# Rutgers rr round 3

**1AC – BCRR Round 3**

**Federalism Adv**

**Advantage One: Federalism**

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

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

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

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

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

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

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

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

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

#### Additionally, experimentation is vital to nuclear security – only effective regs solves

Roth 21 [Nickolas Roth is director of the Stimson Center’s Nuclear Security Program and International Nuclear Security Forum, Master of Public Policy from the University of Maryland, 10-5-2021 https://www.stimson.org/2021/a-multilevel-approach-to-addressing-emerging-technologies-in-nuclear-security/]

Risks and opportunities

Emerging technologies present a range of unique risks and opportunities for the security of radiological and nuclear materials, both from operational and institutional points of view. In some cases, technologies that mature and become more easily accessible to adversaries can close capability gaps that would otherwise prevent material theft or sabotage. Others have the potential to strengthen physical protection capabilities, but only after development, implementation and integration into existing plans and procedures. Because the potential impacts of these technological developments are not yet fully understood, they must compete for resources and attention with more immediate and well-defined priorities.

The most immediately apparent risk is that of technological surprise: a novel application of an emerging technology that presents a threat to radiological and nuclear R/N material security that planners and regulators fail to anticipate, suddenly leaving material vulnerable to theft or sabotage and operators without a way to address it. For example, recent attacks using Unmanned Aerial Systems (UAS) such recent attacks against oil processing facilities in Saudi Arabia demonstrate the vulnerability of even well-defended targets against a new adversary capability for which they lack effective countermeasures.3 4 Technological surprise is an ever- present risk in emerging technologies because they often result from the convergence of multiple lines of technical development into an application whose effectiveness may not become apparent until used by an adversary.

Another related risk that emerging technologies present is the introduction of new vulnerabilities as emerging technologies are adopted at various points in R/N material production, storage and use. Technologies that enable increased digitalization, connectivity and automation can improve the efficiency of nuclear power plants, but they also underscore the challenge that new attack surfaces represent. Although there have been no known successful cyberattacks that successfully compromised the operational controls of nuclear power plants, malware and software malfunctions have previously rendered key monitoring systems inaccessible5 and infected internal networks at nuclear plants.6 Other cyberattacks against non- nuclear infrastructure, such as the May 2021 ransomware attack against Colonial Pipeline’s billing system, demonstrate that attackers need not access operational technology systems to severely impact operations.7

The risk of missed opportunities to harness positive effects of emerging technologies remains an important one for the R/N security mission space, particularly because of safety and security concerns and implementation procedures that may inhibit technology adoption and integration into physical protection systems (PPS) or other security infrastructure. Longstanding challenges to R/N security, such as the effect of cognitive stress and fatigue on security personnel,8 insider threats,9 and the challenge of providing realistic training for low-frequency security events, may lessen as emerging technologies provide more potential solutions, but only if those solutions are identified and implemented effectively. Similarly, opportunities to use UAS in security applications are growing along with the technology’s capabilities,10 but the pace and scope of adoption will ultimately determine the impact of this development on global R/N security. Failure to apply these innovations to nuclear security will leave material at unnecessary risk.

#### Single terrorist use is likely and even a crude device kills a million people, causes nuc war

Bunn 17 [Matthew Bunn is a professor of practice at the Harvard Kennedy School. A former advisor in the White House Office of Science and Technology Policy 9-28-2017 https://thebulletin.org/2017/09/the-effects-of-a-single-terrorist-nuclear-bomb/]

The escalating threats between North Korea and the United States make it easy to forget the “nuclear nightmare,” as former US Secretary of Defense William J. Perry put it, that could result even from the use of just a single terrorist nuclear bomb in the heart of a major city.

At the risk of repeating the vast literature on the tragedies of Hiroshima and Nagasaki—and the substantial literature surrounding nuclear tests and simulations since then—we attempt to spell out here the likely consequences of the explosion of a single terrorist nuclear bomb on a major city, and its subsequent ripple effects on the rest of the planet. Depending on where and when it was detonated, the blast, fire, initial radiation, and long-term radioactive fallout from such a bomb could leave the heart of a major city a smoldering radioactive ruin, killing tens or hundreds of thousands of people and wounding hundreds of thousands more. Vast areas would have to be evacuated and might be uninhabitable for years. Economic, political, and social aftershocks would ripple throughout the world. A single terrorist nuclear bomb would change history. The country attacked—and the world—would never be the same.

The idea of terrorists accomplishing such a thing is, unfortunately, not out of the question; it is far easier to make a crude, unsafe, unreliable nuclear explosive that might fit in the back of a truck than it is to make a safe, reliable weapon of known yield that can be delivered by missile or combat aircraft. Numerous government studies have concluded that it is plausible that a sophisticated terrorist group could make a crude bomb if they got the needed nuclear material. And in the last quarter century, there have been some 20 seizures of stolen, weapons-usable nuclear material, and at least two terrorist groups have made significant efforts to acquire nuclear bombs.

Terrorist use of an actual nuclear bomb is a low-probability event—but the immensity of the consequences means that even a small chance is enough to justify an intensive effort to reduce the risk. Fortunately, since the early 1990s, countries around the world have significantly reduced the danger—but it remains very real, and there is more to do to ensure this nightmare never becomes reality.

Brighter than a thousand suns. Imagine a crude terrorist nuclear bomb—containing a chunk of highly enriched uranium just under the size of a regulation bowling ball, or a much smaller chunk of plutonium—suddenly detonating inside a delivery van parked in the heart of a major city. Such a terrorist bomb would release as much as 10 kilotons of explosive energy, or the equivalent of 10,000 tons of conventional explosives, a volume of explosives large enough to fill all the cars of a mile-long train. In a millionth of a second, all of that energy would be released inside that small ball of nuclear material, creating temperatures and pressures as high as those at the center of the sun. That furious energy would explode outward, releasing its energy in three main ways: a powerful blast wave; intense heat; and deadly radiation.

The ball would expand almost instantly into a fireball the width of four football fields, incinerating essentially everything and everyone within. The heated fireball would rise, sucking in air from below and expanding above, creating the mushroom cloud that has become the symbol of the terror of the nuclear age. The ionized plasma in the fireball would create a localized electromagnetic pulse more powerful than lightning, shorting out communications and electronics nearby—though most would be destroyed by the bomb’s other effects in any case. (Estimates of heat, blast, and radiation effects in this article are drawn primarily from Alex Wellerstein’s “Nukemap,” which itself comes from declassified US government data, such as the 660-page government textbook The Effects of Nuclear Weapons.)

At the instant of its detonation, the bomb would also release an intense burst of gamma and neutron radiation which would be lethal for nearly everyone directly exposed within about two-thirds of a mile from the center of the blast. (Those who happened to be shielded by being inside, or having buildings between them and the bomb, would be partly protected—in some cases, reducing their doses by ten times or more.)

The nuclear flash from the heat of the fireball would radiate in both visible light and the infrared; it would be “brighter than a thousand suns,” in the words of the title of a book describing the development of nuclear weapons—adapting a phrase from the Hindu epic the Bhagavad-Gita. Anyone who looked directly at the blast would be blinded. The heat from the fireball would ignite fires and horribly burn everyone exposed outside at distances of nearly a mile away. (In the Nagasaki Atomic Bomb Museum, visitors gaze in horror at the bones of a human hand embedded in glass melted by the bomb.)

No one has burned a city on that scale in the decades since World War II, so it is difficult to predict the full extent of the fire damage that would occur from the explosion of a nuclear bomb in one of today’s cities. Modern glass, steel, and concrete buildings would presumably be less flammable than the wood-and-rice-paper housing of Hiroshima or Nagasaki in the 1940s—but many questions remain, including exactly how thousands of broken gas lines might contribute to fire damage (as they did in Dresden during World War II). On 9/11, the buildings of the World Trade Center proved to be much more vulnerable to fire damage than had been expected. Ultimately, even a crude terrorist nuclear bomb would carry the possibility that the countless fires touched off by the explosion would coalesce into a devastating firestorm, as occurred at Hiroshima. In a firestorm, the rising column of hot air from the massive fire sucks in the air from all around, creating hurricane-force winds; everything flammable and everything alive within the firestorm would be consumed. The fires and the dust from the blast would make it extremely difficult for either rescuers or survivors to see.

The explosion would create a powerful blast wave rushing out in every direction. For more than a quarter-mile all around the blast, the pulse of pressure would be over 20 pounds per square inch above atmospheric pressure (known as “overpressure”), destroying or severely damaging even sturdy buildings. The combination of blast, heat, and radiation would kill virtually everyone in this zone. The blast would be accompanied by winds of many hundreds of miles per hour.

The damage from the explosion would extend far beyond this inner zone of almost total death. Out to more than half a mile, the blast would be strong enough to collapse most residential buildings and create a serious danger that office buildings would topple over, killing those inside and those in the path of the rubble. (On the other hand, the office towers of a modern city would tend to block the blast wave in some areas, providing partial protection from the blast, as well as from the heat and radiation.) In that zone, almost anything made of wood would be destroyed: Roofs would cave in, windows would shatter, gas lines would rupture. Telephone poles, street lamps, and utility lines would be severely damaged. Many roads would be blocked by mountains of wreckage. In this zone, many people would be killed or injured in building collapses, or trapped under the rubble; many more would be burned, blinded, or injured by flying debris. In many cases, their charred skin would become ragged and fall off in sheets.

The effects of the detonation would act in deadly synergy. The smashed materials of buildings broken by the blast would be far easier for the fires to ignite than intact structures. The effects of radiation would make it far more difficult for burned and injured people to recover. The combination of burns, radiation, and physical injuries would cause far more death and suffering than any one of them would alone.

The silent killer. The bomb’s immediate effects would be followed by a slow, lingering killer: radioactive fallout. A bomb detonated at ground level would dig a huge crater, hurling tons of earth and debris thousands of feet into the sky. Sucked into the rising fireball, these particles would mix with the radioactive remainders of the bomb, and over the next few hours or days, the debris would rain down for miles downwind. Depending on weather and wind patterns, the fallout could actually be deadlier and make a far larger area unusable than the blast itself. Acute radiation sickness from the initial radiation pulse and the fallout would likely affect tens of thousands of people. Depending on the dose, they might suffer from vomiting, watery diarrhea, fever, sores, loss of hair, and bone marrow depletion. Some would survive; some would die within days; some would take months to die. Cancer rates among the survivors would rise. Women would be more vulnerable than men—children and infants especially so.

Much of the radiation from a nuclear blast is short-lived; radiation levels even a few days after the blast would be far below those in the first hours. For those not killed or terribly wounded by the initial explosion, the best advice would be to take shelter in a basement for at least several days. But many would be too terrified to stay. Thousands of panic-stricken people might receive deadly doses of radiation as they fled from their homes. Some of the radiation will be longer-lived; areas most severely affected would have to be abandoned for many years after the attack. The combination of radioactive fallout and the devastation of nearly all life-sustaining infrastructure over a vast area would mean that hundreds of thousands of people would have to evacuate.

Ambulances to nowhere. The explosion would also destroy much of the city’s ability to respond. Hospitals would be leveled, doctors and nurses killed and wounded, ambulances destroyed. (In Hiroshima, 42 of 45 hospitals were destroyed or severely damaged, and 270 of 300 doctors were killed.) Resources that survived outside the zone of destruction would be utterly overwhelmed. Hospitals have no ability to cope with tens or hundreds of thousands of terribly burned and injured people all at once; the United States, for example, has 1,760 burn beds in hospitals nationwide, of which a third are available on any given day.

And the problem would not be limited to hospitals; firefighters, for example, would have little ability to cope with thousands of fires raging out of control at once. Fire stations and equipment would be destroyed in the affected area, and firemen killed, along with police and other emergency responders. Some of the first responders may become casualties themselves, from radioactive fallout, fire, and collapsing buildings. Over much of the affected area, communications would be destroyed, by both the physical effects and the electromagnetic pulse from the explosion.

Better preparation for such a disaster could save thousands of lives—but ultimately, there is no way any city can genuinely be prepared for a catastrophe on such a historic scale, occurring in a flash, with zero warning. Rescue and recovery attempts would be impeded by the destruction of most of the needed personnel and equipment, and by fire, debris, radiation, fear, lack of communications, and the immense scale of the disaster. The US military and the national guard could provide critically important capabilities—but federal plans assume that “no significant federal response” would be available for 24-to-72 hours. Many of those burned and injured would wait in vain for help, food, or water, perhaps for days.

The scale of death and suffering. How many would die in such an event, and how many would be terribly wounded, would depend on where and when the bomb was detonated, what the weather conditions were at the time, how successful the response was in helping the wounded survivors, and more. Many estimates of casualties are based on census data, which reflect where people sleep at night; if the attack occurred in the middle of a workday, the numbers of people crowded into the office towers at the heart of many modern cities would be far higher. The daytime population of Manhattan, for example, is roughly twice its nighttime population; in Midtown on a typical workday, there are an estimated 980,000 people per square mile. A 10-kiloton weapon detonated there might well kill half a million people—not counting those who might die of radiation sickness from the fallout. (These effects were analyzed in great detail in the Rand Corporation’s Considering the Effects of a Catastrophic Terrorist Attack and the British Medical Journal’s “Nuclear terrorism.”)

On a typical day, the wind would blow the fallout north, seriously contaminating virtually all of Manhattan above Gramercy Park; people living as far away as Stamford, Connecticut would likely have to evacuate.

Seriously injured survivors would greatly outnumber the dead, their suffering magnified by the complete inadequacy of available help. The psychological and social effects—overwhelming sadness, depression, post-traumatic stress disorder, myriad forms of anxiety—would be profound and long-lasting.

The scenario we have been describing is a groundburst. An airburst—such as might occur, for example, if terrorists put their bomb in a small aircraft they had purchased or rented—would extend the blast and fire effects over a wider area, killing and injuring even larger numbers of people immediately. But an airburst would not have the same lingering effects from fallout as a groundburst, because the rock and dirt would not be sucked up into the fireball and contaminated. The 10-kiloton blast we have been discussing is likely toward the high end of what terrorists could plausibly achieve with a crude, improvised bomb, but even a 1-kiloton blast would be a catastrophic event, having a deadly radius between one-third and one-half that of a 10-kiloton blast.

These hundreds of thousands of people would not be mere statistics, but countless individual stories of loss—parents, children, entire families; all religions; rich and poor alike—killed or horribly mutilated. Human suffering and tragedy on this scale does not have to be imagined; it can be remembered through the stories of the survivors of the US atomic bombings of Hiroshima and Nagasaki, the only times in history when nuclear weapons have been used intentionally against human beings. The pain and suffering caused by those bombings are almost beyond human comprehension; the eloquent testimony of the Hibakusha—the survivors who passed through the atomic fire—should stand as an eternal reminder of the need to prevent nuclear weapons from ever being used in anger again.

Global economic disaster. The economic impact of such an attack would be enormous. The effects would reverberate for so far and so long that they are difficult to estimate in all their complexity. Hundreds of thousands of people would be too injured or sick to work for weeks or months. Hundreds of thousands more would evacuate to locations far from their jobs. Many places of employment would have to be abandoned because of the radioactive fallout. Insurance companies would reel under the losses; but at the same time, many insurance policies exclude the effects of nuclear attacks—an item insurers considered beyond their ability to cover—so the owners of thousands of buildings would not have the insurance payments needed to cover the cost of fixing them, thousands of companies would go bankrupt, and banks would be left holding an immense number of mortgages that would never be repaid.

Consumer and investor confidence would likely be dramatically affected, as worried people slowed their spending. Enormous new homeland security and military investments would be very likely. If the bomb had come in a shipping container, the targeted country—and possibly others—might stop all containers from entering until it could devise a system for ensuring they could never again be used for such a purpose, throwing a wrench into the gears of global trade for an extended period. (And this might well occur even if a shipping container had not been the means of delivery.)

Even the far smaller 9/11 attacks are estimated to have caused economic aftershocks costing almost $1 trillion even excluding the multi-trillion-dollar costs of the wars that ensued. The cost of a terrorist nuclear attack in a major city would likely be many times higher.

The most severe effects would be local, but the effects of trade disruptions, reduced economic activity, and more would reverberate around the world. Consequently, while some countries may feel that nuclear terrorism is only a concern for the countries most likely to be targeted—such as the United States—in reality it is a threat to everyone, everywhere. In 2005, then-UN Secretary-General Kofi Annan warned that these global effects would push “tens of millions of people into dire poverty,” creating “a second death toll throughout the developing world.” One recent estimate suggested that a nuclear attack in an urban area would cause a global recession, cutting global Gross Domestic Product by some two percent, and pushing an additional 30 million people in the developing world into extreme poverty.

Desperate dilemmas. In short, an act of nuclear terrorism could rip the heart out of a major city, and cause ripple effects throughout the world. The government of the country attacked would face desperate decisions: How to help the city attacked? How to prevent further attacks? How to respond or retaliate?

Terrorists—either those who committed the attack or others—would probably claim they had more bombs already hidden in other cities (whether they did or not), and threaten to detonate them unless their demands were met. The fear that this might be true could lead people to flee major cities in a large-scale, uncontrolled evacuation. There is very little ability to support the population of major cities in the surrounding countryside. The potential for widespread havoc and economic chaos is very real.

If the detonation took place in the capital of the nation attacked, much of the government might be destroyed. A bomb in Washington, D.C., for example, might kill the President, the Vice President, and many of the members of Congress and the Supreme Court. (Having some plausible national leader survive is a key reason why one cabinet member is always elsewhere on the night of the State of the Union address.) Elaborate, classified plans for “continuity of government” have already been drawn up in a number of countries, but the potential for chaos and confusion—if almost all of a country’s top leaders were killed—would still be enormous. Who, for example, could address the public on what the government would do, and what the public should do, to respond? Could anyone honestly assure the public there would be no further attacks? If they did, who would believe them? In the United States, given the practical impossibility of passing major legislation with Congress in ruins and most of its members dead or seriously injured, some have argued for passing legislation in advance giving the government emergency powers to act—and creating procedures, for example, for legitimately replacing most of the House of Representatives. But to date, no such legislative preparations have been made.

In what would inevitably be a desperate effort to prevent further attacks, traditional standards of civil liberties might be jettisoned, at least for a time—particularly when people realized that the fuel for the bomb that had done such damage would easily have fit in a suitcase. Old rules limiting search and surveillance could be among the first to go. The government might well impose martial law as it sought to control the situation, hunt for the perpetrators, and find any additional weapons or nuclear materials they might have. Even the far smaller attacks of 9/11 saw the US government authorizing torture of prisoners and mass electronic surveillance.

And what standards of international order and law would still hold sway? The country attacked might well lash out militarily at whatever countries it thought might bear a portion of responsibility. (A terrifying description of the kinds of discussions that might occur appeared in Brian Jenkins’ book, Will Terrorists Go Nuclear?) With the nuclear threshold already crossed in this scenario—at least by terrorists—it is conceivable that some of the resulting conflicts might escalate to nuclear use. International politics could become more brutish and violent, with powerful states taking unilateral action, by force if necessary, in an effort to ensure their security. After 9/11, the United States led the invasions of two sovereign nations, in wars that have since cost hundreds of thousands of lives and trillions of dollars, while plunging a region into chaos. Would the reaction after a far more devastating nuclear attack be any less?

In particular, the idea that each state can decide for itself how much security to provide for nuclear weapons and their essential ingredients would likely be seen as totally unacceptable following such an attack. Powerful states would likely demand that others surrender their nuclear material or accept foreign troops (or other imposed security measures) to guard it.

That could well be the first step toward a more profound transformation of the international system. After such a catastrophe, major powers may feel compelled to more freely engage in preventive war, seizing territories they worry might otherwise be terrorist safe havens, and taking other steps they see as brutal but necessary to preserve their security. For this reason, foreign policy analyst Stephen Krasner has argued that “conventional rules of sovereignty would be abandoned overnight.” Confidence in both the national security institutions of the country attacked and international institutions such as the International Atomic Energy Agency and the United Nations, which had so manifestly failed to prevent the devastation, might erode. The effect on nuclear weapons policies is hard to predict: One can imagine new nuclear terror driving a new push for nuclear disarmament, but one could also imagine states feeling more certain than ever before that they needed nuclear weapons.

#### Independently, effective regulations solve extinction

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

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

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

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

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

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

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

Introduction

IN just three relatively obscure antitrust cases, 1

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

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

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

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

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

III. DOCTRINAL CRITICISM

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

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

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

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

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

IV. PROPOSED SOLUTIONS

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

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

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

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

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

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

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

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

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

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

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

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

B. Spillover Effects and Antitrust Federalism

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

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

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

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

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

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

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

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

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

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

**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.

**Plan**

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

### 2

#### Advantage Two: Rural Health

#### Rural health disruptions collapse cause food shocks

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

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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).

#### Independently, US shortages causes physician brain drain – that undermines global response to AIDS

Emeka 15 [O.C. Nwagwu Emeka, School of Health Sciences, Department of Health Policy and Management, Jackson State University, 2015 https://openmedicinejournal.com/VOLUME/2/PAGE/17/FULLTEXT/]

Mullan [19] found that international medical graduates constituted between 23 percent and 28 percent of the physicians in the US, UK, Canada, Australia and New Zealand with the low-income countries supplying between 40 and 75 percent of them. India, the Philippines, and Pakistan are the leading sources of international medical graduates. The UK, Canada, and Australia draw a substantial number of physicians from South Africa, and the US draws most of its international medical graduates (IMGs) from the Philippines and Nigeria. Nine of the countries with the highest emigration factors are in Sub-Saharan Africa or the Caribbean. Below is a review of the internal dynamics, including polices created by the high-income countries to lure international medical graduates to their shores.

United States of America: Many rural areas in the United States are facing shortages of physicians that could imperil their healthcare delivery systems. Unable to entice American-born physicians to locate in their communities, rural areas have turned to foreign-born physicians to cater to the health needs of rural populations. Even the US Government has also turned to foreign physicians to plug the gap in physician shortages by crafting an array of incentive policies to aid the recruitment and retention of foreign physicians who are willing to live and practice medicine in clearly identified rural communities in the United States. The package of incentives include: a one year Practical Experience or Internship following the completion of the foreign student’s medical education, Loan Forgiveness Programs and Visa Programs that provide a faster track to American citizenship. These programs have also been extended to foreign-born and foreign-trained physicians to encourage their emigration to the United States.

The J-Visa program was established in 1994 to address the shortage of physicians in rural, medically under-served communities. Known as Conrad 30 or State 30, this visa waiver program was designed to encourage physicians to establish practices in the rural areas. It offers foreign-born doctors on student (F-1) visas a pathway to permanent residency in the United States, if they agreed to work in a rural, under-served area for three years. This opportunity has enabled hospitals and state agencies to recruit and to retain the best foreign-born doctors and to stabilize their healthcare workforce.

Under Conrad 30, each state is allowed 30 slots of new graduates or immigrant doctors per year. Conrad 30 waivers’ target primary care physicians who have completed a US residency training program in Family Medicine, General Obstetrics, General Pediatrics, General Medicine or General Psychiatry [21]. Prior to the enactment of this legislation, US-trained foreign physicians were required to return to their countries of origin for two years before they were eligible for emigration to the United States [22].

The Federal Government operates, through the National Health Service Corps (NHSC), a students’ loans forgiveness program for health professionals, especially physicians, who agree to practice for at least three years in a rural area. In addition, the NHSC also awards matching funds to states to operate their own loans repayment or abatement programs. For example, in Nebraska, physicians, dentist, and clinical psychologist can receive up to $40,000 per year for 3 years if they locate their practice in the Nebraska Rural Health Advisory Commission designated shortage areas [23]. This liberal provision explains why “25 percent of practicing physicians in the US and 28 percent of US medical residents come from abroad. Of these, 25 percent were trained in India and Pakistan, countries with health worker crises so acute that the World Health Organization included them on its list of countries with a “Human Resources for Health Crisis” [24]. In 2011 each country had a mere 1.13 doctors per 1,000 inhabitants, while the US enjoys 13.22 per 1,000 populations, one of the highest in the world [24]. Many other developing countries have already lost more than half of their physicians to the US. For example, there are more Ethiopian physicians practicing in Chicago than in all of Ethiopia, a country of 80 million people [24].

New Zealand: New Zealand relies on IMGs in staffing its medical workforce [25]. The number of registered, active doctors in New Zealand in 2010 was 13,883, which represented 41.1 percent of the health workforce in the country and one of the highest in the Organization of Economic Co-operation and Development (OECD) countries [25]. Although New Zealand produced more medical graduates per 10,000 population in 2009 compared to Canada, the US, Australia and the UK, these were insufficient to address the medical needs of the country. While in 2007 the OECD countries averaged 180 specialist doctors per 100,000 population, in New Zealand that average was 317 doctors per 100,000 population [25]. Even so, Parliament still enacted a series of legislation designed to attract and retain physicians in the under-served areas of the country.

In 2009, a program which provides incentive payments for up to five years to assist with student loans of medical, midwifery and nursing graduates who work in hard-to-staff locations was enacted. Health Workforce New Zealand (HWNZ), in conjunction with the Auckland District Health Board, also offers a 12 Week program to assist IMGs prepare for the Medical Council of New Zealand Registration Examination [25]. These are significant steps designed to assuage New Zealand’s critical shortage of physicians.

Britain: Doctors from outside the European Union are required to be registered to work in Britain. They must, in addition, secure a license from the General Medical Council (GMC) of the United Kingdom in order to practice medicine. In addition, immigrant doctors must secure one of three types of registrations from the GMC: Full, Limited, and Specialist. Full Registration allows certified medical doctors, who are citizens of the European Economic Association (EEA) to undertake paid unsupervised employment in the UK [26]. Limited Registrations’ is awarded to physicians whose medical credentials have been vetted and recognized by the GMC. The applicant must also take and pass the Test of English offered by the International English Language Assessment Service and the Professional and Linguistic Training Board (PLAB Test). Specialist Registration status is reserved for specialist physicians, who serve as consultants. When appropriate registration or licensure has been attained, doctors will then apply for UK migration visa-either the Work Permit or the Tier-1 General Skilled Visa.

Canada: Canada has an acute shortage of physicians, which has been exacerbated by physicians’ retirements and the “brain drain” that has been pulling young Canadian doctors into the United States [5]. As the demand for physicians soared, Canada has relied on IMGs to supplement her needs. In 2002, IMGs represented 22.7 percent of physicians in Canada, which constituted 22.5 percent of family physicians and 22.8 percent of specialists physicians in the country [5].

Physicians are unevenly distributed in the country, with rural communities bearing the brunt of the problem. In 1996, only 9.8 percent of physicians were practicing in rural Canada, where 22.2 percent of Canada’s population lived” [27]. Rural Canada is characterized by “a smaller range of healthcare providers, rural hospital closures, and centralized heath services, all of which have negatively impacted rural residents who, studies indicate are ageing more rapidly than their urban counterparts” [27].

Canada has developed an array of strategies and incentives programs to entice physicians to the rural and remote areas, which explains why each year roughly 400 foreign physicians migrate to Canada [27]. Policies that have been designed to encourage migration can be grouped into four categories: regulatory/administrative, financial, educational, and “laissez-faire” or market solutions” [27].

Administratively, the Canadian Government instituted a policy of a mandatory two-year rotating internships in the rural areas. Financially, the Government guaranteed minimum income contracts, rural/remote isolation allowances, loan forgiveness programs, assistance with practice expenses, and differential fees for serving in hard to-supply areas [5]. Other incentives include signing bonus for doctors who agree to practice in rural, shortage areas (British Columbia) and Free Tuition Program which provides up to $40,000 to final year medical students, residents and newly graduated physicians in exchange for a full-time service commitment in an underserved area in the province (Ontario). Finally, is the “laissez-faire” approach, which postulates that as urban centers become over-supplied or saturated with physicians, thus depressing service charges and physicians incomes, new physicians will slowly begin to locate in the rural and areas. That is, overtime, the market will correct the physician imbalance.

Australia: Australia has elaborate requirements for health workforce migration. Doctors who wish to practice in Australia must first register with the Medical Board in the State or Territory, where they intend to practice [28]. Overseas-trained doctors and foreign doctors, who are graduates of Australian medical colleges, must secure the approval of the state or territory in which they intend to practice medicine. After visa is granted, doctors must apply to Medicare Australia for a Medicare Provider number [29]. Doctors who secure Full Medical Registration would be eligible to migrate to Australia. Graduates of Australian medical schools or New Zealand Medical Council accredited medical schools and who complete their internships in Australia, are eligible to apply for one of the following: Occupational Trainee Visa (4 42) or Temporary Business (Long Stay) Visa (4 57) in order to work in Australia [29].

Results of a Survey of IMGs in One State: In 2011, the authors conducted a survey to assess the impact of migrant physicians in the health of rural populations of Mississippi. The choice of Mississippi as the unit of analysis was deliberate: the state is mostly rural and with the highest prevalence of cardiovascular diseases in the nation. The questionnaire addressed the following issues: (a) Physicians’ countries of origin, (b) why they emigrated to the United States and the State of Mississippi, (c) medical specializations, (d) location of practices (rural or urban), (e) factors that informed their decision to locate in the rural areas of the State, and (f) impact of the migration on their professional growth and development.

The survey response was poor, given that 200 questionnaires were mailed to 200 randomly selected foreign physicians and only 47 responses were returned, despite repeated solicitations. This represents approximately 23 percent return. The paucity of response may be due to laxity on the part of the physicians, the lack of staff time to complete the questionnaire or irregular and unreliable mail deliveries, given the rural nature of the State.

Discussion of Survey Results: An analysis of the 47 respondents, found that the majority of the foreign physicians in Mississippi come from Asia, which includes India and Pakistan: 18 out of 47 or 38.0%; Europe, 10 or 21%, the Middle-East, 9 or 17.0%, the Caribbean Island, 5 or 11.0 %, and Africa, 3 or 7.0% and 2 or 4.0% of the physicians come from the US Territories. This result is consistent with other surveys: most of the foreign physicians in the US come from Asia, principally India and Pakistan. Asked to identify their areas of specialization, 50 percent of them identified primary care, a specialty that is in high demand across the United States. With respect to the location of their practices, nearly 100 percent of the respondents identified a rural medically under-served county in the State of Mississippi, (consistent with their visa conditions and loan forgiveness agreements).

Survey participants were provided a list of migration pre-disposing factors and asked to rank the power of each factor in their decision to migrate. Working conditions was ranked first. Ranked second was quality of life, including the inadequacies of medical infrastructure. High crime activities (kidnappings, armed robberies) in their home countries ranked third. Ranked fourth was war and political conflicts in their home countries; the desire to live in an economically stable country; ranked fifth. Enhanced medical technology ranked a distant sixth.

Survey respondents were also asked to assess the impact of migration on their countries as well as on the host country, the United States. They noted that for their home countries, the impact is mixed and for the recipient or host country, the impact is very positive: without the IMGs, rural health will suffer. The limited participation of the foreign physicians in the survey does not diminish the validity of the findings, because the authors conducted informal telephone interviews of foreign physicians who are working in the metropolitan, urban areas of the State. Their responses were consistent with those of their rural counterparts. That is, the findings of the study can be generalized.

Implications for the Brain Drain: Brain Drain is the movement of educated and talented peoples from one country to another. The term brain drain was coined by the spokesperson of the Royal Society of London to describe the outflow of human capital, scientists and technologists from Britain to the US and Canada in the1950s, in search of employment, trade, and education, and social benefits [30]. This phenomenon is also known as the relocation of intellectual human capital from developing to developed countries [30]. Tahir et al.; also found that about 6 percent of the world’s physicians (140,000) resided outside their countries of birth and that 90 percent of all migrant physicians moved to just five countries: Australia, Canada, Germany, UK and USA.

Migration has worked to the detriment of the low-income economies. Rather than be a path toward development, it has been cited by the historical-structural theorists as one of the causes of under-development [7]. According to this perspective, by uprooting their populations and undermining their economies, migration destabilizes whole peasant societies. Physician migration has led to a devastating loss of desperately needed intellectual capital, especially medical talents, from the low-income countries, resulting in increased disease and early deaths in the low-income “donor” countries. The “brain drain” has also led to the lack of medical infrastructure and the perennial insufficiency of physicians that are desperately needed by the low-income countries to meet their growing healthcare needs. The migration-induced shortage of physicians has become a significant impediment to the provision of healthcare in the low-income countries. The brain drain reflects the loss of public resources invested in the education of the physicians and to the reduction in production capacity. It has led to the establishment of new medical schools to produce physicians to mitigate the adverse impact of the migration, thus creating additional fiscal burdens.

The brain drain or the migration of intellectual capital to the developed countries has retarded the development of democratic political institutions and values in the low-income countries. That is, the emigration of a critical mass of educated and capable individuals has led to loss of governance capacity in the low income countries, all of which have weak political institutions and varying degrees of instability. According to Delgado, emigration negatively impacts donor-countries in another way: it can be a mechanism for the release of political pressure on the regime diminishing the incentives for political reform, the elimination of corruption and governmental effectiveness [31].

Physician migration and the continuing loss of intellectual capital would be exacerbated by the US Patient Protection and Affordability Care Act of 2010. The Affordability Care Act would have severe cost consequences for the low-income countries given research that indicates that the reform will pull into the healthcare system an estimated 32 million uninsured Americans. Its full implementation will create the demand for qualified doctors and nurses to the United States, lured by higher salaries, including better working conditions [31]. That is, the Act will trigger an exodus of doctors from their home countries to the United States to meet the growing demand for medical doctors [25]. According to Tulenko, as many as 150,000 additional doctors will be needed by the US in the next 15 years to fully implement the Affordability Care Act [25]. These doctors can only come from the overseas, especially the low-income, developing countries because the U.S. domestic educational system, cannot, in the short-term, produce enough doctors to cater to the needs of the new entrants into the healthcare system. Thus, upon implementation in 2014, the Affordability Care Act would induce a massive brain drain of medical professionals, a frightening prospect for the cash strapped nations that cannot compete with the higher salaries, sophisticated medical technologies and other accoutrements that accompany US medical and healthcare delivery services and practices.

When significant numbers of doctors migrate, their countries lose the return on their investment on the physicians. These countries also face weakened health systems. With fragile health systems, the continuing loss of intellectual capital can bring the entire system close to collapse, with devastating consequences.

Several studies have calculated the financial costs and benefits of the brain-drain. According to Kelland, “Sub-Saharan African countries that invested in training doctors have ended up losing $2 billion as the physicians leave home to find work in more prosperous developed nations” [32]. A study by Canadian scientists found that South Africa and Zimbabwe suffer the worst economic losses due to doctors emigrating, while Australia, Canada, Britain and the United States benefit the most from recruiting doctors trained abroad. The study found that the benefits of foreign migration from Sub-Saharan African to Britain was around $2.7 billion, and to the United States around $846 million, Australia was estimated to have benefited to the tune of $621 million and Canada, $384 million [33]. Many wealthy destination-countries, which also train fewer doctors than they require, depend on immigrant doctors to make up the shortfall.

Developing countries are effectively paying to train physicians that then support the health services of developed countries. The “brain drain” of trained health workers from poorer countries to richer ones exacerbates the problem of already weak health delivery systems in low-income countries that are battling epidemics of infectious diseases such as HIV/AIDS and tuberculosis (TB) and malaria. The inadequacy of physician workforce in many of the donor countries has become a major impediment to disease reduction initiatives sponsored by international organizations, such as the Global Fund, the WHO, the World Bank and the US Government. That is, the brain drain has reduced the capacity of the “donor” countries to respond to ~~crippling~~ [devastating] and debilitating infectious diseases [30].

#### Failure to respond to AIDS undermines military cohesion and CMR

Roberts 6 [Bayard Roberts, Senior Lecturer in Health Systems and Policy at London School of Hygiene and Tropical Medicine (LSHTM), Director of ECOHOST - The Centre for Health and Social Change. Previously worked in reproductive health and HIV/AIDS programmes in Afghanistan, Nepal, Pakistan, and Uganda amongst others. Editor-in-Chief of the BMC journal Conflict and Health and jointly established the LSHTM Public Health in Humanitarian Crises Group. 2004 http://www.forcedmigration.org/research-resources/expert-guides/hiv-AIDS-conflict-and-forced-migration/the-impact-of-hiv-AIDS-on-stability-and-security]

Impact upon national and international security From the limited data available, it appears that HIV/AIDS is having a serious impact upon armed forces around the world, with prevalence rates far exceeding those found in civilian populations both in their country of origin and in the surrounding civilian population in the area of deployment ( Altman 2003 ; Heinecken 2001 ). UNAIDS studies indicate that military forces have infection rates between two and five times higher than the civilian population ( UNAIDS 1998a : 2). According to the National Intelligence Council (2000), several armed forces in sub-Saharan Africa have HIV prevalence rates of around 10 to 20 per cent, with some as high as 60 per cent. Rates in the Cambodian military range from 6 to 17 per cent, and in Haiti 1995 prevalence rates in the military were reported to be around 10 per cent. In 1996, 34 per cent of all deaths among active-duty military personnel in the Congo were estimated to be AIDS related. In Zambia and Namibia, AIDS-related illnesses now constitute the leading cause of death among the military and police forces. In Thailand, the military has designated HIV/AIDS a threat to national security ( Elbe 2003 : 23). Reasons for higher prevalence rates include mobility, frequent casual sexual relations (particularly with sex workers), peer pressure, and alcohol and drug use ( Elbe 2003 : 17). The issue of demobilization of combatants, their reintegration into civilian life, and the impact this may have on the spread of HIV/AIDS is also an area of concern ( Carballo et al., October 2000 ). Implicit within this is the effect that HIV/AIDS is having upon peace-keeping operations ( Tripodi and Patel 2002 ). Many armed forces with high HIV prevalence rates also regularly contribute to international peace-keeping operations aimed at mitigating and containing the outbreak of armed conflicts. In addition, peacekeeping forces are at increased risk of becoming infected by being deployed in areas of high prevalence. This is particularly so in Africa where three-quarters of the police officers and soldiers under UN command are stationed ( International Crisis Group 2004 ). According to senior officers in the French army’s health services, tours of duty overseas multiply the risk of HIV infection for French military personnel by a factor of five. Among Nigeria’s military forces returning from peace-keeping duties in Sierra Leone and Liberia, HIV infection rates were 11 per cent compared with the national adult rate of 5 per cent. ( UNAIDS 1998a : 5). The effect is that peace-keepers act as vectors of HIV, spreading the virus among population in areas of deployment and back in their country of residence. As a result, HIV/AIDS has additional regional and international strategic ramifications by hindering international attempts to respond to conflict by threatening peace-keeping operations as countries become less able or willing to contribute personnel ( Elbe 2003 : 39). However, some military forces are responding to the threat in a progressive manner, such as prevention programmes being run by the Ugandan military ( ICG 2004 ). The UN General Assembly has also recognized the problem and in September 2003 launched a global initiative on ‘Engaging Uniformed Services in the Fight against HIV/AIDS’ in partnership with UNAIDS, UN’s Department of Peace-keeping Operations (DPKO), and national governments ( http://www.unAIDS.org/en/in+focus/topic+areas/uniformed+services.asp). Elbe (2003: 23) notes that ‘the crucial question, therefore, is not whether HIV/AIDS is having an impact on the armed forces, but rather how, in the worst-affected countries, this impact will manifest itself, and with what overall strategic significance. These include impacting upon human and financial resources due to continual replacement and training of lost personnel, an inability to find sufficient numbers of new recruits, and damaged morale and cohesion, and civil-military relations.’ Peter Singer (2002: 146) believes that HIV/AIDS will weaken armed forces ‘to the point of failure or collapse’. The most common hypothesis is that such a reduced military capacity could increase a state’s vulnerability to external attack, or its vulnerability to internal rebel groups, because of the perception by the aggressors that the armed forces were no longer an effective threat. However, Stefan Elbe (2003: 36) notes that high prevalence rates amongst armed forces could conceivably have benign strategic benefits with a reduction in operation efficiency hampering expansionist military plans in bellicose countries.

#### Unstable CMR causes command and control failure and conflict in every hotspot

Cimbala 12 (Stephen J., Distinguished Professor of Political Science at Pennsylvania State University Brandywine, *Civil-military Relations in Perspective: Strategy, Structure and Policy*, p. 8-10)

An interesting question with respect to civil-military relations is whether modernizing autocracies with an Eastern or Middle Eastern way of war can benefit from the experience of Western militaries and civil-military relations. Can China’s rising star be propelled by a civil-military relationship that avoids the worst of the Soviet system, enabling professional military competence within the larger communist party power structure and rule? Can India’s emergence as a military great power, at least regionally, benefit from the study of past successes and failure by Western democracies in controlling their armed forces and in the formulation of policy and strategy? Will the regime in post-Soviet Russia work out a relationship with its reforming military that allows a transition to information age competence, or will Russia remain in retro with reliance on a deficient pool of conscripts, a Soviet-style view of military art, and a propensity for military threat assessments that remains mired in the Cold War (or earlier) past? And what futures portend for civil-military relations in Iran, Iraq, Saudi Arabia and other influential regional actors in the Arab and Islamic worlds?¶ Modern Western militaries had more or less resolved the relationship between church and state, between scepter and miter, before embarking on the industrial and later revolutions and military affairs. But some Middle Eastern and South Asian armed forces will be tasked to formulate military strategy and doctrine within a political context highly embedded in religious symbolism and, in some cases, involving the clergy in control of organs of state. A return of the Ottoman Empire is improbable, but an arc of uncertainty about civil-military relations extends across North Africa through the Eastern Mediterranean – Levant, Turkey, the Arabian Peninsula, Persia and Mesopotamia, former Soviet Central Asia, Afghanistan and Pakistan. Secular governments in some of these regions were under pressure for Islamicization of their politics, including the politicization of their security organs and militaries. Pakistan already finds itself a divided house marked by political conflict between secular pluralists and dissident Islamicists of various types, and these conflicting tendencies play out within that country’s armed forces and intelligence bureaucracies. Pakistan also possesses nuclear weapons and, however ambivalent about the Taliban in Afghanistan from the U.S. and NATO perspective, cannot be avoided as the proving ground for success or failure in stabilizing a Karzai regime in Afghanistan.¶ And speaking of nuclear weapons, the possible spread of nuclear weapons among more states in Asia and-or the Middle East raises a number of issues for civil-military relations. Space does not permit an extended discussion, but the short form of nuclear history is as follow. Through protracted trial and error, the U.S., Soviet and post-Soviet Russia, and other twentieth century nuclear powers learned important lessons about the operation, management and control of nuclear forces. Speaking broadly, nuclear weapons, launchers, and infrastructure required specialized chains of command and hierarchies of control, with “fail safe” protocols both technical and procedural to ensure against (1) the possibility of an accidental or mistaken launch of a nuclear first strike or first use; and (2) the failure of nuclear forces to carry out a successful retaliation against an enemy first strike, due to technical malfunction or flawed decision procedures. The ingredients of failure for possibility number (1) as above, included military usurpation of civilian command over the nuclear launch decision during a crisis or coup attempt. The constituent elements of failure for possibility number (2), as above, included decapitation of the political or military chains of command and disruption of procedures for delegation of authority to surviving commanders.¶ Given the consequences of a U.S.-Soviet nuclear blowout on account of a failure of deterrence during the High Cold War, John Keegan is probably correct to refer to the tasks of nuclear-age heads of state and government and force commanders as “post-heroic” in their mission and professional orientation. They and their states are denied an honorable endgame of prevailing in battle at an acceptable cost, relative to the possible outcomes of conventional wars. The realization that nuclear strategy is therefore primarily or exclusively about the avoidance of war, instead of being about the combative use of nuclear weapons to strategic effect, may make for a controlled nuclear proliferation in which deterrence remains uncertain, but also untested in practice. However, given history’s propensity for wars driven by “fear, honor and interest” as Thucydides noted, reliance on deterrence in the face of extensive nuclear weapons spread could be the equivalent of wishful thinking or gallows humor.¶ Tutorials in civil-military relations for emerging nuclear weapons states, offered by those already members of the nuclear club, may be a “necessary evil” in order to avoid technical or political failure of nuclear command and control. Some evidence of success in this regard is apparent in Pakistan’s recent reorganization of its nuclear security arrangements, doubtless with the blessing of U.S. political and military leaders and the backing of U.S. nuclear expertise. Improving civil-military relations within emerging or nascent nuclear powers implies greater clarity about “who” can enable a nuclear launch, under “what” circumstances and with “which” checks and balances, and “how” the various nuclear weapons and launchers are stored in peacetime and made ready during crises.

#### Extinction

Fried 12 (Ryan, Dean's Teaching Fellow at Johns Hopkins University, “Rethinking Civilian Control: Nuclear Weapons, American Constitutionalism and War-Making,” For Presentation at the 2012 Millennium Conference, London School of Economics and Political Science, 10-21-12, millenniumjournal.files.wordpress.com/2012/10/fried-lse-paper.docx‎)

This material contextual dynamic is also illustrated by a novel shift in civil military relations in which the professionalism of the military cannot be relied upon, and rather, the executive must be active and assertive in controlling the very weapons the military would traditionally be entrusted to use. This Assertive Civil-Military Control as defined by Feaver, using Huntington as a foil, is a method that does not presuppose that the military will conform to the values and more importantly the orders of civilian society or that the officer corps will understand civilian leadership. Nor does it place its trust in military professionalism to restrain itself. As it relates to control over nuclear weapons, assertive civilian nuclear control is a means by which the military is restrained in its ability to use the nuclear weapons in its possession, by keeping custody of the ability for launch out of their control. It is an emphasis on the ‘never’ end of the always/never problematique, a means by which the weapons will not be fired unless given the order by the civilian command. While in possession of the military, the weapons themselves cannot be armed or used because of the method of positive control.¶ The need for the control of such weapons outside the bounds of what Huntington called military professionalism, is a corollary of the increased costs of war and a heightened fear of military accidents or unauthorized uses. In the aftermath of a major nuclear exchange, in as little as 500 detonations, the planet becomes uninhabitable. As argued by the astrophysicist Carl Sagan, global nuclear war would not only bring about the physical destruction of the countries launching such weapons, but would very likely end life on earth as we know it. As he writes it, “cold, dark, radioactivity, pyrotoxins and ultraviolet light following a nuclear war…would imperil every survivor on the planet.” Sagan raises the specter that even a massive disarming first strike by either superpower at the time might be sufficient to wipe out all life. ¶ Therefore, the increasing speed of delivery in conjunction with the rapidly expanding scope of nuclear destruction necessitates further positive control measures to prevent the military from unauthorized use. This in turn reinforces the unchecked power of the president, for it would be only he who can give the order to strike.

#### Narrowing immunity solves rural health – first, 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

#### Second, broad immunity drives hyper-consolidated health markets

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.

#### 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.

**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.

# 2ac

### A2: Link Turn – State Regs Good – 2AC

#### And – pro-competitive mergers don’t need immunity

DLA 15 [DLA Piper is a global law firm with lawyers located in more than 40 countries. Article is part of the DLA publications. 8-6-2015 https://www.dlapiper.com/en/us/insights/publications/2015/08/con-laws-copas-and-the-ftc/]

COPAs (Certificates of Public Advantage)

A few months earlier, in April 2015, the FTC wrote to the New York State Department of Health warning that impending COPA designations by the New York Attorney General for three provider systems would provide immunity against federal antitrust law, which the FTC claimed was unnecessary.

The New York State Delivery System Reform Incentive Program was designed, like many recent healthcare innovations, to promote community-level collaboration among healthcare Medicaid providers. The program’s goal is to increase service and reduce costs. It does this by establishing community-based networks and ties Medicaid funding to performance benchmarks.

The FTC’s concern is that “combining the [State Delivery System Reform Incentive Program] program with the COPA regulations will encourage health care providers to share competitively sensitive information and engage in joint negotiations with payers in ways that will not yield efficiencies or benefit consumers.”

The FTC letter stated:

“Because procompetitive health care collaborations already are permissible under the antitrust laws, the main effect of the COPA regulations is to immunize conduct that would not generate efficiencies and therefore would not pass muster under the antitrust laws.”

The FTC’s argument here is essentially that any joint venture (including healthcare joint ventures) may have perfectly legitimate pro-competitive goals, and that, therefore, they don’t need antitrust immunity. Of course, the catch is that if the FTC, or a private plaintiff, challenges the joint venture, it could take years of very expensive and disruptive litigation to prove you were right.

#### States are still free to regulate if they prove it’s in the public interest

NYT 14 [New York Times Editorial Board, 10-18-2014, “The White Teeth Monopoly” Lexis]

The dental board argued, as did other professional groups and associations in their briefs to the court, that subjecting it to antitrust laws would weaken its authority and discourage professionals from serving on regulatory bodies. During this week's arguments, even Justice Stephen Breyer wondered whether a ruling in favor of the F.T.C. could create a situation where bureaucrats, not neurologists, would decide who could conduct brain surgery.

Those concerns are misplaced. Each antitrust case is different, and a ruling for the F.T.C. in this case will not paralyze [destroy] professional regulatory bodies. The dental board clearly overstepped its authority and the law. If the board was concerned about the safety of consumers, it could have tried to make the case in court that teeth whitening can be performed only by a licensed dentist -- perhaps by suing the teeth whitening services and convincing a judge that the services were violating North Carolina law. Alternatively, as the F.T.C. said, it could have issued rules regulating teeth whitening. These rules would become effective if they were approved by a commission appointed by the North Carolina Legislature.

Either way, the board could not unilaterally tell the teeth whiteners to stop their business. States have the right to regulate competition in the public interest. But they cannot ~~blindly~~ [willy nilly] outsource that responsibility to professionals who stand to benefit from such restrictions.

#### Physician shortages now

CHENEY 12-29 --- CHRISTOPHER CHENEY, Senior Clinical Care Editor, Health Leaders, “6 CLINICAL CARE TRENDS FOR 2022 “, 12-29-2021, https://www.healthleadersmedia.com/clinical-care/6-clinical-care-trends-2022

1. Workforce shortages: The Number One trend in healthcare for 2022 is staffing. We all know about the nursing issues—nursing staffing and the nursing shortage. We are in one crisis with the coronavirus pandemic, but we have also lurched into another crisis in the workforce in healthcare. The workforce crisis is a big challenge for us, and nursing is a top concern.

Health systems are trying to bring in international nurses to address the nurse staffing shortage. First of all, I have a moral issue with this strategy because we are robbing the countries that can barely afford these nurses. So, we are creating a healthcare crisis abroad; and when you talk about COVID-19, it must be a global effort. You cannot just put yourself in isolation in the United States and hope that the pandemic goes away.

By bringing in international nurses, we are robbing Third World countries of a precious resource to fight diseases, including COVID-19. We are accelerating that problem. Secondly, you are going to be seeing some resentment from the nursing staff that is native in this country. As a result, you may see a greater push for unionization.

Medicare has cemented 9.75% cuts for physician pay starting in January 2022. I suspect that the physician workforce is going to go the same way as nursing to the gig economy. We are starting to see that already. You are going to see a lot more physicians moving to locum tenens work. Just like nursing workforce issues came suddenly upon us, I suspect 2022 is the year when we are going to have an even bigger challenge with the physician workforce.

## federalism

## vague/spec/disclosure

## t-courts

### Can’t Be Courts – 2AC

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

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

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

#### Prohibitions prevent “business as usual”

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

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

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

## 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).

## crane cp

### Crane CP – 2AC

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

FYI. MSU = Blue.

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

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

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

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

Also in the shadow of Lochner, recent years have shown glimmers of a reinvigoration of constitutional doctrines checking anticompetitive abuses by state and local governments. The negative or dormant commerce clause—limited by the Parker Court on antiLochner grounds—has occasionally been deployed to invalidate not only anticompetitive regulatory schemes112 that discriminated against out-of-state interests, but also, on occasion, those that impose significant burdens on interstate commerce without a sufficient justification.113 As of this writing, Tesla is testing the limits of these doctrines in its challenge to Michigan’s direct distribution law.114 Its complaint for injunctive relief asserts:

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

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

#### If the counterplan is truly a bolt out of the blue ruling without reference to Parker or antitrust, the interpretation is not applied and doesn’t set precedent

Post 1 – Robert, Law Professor at Berkeley, “The Supreme Court as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court,” May, <http://digitalcommons.law.yale.edu/fss_papers/186>

292. So, for example, the editors of the American Law Review argued in 1886 that "the practice of writing dissenting opinions" ought not to be prohibited by legislation, because “it has always been recognized that judicial decisions which merely announce conclusions of law, without either referring to authority for such conclusions or offering reasons in support of them, carry little weight. If mere legislation is the office of the courts, they would carry the weight which an act of legislation carries. Experience, we take it, shows that judicial decisions which are neither founded on authority nor on sound reasoning are never allowed to remain unquestioned by the profession. Cases are known where such decisions, always unsatisfactory to the profession, have been constantly assailed and finally overthrown after the lapse of many years. It is the office of the judge who writes a judicial decision to give the reasons upon which the court proceeds. The proper administration of justice is not satisfied with anything else. If these are omitted, the judgment becomes a mere arbitrary exercise of power. If it is the office of the judicial courts to furnish the reasons which the court gives for its decision, it cannot be affirmed with any show of logic that it is not equally their office to furnish the reasons which a portion of the court may give for the opposing view.

## Defense Production Act PIC

### Prohibit PIC – 2AC

#### PICs---sector, product or company---don’t compete---antitrust prohibitions can include exemptions.

Frederick 89 (Donald A. Frederick-Attorney-Adviser. “MANAGING COOPERATIVE ANTITRUST RISK” , United States Department of Agriculture, Agricultural Cooperative Service, Cooperative Information Report 38, <https://www.rd.usda.gov/files/cir38.pdf>, 1989, date accessed 9/5/21)

This exposes farmers to considerable antitrust risk unless their joint marketing activity is conducted in a manner exempt from antitrust prohibitions. As one judge phrased it:

“It is clear that if individual agriculturalists, through the medium of a cooperative, jointly fixed prices, reasonably or otherwise, without statutory authorization, they would be subject to prosecution.” (emphasis added) 14

#### Broad collusion impossible – state consumer protection laws

Lobert 20 [Joshua T. Lobert, Legislative Attorney, 8-24-2020 https://www.everycrsreport.com/files/2020-08-24\_LSB10534\_c4d4d4507e00e0136bf89fcd23bd2c9a147c62e6.pdf]

Considerations for Congress

Some commentators warn that, because companies may only raise Section 708’s defense in civil or criminal actions brought under state and federal antitrust laws and “any similar law of any State,” the defense would likely not be available in actions brought under state consumer protection laws.

Consumer protection laws vary from state to state but generally prohibit fraud, deception, and unfair business practices. In In re: Generic Pharmaceuticals Pricing Antitrust Litigation, for example, a district court allowed state law antitrust and consumer protection claims to proceed against generic drug manufacturers for allegedly agreeing to fix the price of generic drugs. Some commentators suggest that, because consumer protection claims may serve as “antitrust substitutes,” these claims may be “similar” to antitrust claims, and thus fall within the scope of Section 708’s defense.

This interpretation presents several difficulties. In particular, Section 708 defines the term “antitrust laws” to exclude laws concerning “unfair or deceptive acts or practices.” As the FTC has explained, “unfair or deceptive acts or practices” generally refer to consumer protection violations. If Congress believes that the goals of the DPA would be better served by granting companies a defense from these types of liability for “any action taken to develop or carry out any voluntary agreement or plan of action,” it could amend Section 708 to expand the scope of the statute’s antitrust defense to include consumer protection claims.

#### 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.

## 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.

#### FTC fails at privacy

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.

## Biz Con

### Econ – 2AC

#### Turn – aff reduces harmful state regulation

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

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

#### Collapse doesn’t cause war

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

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

## sua sponte

### A2: Link – Sua Sponte – 2AC

#### The Court can always find a test case OR will order new argument.

Adamany 90 [David; 1990; Professor at Wayne State University, Ph.D. and M.A. from the University of Wisconsin-Madison, J.D. from Harvard University; *The American Courts: A Critical Assessment*, p. 9]

Since Congress adopted the Judges Bill of 1925, most cases on the appellate and miscellaneous dockets have been by writ of certiorari — a request for the justices to hear cases that they may, but are not required, to hear. Under Supreme Court Rule 17, which gives broad categories of cases that the Court may hear, at least four justices must agree to hear a case before it is considered by the Court. Some cases on the appellate docket have been “appeals by right,” certain cases involving the constitutionality of state or federal laws or state constitutional provisions. By law, the Court was required to hear these cases; but the justices developed broad discretion by rejecting cases that failed to pose a substantial federal question as defined by the justices. In 1988, Congress revised the law virtually to eliminate appeals by right, thus giving the justices almost complete choice about what cases to decide. With more than 5,000 cases pending annually, the Supreme Court can almost always find a case to raise any policy issue that the justices wish to decide. Chief Justice Earl Warren apparently asked his law clerks to find a case on the Court’s docket that would allow the justices to overrule a previous decision holding that there was no right for the poor to have an attorney in every criminal trial. The clerks found such a case, and the Court used it to announce a new constitutional rule guaranteeing the right to counsel (Danelski and Danelski 1989, 508). The Court has sometimes gone to great lengths to find the issue it wants to decide. In the landmark case of Mapp v. Ohio (367 U.S. 617 [1961]), the Court held that illegally seized evidence could not be used in state criminal trials. But the dissenting justices accused the majority of “reaching out” to find that issue in the brief of amicus curiae, because the jurisdictional statements, briefs, and oral arguments of the parties had all been devoted to First Amendment free speech issues. Where the Court cannot find an issue on its docket, it may order parties to argue an issue that the justices want to consider. Over the strong objection of four justices that the majority was raising “a question not presented” by the parties, five justices ordered the parties in Patterson v. McLean Credit Union (485 U.S. 617 [1988]) to reargue the case to determine whether the Court’s 1976 interpretation of a federal civil rights statute should be reconsidered and changed. The majority pointed out four previous cases within the past twenty years when the Court had also ordered reargument to determine whether an earlier decision should be reconsidered and changed.

#### Normal means solves the link

Freeman 16 – Jody Freeman, Professor of Law and Director of the Environmental Law Program at Harvard Law School, “Update on the Clean Power Plan: The Knowns and Unknowns”, American College of Environmental Lawyers, 3-2, http://www.acoel.org/post/2016/03/02/Update-on-the-Clean-Power-Plan-The-Knowns-and-Unknowns-.aspx

Next Steps and Timing of Litigation

Whatever the composition of the D.C. Circuit panel, however, and whatever it decides, the losing parties might seek en banc review in the D.C. Circuit. The State and industry challengers would be almost certain to do so, because delay favors their side. This is because the Supreme Court took the unusual step of staying the rule not just until the D.C. Circuit rules on the merits, but for longer: until the Supreme Court either denies certiorari or grants review and decides the case. Delay means the Stay remains in force, which means the deadline for filing compliance plans keeps being pushed off, which means momentum slows, which favors those opposed to the CPP. En banc review is rarely granted, however, and the D.C. Circuit may be reluctant to further delay things by providing it when the Supreme Court has already associated itself with the case (by granting the Stay and making it all but certain review will be granted).

What all of this means is that the earliest the Supreme Court could decide the case--given the time necessary for the cert petition, briefing, argument and deliberation--is likely to be June 2017, and the latest the Court is likely to decide the case is June 2018. That means the Stay could remain in place for more than two years.

#### Sua sponte inevitable

Shannon 12 [Bradley Scott Shannon, Professor of Law, Florida Coastal School of Law, 2012 Ohio State Law Journal Furthermore <https://kb.osu.edu/bitstream/handle/1811/75482/OSLJ_Furthermore_V73_027.pdf> //DMcD]

III. THE UBIQUITY OF SUA SPONTE DECISIONMAKING

In order to further understand sua sponte decisionmaking, it also might be helpful to consider the breadth of this subject. Though the Supreme Court tends to focus on some of the more controversial exercises of sua sponte decisionmaking, this practice actually is much more pervasive than might first appear. Indeed, even the terminology in this area masks its pervasiveness, as sua sponte decisionmaking tends to be described in a number of different ways,13 and sometimes it is not described at all. Consider, for example, two events that occur in almost every case14: the assignment of the presiding judge, and the selection of the trial date. In most cases, the assignment of the presiding judge and the selection of the date of trial are fairly inconsequential; neither should substantially affect the ultimate outcome. But as many lawyers know, the identity of the presiding judge sometimes can have a significant effect on the outcome. And even the date of trial can have some effect on the outcome, as many lawyers who have been assigned a trial date in December or immediately after some traumatic event (such as occurred on September 11, 2001) can attest. And yet, as important as those choices might be, the parties generally have little, if any, input with respect to either.15 It is true that the assignment of the presiding judge is usually limited to those judges assigned to the district in which the case is pending, and might be influenced by some factors within the parties’ control, such as the location of the particular courthouse where the case was initiated. Similarly, the parties might be asked or permitted to provide their views regarding the estimated length of the trial and the time needed to prepare for trial. But the parties ultimately have little or no control over the assignment of the presiding judge or the selection of the trial date; those are decisions almost exclusively within the control of the court. Upon further reflection, one could easily come up with numerous other examples. One has already been mentioned: the ability of courts to raise legal issues sua sponte.16 Indeed, virtually every question posed to the parties by a judge, such as those raised during a typical motion hearing or appellate oral argument, could be regarded as a form of sua sponte decisionmaking. So the second point is simply that sua sponte decisionmaking is quite widespread, and probably more widespread than many imagine. Why is this so? Some of the reasons will be explored in the next Part, but one reason why sua sponte decisionmaking is so widespread is that it is probably both inevitable and unavoidable, at least to some extent. Perhaps one could imagine a world in which virtually everything currently being done by judges without significant party input could be left to the parties themselves, such that even the most perfunctory matters would become adversarial proceedings. But at least with respect to some matters, this seems neither feasible nor desirable. Thus, it seems that the proper inquiry is not whether sua sponte decisionmaking should or should not be allowed, but rather when and to what extent sua sponte decisionmaking is desirable.

#### Doesn’t hurt legitimacy

--not highlighted out of context, just sua sponte only appeared at the top but warrants were at the bottom – if plan’s sua sponte, that’s only interpreted to signify that the court thought the lawyers misstated the relevant legal arguments, which courts correct all the time and is perceived to increase their legitimacy as a result

Miller 98 – Erin D. Miller. JD Candidate – University of Chicago Law. 1998. “Should Courts Consider [18 USC § 3501](http://www.lexis.com/research/buttonTFLink?_m=0a8b369e3369f0b8779aab51703aa3c5&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b65%20U.%20Chi.%20L.%20Rev.%201029%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=2&_butInline=1&_butinfo=18%20USC%203501&_fmtstr=FULL&docnum=28&_startdoc=1&wchp=dGLbVlz-zSkAA&_md5=dab19aeabc774a80b4407350f8e7b2d6) Sua Sponte?”, University of Chicago Law Review, Summer, 65 U. Chi. L. Rev. 1029. Lexis.

2. Justifications for the exercise of the power. When judges consider an issue sua sponte because they do not think the parties' arguments are adequate, they rarely state their specific reasons for doing so. Nevertheless, they seem to have in mind the concept to which Justice Scalia referred when he discussed "the Third Branch's obligation to decide according to the law." [104](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=803f13900f0ca00f31a4b5cb6b437cbc&docnum=28&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlz-zSkAA&_md5=7a276daf47d5ee0559bbc0ddca44d74c&focBudTerms=sua+sponte+w%2F35+supreme+court+w%2F35+sua+sponte&focBudSel=all#n104) The courts enjoy the power "to say what the law is," which entails a power to say so correctly. [105](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=803f13900f0ca00f31a4b5cb6b437cbc&docnum=28&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlz-zSkAA&_md5=7a276daf47d5ee0559bbc0ddca44d74c&focBudTerms=sua+sponte+w%2F35+supreme+court+w%2F35+sua+sponte&focBudSel=all#n105) Judge Easterbrook has made this point more explicitly, observing that "litigants' failure to address the legal question from the right perspective does not render us powerless to work the problem out properly. A court of appeals may and often should do so unbidden rather than apply an incorrect rule of law to the parties' circumstances." [106](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=803f13900f0ca00f31a4b5cb6b437cbc&docnum=28&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlz-zSkAA&_md5=7a276daf47d5ee0559bbc0ddca44d74c&focBudTerms=sua+sponte+w%2F35+supreme+court+w%2F35+sua+sponte&focBudSel=all#n106) Judge Easterbrook's observation reflects the fact that courts are properly concerned with more than just the interests of litigants. The adjudication of cases generates precedents and clarifies the law, providing benefits to everyone in society. [107](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=803f13900f0ca00f31a4b5cb6b437cbc&docnum=28&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlz-zSkAA&_md5=7a276daf47d5ee0559bbc0ddca44d74c&focBudTerms=sua+sponte+w%2F35+supreme+court+w%2F35+sua+sponte&focBudSel=all#n107) The precedent-generating function of courts is inhibited when courts defer to parties' incorrect statements of the law rather than declare which legal principles in fact govern the case. [108](http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&brand=&_m=803f13900f0ca00f31a4b5cb6b437cbc&docnum=28&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlz-zSkAA&_md5=7a276daf47d5ee0559bbc0ddca44d74c&focBudTerms=sua+sponte+w%2F35+supreme+court+w%2F35+sua+sponte&focBudSel=all#n108) Moreover, courts have a valid interest in preserving their own institutional prestige and legitimacy, both of which are reduced when courts decide cases based on incorrect principles of law.

#### If the case is close enough, bringing up new issues is common practice

Bhagwat 2K – Ashutosh Bhagwat 2k. Professor of law at the University of California, Hastings College of Law, 80 B.U.L. Rev. 967, October, lexis

Even after it has decided that it should resolve an issue, the Court may choose to pass up cases presenting the issue until a case with suitable facts is presented. When the Court finally grants certiorari in a case and then decides it, the Court's opinions on the merits tend to focus almost exclusively on abstract doctrinal and policy issues, with essentially no discussion of the facts and equities of the particular case in front if it. Indeed, even after it has crafted a new legal standard, the modern Court has displayed an increasing tendency to remand the case to a lower court to apply that standard, rather than to fully resolve the dispute before it as most courts would do as a matter of course. n154 Finally, Erwin Chemerinsky has noted a recent trend on the Court of reaching out to decide issues which were not presented in the petition for certiorari, and were not briefed or argued by the parties. n155 All of these are well-accepted and today largely uncontroversial aspects of the Court's decision-making process. But taken together, they emphasize just how far the functions of the modern Supreme Court have drifted from the traditional judicial role of adversarial dispute resolution, as well as the general acceptance of this fact. n156

### Legitimacy – 2AC

#### Legitimacy wrecked – poor decisions, lack of transparency, shadow docket

Biskupic 9-2 [Joan Biskupic, CNN legal analyst & Supreme Court biographer, 9-2-2021 https://www.cnn.com/2021/09/01/politics/transparency-analysis-supreme-court-abortion/index.html]

Supreme Court justices tout judicial integrity and the importance of public confidence in their decisions, but the court's midnight silence Tuesday while letting a Texas law that curtails abortion rights take effect -- followed by a midnight order Wednesday -- offers the latest and most compelling example of its lack of transparency and the cost.

The justices' secretive patterns have gained new attention as confidence in all government institutions has waned. Witnesses before a bipartisan commission set up by President Joe Biden to consider court revisions -- most visibly, the options of term limits and the addition of more seats -- have targeted the justices' secrecy and how it contributes to public distrust of the high court, along with the lopsided advantage the court gives to some litigants.

Such lack of transparency is only part of the context behind the Supreme Court's silence in the closely watched Texas case. The emboldened conservative majority already is poised to reverse or at least undercut Roe v. Wade, the 1973 landmark ruling that declared women's constitutional right to end a pregnancy. The court announced last spring that it would take up in the 2021-22 session a dispute over Mississippi's ban on abortions after 15 weeks. The Texas law goes much further, making it illegal to terminate a pregnancy when a fetal heartbeat is detected, which may be typically around six weeks.

Both laws sharply conflict with Roe v. Wade, which forbade states from interfering with a woman's abortion decision before the fetus would be viable, that is, able to live outside the womb, at about 22-24 weeks.

The justices have made plain their concerns regarding public mistrust and misunderstanding of the Supreme Court. Chief Justice John Roberts regularly declares that judges differ from elected lawmakers, and Justice Stephen Breyer protested in a speech at Harvard last spring that they should not be regarded as "junior-varsity politicians." Breyer cited the court's long-standing preservation of abortion rights as evidence of its nonpartisan, nonideological character.

Separately last spring, Justices Sonia Sotomayor and Neil Gorsuch emphasized in a joint appearance, advocating civics education, the deep reasoning that underlies their opinions. They criticized those who would look only for a bottom-line judgment.

Yet no judgment -- or word of any sort -- came late Tuesday night, with the clock ticking, anxiety rising among both sides in Texas and a national audience watching.

There was no avoiding the sense that the justices had abdicated some responsibility. The Supreme Court has the last word on the law under the US Constitution. If Roe v. Wade were suddenly invalid in Texas or elsewhere, it would be for the court to declare, traditionally in a signed opinion.

Amid the confusion, some advocates on both sides took Tuesday night's silence as implicit endorsement of the law.

At midnight Wednesday, a 5-4 court said it would not block the Texas law, nearly 24 hours after it already had taken effect and has already severely curtailed abortion access in the country's second-largest state.

The shadow docket

The entire ordeal has highlighted the Supreme Court's secretive operations, particularly for scores of important cases handled outside of the usual pattern of scheduled oral arguments.

The justices decline to make their votes public or offer reasoning on many cases that arise on what's become known as "the shadow docket."

Even on cases that result in public orders, such as those last week rejecting the Biden administration's policy on US asylum-seekers and a Covid-19 eviction moratorium, the justices do not make their votes explicit.

It appeared in both cases that all six conservatives had joined the majority, but that was not clear. Only the three liberals -- Breyer, Sotomayor and Elena Kagan -- publicly dissented. In an earlier stage of the moratorium dispute this summer, Roberts had fully voted with the liberals to allow a temporary freeze on evictions to continue.

The justices' opinion invalidating the Biden administration freeze on evictions, based on the reasoning that only Congress could impose such a moratorium, was unsigned.

Patterns of ambiguity and secrecy extend to the justices' personal behavior, too. If any of them sit out a dispute because of a conflict of interest, they decline to explain it. When they are injured and land in the hospital, they often keep that quiet, too. Last year, Roberts fell while at a country club near his suburban Maryland home, hit his head and was rushed to a hospital by ambulance. He declined to make the June incident public for more than two weeks, and then only after The Washington Post followed up on a tip.

A related topic that has been the subject of the Biden overhaul commission: The nine refuse to be bound by federal judicial ethics rules that cover lower court judges. They also decline to provide advance notice of their expense-paid travels to academic and special interest organizations for speeches. And they give scant information about book or other extracurricular deals they have signed.

The most recent case in point: Justice Amy Coney Barrett's reported $2 million book deal negotiated soon after she took her seat in 2020. Her publisher has confirmed that an agreement exists but declined to provide any details about the book subject or what it is paying Barrett. She did not respond to news media questions about the deal.

Such tendencies are hardly new. Nor is the justices' desire to further their own stature through mystique and mystery. But today's trend may be having the opposite effect when it comes to public regard. Gallup reported in July that Americans' approval of the Supreme Court had fallen to 49%, the first such below-50% rating since 2017 and a contrast to its 2020 poll that found 58% of Americans approved of the court.

Equally important, the drama over the Texas case demonstrates the confusion for Americans when the justices fail to act with clarity.

# 1ar

## Case

## T –

### 1ar – WM

**Scope – Courts “define the scope”**

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

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

#### resolved means reach decision

**Random House 6** (Unabridged Dictionary, http://dictionary.reference.com/browse/resolve)

re·solve thinsp [Audio Help](http://dictionary.reference.com/help/audio.html)   /rɪˈzɒlv/ Pronunciation Key - Show Spelled Pronunciation[ri-zolv] Pronunciation Key - Show IPA Pronunciation verb, -solved, -solv·ing, noun

–verb (used with object)

1. to come to a definite or earnest decision about; determine (to do something): I have resolved that I shall live to the full.

### Can’t Be Courts – 1AR

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

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

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

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

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

**[FOOTNOTE 15]**

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

**[FOOTNOTE 15]**

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

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

**[FOOTNOTE 21]**

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

**[FOOTNOTE 21]**

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

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

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

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

ANNEX A

**Exemptions from the Antitrust Laws**

Statutory Exemptions **from the Antitrust Laws**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judicial**ly Created** Exemptions

Baseball exemption

Filed-rate/Keogh doctrine

Noerr-Pennington Immunity

State Action Doctrine

Various implied immunities created in specific regulatory settings

### A2: Kalbfleisch

#### Kalbfleisch has no broad intent to define – it’s one defendant’s assertion sixty years ago – turns predictability and limits args

For reference. MSU = Blue.

Kalbfleisch 61 – Kalbfleisch, District Court judge. [Paul M. Harrod Co. v. A. B. Dick Co., 194 F. Supp. 502 (N.D. Ohio 1961)]//babcii

Defendant asserts that the term ‘antitrust laws,’ as used in the above section and as defined in 15 U.S.C.A. § 12, does not include a judgment or decree entered in connection with an antitrust case filed by the Government. Plaintiff, on the other hand, asserts that ‘the violation of the earlier decree of this court in itself gives rise to an independent cause of action under Section 4 of the Clayton Act.’ 15 U.S.C.A. § 15. Plaintiff's Brief, p. 7. Plaintiff concedes that ‘as far as he has been able to ascertain, this contention raises issues which have never before been decided by any appellate court.’ Plaintiff's Brief, p. 5. In Nashville Milk Co. v. Carnation Co., 1958, 355 U.S. 373, 78 S.Ct. 352, 2 L.Ed.2d 340, the Supreme Court held that the Robinson-Patman Act, 15 U.S.C.A. §§ 13-13b, 21a, was not included among the ‘antitrust laws' defined in Section 1 of the Clayton Act (15 U.S.C.A. § 12) and that ‘the definition contained in § 1 of the Clayton Act is exclusive.’ Id., 355 U.S. at page 376, 78 S.Ct. at page 354. The definition of ‘antitrust laws' in 15 U.S.C.A. § 12, clearly embraces only the statutes described therein. Even without such a definition the term ‘antitrust laws' could not be construed as pertaining to a judgment or decree entered by a court in connection with an antitrust case filed by the Government. Such decrees do not necessarily reflect the prohibitions of the antitrust laws but may, by their terms, seek to dissipate the effects of the past conduct of the parties and, to this end, frequently enjoin performance of acts lawful in themselves. To permit a private party to recover damages for violation of any provision of such a decree is so obviously beyond the scope of the term ‘antitrust laws,’ as used in the statute, as to require no further discussion. Defendant's motion to dismiss that part of the complaint based on alleged violations of the 1948 consent decree in United States v. A.B. Dick Company will be sustained.

## CP

**Private Action CP**

#### 1-doesn’t solve – leaves Parker immunity on the books in context of antitrust laws – providing shield for private entities and chilling states

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

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

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

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

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

#### 3-Equal protection fails

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

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

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

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

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

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

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

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

### BIZ CON

### Econ – Mergers Thumper – 1AR

#### It creates uncertainty

Gidley 8-5 [J. Mark Gidley, Partner, White & Case, JD Columbia Law School, Ned Gidley’s dad, 8-5-2021 https://www.whitecase.com/publications/alert/federal-trade-commissions-pre-consummation-warning-letters-signal-new-risk]

On Tuesday, August 3, 2021, the Federal Trade Commission announced a new approach for merger investigations that the FTC does not complete during the Hart-Scott-Rodino Act (HSR) waiting period—the FTC may advise merging parties via a Warning Letter that its investigation remains open despite the expiration of the HSR waiting period.

The FTC announced on August 3, 2021 that it has begun issuing "Pre-Consummation Warning Letters" for transactions that it cannot fully investigate within the HSR waiting period, which is generally 30 days (or 15 days for cash tender offers and certain bankruptcy transactions).1

A blog post from Holly Vedova, Acting Director of the FTC's Bureau of Competition, explains that a "tidal wave of merger filings" has strained the FTC's ability to sufficiently investigate deals within the HSR Act’s deadlines.2 It is unclear whether the FTC's issuance of Pre-Consummation Warning Letters is permanent—however, it does come on the heels of the FTC's "temporary" suspension of early termination under the HSR Act that was put in place eight months ago.3 Both the continued suspension of early termination and issuance of Pre-Consummation Warning Letters come at a time of new FTC leadership, with Lina Khan having assumed the role of FTC Chair in June, and an increasing interest in antitrust from lawmakers on Capitol Hill. Pre-Consummation Warning Letters, announced as an exigency measure, may not be going away anytime soon, but it remains unclear if this is a temporary measure due to the FTC's limited resources. The Antitrust Division of the Department of Justice (DOJ) has not yet indicated whether it intends to adopt a similar procedure.

According to the FTC's August 3, 2021 blog post, the FTC will send a Pre-Consummation Warning Letter to certain merging parties when the FTC is not able to sufficiently investigate a merger transaction within the HSR waiting period and will advise that while the merging parties are legally permitted to close they do so at their own peril because the FTC's investigation is ongoing.4 The FTC has declined to say how many warning letters the agency has issued so far under the new policy and whether it will report those figures publicly.

Notably, the FTC's and DOJ's enforcement powers are not (and have never been) limited whether or by how long a deal has been closed.5

While the FTC and DOJ have always had the power to challenge consummated transactions, whether previously cleared by the FTC or DOJ or non-reportable,6 in the past, the FTC only sent warning letters in the most severe instances where parties threatened to merge while a review remained open.

The new policy comes at a time when there has been an uptick in challenges to non-reportable and cleared transactions in recent years, including legal challenges to acquisitions cleared after investigation by the FTC.7

A recent survey noted that the two US antitrust agencies have brought 51 cases challenging consummated mergers over past 3 decades.8 23 of them were not HSR-reportable, 6 were HSR-reportable, and 22 not specified.9 The challenged cases arise from a variety of industries, including healthcare, digital, oil and gas, telecommunication, and education.10

There is no clear answer to how long after consummation DOJ or FTC may challenge a previously blessed merger. Based on the "Time of Suit" doctrine derived from United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957), consummated mergers may be challenged at "any time when the acquisition threatens to ripen into a prohibited effect."11 The survey discussed above suggests that it could be as short as three days or as long as eight years after the closing.12 In addition to creating uncertainty, consummated merger challenges also create issues like how to successfully "unscramble the egg," what are the appropriate remedies for anticompetitive effects, and whether it is fair for the parties in transaction to be penalized for unexpected market circumstances.13

### Econ – A2: Link – A2: Abbott

#### And – it’s about rulemaking happening in the squo

FYI. MSU = Blue.

Abbott ’21 [Alden; February 2021; Senior Research Fellow at the Mercatus Center of George Mason University, J.D. from Harvard Law School and M.A. in Economics from Georgetown University; Concurrences, “Competition Policy Challenges for a New U.S. Administration: Is the Past Prologue?” <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en>]

12. But recent suggestions put forth in an October 2020 House Judiciary Subcommittee on Antitrust majority report (HJSMR) [[12](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb12)] and in a November 2020 report by the Washington Center for Equitable Growth (WCEGR) [[13](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb13)] (coauthored by various prominent critics of Trump administration antitrust enforcement who served in the Obama administration) would go far beyond application of existing antitrust law to big digital platforms. In particular, the HJSMR proposes taking a highly regulatory approach to digital platforms, including imposing “[s]tructural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business.” [[14](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb14)] The WCEGR also endorses the use of rulemaking (and, in particular, FTC rulemaking) to tackle significant problems of competition. [[15](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb15)] Rushing into rulemakings on platforms (especially without a clear showing of market failure) poses major risks, however, including, in particular, the creation of disincentives to invest in platform-specific innovation; and the interference with potential efficiency-seeking transactions by platform operators and suppliers of complements (in light of inevitable government second-guessing of platform-related business decision-making). The JBA antitrust team may wish to keep such potential costs in mind in setting competition policy vis-à-vis digital platforms.

13. To address the perceived growth and abuse of market power that are said to afflict the American economy, the HJSMR and WCEGR have also proposed to amend and thereby “toughen” the core antitrust statutes, to alter burdens of proof in litigation, and to bestow a substantial increase in resources on federal antitrust enforcers. [[16](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb16)] The problem of scarce agency resources has long been highlighted by enforcement agency leadership, and certainly merits attention. The call for dramatic systemic change in antitrust enforcement norms, however, should be approached cautiously, with a jaundiced eye. In our common-law-based antitrust system, a major disruption to long-familiar statutory schemes would generate major uncertainty regarding antitrust enforcement principles and substantially disrupt business planning for an indeterminate amount of time. Many welfare-enhancing transactions could be sacrificed. The harm to consumer and producer welfare due to lost socially beneficial business initiatives would be hard (if not impossible) to measure, but nonetheless real. It is certainly possible that such losses would outweigh (perhaps substantially) whatever welfare gains might flow from statutory enforcement “reform.” In other words, it should not casually be assumed that “more and different” antitrust would be an unalloyed benefit. As in all other areas of law enforcement, likely costs as well as purported benefits should be central to the antitrust public policy calculus. (Costs would include, of course, the likelihood and magnitude of “false positives” under the new enforcement regime, not just the reduction in socially beneficial transactions.)