conclusion. For example, one study concluded that states with less restrictive SOP laws "overall had more geographically accessible" NPs. 91 Similarly, a 2018 study found that relaxing SOP laws increases access to healthcare generally but has the largest positive effect in counties that have the least access to healthcare. 92 This evidence suggests that "restrictive licensing laws limit the growth in the supply of [NPs] who could deliver care in communities with relatively few practicing physicians." 93 Extending this evidence to more specific measures of healthcare access, a third study concluded that granting NPs more autonomy increases the likelihood that individuals receive a routine check-up, have access to a usual source of care, and can obtain an appointment with a provider. 94 NP independence also reduces the use of emergency departments for conditions that can be addressed in less intensive (and less expensive) settings, as patients can more easily access a healthcare provider when NPs can practice independently. 95 [\*906] The response to the argument that allowing NPs greater autonomy increases access to healthcare by opponents of NP independence often does not focus explicitly on healthcare access. While not every study has found that relaxing SOP laws increases access to healthcare providers, 96 the existing evidence generally supports this conclusion. 97 Opponents, therefore, typically offer only indirect arguments on the access issue. In opposing a bill that would relaxing California's SOP laws, the president of the California Medical Association offered an example of a common argument: "We must ensure that every American, regardless of age or economic status, has access to a trained physician who can provide the highest level of care. Expanding access to care should not come at the expense of patient safety and we will not support unequal standards of care... ." 98 In other words, expanding access to NP-supplied care does not amount to expanding access to care generally because NPs provide inferior care. Though framed as an access-to-care argument, this contention is more accurately characterized as an argument about the quality of care provided by NPs, which as addressed above, appears to be equal in basic practice areas.

4. The State of the Scope-of-Practice Debate

The debate over NP SOP laws is not new, and multiple national organizations - both governmental and non-governmental - have weighed in on this debate after conducting extensive reviews of the available evidence. Perhaps the most relevant organization to opine on SOP laws to date has been the National Academy of Medicine (formerly, the Institute of Medicine). The Academy criticized restrictive SOP laws, noting that "what nurse practitioners are able to do once they graduate varies widely for reasons that are related not to their ability, education or training, or safety concerns, but to the political decisions of the state in which they work." 99 Calling for an end to restrictive SOP laws, the Academy clearly stated that NPs "should practice to the full extent of their education and training." 100

[\*907] Researchers at the FTC reached a similar conclusion, albeit for somewhat different reasons. The FTC has no authority to enforce federal antitrust laws against states that restrict the practices of NPs with SOP laws because these laws fit squarely within the state-action immunity articulated in Parker v. Brown. 101 However, FTC researchers applied the economic principles that underlie those antitrust laws and concluded that restrictive SOP laws "deny[] health care consumers the benefits of greater competition." 102 They further concluded that the harms to healthcare services markets - higher prices and decreased access to care - associated with restrictive SOP laws were not offset by any attendant benefits. 103 Consistent with these conclusions, the FTC has regularly opposed state laws that restrict the practices of NPs and supported the passage of bills that relax the SOP laws. 104

#### No turns – the aff preserves procompetitive mergers and reasonable 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.

#### Scenario 1 is food shocks:

#### Rural health disruptions cause them

Alemian 16 [David Alemian, Vice President - Capital Crest Financial Group. 11-8-2016, "Rural Healthcare Is a Matter of National Security," MD Magazine, http://www.mdmag.com/physicians-money-digest/contributor/david-alemian-/2016/11/rural-healthcare-is-a-matter-of-national-security]

Value-based healthcare has made the problem of talent retention and recruitment in rural America a matter of national security. Talent shortages make it nearly impossible for rural health organizations to successfully transition to value-based healthcare. Without the needed high quality talent, rural health organizations will be unable to deliver high quality healthcare. As a result, Medicare and Medicaid would financially penalize them.

Rural health organizations are already struggling with enormous turnover rates and costs that run up into the millions of dollars each year. The additional financial burden of penalties from Medicare and Medicaid will put many rural health organizations at risk of going out of business. If too many rural health organizations go out of business, it then becomes a matter of national security and here’s why:

In most rural communities, the healthcare organization is the largest employer. When the largest employer goes out of business, the community collapses and people move away. What was once a thriving community then becomes a ghost town. Rural America produces the food that feeds the rest of the country.

What will happen when our amber waves of grain turn to desert wastelands because there is no one to work our great farmlands? As the source of food dries up, and store shelves empty, the price of food will go through the roof. As food prices go up, hyperinflation will become a reality, and our printed money will become worthless. Almost overnight, Americans will begin to go hungry because they won’t be able to afford to put food on the table.

#### US shocks cause extinction –causes global conflict

DoCampo 17 [Isabel DoCampo joined the Council's Global Food and Agriculture Program in 2015 and currently serves as a research associate. Previously, she has conducted research for Vivo en Positivo, a Bolivian HIV organization, and served as a fellow for the Project on International Peace and Security, through which she presented a policy brief regarding epidemic security at the National Press Club in Washington, DC. DoCampo holds a BA in international relations with a minor in public health from the College of William and Mary 2-8-2017 https://www.thechicagocouncil.org/blog/global-food-thought/food-secure-future-warding-instability-and-conflict]

Food Insecurity and Price Shocks can Spark Violence and Political Instability

We have learned time and again that food supply shocks—like food price spikes—lead to instability, violence, and even regime collapse. In 2007 and 2008, when global food prices spiked dramatically, the governments of Haiti and Madagascar fell in the wake of food price-related protests. In 2010 and 2011, food prices were again implicated in the destabilizing uprisings of the Arab Spring. More recently, severe food shortages and soaring inflation have sparked rioting and lootings throughout Venezuela, as 90 percent of Venezuelan families struggle to afford food.

Council research has found that food price-related unrest occurs most often in urban areas, particularly in low- and middle-income countries. Africa and Asia, where rates of undernourishment are high and rates of urbanization are higher, housed 28 of the 29 riots that occurred during the food price spikes in 2007-2008 and 2010-2011. In developing cities on these continents, impoverished urban dwellers may spend up to 50 percent of their incomes on food. Additionally, food supplies in these cities many be tenuous—either dependent on food imports or domestic production vulnerable to external shocks. As such, urban consumers in low- and middle-income countries may face chronic food insecurity, significant food price volatility, and little ability to absorb price shocks—these factors all contribute to the likelihood of rioting and unrest in urban areas plagued by hunger crises.

Rural citizens—though they aren’t able to mobilize as readily as their urban counterparts—are deeply impacted by instability in agricultural markets and chronic food insecurity. Rural communities depend on stable food prices, sufficient agricultural inputs, and fair agrarian policy to sustain their livelihoods. In their absence, rural residents may be more likely to engage in civil unrest. The Revolutionary Armed Forces of Colombia (FARC)—which concluded peace negotiations with the government in December after a bloody, 52-year conflict—was formed by disenfranchised rural communities, who had suffered from a collapse in agricultural markets and a lack of agrarian reform. FARC continued to recruit poor, rural people throughout its insurgency.

Food Insecurity is a Powerful Driver for Migration

Food insecurity is not only a potential driver of conflict, but it can also spur large-scale migration. The World Food Programme and the International Organization for Migration first identified this relationship in the migratory patterns of subsistence farmers and households impacted by drought in El Salvador, Guatemala, and Honduras in 2014. They found that food insecurity proved a significant factor in decisions to migrate, particularly to the United States, while violence may have also played a less consistent role in outward migration from the region.

This is a phenomenon we, sadly, see playing out today across the Middle East and sub-Saharan Africa. In South Sudan, where nearly one third of the population is in need of emergency food assistance as a result of civil war, 450,000 people have left the country since July 2016. Conflict in Syria, meanwhile, has decimated agricultural production, destroying agricultural infrastructure and disrupting food supply chains. With little ability to generate livelihood or secure sufficient food, many farmers and rural households have had no choice but to migrate. Those that have fled to refugee camps in the region continue to face hunger as funding cuts have restricted the ability of organizations like WFP and UNHCR to supply sufficient rations and aid; many refugees have chosen to migrate farther, to Europe in many cases, in response.

Food Security Promotes International Security

The impacts of food insecurity, especially when they provoke instability and unrest, reach well beyond national borders. When food insecurity topples governments, the international order is invariably altered and regions are destabilized. When food insecurity forces migration across regions, or continents, international relations are strained, public services are weakened, and families are torn apart.

These are lessons, however, that are too often employed in hindsight. In Cameroon, the United Nations Development Programme has begun to provide agricultural inputs and training to youth, who, without economic alternative, were being recruited to Boko Haram. The Colombian government incorporated agricultural development and rural poverty reduction measures into its peace treaty with FARC, having completed its first rural census in 45 years in 2015.

We all have enormous stake in ensuring the food security of individuals and communities around the world—in providing both consumers and producers with the resilience to withstand shocks from climate, conflict, or any extreme conditions. We have the opportunity, now, to do so before further instability threatens our collective welfare. Otherwise, we will continue to face new iterations of the challenges we see today: deeply entrenched conflict, widespread migration, and unimaginable human suffering.

#### Best research disproves their defense

Brinkman 11 – Henk-Jan Brinkman Chief of Policy, Planning and Application in the Peacebuilding Support Office of the United Nations and Cullen S. Hendrix, Assistant Professor at the The College of William & Mary and Fellow at the Robert S. Strauss Center for International Security and Law at the University of Texas at Austin, “Food Insecurity and Violent Conflict: Causes, Consequences, and Addressing the Challenges”, Occasional Paper n° 24, July, http://ucanr.edu/blogs/food2025/blogfiles/14415.pdf

Most of the types of political violence addressed here are more prevalent in societies with higher levels of chronic food insecurity. There is a correlation between food insecurity and political conflict in part because both are symptoms of low development (Collier et al., 2003). Nevertheless, a growing body of research makes both direct links and indirect links – as proxied by environmental scarcity or access to water resources – between food scarcity and various types of conflict.

The causal arguments linking food insecurity to political violence lack microfoundational evidence – evidence based on actions of individuals – to explain how the mechanism works, but there are plenty of theories. The theories tend to rest either on the perspective of motivation, emphasizing the effect of food insecurity on economic and social grievances; or on the perspective of the opportunity cost, emphasizing the perceived costs and benefits of participating in violence relative to other means of securing income or food (Gurr, 1970; Tilly, 1978; Humphreys and Weinstein, 2008; Blattman and Miguel, 2010). These arguments are most valid with respect to participation in civil war and rebellion, where participation is better explained by a mixture of grievances – which provide motivation – and selective incentives – protection from violence and opportunities to engage in predation or to receive food, clothing, shelter and other material benefits – rather than grievances alone (Berman, 2009). A study of demobilized combatants in Sierra Leone found that poverty, lack of educational access and material rewards were associated with participation in the civil war (Humphreys and Weinstein, 2008). Interestingly, in Liberia, women were more likely than men to fight for material benefits (Hill et al., 2008). Thus, grievances are important, but so are motivations related to that individual’s economic and opportunistic considerations.

Civil Conflict

Civil conflict is the prevalent type of armed conflict in the world today (Harbom and Wallersteen, 2010). It is almost exclusively a phenomenon of countries with low levels of economic development and high levels of food insecurity. Sixty-five percent of the world’s food-insecure people live in seven countries: India, China, the Democratic Republic of Congo (DRC), Bangladesh, Indonesia, Pakistan and Ethiopia (FAO, 2010), of which all but China have experienced civil conflict in the past decade, with DRC, Ethiopia, India and Pakistan currently embroiled in civil conflicts.

Pinstrup-Andersen and Shimokawa (2008) find that poor health and nutrition are associated with greater probability of civil conflict, though their findings are based on small sample sizes. Countries with lower per capita caloric intake are more prone to experience civil conflict, even accounting for their levels of economic development (Sobek and Boehmer, 2009). This relationship is stronger in those states where primary commodities make up a large proportion of their export profile. Some of the countries most plagued by conflict in the past 20 years are commodity-rich countries characterized by widespread hunger, such as Angola, DRC, Papua New Guinea and Sierra Leone. The mixture of hunger – which creates grievances – and the availability of valuable commodities – which can provide opportunities for rebel funding – is a volatile combination.

World commodity prices can trigger conflict, as higher prices, especially for food, increase affected groups’ willingness to fight. Timothy Besley and Torsten Persson (2008) find that as a country’s import prices increase, thereby eroding real incomes, the risk of conflict increases. Oeindrila Dube and Juan F. Vargas (2008) arrive at similar conclusions when looking at Colombia, where higher export prices for coffee (which is labour intensive and a source of rural income) reduced violence in coffeeproducing areas while higher export prices for oil (which is capital intensive and a source of income for rebels and paramilitary groups) increased violence in regions with oil reserves and pipelines.

Other research links transitory weather shocks to civil conflict. In these studies, weather shocks – like drought and excess rainfall – are thought to fuel conflict by causing crops to fail and reducing agricultural employment opportunities, thus increasing food insecurity both in terms of food availability and food access (ability to pay). The people most likely to participate in armed conflict – young men from rural areas with limited education and economic prospects – are likely to seek work in the agricultural sector. As that work dries up, fighting looks more attractive. However, the empirical link between transitory weather shocks and civil conflict is still ambiguous. Some studies find that civil conflict is more likely to begin following years of negative growth in rainfall (Miguel, Satyanath and Sergenti, 2004; Hendrix and Glaser, 2007), suggesting that drought and decreased agricultural productivity expand the pool of potential combatants and give rise to more broadly held grievances. However, approaches that look at levels of rainfall, rather than growth in rainfall from year to year, find tenuous, or in fact positive relationships, between rainfall abundance and the onset of conflict (Burke et al., 2009; Buhaug, 2010; Hendrix and Salehyan, 2010; Ciccone, forthcoming). Some case-based research, however, links drought to conflict – though mediated by the government’s response to the crisis. For example, during the Tuareg rebellion in northern Mali, drought – aggravated by the government’s embezzlement of drought relief supplies and food aid – was a significant source of grievance that motivated young men and women to take up arms (Benjaminsen, 2008).

Recently, warmer temperatures have been linked to an increase in civil conflict, though this finding has been challenged (Burke et al., 2009; Buhaug, 2010). Civil war is also more likely in the aftermath of quick-onset natural disasters, such as earthquakes, major volcanic eruptions, floods, and cyclonic storms (Brancati, 2007; Nel and Righarts, 2008). The relationship between disaster and conflict is strongest in countries with high levels of inequality and slow economic growth; food insecurity and resource scarcity are among the more plausible explanations for this correlation.

Interstate War

The links between food insecurity and interstate war are less direct. While countries often go to war over territory, previous research has not focused directly on access to food or productive agricultural land as a major driver of conflict (Hensel, 2000). However, wars have been waged to reduce demographic pressures arising from the scarcity of arable land, the clearest examples being the move to acquire Lebensraum (“living space”) that motivated Nazi Germany’s aggression toward Poland and Eastern Europe (Hillgruber, 1981) and Japan’s invasion of China and Indochina (Natsios and Doley, 2009). Water, for drinking and for agriculture, is also a cause of conflict (Klare, 2002). Countries that share river basins are more likely to go to war than are other countries that border one another (Toset et al., 2000; Gleditsch et al., 2006). This relationship is strongest in countries with low levels of economic development. Institutions that manage conflicts over water and monitor and enforce agreements can significantly reduce the risk of war (Postel and Wolf, 2001).

Jared Diamond (1997) has argued that for centuries military power was built on agricultural production. Zhang et al. (2007) show that long-term fluctuations in the prevalence of war followed cycles of temperature change over the period 1400–1900 CE, with more war during periods of relatively cooler temperatures and thus lower agricultural productivity and greater competition for resources. Similar findings linking cooler periods with more war have been established for Europe between 1000 and 1750 CE (Tol and Wagner, 2008).

Democratic and Authoritarian Breakdowns

Democratic breakdowns occur when leaders are deposed and replaced by officials who come to power without regard for elections, legal rules, and institutions. Not all breakdowns are violent – “bloodless” coups account for 67 percent of all coups and coup attempts – but many have been very bloody, and the autocratic regimes and instability that follow democratic breakdowns are more likely to lead to the abuse of human rights, in some cases leading to mass state killing (Poe and Tate, 1994;

Harff, 2003).

Food insecurity, proxied by low availability of calories for consumption per capita, makes democratic breakdown more likely, especially in higher-income countries, where people expect there to be larger social surpluses that could be invested to reduce food insecurity (Reenock, Bernhard and Sobek, 2007).

Though statistical evidence is lacking, rising food prices have been implicated in the wave of demonstrations and transitions from authoritarian rule to fledgling democracy in some countries across North Africa and the Middle East in 2011. There are some historical precedents for this: a bad harvest in 1788 led to high food prices in France, which caused rioting and contributed to the French revolution in 1789; and the wave of political upheaval that swept Europe in 1848 was at least in part a response to food scarcity, coming after three below-average harvests across the continent (Berger and Spoerer 2001).

Protest and Rioting

Throughout history higher food prices have contributed to or triggered violent riots. Protests and rioting occurred in response to sharp increases in world food prices in the 1970s and 1980s (Walton and Seddon, 1994). Record-high world food prices triggered protest and violent rioting in 48 countries in 2007/08 (see Figure 1). The ratio of violent to non-violent protest was higher in low-income countries and in countries with lower government effectiveness (von Braun, 2008). Recent research links higher world food prices for the three main staple grains (wheat, rice and maize) to more numerous protests and riots in developing countries, though this relationship can be mitigated by policy interventions designed to shield consumers from higher prices (Arezki and Brückner, 2011; Bates, 2011).

International market prices are not the only source of food-related protests. The lifting of government subsidies can lead to rioting as well. Until recently, the biggest demonstrations in modern Egyptian history were the three-day “bread riots” in 1977 that killed over 800 people, which were a response to the Egyptian government’s removal of state subsidies for basic foodstuffs, as mandated by the International Monetary Fund (IMF) (AFP, 2007). “IMF riots” can be traced to popular grievances over withdrawn food and energy subsidies (Walton and Seddon, 1994; Abouharb and Cingranelli, 2007). However, the relationship between “IMF riots” and food insecurity is more complicated. Generalized food and energy subsidies are regressive, meaning that wealthy and middle-class households generally capture more of the benefits. As such, it may be real income erosion, rather than acute food insecurity, that is driving participation in protest.

Communal Violence

Competition over scarce resources, particularly land and water, often causes or exacerbates communal conflict (Homer-Dixon, 1999; Kahl, 2006; Ban, 2007). Communal conflict involves groups with permanent or semi-permanent armed militias but does not involve the government. However, it can escalate to include government forces, as in the massacres in Darfur, Rwanda and Burundi. These conflicts have the potential to escalate to civil war when the government is perceived to be supporting, tacitly or otherwise, one communal group at the expense of the other (Kahl, 2006). While the conflict in Darfur began as a communal conflict over land and water, its impact escalated to devastating proportions following the government’s support for Janjaweed militias in their fight against the Sudan People's Liberation Army/Movement and Justice and Equality Movement rebels.

Communal conflicts are common in the Sahel, the zone of transition between the Sahara desert and the savanna, particularly in years of extremely high and low rainfall (Hendrix and Salehyan, 2010). Recurrent, long-lasting droughts in the Sahel have undermined cooperative relationships between migratory herders and sedentary farmers, leading to food insecurity and increased competition for water and land between farmers and herders, but also within herding and farming groups. As a pastoralist in the Sudan noted: “When there is food, there is no cattle raiding.” (quoted in Schomerus and Allen, 2010). Once violence begins, conflict escalates and persists because of security dilemmas (fear of future attacks leads to preemptive attacks – see Posen, 1993) and lack of alternative dispute mechanisms between groups and effective policing within groups (Fearon and Laitin, 1996).

These conflicts have been particularly lethal in Kenya, Nigeria, the Sudan and Uganda. Repeated clashes between Fulani herders and Tarok farmers in Nigeria’s Plateau State killed 843 people in 2004. Similar clashes between Rizeigat Abbala and Terjam herders in the Sudan killed 382 in 2007. Cattle raiding in the Karamoja Cluster, a cross-border region of Ethiopian, Kenyan and Ugandan territory, resulted in more than 600 deaths and the loss of 40,000 heads of livestock in 2004 alone (Meier, Bond and Bond, 2007). These conflicts tend to occur in politically marginalized territories far from the capital (Raleigh, 2010).

Context Matters: Demographic, Social, Political, and Economic Mediators

Food insecurity is a clear contributor to political instability and conflict. But neither hunger nor conflict exist in a vacuum: other aspects of the political, economic and social environment affect the degree to which food insecurity, and grievances more generally, are expressed violently (Tilly, 1978).

#### Scenario 2 is shortages:

#### SOP restrictions block nurse-led clinics that expand access to 81 million people

Morgan 21 (Larissa, The Regulatory Review, “Law Reforms Promote Nurse-Managed Care,” September 1st, 2021, <https://www.theregreview.org/2021/09/01/morgan-law-reforms-promote-nurse-managed-care/)//NRG>

Advanced practice registered nurses lead nurse-managed clinics, which offer primary care and wellness services through partnerships with federally qualified health centers, academic institutions, nonprofits, and social services agencies. These clinics address the social determinants of health by increasing access to care and improving patient satisfaction, health outcomes, and behaviors that affect health. Hailed as “the future of primary care in the United States” by some health policy experts, nurse-led clinics support medically underserved populations, particularly in areas with a shortage of primary care physicians.

Nurse practitioners offer the same—and, on some metrics, better—quality of care than primary care physicians, while also providing cost savings to the U.S. health system.

For routine wellness visits, Medicare—the federal health insurance program for elderly U.S. residents and certain younger people—reimburses nurse practitioners at 85 percent the rate of doctors. Primary care from nurse practitioners is also less expensive for private insurers and patients who pay out-of-pocket. In addition to lower payments, nurse-managed care may decrease expensive emergency room visits by focusing on preventive services.

Nurse-led clinics were federally recognized as a health care delivery model following the passage of the Affordable Care Act (ACA). Although the ACA increased the number of Americans with health insurance, the supply of primary care physicians has remained insufficient to match the needs of the insured population.

To address this shortcoming, the ACA established a $50 million grant program to expand the financial capacity of safety net providers, such as nurse-led clinics. The federal government distributes funding under this program based on a number of factors, including the financial need of the safety net provider and other available funding at a state, local, and organizational level. To qualify for funding, nurse-led clinics must meet certain regulatory requirements. First, nurses must serve as the primary providers at such clinics where at least one advanced practice registered nurse works in a management capacity. Second, the nurse-led clinic must offer a full range of primary care and wellness services to all patients, regardless of their socioeconomic or insurance status. Finally, nurse-led clinics must create community advisory committees composed of patients to oversee the impact of the clinic and seek civic input.

Although some health policy experts have praised the ACA’s funding for nurse-managed clinics as “the beginning of a new era for nurse-led health care,” variability across state regulations in nurse practitioner practice authority creates barriers to expanding these clinics.

Specifically, states differ in the amount of authority they grant nurse-led clinics to practice without physician oversight. Many states require nurses to enter into collaborative practice agreements with physicians before they can practice independently. To gain full practice authority, some states require nurse practitioners to complete several thousand hours or, in some cases, years of training under the supervision of a physician. Other states extend physician oversight into operations of nurse-led clinics.

For example, in addition to mandating 4,000 hours of supervised practice, Alabama requires supervising physicians to visit nurse-led sites at least twice per year. For nurse practitioners who have yet to complete their mandatory supervised practice, a physician must oversee a minimum of 10 percent of their work at the clinic. Some medical experts argue that collaborative practice regulations are necessary to protect patient safety and quality of care. Other health experts, however, explain that—compounded with a growing insured and aging population—these regulations hinder health care for the 81 million Americans who lack access to a primary care physician. To keep up with these demands in Alabama, for example, the state would need to increase its number of primary care physicians by 23 percent over the next nine years.

In response to these mounting pressures for access to additional medical professionals, some states have changed their laws to grant nurse practitioners full practice authority. Following 22 other states’ existing laws, California recently passed legislation that permits nurse practitioners to practice independently starting in 2023. Currently, nurse practitioners in California are required to work under the direction of a physician, and to collaborate with the physician and the larger health system in which they operate to establish treatment and care practices.

This new state legislation does not completely abandon this partnership, but it does afford nurse practitioners more freedom. Under the new law, nurse practitioners must complete a three-year, supervised “transition to practice” period before they are eligible to operate clinics independently, similar to a regulatory model used in states such as Connecticut, Delaware, and Nebraska. Although the legislation permits nurse practitioners to offer primary care and some diagnostic services, they must refer patients to physicians when medical needs exceed the scope of their practice capacity. This new legislation has sparked debate in the medical community. Proponents of physician-based care argue that easing supervision could compromise patient health. To resolve physician shortages, the state should instead focus on increasing training and education of providers, suggests the California Medical Association. Advocates of full practice authority welcome the legislation as an opportunity to expand care to needy patients while promoting the development of new health care delivery models, such as nurse-managed clinics. As the shortage of medical workers has worsened during the coronavirus pandemic, other states—most recently, Massachusetts—have granted full practice authority to nurse practitioners as part of larger health care reform efforts.

States will likely continue to update their health care laws to address the systemic inequalities that have intensified amid the pandemic. With heightened awareness of the social determinants of health, disparities in access to care, and rising health care costs, nurse-led care appears to serve as one solution to the existing challenges faced by patients across the United States.

#### NPs are key – studies confirm SOP laws costs many lives *per day* *per State*. Solvency is *empirical* and the *impact is significant*.

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Nurse practitioners (NP) are well-trained health care personnel for primary, acute, and specialty care in the US. However, 32 states have restrictions on their scope of practice and Illinois is one of them.

In response to the shortage of health care workers during the coronavirus pandemic, twenty-one states granted NP full practice authority to cope with the increasing demand for health care services. In the Midwest, Kansas, Indiana, Michigan, Missouri, and Wisconsin, adopted a more expansive scope of service for NP.

This report evaluates the effect of this policy change on the rate of COVID-related deaths in the Midwest states, which expanded NP authority and sheds light on healthcare policy in Illinois.

Findings:

NP in Illinois have full practice authority only if they have had 4,000 hours of clinical experience and completed 250 training hours.

Illinois and Ohio are the only two Midwest states, which did not expand the scope of practice for NP during the pandemic.

In the states that did expand the scope of practice for NP, COVID related deaths were potentially reduced by 10 cases per day

If Illinois had expanded the scope of practice, 8% fewer COVID-19 deaths would have occurred in Cook County, which is the most affected area in the state.

The findings reveal that granting NP full practice authority is effective in easing the shortage of health care workers and improves health care quality. Our result echoes the findings by other healthcare researchers that granting NP independent practice authority improves patient outcomes. This report recommends that health care regulators in Illinois grant all NP independent practice authority in order to meet the states’ growing health care demand.

Introduction

The shortage of healthcare professional in the US has been a notable concern among health policy makers. According to the Bureau of Health Workforce, in 2017 only 55 percent of the need for primary care professional was met.1 For Illinois, the Bureau estimated that 468 extra primary care health providers were needed to address the shortage problem, which is roughly 188% of the existing number of primary care providers in the state. The shortage problem is the biggest in the Midwest.

The nationwide healthcare labor force shortage manifests itself even more during the COVID-19 pandemic. To address the health workforce shortage, a number of states temporarily expanded the scope of practice for nurse practitioners (NP). NP are well-trained health care personnel, typically requiring post-graduate training. According to the American Association of Nurse Practitioners (AANP), NP with full autonomy are authorized to \evaluate patients; diagnose, order and interpret diagnostic tests; and initiate and manage treatments".2 Although they are well-prepared to provide primary, acute, and specialty care, their scope of practice varies by state. According to the classification by AANP, in a state with "restricted/reduced practice," NP need to have a collaborative agreement with, or work under direct supervision of a licensed health professional (e.g. physician, dentist). The limited authority of NP has not only reduced health access in rural areas, but also significantly increased the administrative burden of the supervising personnel. It has also reduced the amount of time dedicated for patient care (Traczynski and Udalova, 2018). Healthcare researchers have claimed that granting NP independent practice authority would have a positive impact on patient outcomes.

This report estimates the impact of expanding the scope of practice for NPs on COVID mortality in the Midwest. In the region, seven states were classified prior to the pandemic as "restricted/reduced NP practice" by the AANP. Among those, Kansas, together with Indiana, Michigan, Missouri, and Wisconsin granted NPs independence, whereas Illinois and Ohio did not implement changes.3 In the empirical exercise, we leverage on this quasi-experimental setting to compare daily COVID mortality in the treated states with that in Illinois and Ohio before and after the emergency response. Although the discussion evaluates the recent emergency response under the pandemic, the finding here contributes to the ongoing debate of whether NP should be granted independent authority.

According to our estimates, expanding the scope of practice for NPs potentially reduced COVID-related deaths by ten per day. To put this figure into context, the number amounts to a reduction of 8% of in those states that implemented the changes the average death toll in Cook County during the sample period. These results add support to granting NP full independent authority to ease the healthcare workforce shortage.

Restriction on NP and State Emergency Response

The scope of practice for nurse practitioners varies by state. According to the American Association of Nurse Practitioners (AANP), five of the Midwest states allow full practice (light blue in Figure 1a), meaning that NP can work independently and are authorized for patient diagnosis and prescription.

Illinois with four other Midwest states (Figure 1a) classify NP under "reduced practice" restrictions. Illinois regulations amended in 2017 do allow a subset of NP full practice authority, but the change only applies to NP who have had at least 4,000 hours of clinical experience and completed 250 training hours.4 In contrast, North Dakota, South Dakota, Nebraska, Minnesota and Iowa permit a full scope of practice for all NP without a minimum threshold of accrued work hours.

In Illinois, NP are required to have a collaborative agreement with a health professional (e.g. licensed physician), listing the types of care, treatment and procedures the NP is allowed to perform. NP in Illinois and five other Midwest states can work quasi-independently because physicians are not required to be physically present with the NP. Prior to the pandemic outbreak, Missouri and Michigan had the most restrictive rules, requiring that NP work under direct supervision of a physician (Figure 1a).

As the pandemic unfolded, states with reduced or restricted practice authority began to expand the scope of practice for NP. The aim of the change was to enlarge the healthcare workforce capable of providing COVID-19 care.

Among the Midwest states shown in Figure 1b, Missouri and Indiana were the first to waive part of the supervision requirements. At the date of this report, Illinois and Ohio were the only two states, which have not taken action to expand the scope of practice for NP.

Policy Effect on COVID-related Mortality

To evaluate the effectiveness of expanded scope of practice, this report looks into the impact on COVID-related mortality. Data on county level daily mortality are retrieved from the New York Times.5

To estimate a cause-and-effect relationship between expanded scope of practice and COVID-19 mortality, this report employs the synthetic control method (Abadie and Gardeazabal, 2003; Abadie, Diamond, and Hainmueller, 2010). The essence of this statistical technique is to construct a counterfactual which mirrors the post-policy mortality that would have been observed had the policy not happened. We then obtain the daily policy effect by directly comparing the counterfactual mortality with the observed mortality. To ensure the counter-factual offers a valid comparison, we make use of several important indicators that would predict COVID-related deaths. These include the pre-policy number of COVID death, pre-policy number of confirmed cases (also retrieved from the New York Times database), and county characteristics (number of NPs, population size, percent of 65+ population, percent of black, number of hospital, and number of beds) obtained from the Area Health Resource Files (AHRF, 2020).

An important property of the synthetic control technique is that the pre-policy number of COVID death has to be informative enough to produce reliable post-policy predictions. In other words, we rely on the pre-policy trend to predict the post-policy movement. This limits the start of the sample period to late March because many counties did not record any COVID deaths until then. For this reason, we are not able to produce a dependable counterfactual for the counties in Missouri and Indiana because they granted authority to NP prior to reporting any COVID-19 deaths.

Figure 2, shows the estimation result for Kansas, Wisconsin, and Michigan. The solid line of each graph represents the actual daily mortality of a state (average of all counties), whereas the dotted line shows the predicted counterfactual using the synthetic control technique. The red vertical line in the middle of each graph represents the day before the policy takes place. For example, in the top-left corner, the solid line shows that Kansas counties recorded an increasing number of COVID-related death with a modest decline in magnitude since April 22, which is the date Kansas started to authorize temporary independent practice for NPs. The trend afterward clearly diverges from the predicted no-policy counterfactual, which implies that the policy slowed down the death toll. Until the end of the sample period, the maximum impact by the policy reduces the daily death toll by 10 cases. We also observe a similar pattern in Wisconsin and Michigan, though the magnitude of death reduction in Michigan is smaller.

There is however the possibility that the reduction in deaths was caused by some other concurrent policies and any reduction in fatalities would then be falsely attributed to the expanded scope of practice. This concern is particularly valid because there were many policies adopted in response to the nationwide health risk.

Therefore, to check the robustness of our prediction of reduced deaths associated with NP scope of authority, we tested to see if the social distancing policy, a major attempt by states in response to the pandemic, had the same associated improvement on the cases of COVID-19 deaths.

For Kansas, Wisconsin, and Michigan, social distancing measures were implemented in late March. We therefore implemented the same estimation procedures using the synthetic control method but moving the treatment date in each state to correspond to the start of the state's shelter-in-place order. As shown in Figure 3, in each of the three states, the actual cases of death continues to grow at a higher rate than the predicted counterfactual. This finding suggests that the lock down policies did not produce the same reduction in the number of COVID-related fatalities as the expanded scope of practice

Conclusion and Policy Implication

Amid the unprecedented health crisis, it is important that state regulators consider the cost of occupational regulations.

The argument for occupational licensing is that it protects the consumer. In the case of NPs scope of practice, regulators often worry about the quality of service if the scope is widened. This report however suggests there is empirical evidence that granting NPs independent authority has contributed to a reduction in COVID-19 deaths.

#### COVID highlights the pivotal role of SOP laws – shortages are classist and racist in nature

Heath 20 [Sara Heath, health care journalist for PatientEngagementHIT 7-20-2020 https://patientengagementhit.com/news/why-nurse-practitioners-are-pivotal-in-health-equity-work]

When COVID-19 first came ashore in the United States, it quickly became apparent that the virus would bring to light racial health disparities that have long pervaded the healthcare industry.

It didn’t take long for the virus, which can become more harmful when an individual has comorbidities, to show itself more harshly among certain populations. Across the country, more Black patients have suffered from COVID-19 and in worse forms, according to Centers for Disease Control & Prevention (CDC) data.

In the agency’s weekly report ending on July 11, 2020, CDC said there were 227.1 COVID-19 hospitalizations per 100,000 non-Hispanic Black patients, compared to only 49 COVID-19 hospitalizations per 100,000 white patients.

For non-Hispanic American Indian or Alaska Native patients, that rate came in at 273 hospitalizations per 100,000 patients, and 224.2 hospitalizations per 100,000 Latinx patients.

Across the industry, leaders were largely unanimous in saying that these health disparities are not new in the age of coronavirus; instead, coronavirus has shown an unflattering spotlight on health disparities that were already there.

“Sadly, the health disparities that are making the news today aren't new and they're not specific to COVID-19,” said Sophia Thomas, DNP, APRN, FNP-BC, PPCNP-BC, FNAP, FAANP, the president of the American Association of Nurse Practitioners (AANP).

For Thomas, health inequity has been a long-standing issue. Nurse practitioners and those working within the AANP specifically have been sounding the alarm on healthcare disparities for years, she said. The current climate with COVID-19 has provided a tangible example of how health inequities ultimately manifest.

Health inequities start with the social determinants of health, Thomas explained, and how those social risk factors limit an individual’s ability to achieve wellness. Because traditionally underserved populations, like Black, Hispanic, and Indigenous populations, must contend with structural and cultural limitations to care and other resources, they adversely experience social determinants of health.

“When you think about long-term health outcomes and assisting in staving off short-term health complications, providers need to consider things such as poverty, economic stability, safe and accessible housing, and food security,” Thomas, a practicing nurse practitioner herself, told PatientEngagementHIT.

“We talk about food deserts, dependable transportation, and then probably most importantly from our aspect, training and education that provides a pathway for all patients to have greater access to primary care.”

Again, this isn’t a new trend, Thomas acknowledged. Decades of institutional inequities have set the stage for a health equity crisis to come to bear like it has during the COVID-19 pandemic.

“Really, the CDC's recent racial and ethnicity data are proof positive that health systems, policy makers, healthcare providers all need to work together now more than ever to stop the COVID-19 impact on communities of color,” Thomas explained.

And it’s nurse practitioners who can play a pivotal role in that, she asserted.

“What makes us unique is that we have a foundation in nursing and with that we also have a holistic approach to patient care,” Thomas stated.

“So when we, for example, tell a patient she has diabetes and give her a prescription for her medication, we're not just prescribing medication and saying ‘follow up with us in three months.’ We're making sure that she can afford that medication. We're discussing with her at that time some diet and lifestyle changes.”

And it’s that very discussion that Thomas said truly makes a different in self-management for a chronic illness and can ultimately tame those comorbidities that have manifested themselves during the COVID-19 outbreak.

Delivering that care management across every community, especially traditionally underserved ones disproportionately experiencing social determinants of health, will be the first step to addressing health equity, at least on a micro scale.

“The most important thing is listening. But with that, before we start the office visit or discussing the reason why patients are there, we may just do a little bit of small talk to get to know them to hear about their life,” Thomas advised, outlining what an encounter that addressing social determinants of health with a nurse practitioner can look like.

“In hearing the stories, they key us into possible issues that may happen,” Thomas said.

During the coronavirus pandemic specifically, Thomas has been taking advantage of the widespread use of telemedicine to understand the social circumstances in which her patients live. Telemedicine lets Thomas see her patients’ housing situations, or during a conversation about nutrition Thomas can prompt her patients to show her their pantries, if they are interested and engaged.

And perhaps most important, nurse practitioners are poised to establish trust with their patients, something that is essential for discussing sensitive topics like social needs and is important when working with traditionally marginalized communities.

“We call on our nursing foundation of compassion and empathy to build a relationship with patients and their family members,” Thomas explained. “Surveys year after year show that nurses are listed as one of the most trusted professions.”

Patients will tell Thomas things they have never felt comfortable admitting to their doctors, she shared, underscoring the important role nurses play in being a trusted confidante for underserved patients.

But nurse practitioners can’t accomplish these goals without some support. Importantly, Thomas said nurse practitioners need expanded scope of practice regulations in order to fulfill their potential while treating patients.

“There are 77 million Americans that live in communities that don't have adequate access to primary health care, and about 80 percent of rural America is actually designated as medically underserved,” Thomas said.

At the same time, the 10 states with the best health outcomes also have the most flexible scope of practice laws for nurse practitioners, Thomas said, citing the US News and World Reports rankings. In the 10 states with the worst health outcomes, nurse practitioners face the strictest scope of practice laws.

When access to quality care is at the crux of health inequities, Thomas said this is a huge issue.

**Plan**

The United States Federal Government should significantly increase prohibitions on anticompetitive business practices by the private sector shielded by state action immunity.

**Federalism Adv**

**Advantage Two: Federalism**

**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 address regulatory externalities devolve into fiefdoms that destroys Congressional capacity and causes factionalism

Finkel 19 [Jacob Finkel, J.D., Stanford Law School, June 2019 https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/06/Finkel-71-Stan.-L.-Rev.-1575.pdf]

1. Compacts meet “Federalism 3.0”

In 2016, Heather Gerken delivered a wake-up call: “[O]ur operating system is outdated. . . . We need an intellectual frame for thinking about today’s federalism, Federalism 3.0.”122 Gerken’s work—which is by no means uncontroversial123—suggests that, as legal practitioners and scholars, we must choke back an instinctive aversion to spillover effects (jurisdictions affecting those nearby)124 and reject our innate desire for clear delineations such as nationalists versus federalists. Gerken and Ari Holtzblatt have suggested embracing the diverse conflicts operating today between states, outside interest groups, Congress, and the executive branch.125 These “[s]pillovers, in short, can help generate the democratic churn necessary for an ossified system to move forward.”126

Where do compacts fit in this tapestry of power plays? Although they do not enter Gerken and Holtzblatt’s analysis, they actually provide the key to an essential harm compacts pose.127 First, it is important to establish the correct frame of reference; as able federalism scholars have reminded us, “[f]ederalism must be understood as a means rather than an end.”128 States’ rights are not themselves the endpoint of federalism; rather, “their worth derives entirely from their utility in enhancing the freedom and welfare of individuals.”129 Gerken and Holtzblatt argue that the conflict we see around us is better suited to moving our democratic society forward than illusory, immediate progress in the direction we ourselves might choose to go.130 Taking that hypothesis further, what could be more immediate and convey the illusion of progress better than an interstate compact, executed without congressional approval, that shoves a block of states in the direction a majority of their citizens desire to see the nation as a whole move? Such efforts will almost axiomatically move faster if they need only the support of those states that already agree with them.

Yet the end result of such a process—a patchwork of opposing compacts on hot-button national issues from health care and gun control to the regulation of major nationwide dangers like the tobacco industry—harms both the uninvolved states and the very project of national unity that lies at the core of federalism itself.131 Further, the partitioning argument—that policymaking should return to the states when the federal government is gridlocked—rests on the notion that the states are the best division lines for such political decisionmaking. As scholarship has shown, the United States is riven at a more granular level132—why stop at state-level compacts? A conservative community in California’s Central Valley, for instance, would (if granted home rule powers) most likely prefer to adopt the policies favored in Wyoming and Idaho than those advanced by Democratic supermajorities in Sacramento.133 If individual self-determination becomes our only focus, the project of a pluralistic society crumbles into virtual impossibility.

2. Horizontal harms in practice

Nor is this merely a theoretical concern. Most of the major regulatory compacts in recent decades have been preceded by some effort to gain congressional approval before organizers resorted to a compact.134 Further, empirical studies have demonstrated that compacts are being used to replace, not complement, congressional action on national problems.135 Thus, compacts serve to supplant Congress when it chooses not to act, or when vetogates within the federal legislative process prevent action on a particular controversy. Moreover, this problem is growing. Rising polarization and decreasing congressional productivity form a pernicious cycle. When coupled with efforts toward wide-ranging compacts, these trends feed upon, and likely exacerbate, one another: An unproductive Congress incentivizes advocates to push for compacts as a more responsive alternative. This increasingly extracongressional focus of advocacy further weakens Congress’s capacity for effective legislation, reducing the pressure felt by members of Congress to act upon issues being handled instead by compacts.136

Averting this hypothetical outcome should not lead us to block all compacts. However, for those compacts most likely to cause such turmoil—those with national political aims—a commonsense safeguard would be a return to congressional oversight. Like-minded states would be prevented from bringing policy preferences they could not enact in Washington into implementation as a separate bloc. Of course, states are still free to legislate their policy preferences within their own borders, with possible repercussions in neighboring states.137 At times, such local or regional solutions will be the best answer—a reasoned solution surely will not require every compact to receive congressional approval. However, accepting congressional gridlock as inevitable and abandoning the national project for independent fiefdoms governed by the individual policy preferences of small groups of states has potentially grave consequences.138 The horizontal harm to be prevented is saving the states from themselves—if one believes as a normative matter that “[f]ederalism ought to exercise a centripetal rather than centrifugal force on the polity,”139 then the current permissibility of states forming their own preferred pseudo-national policies without congressional involvement, even in pursuit of laudable policy objectives, must be addressed.

#### Only enhanced Congressional capacity ends centralization of nuclear control that makes use inevitable

Heer 17 [Jeet Heer is a staff writer at the The New Republic who has published in a wide array of journals including The New Yorker, The Paris Review, and VQR. 8-12-2017 https://newrepublic.com/article/144297/dont-just-impeach-trump-end-imperial-presidency]

But the more ineffectual Trump is in domestic politics, the louder and scarier he is on the international stage. Even if we accept Krauthammer’s contention that the “guardrails” of political and civil society are preventing Trump from fundamentally damaging American society, Trump still enjoys enormous unchecked power abroad. Perhaps precisely because he is thwarted at home, Trump is now more prone than ever to lash out against foreign foes. This week, he used the incongruous setting of a photo op at Trump National Golf Course in New Jersey to threaten North Korea with nuclear annihilation. “North Korea best not make any more threats to the United States,” he warned. “They will be met with fire and fury like the world has never seen.” He doubled down on those remarks on Friday, tweeting:

Military solutions are now fully in place,locked and loaded,should North Korea act unwisely. Hopefully Kim Jong Un will find

What makes these words terrifying, even if we make every allowance for Trump’s bluster, is that he has the power to make them true. America’s nuclear chain of command grants a president absolute authority to launch preventive nuclear strikes whenever desired. In 1974, as his presidency was capsizing, Richard Nixon reflected that, “I can go into my office and pick up the telephone, and in 25 minutes 70 million people will be dead.” Trump enjoys that same power.

Much has been made of Trump’s manifest authoritarian tendencies: that he sees politics only in terms of domination, his habit of praising extrajudicial violence, and his proclivity for breaking norms. Yet Trump’s authoritarian tendencies would not get him very far without a mechanism for enacting his wishes, and his nuclear threats make clear what that mechanism is: the Imperial Presidency. The powers of the office are not just those enumerated in the Constitution, but the extra-constitutional powers the presidency has acquired over the decades—especially the ability to start wars at whim. It’s taken someone as frightening as Trump to make plain that Congress must act to restrain not just the sitting president, but the office itself.

Historians and political scientists often use the term “Imperial Presidency” to refer to the fact that the American president, at least since the dawn of the Cold War in the 1940s, has war-making powers closer to that of an absolute monarch than an officeholder in a republic who is bound by the rules of law. If we are worried about Trump inflicting great harm on the world, it’s the powers of the Imperial Presidency that enable him to do the most damage.

The Imperial Presidency rests on an ambiguity in the Constitution. In theory, the president is coequal to Congress and to be held in check by it. But in times of war, the requirement of national unity almost always leads Congress to defer to the president. As Alexander Hamilton noted in “The Federalist 8,” “It is of the nature of war to increase the executive at the expense of the legislative authority.” Throughout the nineteenth and early twentieth century, the American political system seesawed: in times of war, the presidency was dominant; in times of peace, Congress was.

The permanent emergency of the Cold War created an unrelieved wartime footing in which presidents entered America into large conflicts, like the Korean War and the Vietnam War, without a formal congressional declaration. The emergence of nuclear weapons further centralized power in the hands of the president. Under the nuclear deterrence theory that America adopted in the 1950s, a president had to be prepared to launch an attack immediately, which meant no time to consult Congress.

The consequence, as the historian Arthur Schlesinger, Jr. wrote in his classic study The Imperial Presidency (1973), was “the all-purpose invocation of ‘national security,’ the insistence on executive secrecy, the withholding of information from Congress, the refusal to spend funds appropriated by Congress, the attempted intimidation of the press, the use of the White House as a base for espionage and sabotage directed against the political opposition—all signified the extension of the imperial presidency from foreign to domestic affairs.” The end result was “by the early 1970s the American President had become on issues of war and peace the most absolute monarch (with the possible exception of Mao Tse-tung of China) among the great powers of the world.”

Schlesinger was writing during the Watergate scandal. The Nixon presidency was both the height of the Imperial Presidency and also the beginning of its decline, at least for a few years. In the wake of Nixon’s abuses, Congress pushed back. In 1973, over Nixon’s veto, Congress passed the War Powers Resolution, which limited a president’s war-making ability, requiring the White House to notify Congress about the use of force and forbidding deployment beyond 90 days without a congressional authorization for use of military force. Other measures of the period include The Congressional Budget and Impoundment Control Act (1974) which reasserted congressional control of spending.

Writing in The Wilson Quarterly in 2002, Donald R. Wolfensberger, then director of the Congress Project at the Wilson Center, listed other examples of Congress rolling back the Imperial Presidency:

The Federal Election Campaign Act of 1974 was supposed to eliminate the taint of big money from presidential politics. Subsequent years witnessed a spate of other statutes designed to right the balance between the branches. The National Emergencies Act (1976) abolished scores of existing presidential emergency powers. The Ethics in Government Act (1978) authorized, among other things, the appointment of special prosecutors to investigate high-ranking executive branch officials. The Senate, in 1976, and the House, in 1977, established intelligence committees in the wake of hearings in 1975 revealing widespread abuses; and in 1980 the Intelligence Oversight Act increased Congress’s monitoring demands on intelligence agencies and their covert operations.

As Wolfensberger noted, these restraints on the Imperial Presidency were only partial and often ineffectual, as post-Nixon presidents found ways to work around them. The Reagan administration, with the pretext of a renewed Cold War, tried to undermine congressional limits on aid to the Contras by using funds from secret arms sales to Iran. President George H. W. Bush tried to finesse the issue by getting congressional authorization for the Gulf War, but also saying that it wasn’t necessary. President Bill Clinton bombed Kosovo with support from a Senate resolution that failed in the House of Representatives.

Whatever limits there might have been on presidential power ended with 9/11. After President George W. Bush delivered a stirring speech in the weeks after the attack, presidential historian Michael Beschloss cheered on television that “the imperial presidency is back. We just saw it.” Under the auspices of the unitary executive theory promulgated by Vice President Dick Cheney, the U.S. entered the era of warrantless wireless searches, the kidnapping and torture of terrorist suspects held indefinitely in secret prisons, and an undefined and undeclared global war on terror.

While President Barack Obama might have tried to bring some semblance of legality to Bush’s expansion of presidential power, there was no real curtailment of it. Instead, with his use of drones and assassination of Osama Bin Laden, Obama’s goal was to act as a more efficient and focused Imperial President. As Alex Emmons noted earlier this year in The Intercept, Obama left behind a presidency with vast, unchecked powers that could easily be abused by Trump. “President Obama has spent much of his time as commander in chief expanding his own military power, while convincing courts not to limit his detention, surveillance, and assassination capabilities,” Emmons wrote. “Most of the new constraints on the security state during the Obama years were self-imposed, and could easily be revoked.”

Trump is not just the heir to the Imperial Presidency; he represents a new crisis of it. His blatant incompetence and instability demonstrates the dangers of investing so much power in the hands of one person. At the heart of the Imperial Presidency is the “thermonuclear monarchy” enjoyed by the president, who has the ability to launch a nuclear war at will. Writing in Politico Magazine on Friday, Garrett Graff outlined how it works: “That the president has almost unlimited and instantaneous authority to push the [nuclear] button. It’s undoubtedly the most powerful unilateral action that a commander in chief can take. Whereas there are careful multi-branch checks on most presidential powers, over many decades the U.S. carefully honed its nuclear launch procedures to strip away any check or balance that could delay or stymie a launch.”

The journal Scientific American has just published an editorial in its August issue, calling for an end to the the president having sole power over nuclear weapons:

With the exception of the president, every link in the U.S. nuclear decision chain has protections against poor judgments, deliberate misuse or accidental deployment. The “two-person rule,” in place since World War II, requires that the actual order to launch be sent to two separate people. Each one has to decode and authenticate the message before taking action. In addition, anyone with nuclear weapons duties, in any branch of service, must routinely pass a Pentagon-mandated evaluation called the Personnel Reliability Program—a battery of tests that assess several areas, including mental fitness, financial history, and physical and emotional well-being.

There is no comparable restraint on the president. He or she can decide to trigger a thermonuclear Armageddon without consulting anyone at all and never has to demonstrate mental fitness. This must change. We need to ensure at least some deliberation before the chief executive can act.

One alternative to the thermonuclear monarchy is to require the president to have the support of high-ranking members of Congress before he can call for nuclear strikes. Graff suggested that America consider “whether our nuclear command system should include a second voice, either from the vice president, the secretary of defense or a congressional leader.” In this new system, there would be a “two-person rule” from the top of the chain of command to the bottom. An order to launch an attack would require the authorization of the president and a second person. Making that person the speaker of the House would be more in keeping with the original balance of the Constitution, restoring to Congress a say in war-making decisions.

Stripping Trump of sole control of nuclear weapons should be part of a larger rollback of the Imperial Presidency, one that could take lessons from the laws enacted by Congress in the 1970s and indeed go even further. Beyond nuclear weapons, the heart of the current Imperial Presidency is Authorization for Use of Military Force that Congress passed three days after the 9/11 attack. The AUMF is the blank check that allows U.S. presidents to wage an endless global war on terror, a war without border and without any foreseeable conclusion. Democratic Representative Barbara Lee has been waging a lonely battle against the AUMF, calling for its repeal.

Trump’s unstable behavior should worry all of Congress, both Republican and Democrats. He often blurts out threats—sometimes, as in the case of his rant about North Korea, saying things that are contradicted by his own secretary of state and secretary of defense. Trump’s erratic actions show how dangerous the Imperial Presidency can be when the president is a madman. The power he enjoys is far beyond what any one person should have in a democracy.

The remedies for Trump have to be institutional rather than just personal. It’s not enough for Trump to be impeached and removed; Congress must address the fact that the presidency has too much foreign policy power. The thermonuclear monarchy must end, the AUMF should be repealed, the drone program should only continue with congressional approval, and the NSA surveillance program should be tightly monitored by Congress. The courts are doing their part to check the White House. It’s time the other co-equal branch of the government do the same, and put an end to the Imperial Presidency for good.

#### 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 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.

**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.

**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.

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#### Civil conflict goes nuclear

Ramberg 16 [Bennett Ramberg, Ph.D., Johns Hopkins, J.D. UCLA, former policy analyst in the US State Department's Bureau of Politico-Military Affairs under President George H.W. Bush 9-10-2016 http://jordantimes.com/opinion/bennett-ramberg/nuclear-weapons-civil-war-zones]

The world’s nine nuclear powers claim that there is little to worry about.

They argue that the combination of physical protection and, in most cases, electronic safeguards (permissive action links, or PALs) means that their arsenals would remain secure, even if countries where they are stored or deployed were engulfed by violence.

Robert Peurifoy, a former senior weapons engineer at Sandia National Laboratories, disagrees.

He recently told the Los Angeles Times that such safeguards — earlier versions of which he helped design — may only delay terrorists in using seized nuclear weapons.

“Either you keep custody or you should expect a mushroom cloud.”

Peurifoy’s statements have rightly raised concerns about the security of nuclear weapons stockpiled in insecure regions.

Consider Pakistan, which has the world’s fastest-growing nuclear arsenal and suffers relentless jihadist terrorism and separatist violence. Attacks have already been carried out on Pakistani military installations reportedly housing nuclear components.

The country’s new mobile “battlefield nuclear weapons” — easier to purloin — augment current fears.

North Korea, with its volatile and mercurial regime, is another source of concern.

Suspicious of the military, Kim Jong-un’s government has repeatedly purged senior officers, which has surely stoked opposition that someday could spark serious civil strife.

Adding nuclear weapons to that mix would be highly dangerous.

While other nuclear powers appear stable, countries like China and Russia, which rely increasingly on authoritarianism, could face their own risks, should political cohesion fray.

Of course, there are plenty of examples of security enduring strife. The 1961 revolt of the generals in French Algeria, which placed a nuclear test device in the Sahara at risk, produced no dangerous incidents.

In China, the government effectively protected nuclear weapon sites threatened by Revolutionary Guards during the Cultural Revolution. And neither the attempted coup against Mikhail Gorbachev nor the Soviet collapse resulted in a loss of control over the country’s nuclear arsenal.

But it is a leap to presume that these precedents mean that nuclear weapons will remain safe, especially in unstable countries like Pakistan and North Korea.

Nuclear bombs or materials risk being controlled by rebels, terrorist groups, or even failing and desperate governments. And, in those cases, the international community has few options for mitigating the threat.

External powers can, for example, launch a targeted attack, like the one that Israel carried out on suspected reactors under construction in Iraq and Syria.

Those strikes would not have succeeded had Israel not been able to identify the targets accurately. Indeed, though the existence of Iraq’s Osirak plant was public knowledge, uncovering Syria’s Al Kibar plant was an intelligence coup.

Carrying out such a strike on North Korean or Pakistani nuclear sites in a time of crisis would require a similar breakthrough — one that may be even more difficult to achieve, given extensive concealment efforts.

Stealthy movement of bombs or materials amid the unrest would further complicate targeting.

Another option — invasion and occupation — avoids the challenge of identifying nuclear sites.

The defeat of Nazi Germany permitted the Allies to find and destroy the country’s nascent nuclear programme. The 2003 invasion of Iraq granted the US unfettered access to all possible sites where weapons of mass destruction could be stored.

But the costs were huge. Likewise, invasion and occupation of either North Korea or Pakistan would require massive armies risking a bitter conventional war and possible use of the weapons against the invaders.

A third option is nuclear containment, which relies on several measures.

First, in order to prevent nuclear migration, all land, sea, and air routes out of the country in question would have to be controlled, and homeland security near and far would have to be strengthened.

While the Proliferation Security Initiative (PSI) is already in place to stop the smuggling of nuclear contraband worldwide, the International Atomic Energy Agency reports continued trafficking of small amounts of nuclear material. An increase in monitoring may reduce, but still not eliminate the problem.

Containment also requires nuclear custodians be persuaded to risk their lives to defend nuclear sites against terrorists or rebels. And it demands that states neighbouring the country in question put ballistic missile defences on alert.

While India, South Korea, and Japan continue to modernise such systems, no missile defence is perfect.

In a time of crisis, when the facts on the ground change fast and fear clouds thinking, mitigating the nuclear threat is no easy feat.

While concerned governments do have confidential contingency planning in place, such planning has a mixed record when it comes to responding to recent international upsets in the Middle East.

And simply hoping that things will go according to plan, and nuclear command and control will stick, remains a gamble.

## federalism

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## solvency

### A2: AC – You Only Affect Private

#### That’s the biggest issue here….

Sandefur 14 [Timothy Sandefur, \*Principal Attorney and Director of the Program for Judicial Awareness, Pacific Legal Foundation 2014 https://www.cato.org/sites/cato.org/files/pubs/pdf/nc-dental-merits-brief.pdf]

This Court should presume strongly against granting state-action immunity in antitrust cases. It makes little sense to impose powerful civil and criminal punishments on private parties who are deemed to have engaged in anti-competitive conduct, while exempting government entities—or, worse, private parties acting under the government’s aegis—when they engage in the exact same conduct. As Chief Justice Burger observed, if the antitrust laws were “‘meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade,’” then it is “wholly arbitrary” to treat government-imposed restraints of trade as “beyond the purview of federal law.” City of Lafayette, La. v. Louisiana Power & Light Co., 435 U.S. 389, 419 (1978) (opinion of Burger, C.J.) (citation omitted).

This Court has declared that the antitrust laws are concerned with “the result[s]” and not “the form of the combination or the particular means used,” so that it is “not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful.” American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946). Thus there can only rarely be any justification for treating a state-approved restraint of trade differently from one that lacks government’s imprimatur.

Antitrust immunity for private parties who act under color of state law is especially problematic, given that anticompetitive conduct is most likely to occur when private parties are in a position to exploit government’s regulatory powers. See Hallie v. City of Eau Claire, 471 U.S. 34, 47 (1985) (“[w]here a private party is engaging in the anticompetitive activity, there is a real danger that ~~he is~~ [they are] acting to further his own interests, rather than the governmental interests of the State.”). And where, as here, private parties have an explicit conflict of interest when put in charge of state policy, the Court should be especially wary of according those parties immunity. The Board of Dental Examiners is made up of members of the trade who privately benefit from excluding potential competitors from the market, and who answer to other members of the trade who share that interest. For the state to empower them to restrict entry into the trade obviously brings about the danger Justice Stevens warned about in Hoover v. Ronwin, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting): it empowers private parties to exploit licensing laws “to advance their own interests in restraining competition at the expense of the public interest.”

### A2: Circumvention – A2: 11th Amendment

#### Reach of the 11th is extremely limited

Page & Lopatka 19 [William H. Page, Marshall M. Criser Eminent Scholar, University of Florida Levin College of Law, and John E. Lopatka, A. Robert Noll Distinguished Professor of Law, Penn State Law, ’19, Parker v. Brown, The Eleventh Amendment, and Anticompetitive State Regulation, 60 Wm. & Mary L. Rev. 1465 (2019), https://scholarship.law.wm.edu/wmlr/vol60/iss4/10

The state action doctrine and the Eleventh Amendment both provide a version of sovereign immunity from the federal antitrust laws for state-connected anticompetitive conduct.289 But these immunities have evolved separately, and they now vary in the scope of their protection.290 State action immunity would leave some conduct exposed to the full range of remedies available under the antitrust statutes that the Eleventh Amendment protects. At first glance, this enforcement gap would seem to create a substantial risk that serious anticompetitive conduct will go undeterred, especially because the state actors protected by the Eleventh Amendment wield the power of the government in pursuing their objectives. On closer examination, however, the risk proves modest. The Eleventh Amendment itself does not preclude all remedies against state actors.291 It permits private injunctive actions against state officials and federal actions for any remedy against state governmental entities and their officials.292 It does not preclude actions against private antitrust violators enabled by state actors.293 It has nothing to say about actions under state antitrust laws in state courts.294 Eleventh Amendment immunity, with all these limitations, seems less costly than eliminating the immunity or eliminating its limitations.

#### FTC review deters anticompetitive practices

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]

In the competition context, application of the consideration-of-alternatives requirement by the FTC could prompt state regulators to consider regulatory approaches that create fewer barriers to competition. In particular, where a state substitutes centralized planning for market-based determinations of production and distribution, the FTC could ensure that that the state articulates reasons why market-based solutions were inadequate to meet the regulatory objective.288 This, in turn, would require the state to explain not merely the market failures that prompted the regulatory decision, but also why those failures could not be corrected through less-intrusive regulatory actions.

A final important feature of hard look review is the requirement that any justifications for the regulatory decision be presented at the time of the regulatory decision, and not subsequently invented for litigation purposes.289 The contemporaneousness rule stands in contrast to rational basis review, under which a regulatory action is upheld if it could be supported by any conceivable rational basis. Not only must the regulatory decision be empirically supported, as opposed to merely rational, but the agency must think through the justifications upon which it will rely before promulgating the regulation. The basis for the regulation should be decided by the state actors making the regulatory decision, not by lawyers subsequently brought in to defend it.

In the competition context, the contemporaneousness requirement could increase the likelihood that state legislatures or regulatory bodies consult with economic or technological experts when framing statutes or regulations that impair competition. It would diminish the likelihood that states would act solely to insulate special interests from competition and then rely on legal arguments to defeat challenges to the anticompetitive regulatory decision. It would also diminish the likelihood that states would rely on theoretical or potential, rather than documented, market failures to justify measures that suppress competition. In short, the contemporaneousness requirement could prompt states to take a more careful look at the competitive effects of their decisions before taking actions that reduce market competitiveness, knowing that a failure to do so could lead to preemption by federal antitrust law.

The FTC might exercise its superior-preemptive authority to bolster the accountability of state legislatures and regulators when they regulate in anticompetitive ways. By developing a reputation for declaring anticompetitive state laws preempted unless based on a contemporaneously reasoned public record, with due consideration of market-based alternatives, the commission might provide a backstop to the worst abuses of special interest group legislation and regulation.

## t

### 2ac – t-private

#### We meet – the plan text specifies the application to the private sector

#### Parker immunity shields private entities in anticompetitive behavior – it’s not only when state is acting as sovereign

Safvati 16 [Sina Safvati, J.D., University of California, Los Angeles, School of Law, with honors, 2016 B.A., University of California, Los Angeles, summa cum laude, 2012 CLERKSHIPS U.S.C.A., 9th Circuit U.S.D.C., Southern District of Florida, https://www.uclalawreview.org/wp-content/uploads/2019/09/Safvati-63-4-update.pdf]

Based in part on the fear that States might “confer antitrust immunity on private persons by fiat,”24 the Supreme Court clarified in later decisions that the automatic exemption from federal antitrust law applies only when the state is acting as a sovereign—when the anticompetitive decision is expressly made by a state legislature or state supreme court.25 In the case of political subdivisions and private entities, the Parker immunity exemption applies only if the entity makes a sufficient showing that the anticompetitive decision was in fact one of the sovereign.26 Through its subsequent jurisprudence, the Court defined three distinct categories in the Parker-immunity inquiry.

The first category is reserved for cases in which the sovereign directly and expressly made the anticompetitive action, limited to actions of the state legislature or state supreme court.27 Parker immunity automatically applies in such cases.28 The second category (“quasi-public”)29 is reserved for cases in which a municipality or a “prototypical state agency”30 has engaged in anticompetitive conduct.31 When municipalities seek Parker immunity, the anticompetitive conduct must have been pursuant to a clearly articulated state policy to displace competition.32 The third category is reserved for instances in which private entities have engaged in anticompetitive conduct. When private entities seek Parker state-action immunity, they must show both that the challenged conduct was pursuant to a clearly articulated state policy and that it was actively supervised by the state itself.33 In the 2014–2015 term, the Supreme Court held in North Carolina Board of Dental Examiners v. FTC that a state occupational licensing board comprised of a “controlling number” of “active market participants” was private and subject to the active supervision requirement.34

[Footnote 33] E.g., Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 105–06 (1980) (holding that the private wine price-setting scheme could not benefit from Parker immunity because although the scheme was pursuant to a clearly articulated state policy, the state did not engage in any “pointed reexamination” of the program and thus did not satisfy the active state supervision prong); see also S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 56–57 (1985).

#### Private sector is not “controlled” by state

**JTP 21** (Java T Point, https://www.javatpoint.com/public-sector-vs-private-sector)

The **public sector** is the sector which includes both **public companies** and **services**. In other words, the public sector is the sector that is under government's control. The public sector includes agencies, enterprises, banks, companies, etc., that are controlled by the government. Some examples of the public sector include infrastructure, sewers, public transit, healthcare, goods, services, etc. The public sector is made of three parts, i.e., the judiciary, legislative, and executive. These three segments combine and make the private sector. One of the major aims of the public sector is to have a balance between economy and wealth. The public sector is under the state control. More or less, the companies and agencies under the public sector are owned by the state. Now, let us look at some contrasting points between these sectors.

Private Sector

The private sector is defined as the **sector** wherein the **economy** is controlled by **private groups**. In layman's terms, a **private sector** is the sector that is **not under the control of the state**. Private sectors are run by companies yielding profits. The private sector can also be called as the citizen sector. Examples of the private sector are ICICI Bank, ITC Limited, HDFC Bank, etc. Apart from the banks, the proprietors, businessmen, accountants, SMEs, etc., are some other examples of the private sector. The major objective of the private sector is to earn maximum profits and have sole ownership or control. The private banks have better management systems, due to which they are able to yield more profits. Some of the private companies include Vitol, Koch Industries, Huawei, etc.

### 2ac – t-per se

#### We meet --- removing immunity exposes conduct to per-se prohibitions

**PAGE 19** --- WILLIAM H. PAGE, Marshall M. Criser Eminent Scholar, University of Florida Levin College of Law, & JOHN E. LOPATKA, A. Robert Noll Distinguished Professor of Law, Penn State Law, “Parker v. Brown, The Ele own, The Eleventh Amendment, and Anticompetitiv enth Amendment, and Anticompetitive State Regulation “, 3-15-2019 , https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3804&context=wmlr

Significantly, given our later focus on remedies in this Article, the state action doctrine also does not distinguish between actions for damages and actions for injunctions: **if the immunity is not available** to the state or local agency, **all remedies are on the table**.51 The Court has suggested that private parties can be held liable for antitrust damages despite acting pursuant to apparent state authority, if the conditions for immunity are not met.52 If the immunity is present, however, **it precludes actions for all types of relief**.53

A doctrine related to, but separate from, state action holds that a statute may be preempted by the Sherman Act pursuant to the Supremacy Clause54 if the statute on its face mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.55 “Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases **a per se violation**.”56 Conduct that is taken pursuant to a statute that is not preempted in the abstract may or may not be illegal under the **rule of reason**.57

#### Counterinterp:

#### Substantially means “considerable amount” – *qualitative* not *quantitative*

**Prost 4** (Judge – United States Court of Appeals for the Federal Circuit, “Committee For Fairly Traded Venezuelan Cement v. United States”, 6-18, http://www.ll.georgetown.edu/federal/judicial/fed/opinions/04opinions/04-1016.html)

The URAA and the SAA neither amend nor refine the language of § 1677(4)(C).  In fact, they merely suggest, without disqualifying other alternatives, a “clearly higher/substantial proportion” approach.  Indeed, the SAA specifically mentions that no “precise mathematical formula” or “‘benchmark’ proportion” is to be used for a dumping concentration analysis.  SAA at 860 (citations omitted); see also Venez. Cement, 279 F. Supp. 2d at 1329-30.  Furthermore, as the Court of International Trade noted, the SAA emphasizes that the Commission retains the discretion to determine concentration of imports on a “case-by-case basis.”  SAA at 860.  Finally, **the definition of** the word “**substantial**” undercuts the CFTVC’s argument.  The word “substantial” generally means “**considerable in amount**, value or worth.”  Webster’s Third New International Dictionary 2280 (1993).  **It does not imply a specific number** or cut-off.  What may be substantial in one situation may not be in another situation.  The very breadth of the term “substantial” undercuts the CFTVC’s argument that Congress spoke clearly in establishing a standard for the Commission’s regional antidumping and countervailing duty analyses.  It therefore supports the conclusion that the Commission is owed deference in its interpretation of “substantial proportion.”  The Commission clearly embarked on its analysis having been given **considerable leeway to interpret a particularly broad term**.

#### Business practices includes all operations

**Blumenthal 14** --- Text of a bill introduced by Richard Blumenthal, Senator, 113TH CONGRESS 2D SESSION S. 2615, “A BILL To establish criminal penalties for failing to inform and warn of serious dangers.”, July 2014, https://www.congress.gov/113/bills/s2615/BILLS-113s2615is.pdf

“(3) the term ‘business practice’ means a meth od or practice of—

“(A) manufacturing, assembling, designing, researching, importing, or distributing a covered product;

“(B) conducting, providing, or preparing to provide a covered senice; or

“(C) otherwise carrying out business operations relating to covered products or covered sendees;

#### Prohibitions hamper 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**.

**Prefer it:**

#### Overlimits

**Hovenkamp 18** --- Herbert J. Hovenkamp University of Pennsylvania Carey Law School, “THE RULE OF REASON”, 2018, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2780&context=faculty\_scholarship

Courts evaluate most antitrust claims under a “rule of reason,” which requires the plaintiff to plead and prove that defendants with market power have engaged in anticompetitive conduct. To conclude that a practice is “reasonable” means that it survives antitrust scrutiny.1 This is in contrast to antitrust’s “per se” rule, in which power generally need not be proven and anticompetitive effects are largely inferred from the conduct itself.2 However, the domain of the per se rule has been **narrowing**.3 Today it extends to “**naked**”4 **price fixing** and **market division agreements**, **a small subset** of boycotts, or concerted refusals to deal, **and—by a** very thin thread—some tying arrangements.5

### 2ac – t-by

#### We meet – that’s the phrase we use in the plan

#### ABP restricts competition

**SICE 21** (Foreign Trade Information System, “Dictionary of Trade Terms,” 2021, <http://www.sice.oas.org/dictionary/cp_e.asp>)

Anticompetitive practices A wide range of business practices in which a firm or group of firms may engage in order to restrict inter-firm competition to maintain or increase their **relative market** position and profits without necessarily providing goods and services at a lower cost or of higher quality. These practices include **price fixing** and other **cartel arrangements**, abuses of a **dominant position** or **monopolization**, mergers that **limit competition** and **vertical agreements** that foreclose markets to new competitors.

#### We meet

Sandefur 14 [Timothy Sandefur, Vice President for Litigation at the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation 2014 https://www.cato.org/sites/cato.org/files/serials/files/regulation/2014/10/regulationv37n3-4.pdf]

If federal law is to prohibit restraints on competition and conspiracies against trade, those prohibitions should presumptively apply to everyone equally, and particularly in cases in which state laws are used to block competition. As James Madison observed in The Federalist, a legal system that exempts the government from rules that apply to ordinary citizens undermines “the communion of interests and sympathy of sentiments … without which every government degenerates into tyranny.” If Americans ever became so “debased” as to “tolerate a law not obligatory on the legislature, as well as on the people,” he warned, “the people will be prepared to tolerate any thing but liberty.” This is not a merely rhetorical concern; state-established cartels tend to reward privileged insiders against entrepreneurs who lack political influence and thus to perpetuate a class system that blocks the route to economic independence for those who need it most.

Parker immunity should thus be limited not only to cases in which state officials carefully oversee the regulations at issue, and—contrary to Southern Motor Carriers—in which states actually require anticompetitive behavior, but also where the restriction on competition passes a meaningful constitutional test. Although the North Carolina case involves antitrust statutes instead of constitutional claims, the issues are identical: where established firms wield government power, they have a strong incentive to do so in ways that restrict competition, harm consumers, and block entrepreneurs from exercising their right to earn a living. Courts must shed their infatuation with federalism in the realm of antitrust immunity and adopt a strict rule limiting such immunity to cases where states explicitly choose to restrict competition, carefully supervise those who do so, and do so for legitimate reasons. Today’s more permissive rules allow states far too much discretion to establish cartels and block entrepreneurs—who have no realistic political protection against vested interests that exploit Parker immunity—from their constitutional right to earn a living. The substantial advancement test already used in several areas of constitutional law would give states enough flexibility to restrain trade where doing so is legitimate, while ensuring that entrepreneurs are not left at the mercy of the very firms that have the strongest interest in barring them from competition

## Estados

### States CP – Don’t Have Anticompetitive Regs – 2AC

#### Case-by-case state application is a disaster for regulated entities – leaves them guessing about the application of immunity

Roche 13 [Karen Roche J.D. Candidate, May 2013, Loyola Law School Los Angeles; B.A., May 2010, University of San Diego, 2-8-2013 https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2809&context=llr]

C. The Parker Court’s Failure to Recognize the Conflict Between Antitrust Laws and Federalism Principles Has Left State Action Essentially Unregulated

The Court’s choice to ignore the conflict between the principles of federalism and the national antitrust laws has essentially left state action unregulated.226 By holding that antitrust law does not apply in the area of state action, the Court has created a state action doctrine that is both unclear and overly broad.227 This choice has eroded the protection that antitrust law is meant to provide to the consumer.228

1. Midcal Foreseeability

Regardless of whether the foreseeability standard for municipalities and private actors is read broadly or narrowly, within the context of state action immunity generally, the standard is too broad.229 As one commentator put it, “the foreseeability standard has proven to be of no bite.” 230 Unless a state specifically authorizes anticompetitive action, the broader the state’s grant of authority, the more likely a court will hold that anticompetitive conduct was foreseeable.231 If the state does not specify what type of conduct it is authorizing, anticompetitive conduct could almost always be a foreseeable result. 232 Thus, the foreseeability standard significantly waters down the requirements of the first prong of the Midcal test and makes it much easier for a court to grant Parker immunity.233

When courts immunize conduct because it was simply foreseeable rather than expressly authorized by the state, they are immunizing conduct that does not fall within the regulatory policy of the state. Because the state action doctrine says that the Sherman Act was not meant to regulate in this area, this type of conduct can be immunized.234 On the other hand, if the state action doctrine was bound by the guidelines of federalism, this type of conduct would likely not be protected because it is not the state’s clearly articulated policy that is being protected, but rather what the court thinks could logically have resulted from the state’s policy. This immunity comes at the expense of the consumer, who is subjected to the effects of anticompetitive behavior—behavior that does not actually further the policy of the Sherman Act or correspond to what the Court is aiming to protect. Without the protection of antitrust law, there would be a shortage of competitors to drive down prices, and, consequently, the consumer would have to pay more for services.

Many cities have exclusive contracts with utilities or cable companies that states do not expressly authorize but that courts nonetheless protect because they consider it foreseeable that the city would enter into these contracts when the state gives them the authority to regulate in these areas.235 Thus, the consumers—the residents of the city—ultimately pay more for utilities and television than they would otherwise because there is nobody to compete with the cable company or waste services provider and thus drive prices down. For example, in Massengale, because the Court held that it was foreseeable that the city would grant an exclusive contract for waste disposal in the wake of a state statute that authorized cities to manage their waste disposal, the plaintiff was required to pay for trash and recycling services that he did not use.236 This change resulted in an increase of the cost of waste disposal from about $1.56 per month to $15.65 per month.237

2. Active Supervision

The second prong of the Midcal test, the active supervision requirement, is as problematic as the first prong. The requirement is unclear and, with the exemption for municipalities, it is far too broad.

a. Unclear standard requires courts to make subjective determination about what is sufficient Because it is unclear what is sufficient to satisfy this requirement, it is difficult for private actors to determine whether they are protected by antitrust immunity.238

[Footnote 238] See Cantor v. Detroit Edison Co., 428 U.S. 579, 640 (1976) (Stewart, J., dissenting) (“Henceforth, a state-regulated public utility company must at its peril successfully divine which of its countless and interrelated tariff provisions a federal court will ultimately consider ‘central’ or ‘imperative.’ If it guesses wrong, it may be subjected to treble damages as a penalty for its compliance with state law.”); see also Hettich, supra note 111, at 138 (arguing that requiring regulated parties to guess whether they will be protected by antitrust immunity is inherently unfair).

This ambiguity unfairly subjects those actors to antitrust liability when they happen to guess wrong.239 Additionally, without clear standards, the reviewing court will inevitably impose its own judgment about whether the economic regulation in question is wise.240 Had the Court adhered to the principles of federalism—instead of saying that antitrust law simply did not apply in the context of state action—it would have developed a standard that required accountability by the state rather than one that requires courts to make determinations about the state’s intention or the scope of the state’s authorization.241 Instead, the standard defeats the purpose of the active supervision requirement, which is to ensure that the private actor is engaging in conduct that is deemed to be the conduct of the state itself.242

**States CP – Solve Link – 2AC**

#### Perm flies under the radar

Gluck 13 – Abbe R. Gluck, Professor of Law and the Faculty Director of the Solomon Center for Health Law and Policy at Yale Law School, expert on Congress and the political process, legislation, federalism, state and local government, civil procedure, and health law, and is chair of Section on Legislation and the Law of the Political Process for the Association of American Law Schools, Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble, Published in 2013, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5710&context=fss\_papers

Other motivations may be instrumental. State administration of new federal programs may make federal legislative expansions more **politically palatable** for those who prefer (at least the appearance of) "small" government. Running controversial federal programs through the states also may **diffuse federal accountability**. Sometimes, these moves are "nationalist" in nature: a use of the states to increase federal power in a **below-the-radar fashion**. Other times (or perhaps simultaneously), they may be an effort to effectuate values that we normally associate with "federalism," even as Congress steps in to regulate. For example, a federal law that relies on state implementation might be a way of expressing a preference for experimentation, local control, or respect for areas of traditional state expertise.

## Adv cp

### Adv CP

#### 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.

#### Licensing boards circumvent individual reforms – they control their own regulatory structures

Allensworth 17 (Rebecca Haw Allensworth, professor of Law, Vanderbilt Law School; September 17th 2017, “Written Testimony of Professor Rebecca Haw Allensworth U.S. House of Representatives Hearing: “Occupational Licensing: Regulation and Competition” Pages 1-2, Congress.Gov, <https://www.congress.gov/115/meeting/house/106382/witnesses/HHRG-115-JU05-Wstate-AllensworthR-20170912.pdf>) MULCH

How can such wasteful regulation survive—even thrive—in the face of wide-spread opposition? The answer, like so many root causes of big problems, turns out to be rather small. The institutional structure of occupational licensing—specifically, the state-level licensing board—is to blame for the proliferation of a regulatory structure that costs consumers billions every year and prevents millions of workers from practicing their trade. We have, unwittingly, handed over control of almost a third of the American workforce to nearly two thousand selfserving, self-regulating boards. Each board is so tiny and covers such a small portion of the American workforce as to be almost invisible on the national stage. But together they form the most powerful labor institution in our country’s history, eclipsing unions in their heyday.

### Arg

#### 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.

#### 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.

“ The most important takeaway is that large pandemics like COVID-19 and the Spanish flu are relatively likely. WILLIAM PAN — ASSOCIATE PROFESSOR OF GLOBAL ENVIRONMENTAL HEALTH

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.

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.

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### 2ac – fw

#### Our FW’s is best for crafting resistance to neolib

Watts 21 [Galen Watts is Guest Professor with Special Appointment and Banting Postdoctoral Fellow, based at KU Leuven, “Are you a neoliberal subject? On the uses and abuses of a concept” 8-6-2021 Sage Journals]

a kind of cookie-cutter typification or explanation, a tendency to identify any programme with neo-liberal elements as essentially neo-liberal, and to proceed as if this subsumption of the particular under a more general category provides a sufficient account of its nature or explanation of its existence. (Rose et al., 2006, p. 98).1

Furthermore, it is critical to note that Rose, like Foucault, has long distanced himself from the kind of socio-critique implicit in neoliberalism (2). And the reason for this is that he seems to think, given that advanced liberalism is the regnant form of political rule, we are all subject to it in one way or another (Barry et al., 1996).

Where does this leave us? I would put it this way: If we accept that neoliberalism (1) has created socio-economic conditions that have forced individuals to adapt and thereby become, to some extent, self-responsible subjects, then it might well be that all of us, simply by virtue of inhabiting these social conditions, have become ‘neoliberal subjects’. Indeed, if we accept Rose’s claim that we are all subject to advanced liberal forms of rule, then this would seem a natural corollary. However, the difficulty with this conception of ‘neoliberal subject’ is that it is not clear what ‘neoliberal’ in this instance actually means. It is clearly not neoliberalism (2), since this would entail not just adaptation, but acquiescence such that we, as individuals, had accepted the basic tenets of neoliberal 14 European Journal of Social Theory XX(X) ideology. Nor is it clear that it entails neoliberalism (3), which entails having one’s subjectivity constituted by neoliberal reason. Thus, it seems to me far more accurate to say that we are all (or most us, anyway) liberal subjects – those who, in one way or another, conceive of ourselves as self-responsible, autonomous and self-realizing subjects. Though it goes without saying that such a claim is not all that illuminating.

Conclusion

Let me be clear: I do not doubt that, in some cases, neoliberalisms (1), (2) and (3) have led to the production of actual ‘neoliberal subjects’ – that is, living breathing homo oeconomicus. For instance, I would conjecture that the world of corporate finance is probably densely populated with such subjects (e.g. Neely, 2020). And indeed, in my own research, I have found that Charismatic Christians who subscribe to ‘prosperity gospel’ approximate the ‘enterprising self’ normalized in human capital theory (Watts, forthcoming). However, I am quite sceptical of the claim that neoliberal subjects populate each and every social sphere, as if we are all in the thralls of neoliberal ideology, or govern ourselves exclusively according to the dictates of neoliberal reason. That said, this obviously remains an urgent research question. But if we are to pursue it, we require a methodological approach that is sensitive to institutional specificities, the extent to which discourses are polyvalent, and the complexities involved in the production of psychic and embodied subjectivities, not just a loose discourse analysis of governmental texts.

Why? For both academic and political reasons. First, the academic: to the extent that neoliberalisms (1), (2) and (3) exist, it only muddies the water to overinterpret them. Indeed, we would do better to practice analytic precision when labelling something (or someone) ‘neoliberal’. This is especially the case when researching across national contexts: it is simply not accurate that every citizen of Western liberal democracies is equally ‘neoliberal’, either in the sense that they adhere to neoliberal ideology or that they live according to neoliberal reason. And as a growing number of scholars have maintained, it is misleading to interpret the subjective lives of citizens of East Asia and the Global South as wholly colonized by either neoliberalisms (2) or (3) (Ferguson, 2009; Parnell & Robinson, 2012). However, even within specific national contexts, we must make sure to recognize that identities and discourses are multiple, such that mere invocations of aspects of ‘neoliberal discourse’ should not be taken as evidence of a comprehensive ‘neoliberal subjectivity’. In short, if our aim as social scientists is to capture the complexity, richness and diversity of subjective life in the twenty-first century, then we ought to broaden the ‘repertoire of subjectivity’ (Green, 2010, p. 331) carried in our analytic toolboxes.

Second, the political: for those of us who find something abhorrent about neoliberalisms (1), (2) and (3), it may actually undermine our cause to repeatedly give the impression that one or either of these have seeped into the subjectivities of everyone presently living. One reason for this is that to the extent that we overlook, or dismiss, extant alternative social and moral forms, we may unwittingly serve to bolster neoliberal ideology and reason, aiding and abetting their spokespeople in their goal of global domination. Indeed, John Welsh (2020, p. 68) suggests that if we are to oppose neoliberalism in all of its forms, academics must begin to ‘introduce contingency back into the interstices of this seemingly impenetrable edifice’. Interestingly, this strategy actually aligns with the mature work of Foucault, for whom scholarship should seek to disrupt that which is taken for granted. Drawing on this Foucaultian legacy, Cornelissen (2018, p. 144) convincingly argues that ‘resistance should be given a more prominent analytical role in the critique of neoliberalism’, adding, ‘resistance is not secondary to the elaboration of alternatives; rather, moments of refusal must guide the formulation of alternative analyses’. Cornelissen concludes, ‘what is at stake politically is our capacity to imagine practices or resistance to neoliberalism and to take seriously those modalities of resistance that already exist’. I could not agree more. And for this reason, I think we should be far more careful when invoking the monolithic notion of a ‘neoliberal subject’.

### 2ac – sustainability

#### Try or die – only innovation can solve in time – prefer new IPCC report

King 21 (David King, Founder and Chair, Centre for Climate Repair at Cambridge, University of Cambridge; and Jane Lichtenstein, Associate, Centre for Climate Repair at Cambridge, University of Cambridge; “Surviving the next 50 years is an existential crisis – 3 things we must do now,” The Print, 8-14-2021, https://theprint.in/opinion/surviving-the-next-50-years-is-an-existential-crisis-3-things-we-must-do-now/715069/)

The challenge of surviving the next 50 years is now seen as a planet-wide existential crisis; we need to work together urgently, just to secure a short-term future for human civilisation. Global weather patterns are violently disrupted: Greece burns; the south of England floods; Texas has had its coldest weather ever, while California and Australia suffer apocalyptic wild fires. All of these violent, record-breaking events are a direct result of rapid heating in the Arctic – occurring faster than in the rest of the world. A warm Arctic triggers new ocean and air currents that change the weather for everyone. The only way to reverse some of these catastrophic patterns, and to regain a kind of stability in climate and weather systems, is “climate repair” – a strategy we call “reduce, remove, repair” – which demands that we make very rapid progress to net zero global emissions; that there is massive, active removal of greenhouse gases from the atmosphere; and, in the first instance, that we refreeze the Earth’s poles and glaciers to correct the wild weather patterns, slow down ice-melt, stabilise sea level, and break the feedback loops that relentlessly accelerate global warming. There are no either/or options. Reducing emissions About 70% of world economies have net zero emissions commitments over varying timescales, but this has come too late to restore climate stability. The IPCC has asked for accelerated progress on this trajectory, but whatever happens, current emission rates of atmospheric greenhouse gases imply global warming of 1.5℃ by 2030 and well over 2℃ above pre-industrial level by the end of the century – a devastating outcome. In particular, melting ice and thawing permafrost are considered inevitable even if rapid and deep CO2 emissions reductions are achieved, with sea-level rise to continue for centuries as a result. In every area of the world, climate events will become more severe and more frequent, whether flooding, heating, coastal erosion or fires. There are definitely important steps that can still reduce the scale of this devastation, including faster and deeper emissions reductions. However, this is not enough on its own to avert the worst. Together there is real evidence that the massive removal of greenhouse gases from the atmosphere and solutions such as repairing the Earth’s poles and glaciers could help humanity find a survivable way out of this crisis. Removing greenhouse gases Taking CO2 and equivalent greenhouse gases out of the atmosphere, with the aim of getting back to 350ppm (parts per million) by 2100, involves creating new CO2 “sinks” – long-term stores from which CO2 cannot escape. Sinks operate at many scales, with forest planting, mangrove restoration, wetland and peat preservation all crucially important. Very large projects, such as the restoration of the Loess Plateau in China demonstrate scalable CO2 removal, with multiple add-on benefits of food production, bio-diversity enhancement and weather stabilisation. Habitat restoration can also make economic sense. In the Philippines, mangrove is the focus of a cost-benefit analysis. Mangrove captures four times more carbon than the same area of rainforest, provides numerous ecosystem services and protects against flooding, conferring socio-economic benefits and significantly reducing the cost of dealing with extreme weather events. Big new carbon sinks must be created wherever safely possible, including in the oceans. Interventions that mimic natural processes, known to operate safely “in the wild”, are a workable starting point. Promotion of ocean pastures to restore ocean diversity and fish and whale stocks to the levels last seen 300 years ago is one such possibility – offering new sustainable food sources for humans, as well as contributing to climate ecosystem services and carbon sinks. In nature, sprinklings of iron-rich dust blow from deserts or volcanic eruptions, onto the surface of deep oceans, generating – in a matter of months – rich ocean pastures, teeming fish stocks and an array of marine wildlife. Studies of ocean kelp regeneration show the full range of real-life impacts, from increased protein sources for human consumption, to restoration of pre-industrial levels of ocean biodiversity and productivity, and extensive carbon sequestration. Extending the scale and number of ocean pastures could be achieved by systematically scattering iron-rich dust onto target areas in oceans around the world. The approach is intuitively scalable, and could sequester perhaps 30 billion tons per year of CO2 if 3% or so of the world’s deep oceans were to be treated annually. Large-scale carbon-sink creation of this kind is pivotal if the atmosphere is to return to pre-industrial CO2 levels. A billion tons per year of sequestration is the minimum threshold coordinated by the Centre for Climate Repair at Cambridge given the intensity of the climate crisis. While the scale of intervention is sometimes called “geoengineering”, the approach is closer to forest planting or mangrove restoration. The aim is to remove CO2 from the atmosphere using natural means, to return us to pre-industrial levels within a single generation. Repairing the planet The immediate challenge is to stabilise the planet, achieving a manageable equilibrium that gives a last chance to shift to renewable energy and towards a circular global economy, with new norms in urban, rural and ocean management. “Repairing” systematically seeks to draw the Earth back from climate tipping points (which, by definition, cannot happen without direct effort), providing a supporting framework in which “reduce” and “restore” can happen. Political and societal will is needed. The most urgent effort is to refreeze the Arctic, interrupting a bleak spiral of accelerating ice loss, sea-level rise – and the acceleration of climate change and violent global weather changes that they cause. Arctic temperatures have risen much faster (and increasingly so) than global average temperatures, when compared with pre-industrial levels. Figure 1 shows this clearly from 1850 to the present day. Melting Arctic ice embodies a powerful feedback force in climate change. White ice reflects the Sun’s energy away from the Earth before it can heat the surface. This is known as the albedo effect. As ice melts, dark-blue seawater absorbs increasing amounts of the Sun’s energy, warming increases, and ever-larger areas of ice disappear each summer, expanding the acceleration. Arctic temperatures govern winds, ocean currents and weather systems across the globe. A tipping point is passing: sea-ice loss is becoming permanent and accelerating; Greenland ice will follow and will eventually raise global sea-levels by over seven metres. Total loss may take centuries but, decade by decade, there will be relentless incremental impacts. By mid-century the melting will be irreversible, and sea-level rise alone will leave low-lying countries like Vietnam in desperate circumstances, with reductions to global rice production a certainty, many millions of climate refugees and no obvious pathway forward for such nations. Figure 1: comparison between average global temperature change, and change in the Arctic region from 1850 to present day. Provided by Nerilie Abram using IPCC data, ANU, Australia, 2021 The rapid Arctic temperature increase is matched by the rapid and accelerating loss in minimum (summer) sea-ice volume (Figure 2), which further accelerates the temperature rise in a spiral of reinforcing feedback loops. Figure 2: decline in annual minimum Arctic Sea ice volume 1980-2020. Provided by Nerilie Abram using IPCC data, ANU, Australia, 2021 It is vital to pivot the world back from this ice-melt tipping point, and to repair the Arctic as rapidly as possible. Marine cloud brightening in which floating solar-powered pumps spray salt upwards to brighten clouds and create a reflective barrier between the Sun and the ocean, is known to cool ocean surfaces and is a promising way to promote Arctic summer cooling. It mimics nature, and can be scaled up or down in a flexible way. Studies of marine cloud brightening, its climate impacts and interactions with human systems, are underway. As with promotion of ocean pastures, such solutions must be critically analysed, but there is no longer any doubt of their crucial importance. What we do in the next five years determines the viability of humanity’s future. Even if we narrow our aspirations to “survival”, fixing on a timescale of 50 years or so, the challenges are daunting. Humanity deserves better. We know what to do to be able to imagine thousands of years of human civilisation ahead, as well as behind us.

### 2ac – link

#### No link and Turn - Reductionist and rejects tools that curtail violence.

* … post-dating oddly matters bc past examples don’t assume how the Aff/Khan might deploy anti-trust.
* … more than link D – Alt forgoes workable option to re-shape the very power they criticize.
* Author = uber-qual’d… peer-reviewed cultural theory journal recent lit..

Paul ‘22

Sanjukta Paul - Assistant Professor of Law, Romano Stancroff Research Scholar, Wayne State University - J.D., Yale Law School - From the article: “A Democratic Vision for Antitrust” - From the Journal – Dissent - Published by University of Pennsylvania Press - Volume 69, Number 1, Winter 2022, pp. 56-62 (Article) – modified for language that may offend - available via Project Muse

Last spring, prominent Big Tech critic Lina Khan became the new chair of the Federal Trade Commission (FTC)—an appointment widely ~~seen as~~ (considered) a coup for progressive reform. In her confirmation hearing, she characterized the agency’s overarching goal in terms of “fair competition.” This choice of emphasis is significant for understanding the antitrust reform project of which Khan is a leader. At its core, the project is a policy paradigm aimed at creating fair markets—markets characterized by socially beneficial competition, fair prices, and decent wages.

While both proponents and detractors of this reform project sometimes conflate competition policy with the goal of maximizing economic competition for its own sake, in reality, competition law has always assessed economic rivalry and coordination in relation to broader social ends. For a long time, that assessment has been obscured—not to mention insufficiently tethered to the original goals of federal antitrust law. The reform project aims to reorient the use of antitrust in expressly egalitarian and democratic directions.

For decades, competition law and policy have been dominated by the neoclassical law and economics paradigm, which claims that visible market design and coordination interfere with competitive dynamics that would otherwise lead to an efficient allocation of social resources, and thus to the maximization of social welfare. While recent shifts in mainstream economic thinking have led to more discussion of imperfect competition, particularly in labor markets, the “market failures” and power imbalances that justify interventions are on this view still essentially special cases. Moreover, this idealized picture of markets still obscures certain forms of background coordination—especially the often hierarchical and extractive coordination that happens within business firms—while treating other coordination mechanisms as exceptional, with the potential to distort ideal market outcomes.

Conventionally organized business firms are just one of the many means we have to coordinate economic activity; others include labor unions, producers’ cooperatives, and public price boards, to take just a few examples. Because competition law makes ground-up decisions about many forms of economic coordination, and influences the regulatory stance toward others, antitrust reforms hold the potential to affect a broad set of economic policies.

We should not act as if putatively neutral, technocratic appeals to idealized competition can replace moral and political choices about economic life. Nor, however, should we treat actual competition as inherently tainted by its association with neoclassical theory. Channeled appropriately, competition is healthy rivalry: it encourages technological and operational innovations that can have broad social benefits, and it represents an important check on arbitrary bureaucratic power by preserving outside options for workers, consumers, and businesses. Channeled inappropriately, competition can lead to the destructive undermining of rivals (in contrast to constructive outperformance), overwhelm socially valuable independent enterprises, and destroy existing market settlements characterized by fair prices and decent wages. There is no universal logic of competition for policymakers to apply, either dark or redemptive: it is legal, social, and political choices (almost) all the way down.

To move from principles to some specifics, we can ~~look at~~ (consider) the approach the reform project might take in three policy areas: policing corporate mergers and acquisitions, accommodating horizontal and bottom-up economic coordination, and re-regulating the law of vertical restraints. *These* reforms, which are mutually reinforcing, all have the power to help build a more equal and democratic legal organization of the economy.

### 2ac – alt – cap

#### Alt fails and causes war

Smith 19 [Noah; 4/5/19; Bloomberg Opinion columnist, former assistant professor of finance at Stony Brook University; "Dumping Capitalism Won’t Save the Planet," https://www.bloomberg.com/opinion/articles/2019-04-05/capitalism-is-more-likely-to-limit-climate-change-than-socialism]

It has become fashionable on social media and in certain publications to argue that capitalism is killing the planet. Even renowned investor Jeremy Grantham, hardly a radical, made that assertion last year. The basic idea is that the profit motive drives the private sector to spew carbon into the air with reckless abandon. Though many economists and some climate activists believe that the problem is best addressed by modifying market incentives with a carbon tax, many activists believe that the problem can’t be addressed without rebuilding the economy along centrally planned lines.

The climate threat is certainly dire, and carbon taxes are unlikely to be enough to solve the problem. But eco-socialism is probably not going to be an effective method of addressing that threat. Dismantling an entire economic system is never easy, and probably would touch off armed conflict and major upheaval. In the scramble to win those battles, even the socialists would almost certainly abandon their limitation on fossil-fuel use — either to support military efforts, or to keep the population from turning against them. The precedent here is the Soviet Union, whose multidecade effort to reshape its economy by force amid confrontation with the West led to profound environmental degradation. The world's climate does not have several decades to spare.

Even without international conflict, there’s little guarantee that moving away from capitalism would mitigate our impact on the environment. Since socialist leader Evo Morales took power in Bolivia, living standards have improved substantially for the average Bolivian, which is great. But this has come at the cost of higher emissions. Meanwhile, the capitalist U.S managed to decrease its per capita emissions a bit during this same period (though since the U.S. is a rich country, its absolute level of emissions is much higher).

In other words, in terms of economic growth and carbon emissions, Bolivia looks similar to more capitalist developing countries. That suggests that faced with a choice of enriching their people or helping to save the climate, even socialist leaders will often choose the former. And that same political calculus will probably hold in China and the U.S., the world’s top carbon emitters — leaders who demand draconian cuts in living standards in pursuit of environmental goals will have trouble staying in power.

The best hope for the climate therefore lies in reducing the tradeoff between material prosperity and carbon emissions. That requires technology — solar, wind and nuclear power, energy storage, electric cars and other vehicles, carbon-free cement production and so on. The best climate policy plans all involve technological improvement as a key feature.

## Ftc OS

### FTC OS – 2AC

#### 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.

#### Lots of thumpers

Zakrzewski 8-19 (Cat Zakrzewski, technology policy reporter at The Washington Post, covers antitrust, privacy and the debate over regulating social media companies, former reporter for Wall Street Journal Pro Venture Capital, BS Journalism, Northwestern University; **internally citing competition policy director at the consumer group Public Knowledge Charlotte Slaiman, and George Washington University professor and former FTC chair William Kovacic**; “Lina Khan’s first big test as FTC chief: Defining Facebook as a monopoly,” The Washington Post, 8-19-2021, https://www.washingtonpost.com/technology/2021/08/19/ftc-facebook-lawsuit-lina-khan-deadline/)

“There’s multiple signals that FTC is serious about doing their job of investigations and bringing these cases and fighting them hard,” said Charlotte Slaiman, competition policy director at the consumer group Public Knowledge.

Though the most significant, the Facebook case is but one of a wide range of issues on Khan’s plate. A month after she assumed office, the Biden administration issued a sweeping competition executive order, which called for her agency to take a tougher line on concentration throughout the economy.

So far, Khan has taken a series of steps to signal a shake-up has arrived at the FTC. She’s started hosting open meetings to open the agency’s business to the public, and she’s warned that greater scrutiny of mergers is on its way.

But the challenge will be for the agency to remain focused on the most important cases, including Facebook, Kovacic said. “She has a downpour of demands from both ends of the avenue,” he said.

And none of her other efforts will matter if she can’t show that she can win against companies, including Facebook, in court.

“The real measure to business decision-makers of your effectiveness and seriousness is your ability to prosecute and win cases,” Kovacic 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.

#### Other mechanisms solve most dark patterns

Hung 21 (Alison Hung, Columbia Law School, and Professor David Pozen, Columbia Law School, December 2021 “KEEPING CONSUMERS IN THE DARK: ADDRESSING “NAGGING” CONCERNS AND INJURY” Columbia Law Review, Volume 121, No. 8, Pages 2501-2502, <https://columbialawreview.org/content/keeping-consumers-in-the-dark-addressing-nagging-concerns-and-injury/>) MULCH

II. ADDRESSING NAGGING: THE FTC’S LIMITED AUTHORITY While the FTC and consumers likely can use existing legal authority and frameworks to address some categories of dark patterns, nagging will elude regulation. As scholars like Luguri and Strahilevitz have recognized, the legal frameworks for combatting other types of dark patterns—particularly those that are deceptive—largely already exist.99 For example, some dark pattern techniques, such as the bait and switch, could probably be considered “deceptive” trade practices under the FTC Act.100 The CFPB could combat most dark patterns in the banking and financial services sectors through its authority to regulate “unfair, deceptive, or abusive acts or practices.”101 In other cases, the use of dark patterns could render contractual arrangements void by calling into question consent obtained from a consumer, particularly when consumers unwittingly enter into an agreement that a company presented misleadingly.102

#### FTC fails at solving

MacCarthy 21 (Mark MacCarthy, Nonresident Senior Fellow in Governance Studies at the Center for Technology Innovation at Brookings, Nonresident Senior Fellow in the Institute for Technology Law and Policy at Georgetown Law, adjunct professor at Georgetown University in the Graduate School’s Communication, Culture, & Technology Program and in the Philosophy Department, served as a professional staff member of the U.S. House of Representatives’ Committee on Energy and Commerce, where he handled telecommunications, broadcasting and cable issues, and as a regulatory analyst at the U.S. Occupational Safety and Health Administration, PhD philosophy, Indiana University, MA economics, Notre Dame, BA Fordham University, “Do not expect too much from the Facebook antitrust complaints,” Brookings, 2-3-2021, https://www.brookings.edu/blog/techtank/2021/02/03/do-not-expect-too-much-from-the-facebook-antitrust-complaints/)

The need to please advertisers will inevitably frustrate the widespread expectation that a Facebook breakup will lead to better privacy protections for users. True, there will be a one-time benefit for user privacy as Facebook’s integrated data base is ripped apart into separate profiles of WhatsApp, Instagram, and Facebook users. But each of these companies will rapidly rebuild their user profiles with new data and continue their efforts to exploit this data to personalize services and advertising.

This will be a boon for advertisers. Many of them, especially small and medium sized businesses and news publishers, are heavily dependent on Facebook to reach their customers, and they pay a premium for these advertising services. With Instagram and WhatsApp as two newly independent advertising outlets, they can expect a broader range of choices and some decrease in ad prices.

These traditional benefits of antitrust action are substantial and perhaps should be complemented with new mandates and tools to promote competition in digital markets, as recommended in the recent Shorenstein Center report.

But if reinvigorated antitrust enforcement does succeed in bringing more competition to digital markets dependent upon advertising, this might only worsen the competitive race to the bottom for user privacy. The solution is not more antitrust efforts, but better privacy law. The Biden administration and Congress should move ahead with regulatory measures to protect privacy such as those recommended in a recent Brookings Institution report.

More competition won’t help with content moderation issues either, for the same reason. The need to generate user engagement to build ad profiles and personalize service is in tension with the goal of content moderation to limit harmful online conduct such as the spread of hate speech and disinformation. Measures to establish due process protections for social media users, such as those proposed in the discussion draft bill circulated by Rep. Jan Schakowsky (D-Ill.), chair of the House Subcommittee on Consumer Protection, would be needed regardless of the state of competition in the marketplace.

This all means a stronger regulatory net for social media companies, with an agile agency such as the Federal Communications Commission empowered to protect privacy, preserve user content moderation rights, and promote competition in social media. Policymakers shouldn’t expect antitrust alone to do the job of regulating dominant social media companies to protect the public interest.

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## Cp

#### Failure to reform boards decks medical innovation – licensure, reciprocity, and innovation

\*SMB = state medical board

Adashi et. al. 20 (Eli Y. Adashi, MD, MS, Barak D. Richman, JD, PhD, and Reuben C. Baker, MD, "The New State Medical Board: Life In The Antitrust Shadow", Health Affairs Blog, January 6, 2020, DOI: 10.1377/hblog20191226.86148)//NRG

However, SMBs continue to maintain unnecessary restrictions on good medicine. Many continue to resist ceding authority to non-physicians, undermine cross-state reciprocity compacts while jealously controlling their exclusive state licensure regimes, and use their regulatory authority to impede innovation. As health care costs continue to outpace inflation, the urgency to remove SMB-sustained inefficiencies remains pressing. The FTC deserves enormous credit for both identifying the economic harm inflicted by SMBs and for targeting SMBs with its limited litigation resources, but it cannot become complacent. State attorneys general should also enforce state consumer protection laws to counter SMB abuses, and Congress would do well to consider reforms to obsolete elements of state-based licensure fiefdoms. And we should celebrate the repeated and unambiguous affirmation of competition principles by the courts, which have a spotty record in enforcing the antitrust laws. Continued success in federal courts will require a continued justification and prioritization of competition in health care markets.

Perhaps most importantly, the medical profession ought to reconsider the role of its SMBs. Embracing and fostering robust competition in health care markets is the only route to assuring that the new SMB has indeed arrived, and this can only happen from within. Physicians can recognize SMB abuses better than any outsider, and they recognize how SMBs have impeded dire reforms of the practice of medicine. At the same time, physicians know how SMBs might be agents of necessary change. SMBs could not only embrace the value and rigors of competition, but they also might provide useful leadership in encouraging physicians to pursue reform. In short, the new SMB could be one that abandons its role as an ossified gatekeeper and crafts a visionary role for expanding consumer welfare and professional dynamism.

#### Reciprocity is key to avoiding a telehealth cliff – industry’s booming now

Galvin 21 (Gaby, Public Health Correspondent for Morning Consult, “Regulators Want to Extend Some Pandemic Telehealth Flexibilities. Virtual Care Companies Still Have Questions,” July 27th, 2021, <https://morningconsult.com/2021/07/27/telehealth-companies-post-pandemic-future/)//NRG>

Federal regulators have proposed extending some telehealth flexibilities for behavioral care through at least the end of 2023.

Virtual care companies want clarity on providers’ ability to offer telehealth services across state lines, pay parity and other regulations beyond the pandemic.

The COVID-19 pandemic reshaped the way many Americans get health care, largely by ushering in new flexibilities that made telehealth easier to access. Now, as policymakers wrestle with which pandemic-induced changes have staying power beyond the crisis, providers are insisting virtual care is here to stay — and pleading for clarity as they chart their own paths forward.

On Monday, a group of 430 health care and technology groups asked lawmakers to address the “telehealth cliff” they say is looming at the end of the public health emergency. Medicare officials are proposing extending waivers to keep some telehealth services easier to access through 2023, and while that offers some stability over the next 18 months, the future of the field — including coverage, what types of virtual care will be offered and how people will be able to access services — is still very much in flux, and the uncertainty has thrown a wrench into how telehealth companies are planning for their futures.

It’s happening even as the digital health sector is seeing its biggest boom ever, securing a record-high $14.7 billion in funding in the first half of 2021, according to Rock Health, a venture fund focused on digital health startups. Telehealth use has also surged over the past year, peaking in April 2020 but remaining 38 times above pre-pandemic levels as of February, a McKinsey & Co. analysis found.

“We built this system to operate in a complex environment prior to the pandemic, so we can continue to operate after,” said Russell Glass, chief executive of Ginger, which provides on-demand mental health care to companies. But, he said, reverting back to the pre-pandemic telehealth environment “doesn’t mean it’s good for the consumer.”

That’s largely because regulators have allowed mental health clinicians to practice telehealth across state lines during the public health emergency. But the Biden administration has been extending the emergency order in 90-day increments, meaning the waiver could be revoked with little notice, disrupting patients’ relationships with therapists and other behavioral health providers.

“It gets extremely murky in terms of being able to understand what the laws are, and what they’re going to be,” Glass said. Federal health officials have signaled they expect the public health emergency to last through the end of 2021. But the short-term forecast “just doesn’t give providers enough time to plan,” he said.

A picture containing timeline

Description automatically generated

Executives at Talkspace Inc., a virtual behavioral health care company, and Teladoc Health Inc., which offers primary care, mental health services and other telemedicine, also highlighted the importance of keeping cross-state licensing in place after the pandemic.

“Extending the waivers will ensure that trusted patient-provider relationships that take place across state lines are not severed,” said John C. Reilly, Talkspace’s general counsel. Those relationships are why the company believes virtual mental health services should be considered separately from other forms of care as policymakers weigh waivers and other extensions on telehealth use, he added.

In the meantime, Talkspace is hiring hundreds of therapists and helping them get licensed in multiple states so they can help meet the demand for mental health services in areas with care shortages, Reilly said.

Meanwhile, Claudia Duck Tucker, senior vice president of government affairs at Teladoc Health, said that while commercial health plans and employers are looking to expand their telehealth offerings, “there is much less certainty from Congress and some state legislatures” on what services could be available to those who are insured through Medicare and Medicaid once the pandemic ends.

#### Disruptive innovation is key and only the aff solves it

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.

## Other Da

#### No impact to CBRNs – acquisition, knowledge, no mass casualties, and new tech checks

Koblentz 20 (Gregory D. Koblentz is an Associate Professor and Director of the Biodefense Graduate Program at the Schar School of Policy and Government at George Mason University. He is also a member of the Scientists Working Group on Biological and Chemical Security at the Center for Arms Control and Non-Proliferation, Summer 2020, “Emerging Technologies and the Future of CBRN Terrorism” Pages 187-188 The Washington Quarterly, <https://www.novahtrp.com/uploads/1/2/5/9/125988329/emerging_technologies_and_the_future_of_cbrn_terrorism.pdf>) MULCH

It is important to note that scientific advances and the emergence of new technologies are not the only, or even the most important, factors influencing the likelihood of terrorist groups acquiring and using CBRN weapons. Thankfully, the number of terrorist groups motivated to acquire these weapons has been limited, despite many that have the requisite technical and financial resources.60 The vast majority of terrorist groups have been satisfied with conventional weapons such as guns and bombs. The surprising rise of the Islamic State and their repeated use of chemical weapons in Iraq and Syria, however, serve as a reminder that it only takes one group with the intent and capability to acquire and use CBRN weapons to pose a threat to international security.61

In addition, the ability of a terrorist group to convert CBRN-related material into a weapon depends on intangible factors such as tacit knowledge (the unarticulated knowledge that can only be gained through hands-on, trial-and-error experience or mentorship), the ability of the group to create and share such knowledge, and its ability to assemble and successfully manage interdisciplinary teams.62 Terrorist groups, especially those facing pressure from law enforcement and intelligence agencies, have had difficulties recruiting, retaining, and effectively utilizing individuals with the right combination of scientific, technical, and organizational skills to develop effective CBRN weapons.

Developing a CBRN weapon capable of causing mass casualties is also a very complex process. A scientific breakthrough that makes developing or acquiring one component of a weapon easier might not have any impact on the other stages in the weaponization process. Thus, the impact of a single scientific breakthrough or a novel technology on the acquisition of a CBRN weapon should not be exaggerated. For example, synthetic biology might make it easier for a non-state actor to create a pathogen, but that technology does not help terrorists improve their ability to disseminate the pathogen on a large scale.63

Likewise, it is important to assess the specific contributions that a particular technology can make to a specific aspect of the CBRN threat in practice, not just in theory. In the case of 3D printing, this manufacturing technology is not appropriate for working with metals that are toxic or radioactive. While microreactors are well-suited to covertly producing small quantities of highly pure chemicals, they are not well-suited to the production of most chemical warfare agents and precursors due to excessive heat generated by their synthesis and by the production of solid byproducts that would clog the microfluidic channels at the heart of this technology.64

Finally, advances in science and technology represent not just threats, but also opportunities to make it harder for terrorist groups to acquire CBRN weapons. Unmanned aerial and ground vehicles can be used for border security, CBRN weapon detection, and bomb disposal. For example, the EU is sponsoring the development of unmanned aerial and ground vehicles to investigate CBRN crime scenes under the ROCSAFE project.65 Biometrics and radio frequency ID chips can be used to improve physical security measures and inventory control to prevent unauthorized access to CBRN materials. Advances in science and technology are also leading to improved sensors that can be used to detect the production, transportation, and use of CBRN weapons. The development of dedicated laboratories and new techniques to analyze CBRN materials has also contributed to impressive advances in nuclear, biological, and chemical forensics, which are crucial for attribution.66

## Ftc da

### Thumpers

#### FTC heavily involved in immunity litigation now

Blanquez 19 [Luis Blanquez, international antitrust and competition law attorney at Bona Law, 12-3-19 https://www.theantitrustattorney.com/the-amicus-brief-is-an-important-advocacy-tool-for-both-the-federal-trade-commission-and-the-department-of-justice-in-state-action-immunity-cases/]

THE FIRST STEPS: THE MODERN STATE ACTION PROGRAM

In September 2003, the State Action Task Force of the FTC published a report summarizing the state action doctrine, explaining how an overbroad interpretation of the state action doctrine could potentially impede national competition goals. The Task Force stressed that (i) some courts had eroded the clear articulation and active supervision standards, (ii) courts had largely ignored the problems of interstate spillover effects, (iii) and that there was an increasing role for municipalities in the marketplace.

To address these problems, the FTC suggested in its report that the Commission implement the following recommendations through litigation, amicus briefs and competition advocacy: (1) re-affirm a clear articulation standard tailored to its original purposes and goals, (2) clarify and strengthen the standards for active supervision, (3) clarify and rationalize the criteria for identifying the quasi-governmental entities that should be subject to active supervision, (4) encourage judicial recognition of the problems associated with overwhelming interstate spillovers, and consider such spillovers as a factor in case and amicus/advocacy selection, and (5) undertake a comprehensive effort to address emerging state action issues through the filing of amicus briefs in appellate litigation.

#### Mergers thump – tougher action coming – answers “priced in” args because it’s predictive

#### Prior approval rules cracked down this week

Kendall 10-29 [Brent Kendall, “New Policy Gives FTC Greater Control Over How Companies Do M&A”, Wall Street Journal, 10/29/2021, https://www.wsj.com/articles/new-policy-gives-ftc-greater-control-over-how-companies-do-m-a-11635499802]

The Federal Trade Commission, led by new Democratic Chairwoman Lina Khan, has adopted a series of policy changes aimed at cracking down on corporate mergers, sparking deep partisan disagreement at the agency.

The latest initiative came this week when Democrats who control the five-member FTC announced a policy that would give the commission veto power over a company’s future transactions once it attempts an allegedly anticompetitive merger or acquisition.

The new prior-approval policy will be incorporated into legal settlements in which merging companies make concessions to resolve FTC concerns that their tie-up would be anticompetitive. The commission in those agreements plans to prohibit companies from making future acquisitions in the same market—and possibly other markets—without its say-so. The FTC might also seek prior-approval rights when companies drop a proposed merger after an antitrust investigation, or if the FTC wins a merger challenge in court.

Holly Vedova, tapped by Ms. Khan to lead the FTC’s bureau of competition, said in a statement the new policy restores a practice the FTC followed until the mid-1990s and “forces acquisitive firms to think twice before going on a buying binge because the FTC can simply say no.”

The policy adds a layer of enforcement beyond standard U.S. antitrust rules, which say companies doing sizable mergers must submit them for government review and can close their transaction after a waiting period, unless the FTC or Justice Department files a lawsuit and convinces a court to block the deal. The department hasn’t adopted a policy similar to the FTC’s new measure, raising questions about diverging approaches.

### FTC OS – States Fill-In – 1AR

#### States can and will fill in

Hamburger et al 19 (Jacob Hamburger, attorney in the Office of Policy Planning at the Federal Trade Commission; David Sonnenreich, Deputy Attorney General and the Director of the Antitrust Section of the Utah Attorney General’s Office; and Sarah Oxenham Allen, Senior Assistant Attorney General and Unit Manager of the Antitrust Unit at the Virginia Attorney General’s Office, Chair of NAAG’s Antitrust Multistate Task Force; “Competition and Consumer Protection in the 21st Century,” Federal Trade Commission, 6-12-2019, https://www.ftc.gov/system/files/documents/public\_events/1519667/ftc\_hearings\_session\_14\_transcript\_6-12-19\_0.pdf)

MR. HAMBURGER: Great. Thanks, Sarah.

So I do want to ask you, David, a quick question, but I think this might be something that everyone on the panel can ask -- or can answer. And this is from the audience.

Are state attorneys general expanding their efforts on antitrust? And how can federal enforcers support your enforcement efforts?

MR. SONNENREICH: I would say that we are focusing our efforts on antitrust, and in particular industries, we’ve really made a really hard push, particularly in pharmaceuticals, and the best way to support that effort is through some of the sorts of coordination I was discussing.

I also think that states’ attorneys general are more willing than in the past to bring cases on our own. So I would say those are two of the ways.

MR. HAMBURGER: Great.

Anyone else?

MS. OXENHAM ALLEN: Yeah, I’d like to add that, you know, we have our Suboxone product top case that the states are doing alone without the FTC or DOJ. We have the generic drugs price-fixing case, which some of you may recently have seen on “60 Minutes.” Nine states and D.C. yesterday filed a complaint to stop the T-Mobile/Sprint merger, and that's being done independently of DOJ.

So I would say absolutely we are stepping up our own enforcement efforts. We have single states like Washington that's doing a lot of work, especially in the no-poach area. And California with its Sutter Health case. And we have our committees, like the Technology Industry Working Group, but we also have a Labor and Antitrust Committee that’s looking at some of the issues that were discussed by Max and Eric. And so I think it's an exciting time to be in the states.