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### Rural Health Adv

#### Advantage One: 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.

**Plan**

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

**Federalism Adv**

**Advantage Two: 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**.

Effective state regulatory experimentation solves cybersecurity – used to design more successful regs

Grindal 21 [Karl Grindal, policy analyst and information security researcher, PhD School of Public Policy Georgia Institute of Technology, 7-25-2021 https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3893092]

What works? How would we know? As states pass new cybersecurity and privacy legislation, natural experiments present themselves that allow us to start measuring policy efficacy. One measure of this efficacy is the number of reported state data breaches. More and more states have modified their data breach notification legislation to publicly report this data. Yet, datasets like the Data Breach Clearinghouse don’t retain state level dummy variables. Without these variables, researchers cannot identify non-equivalent control groups for interrupted time series experiments. To this end, this research presents the data and a methodology to integrate 21 state level datasets of breach reports into a national dataset that retains state level metadata. Supplementing those states which publicly report breach incidents are state level data sources acquired from open records requests. This methodological progress is necessary to begin to address the research question, do state level cybersecurity policy interventions reduce the frequency of data breaches in the target population?

The data for this kind of analysis has, until now, been limited to private sector firms like Advisen. Consequently, this paper leverages its data source to produce descriptive statistics on the characteristics of data breach incidents similar to findings in industry reports. Further findings include the rate of breach incident frequency and breaches per-capita over time in reporting states. Evidence demonstrates that breaches have historically been rising by 20% per year, however, incidents plateaued starting in 2016. Annually, breach incidents per-capita are shown to be quite similar in states with shared reporting requirements. This per-capita normalization enables state level rankings of breach likelihood. However, while industry breach reports have historically limited themselves to descriptively characterizing breach activity, this methodology is also intended to enable traditional policy evaluation. Quasi-experiments of state level regulatory interventions, like the Massachusetts Data Security Law, present a case study for further policy evaluation studies. Monthly time series analysis comparing pre and post treatment with a relevant control group, presents the best means for these evaluation studies. This research consequently provides tangible code, data sources, and lessons learned for future researchers to employ to identify which regulatory interventions work. If we can start to learn from this laboratory of democracy, perhaps new regulatory interventions can be designed to protect customer data and reduce incidents of identity theft.

I. INTRODUCTION

Given the significance policymakers place on cybersecurity, how effective has a decade of policy interventions been at reducing social costs? How would we know? Politicians and regulators pass cybersecurity policy interventions with the intention of making a meaningful difference. Compiling mandatory state-level data breach reports presents a novel incident data source that can be used to measure regulatory efficacy. The frequency of mandatory state reported breaches is a comprehensive source. From this source, important descriptive statistics can be derived including an annual rate of growth.

Cyber-attacks trigger retaliation and false readings---nuclear war.

Klare 19 [Michael; November 19; Professor Emeritus of Peace and World Security Studies at Hampshire College, Senior Visiting Fellow at the Arms Control Association; Arms Control Today, “Cyber Battles, Nuclear Outcomes? Dangerous New Pathways to Escalation” <https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation>]

Yet another pathway to escalation could arise from a cascading series of cyberstrikes and counterstrikes against vital national infrastructure rather than on military targets. All major powers, along with Iran and North Korea, have developed and deployed cyberweapons designed to disrupt and destroy major elements of an adversary’s key economic systems, such as power grids, financial systems, and transportation networks. As noted, Russia has infiltrated the U.S. electrical grid, and it is widely believed that the United States has done the same in Russia.[12](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote12) The Pentagon has also devised a plan known as “Nitro Zeus,” intended to immobilize the entire Iranian economy and so force it to capitulate to U.S. demands or, if that approach failed, to pave the way for a crippling air and missile attack.[13](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote12)

The danger here is that economic attacks of this sort, if undertaken during a period of tension and crisis, could lead to an escalating series of tit-for-tat attacks against ever more vital elements of an adversary’s critical infrastructure, producing widespread chaos and harm and eventually leading one side to initiate kinetic attacks on critical military targets, risking the slippery slope to nuclear conflict. For example, a Russian cyberattack on the U.S. power grid could trigger U.S. attacks on Russian energy and financial systems, causing widespread disorder in both countries and generating an impulse for even more devastating attacks. At some point, such attacks “could lead to major conflict and possibly nuclear war.”[14](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote14)

These are by no means the only pathways to escalation resulting from the offensive use of cyberweapons. Others include efforts by third parties, such as proxy states or terrorist organizations, to provoke a global nuclear crisis by causing early-warning systems to generate false readings (“spoofing”) of missile launches. Yet, they do provide a clear indication of the severity of the threat. As states’ reliance on cyberspace grows and cyberweapons become more powerful, the dangers of unintended or accidental escalation can only grow more severe.

Breaches fund terror and organized crime

Wallace 20 [Clyde; 2020; Deputy Assistant Director in the Cyber Division at the Federal Bureau of Investigation; FBI, “Dangerous Partners: Big Tech and Beijing,” <https://www.fbi.gov/news/testimony/dangerous-partners-big-tech-and-beijing>]

Chairman, ranking member, and members of the committee, thank you for the opportunity to appear before you today to discuss the current threats to the United States homeland. Our nation continues to face a multitude of serious and evolving threats ranging from homegrown violent extremists (HVEs) to cyber criminals to hostile foreign intelligence services and operatives. Keeping pace with these threats is a significant challenge for the FBI. Our adversaries—terrorists, foreign intelligence services, and criminals—take advantage of modern technology to hide their communications; recruit followers; and plan and encourage espionage, cyber-attacks, or terrorism to disperse information on different methods to attack the U.S. homeland, and to facilitate other illegal activities.

Cyber Threats

Virtually every national security threat and crime problem the FBI faces is cyber-based or facilitated. We face threats from state-sponsored hackers, hackers for hire, organized cyber syndicates, and terrorists. On a daily basis, these actors seek to steal our state secrets, our trade secrets, our technology, and our ideas—things of incredible value to all of us and of great importance to the conduct of our government business and our national security. They seek to hold our critical infrastructure at risk and to harm our economy.

The FBI is investigating a wider-than-ever range of threat actors, from transnational organized cybercrime to nation-state adversaries to terrorists using social medial for recruiting and radicalization purposes. The scale, scope, speed, and impact of cyber threats is constantly evolving, which may explain why we are also seeing a blending of threats, such as nation state adversaries using criminal actors as proxies to mask their activities. The frequency and severity of malicious cyber activity on our nation’s networks have increased dramatically in the past decade when measured by the amount of corporate data stolen or deleted, the volume of personally identifiable information compromised, or the remediation costs incurred by U.S. victims. Companies that hold large amounts of Personally identifiable information (PII) are susceptible to loss of American’s personal data to criminal organizations, terrorists, and nation-state cyber actors. Hotel chains, airlines, health care companies, credit bureaus, government agencies, and cleared defense contractors have previously been victims of PII theft.

Cyber Criminal Trends

Cyber threats are not only increasing in size and scope, but are also becoming increasingly difficult and resource-intensive to investigate. Cyber criminals often operate through online forums, selling illicit goods and services, including tools that lower the barrier to entry for aspiring criminals and that can be used to facilitate malicious cyber activity. These criminals have also increased the sophistication of their schemes, which are more difficult to detect and more resilient to disruption than ever. In addition, whether located at home or abroad, many cyber actors are obfuscating their identities and obscuring their activity by using combinations of leased and compromised infrastructure in domestic and foreign jurisdictions. Such tactics make coordination with all of our partners, including international law enforcement partners, essential.

Increasingly sophisticated obfuscation techniques are also enabling actors to stealthily obtain data from victims or re-purpose victim computers into cryptocurrency-mining botnets. Botnets used by cyber criminals have been responsible for billions of dollars in damages over the past several years. The widespread availability of malicious software (malware) that can create botnets allows individuals to leverage the combined bandwidth of thousands, if not millions, of compromised computers, servers, or network-ready devices to disrupt the day-to-day activities of governments, businesses, and individual Americans.

Cyber threat actors are conducting ransomware attacks against U.S. systems, encrypting data and rendering systems unusable—thereby victimizing individuals, businesses, and even emergency service and public health providers. Our threat reporting has demonstrated that ransomware attacks are becoming more targeted, sophisticated, and costly, even as the overall frequency of ransomware attacks is holding steady or declining. Since early 2018, the incidence of broad, indiscriminate ransomware campaigns has sharply declined, while losses from ransomware attacks have increased significantly. Allow me to restate that for emphasis: while the number of reported attacks has gone down, the effects and impacts of the attacks are going up. Meanwhile, state and local governments have been particularly visible targets for ransomware attacks. However, ransomware campaigns have also heavily impacted health care organizations, industrial companies, and the transportation sector.

Business email compromise (BEC) remains a pervasive threat due to its low barrier of entry and maturing social engineering techniques, and cyber criminals almost certainly will continue to use BEC to target industries indiscriminately. BEC threat actors have widened their money laundering networks, including domestic transfers prior to laundering the money overseas, which presents challenges and opportunities for countering this type of fraud. Readily available online personal and business information enhances the reconnaissance capability of actors, providing BEC threat actors with more credible social engineering lures. Spoofed domains are seen in the majority of BEC attempts, and likely will remain a technique used by cyber actors. BEC attacks combining social engineering with network intrusions demonstrate an increase in attack sophistication that can use keyloggers or other malware to identify potential targets, such as business vendors, as well as sell access to or further exploit compromised systems.

Actors have learned that BEC is effective and are adapting lures to target human resources departments for PII, such as W-2 tax forms to commit stolen identity return fraud, rather than requesting wire transfers. Additionally, industry partners have observed BEC actors increasingly instruct victims to send automated clearinghouse transfers to prepaid cards in the initial laundering phase.

Nation State Activities: China

While several nation-states pose a cyber threat to U.S. interests, no other country presents a broader and more comprehensive threat to our ideas, innovation, and economic security than the People’s Republic of China (PRC) under the leadership of the Chinese Communist Party (CCP). The threat takes many different forms. Beijing employs a whole-of-government approach to its intelligence collection strategy. While cyber network operations remain a primary and possibly increasing collection tool, the CCP also relies on techniques such as intellectual property theft, purchases of U.S. corporations, and physical and property theft to acquire U.S. data.

For example, less than a month ago, on February 10, the Department of Justice (DOJ), in coordination with the FBI, publicly unsealed an indictment against four Chinese cyber actors who allegedly acted as agents of the People’s Republic of China’s People’s Liberation Army (PLA). All four actors are currently located in China. The alleged crimes occurred between May 13, 2017 and July 30, 2017. The actors targeted a software vulnerability to gain unauthorized access to Equifax’s network and ultimately obtain PII for 145 million American citizens, as well as the intellectual property of the U.S. company.

The indictment alleges the four individuals named therein reside in Beijing, China and are members of the 54th Research Institute. The 54th Research Institute is a component of the PLA. The indicted individuals gained unauthorized access, via a software vulnerability, to Equifax’s internal network, where they allegedly ran approximately 9,000 queries on Equifax’s systems and obtained the names, birth dates, and social security numbers for approximately half of all adult American citizens. The defendants also took deliberate steps to evade detection in the system, including routing traffic through approximately 34 servers located in nearly 20 countries to obfuscate their true location, using encrypted channels in order to blend in normal traffic within Equifax’s network, and wiping log files on a daily basis to try to eliminate records of their activity.

DOJ, the FBI, and our partners will continue to work tirelessly to combat this threat posed by the Chinese government against our nation. Although the PRC continues to modify the ways in which it conducts nefarious cyber activity, including through working with criminal hackers, the cases prosecuted by the DOJ in partnership with the FBI reflect an increasingly sophisticated ability to attribute criminal conduct to the individuals and nation states involved. We will be relentless in our pursuit of such malicious activity against our citizens and our industry.

There are other risks. Chinese companies are increasingly acquiring or launching social media applications not housed in mainland China for the global consumer market. These applications generate big data and collect PII, such as biometric information, contact lists, location data, log data, communication metadata, content (text and photographic), bank and credit card details, and financial transactions of U.S. persons. The associated user agreements and privacy policies typically obfuscate the companies’ data handling responsibilities or directly state any and all data can be transferred to other locations and associated entities to include the Chinese parent company. These data handling policies create a risk for U.S. big data and PII to be targeted and exploited by PRC actors. More broadly, consumers should be aware of the privacy implications of any application they install, especially applications from foreign countries with weak data protection laws.

In June 2017, the PRC introduced a new national cyber security law that requires foreign firms to store data locally and submit to data surveillance measures. Although implementing regulations are still being drafted, Beijing could likely use these authorities and policies to compel access to U.S. commercial and sensitive personal data, including sensitive information stored or transmitted through Chinese systems. U.S.-based subsidiaries of Chinese corporations and entities, or organizations in the U.S. partnering on cooperative research and development efforts, are among the entities affected by this law. The law has raised fears by those concerned with Beijing’s control of sensitive company information and increased opportunity to steal intellectual property.

Threats Exposing Vulnerabilities on Critical Infrastructure Networks and the Public

Virtually all companies collect and maintain sensitive data either of their own employees or customer information. The overall trend of digitizing data for ease of use or access makes many different industries vulnerable to data breaches. For instance, over recent years the health care industry has moved to centralizing patient data and using Internet-connected devices, which has increased the sector’s potential attack surface. Cyber actors benefit from this target-rich environment as the passage of patient data between health care departments and networks is critical to their care, but often levels of cybersecurity vary. Ransomware, denial of service attacks, and data breaches can all impede the ability to provide basic patient care and privacy for protected health information (PHI). Electronic medical records typically contain PII, which, combined with medical record information, is known as PHI.

It is also highly likely cyber actors target the IT sector to access their customers’ data and networks. IT sector entities manage and store valuable customer data and have unique, privileged access to client networks. These vital services create an environment where IT sector networks are compromised as a means for malicious cyber actors to reach a final target for fraud, hacktivism, and counterintelligence purposes.

Illicit economies enflame all hotspots AND are a threat multiplier---extinction.

Luna 21 [David; 2021; Founder and Executive Director of ICAIE, former U.S. diplomat and national security official with over 20 years of federal service; LinkedIn Pulse, “Why We Must Confront the Growing Threat to National Security Posed by Illicit Economies and Cesspools of Corruption and Organized Crime,” https://www.linkedin.com/pulse/why-we-must-confront-growing-threat-national-security-david-m-?trk=public\_post\_promoted-post]

Illicit economies are not harmless and can have tremendous human, economic, societal and security costs and consequences.

Illicit economies come with vulnerabilities to peace and security — including corruption, violence, chaos, organized crime, terrorist financing and instability. Illicit economies are the lifeblood of today’s bad actors, enabling kleptocrats to loot their countries, criminal organizations to co-opt states and export violence and terrorist groups to finance their attacks against our societies.

Illicit economies are pervasive threats that undermine democracy, corrode the rule of law, fuel impunity, imperil effective implementation of national sustainability and economic development strategies, contribute to human rights abuses and enflame violent conflicts.

Across today’s global threat environment, criminals and bad actors exploit natural disasters, human misery and market shocks for illicit enrichment.

The lucrative criminal activities enabling and fueling the multitrillion-dollar illicit economies include the smuggling and trafficking of narcotics, opioids, weapons, humans, counterfeit and pirated goods; illegal tobacco and alcohol products; illegally harvested timber, wildlife and fish; pillaged oil, diamonds, gold, natural resources and precious minerals; and other contraband commodities. Such contraband and illicit goods are sold on our main streets, on social media, in online marketplaces and on the dark web every minute of every day. The United Nations has estimated that the dirty money laundered annually from such criminal activities constitutes up to 5 percent of global gross domestic product, or $4 trillion.

The International Coalition Against Illicit Economies recognizes that illicit economies and crime convergence are threat multipliers that ripple across borders and imperil supply chain security, market integrity, democratic freedoms and institutions and systems of open, free and just societies.

In Mexico and Central America, for example, organized crime infiltrated the government at every level, and has diversified into other sectors such as agriculture, mining and transportation. Criminals also control strategic and critical infrastructure such as the country’s major ports. In recent years, the Jalisco New Generation Cartel has killed judges, police officers, politicians and thousands of civilians. Gangs like MS-13 and the Mexican cartels also remain a significant threat across the United States.

The significant market penetration of the Latin cartels has resulted in illicit economies that have corrupted and destabilized Mexico’s justice system and rule of law, and threaten regional stability. Their reach is now global, expanding to other regions of the world like Africa, Europe, and the Asia-Pacific.

China’s involvement in the expansion of illicit economies — including the booming trade in fraudulent consumer goods, money laundering/trade-based money laundering and the corruptive and malign influence of the Chinese Communist Party — continues to harm American national interests, our economy and competitiveness and the health and safety of our citizens.

In Africa, authoritarian governments, ungoverned spaces and conflicts have created the perfect storm for criminals and terrorist groups to expand their illicit trafficking and smuggling operations. The lucrative business of illicit trade has also been militarized in some areas, bribing complicit government officials to shield illicit enterprises from scrutiny and coercing soldiers to protect the illicit markets.

In other parts of the world – from Southeast Asia to the Caucasus – ruthless corrupt leaders and malign actors are similarly engaging in criminality and undermining global security, financing criminalized markets and creating illicit economies.

According to Euromonitor, while COVID-19 has brought economic malaise to most sectors, the illicit economy continues to accelerate, especially across the digital world. E-commerce platforms and online marketplaces are generating tremendous prosperity for scammers, fraudsters, counterfeiters and other predatory criminals that are raking in tens of billions of dollars selling fake pharmaceuticals and vaccines, personal protective equipment, counterfeit apparel and footwear, copyrighted electronics knock-offs and other illicit goods. Recent Organisation for Economic Co-operation and Development estimates put sales of fake goods and pirated products globally at $464 billion per year, with the International Trademark Association projecting that such illicit trade could reach up to $2.3 trillion by 2022.

These illicit economies divert revenue from legitimate market drivers such as businesses and governments and impair the ability of communities to make the investments necessary to stimulate economic growth, especially during these hard economic times. Revenue that could be used to build roads to facilitate commerce, hospitals to fight pandemic outbreaks and diseases, homes to raise and protect families or schools to educate children and future leaders, is instead lost to criminals’ greed crimes.

But this goes beyond just economic harm. Illicit economies incur a significant negative social cost, and in some cases, help to foment market instability, enslave our human capital, pillage our natural world and endanger national efforts to implement sustainable development goals.

Given the scale, Congress and the Biden administration need to elevate the fight against illicit economies by empowering our law enforcement agencies with new legal authorities and the necessary resources to disrupt illicit markets and anonymized criminal communications, prosecute illicit actors and threat networks, combat corruption and money-laundering safe havens and elevate the issue as a national security and foreign policy priority.

#### 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.

**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.

#### Predictions fail (for midterms)

Rogers 1-4 [Kaleigh Rogers is FiveThirtyEight’s technology and politics reporter., 1-4-2022 https://fivethirtyeight.com/features/5-things-to-watch-going-into-the-midterms/]

Though 2022 has only just begun, the midterm elections are already looming over the political horizon. Democrats’ loss in the Virginia governor’s race last year — and their surprisingly narrow win in the New Jersey governor’s race — both suggested that we could be heading for a red wave in this year’s midterm elections. And overall, the political environment is looking favorable for Republicans. Based on House retirements — which can give us some clues about how the congressional elections might unfold — it also seems like Democrats are more worried than Republicans. Those worries aren’t unfounded, either, since the president’s party almost always struggles in midterm elections, usually losing ground in the House and often in the Senate too.

But there are also a lot of factors that could shake things up. Over the past year, Republican legislatures across the country have passed an unprecedented slew of laws to restrict voting access, including some states that will be most closely watched this November. Fears about inflation are simmering, but the labor market is recovering, albeit unevenly. Meanwhile, COVID-19 cases have surged to an all-time high, driven by the omicron variant, even if so far deaths and hospitalizations have not been as bad as last year. And finally, state lawmakers are in the process of redrawing congressional maps based on the results of the 2020 census, setting the geographic boundaries that will shape congressional power for the next decade (if the courts don’t strike them down).

It’s impossible, of course, to predict how all of these four moving pieces — voting restrictions, the economy, the pandemic and redistricting — will affect each other. But we do have a sense of the role they could play individually. So here’s an overview of what we know about what each of these indicators could mean for the midterms, and what kinds of surprises could be in store this year.

A wave of voting restrictions could affect turnout in swing states

Under the fraudulent pretense that widespread voter fraud cost former President Donald Trump the 2020 presidential election, at least 22 states have passed 53 or more new voting restrictions. And since the federal government has not yet passed federal voting rights legislation, these statewide bills could have an impact on turnout and voter enthusiasm heading into the midterms.

The number of voting restrictions that were enacted in 2021 is astonishing. In fact, according to the Brennan Center for Justice, the total number of restrictions passed in 2021 shatters the previous record-high, which was 2011, when 14 states enacted 19 bills by October of that year. And a lot of the bills passed this cycle have curtailed the expansion of absentee voting from the pandemic, but bills requiring proof of identity to vote and preventing the implementation of automatic voter registration were prioritized too.

The short- and long-term effects of these newest statewide laws are still a bit of an open question; we’ve never seen such aggressive and widespread GOP-led efforts to pass new voter restrictions, but also there’s conflicting research on the effects of proposals like these. On the one hand, some studies show that some policies, like voter ID laws, which have long been anathema to Democrats and voting rights advocates, don’t necessarily decrease voter participation, even among people of color. And although a number of Republican-led states targeted absentee voting after it helped clinch Biden’s 2020 victory, a recent study found that states that implemented absentee voting in 2020 didn’t see a huge increase in turnout when compared with states that did not implement it. So it’s not a foregone conclusion that states like Georgia, which has received national attention for pushing stringent and anti-democratic voter laws, will actually see lower turnout — at least probably not as a result of the restrictions. In fact, other reporting has found that, counterintuitively, some restrictions can backfire and instead boost turnout because voters might be more energized to cast a ballot.

That said, the totality of the laws that have been passed this cycle makes it hard to predict their effects this November. And the fact remains that some of the most restrictive measures on the books are in swing states, which could affect the midterm result, in addition to disenfranchising voters there. There’s also, of course, the possibility that the newest state laws will make administering elections more open to partisan interference, since many of the bills proposed by Republican legislatures reassigned election administration to highly partisan legislatures — which could allow elected lawmakers to overturn the will of the voters and determine their own preferred winners of elections.

Economic worries could play a role — but they might be trumped by partisanship

Inflation is accelerating at the fastest pace in decades, and although the economy is bouncing back in other ways, most Americans feel pessimistic about the country’s economic challenges. That could be a worrying sign for Democrats’ electoral chances in the midterms this year. Often, the economy is seen as a critical electoral indicator, particularly regarding presidential elections.

But the upcoming election cycle could be different. That’s in part because there’s evidence that the economy just doesn’t matter as much in midterm elections. More broadly, views of the state of the economy are also increasingly partisan — which means that Republican and Democrats’ views of the economy may be more influenced by politics than by how the economy is actually doing.

This is not to say that the economy can’t influence politicians’ electoral fates. In fact, political science research has found that voters do reward presidential candidates when the economy is good, and punish them when it’s bad. It’s the overall trajectory of the economy that’s most important here, too, according to Christopher Wlezien, a professor of government at the University of Texas-Austin. “You might have a low unemployment rate and a low inflation rate, but if the economy’s not growing, that’s not really a ‘good’ economy,” he said.

But researchers have consistently found that the economy isn’t as important of a factor in midterm elections. That’s not because the economy is only important every four years — it’s just that other factors, like the generic ballot (a measure of which party people would back for Congress), are better predictors of which way the midterms will go.

Partisanship, too, can have a dampening effect. Polling consistently shows that Americans’ feelings about the health of the economy shift dramatically depending on whether a Republican or Democrat is president.

That detachment from the actual health of the economy could be particularly pronounced in this year’s midterms because the pandemic has the economy in such an intense state of flux. On the one hand, Democrats can point to economic improvement since Biden took over last January — the unemployment rate is falling and wages are rising. But there are worrying signs as well. There are the surging inflation numbers, for instance, and metrics like the unemployment rate are relative. In the November 2021 jobs report, the unemployment rate was 4.2 percent — much better than April 2020, when it was a horrifying 14.7 percent, but still quite not back to its pre-pandemic levels.

This leaves plenty of room for Americans’ political identities to influence how they see the economy. Those assessments will still be based on voters’ everyday economic realities — whether they think the rent and the price of milk are rising, whether they’ve lost or gotten a job, whether their neighbors seem to be struggling or prospering. But their preexisting views about the parties will likely do a lot to shape how they view the economy.

Voters’ fears about COVID-19 could haunt politicians

As we approach the two-year anniversary of the start of the COVID-19 pandemic in the U.S., there is still much uncertainty about what the future holds. While vaccination rates continue to slowly climb, the highly transmissible omicron variant and the need for all Americans to receive booster shots highlight just how unpredictable this pandemic remains. Despite concerns around omicron, many Americans are unwilling to give up the small freedoms they’ve gradually clawed back, and even with the new variant, inflation now beats out COVID-19 as the top concern in polls. This may be what it looks like for COVID-19 to start to become a fact of life, rather than a temporary disaster. But whether the pandemic is top of mind for voters this November or not, it will inarguably play a role in the midterms — both politically and practically.

Let’s start with the practical ramifications. The 2020 election landed during an early wave of the pandemic, and most states made a number of special concessions to the way voters cast their ballots to make things safer and encourage physical distancing. But while these measures were enacted temporarily in some states, they’ve now become permanent in others. Nevada and Vermont switched to universal mail voting during the pandemic, for instance, and both have now made the change permanent, while many other states have now made no-excuse absentee voting (meaning voters don’t need a specific reason to vote by mail) the law of the land.

Even some states that have recently enacted voter restriction laws kept a few pandemic-time voting expansions. For example, despite taking steps to make it harder to vote, Georgia also required a minimum number of drop boxes per county (prior to the pandemic, drop boxes weren’t required at all). It seems that once voters tried out new, more convenient ways of voting, many didn’t want to go back to the old way of doing things.

But beyond changes to how we vote, the long tail of the pandemic will also likely play a role in for whom we vote — or that’s what many politicians are banking on, at least. On the Democrats’ side, there’s an effort to celebrate the party’s successes in responding to the pandemic, such as the relief package passed in March 2021, while also criticizing the response from Republicans. For example, during the California recall election last year, Gov. Gavin Newsom touted his pandemic response and later claimed his win demonstrated that voters appreciated a strong response to COVID-19. (How much of a role COVID-19 played in Newsom’s victory, however, is up for debate.) But Americans’ approval of the Biden administration’s response to the pandemic has precipitously dropped since early July 2021, around the time delta became the country’s dominant strain.

Earlier in the pandemic, approval of Biden’s COVID-19 response was much higher — higher even than his overall approval rating. Now, though, one of his few strong suits with the public has diminished, giving Republicans fresh ammunition. Republicans have leaned into calling out Democratic responses to the pandemic, like vaccine and mask mandates, as violations of freedom, although some Republicans have encouraged voters to get vaccinated (which hasn’t proven to be a particularly effective message with their voters). They’ve also begun firing up their base over the economic woes that have rippled out of the pandemic, such as labor shortages and supply chain delays.

There’s also a good chance that other issues will eclipse the pandemic. Along with the economy taking up more mental space lately, Americans’ concerns around the pandemic tend to ebb and flow with case numbers, as a series of pre-omicron polls from Fox News show. When asked in early August (as the late-summer surge was starting to grow), 69 percent of registered voters said they were very or extremely concerned about the pandemic. That number then grew to 74 percent in mid-September, as that wave was cresting, but when asked again in mid-October (with that wave on the retreat), it shrank back to 67 percent.

As vaccinations increase and more workers begin to trickle back into the office, it’s possible that the pandemic winds up playing a smaller role in the midterms than it has so far. In fact, even in November 2020, as cases swelled to record levels, COVID-19 didn’t play as big of a role in the election as many expected. By this November, it could be an even more minor player in our electoral circus.

Republicans stand to benefit from redistricting, but the overall impact might be small

We’re roughly at the halfway point in redistricting, as 32 states with 279 congressional districts have finished redistricting following the delayed release of the 2020 census last year.1 And while many states still have to draw their lines, we already have a decent idea of what the overall contours of the congressional map will be.

But given the amount of control Republicans have over the redistricting process — the GOP will draw more than twice as many districts as Democrats this cycle — it’s a little surprising that neither party looks set to make major gains in the House due solely to redistricting. We just haven’t seen a dramatic shift favoring one party in the states that have finished drawing their lines. Compared with the old national map, the number of Democratic-leaning seats (defined as seats having a partisan lean of at least 5 percentage points more Democratic than the country as a whole) has increased from the old map, while the number of Republican-leaning seats (R+5 or redder) hasn’t really changed.2

One thing we can point to, though, is that the number of highly competitive seats — those between D+5 and R+5 — is down. And that’s in large part because Republicans have so far been particularly successful in making competitive seats they control much safer for their party in 2022. The number of competitive Republican-leaning seats has shrunk from maps drawn the 2010 census, while the number of safe Republican seats has increased markedly. We can see this trend clearly in states where the GOP controlled redistricting, as previously competitive seats like Indiana’s 5th Congressional District or Texas’s 24th District have become far redder.

For Democrats’ part, they have also tried to create more Democratic-leaning seats in states where they controlled redistricting. So far, they haven’t increased the number of safe Democratic districts, but they have increased the number of competitive Democratic-leaning seats. This reflects their strategy to trade away some dark-blue seats in states like Illinois and Nevada to improve their party’s position in nearby districts that were more competitive on the pre-2022 maps.

The reduction in baseline competitive turf is an important feature of this redistricting cycle; it means that the two parties will be able to more easily lock in control over more seats and to narrow the already-thin campaign battlefield. Most congressional districts are currently quite safe for one party or the other, and that’s not likely to change. It’s true that 18 states haven’t yet finished drawing their lines, but we don’t expect one party to substantially benefit from these new maps. Yes, Republican mapmakers in Florida may draw lines that add a seat or two to their column, but Democrats in New York could produce a map that gives them a chance of flipping a handful of GOP-held seats.

And beyond those two states, about one-third of the remaining seats left to be drawn are not under one party’s control, usually because the state has divided government — as is the case in Pennsylvania and Wisconsin, for instance. A map in one state might end up benefiting one party more than the current lines, but this collection of maps could very well work out to be a wash in the end.

Still, there are wild cards to keep in mind, such as lawsuits that could overturn potential gerrymanders. Yet while Republicans have wider control of redistricting than Democrats, and while they have done quite a bit to shore up their incumbents, The Cook Political Report estimates that the GOP might gain only two to three seats from the redistricting process — a seat swing that is unlikely to decide the House’s fate on its own, considering the president’s party has, on average, lost 26 House seats in midterms since World War II.

What about an October surprise?

We’ve walked you through a host of factors that could influence the 2022 midterms, but sometimes a surprising last-minute event shakes up the race. A hallmark example of this is the 2016 presidential election, when FBI Director James Comey sent a letter to Congress days before the election announcing that the FBI had reopened its investigation into the private email server Hillary Clinton had used as secretary of state. The news dominated headlines, and her lead in the national polls fell nearly 3 points over the next week, with her going on to narrowly lose to Donald Trump.

Now, there aren’t many moments that count as “October surprises” — most day-to-day news events and candidate gaffes during a campaign don’t matter very much. But as the 2016 example shows, they can’t entirely be ruled out as a factor that could affect voter attitudes, especially if a fair number of voters haven’t made up their minds.

# 2ac

## rural health

### 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.

#### 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

## t-priv

### Private Sector – 2AC

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

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

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

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

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

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

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

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

Private Sector

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

## t-core

### 2ac – t-no ftc

**All three are core and the neg knows it**

**FTC No Date**—“The Antitrust Laws.” 2013. Federal Trade Commission. June 11, 2013. https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

Congress passed the first antitrust law, the **Sherman Act**, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the **Federal Trade Commission Act**, which created the FTC, and the **Clayton Act**. With some revisions, these are the **three core federal antitrust laws still in effect today**.

## wto cp

### WTO CP – 2AC

#### Absent fiat, the Court will not do the aff after negotiations

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

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

#### CP fails, causes delay, and links to net benefits

Kretzmer 19 [Tevia Kretzmer, LLM from the University of Kent, BA (LLB) from the University of Johannesburg, Legal and Compliance Consultant at Rutherford, “To What Extent, If At All, Is It Desirable Or Realistic To Aim For A Global Agreement On Competition Policy?”, 5/6/2019, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3404131>]

The substantial costs associated with developing and implementing a global competition policy have not gone unnoticed. For many countries, a cost-benefits analysis needs to take place, especially when a number of factors can increase the costs, time and political difficulties associated with establishing a harmonised agreement.63 The associated costs can also be categorised, with direct costs, out-of-pocket costs, opportunity costs as well as political costs all forming part of the general outlay that would be required to implement such a competition policy.64 This begs the question why any developing country would undertake such a commitment, especially with such limited resources and expertise. Ultimately, states will only cooperate when it is both in their respective interests and a benefit can be gained from such cooperation.65 This inherent selfishness means a global competition policy is merely a farfetched misconception, which is frustrating when one considers the benefits such an agreement could yield. As Noonan succinctly explains, ‘An agreement on core competition law principles could facilitate the acceptance that foreign competition laws are bona fide and not contrary to public policy in the recognising state.’66

#### WTO fails in the context of antitrust

Kretzmer 19 [Tevia Kretzmer, LLM from the University of Kent, BA (LLB) from the University of Johannesburg, Legal and Compliance Consultant at Rutherford, “To What Extent, If At All, Is It Desirable Or Realistic To Aim For A Global Agreement On Competition Policy?”, 5/6/2019, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3404131>]

This essay has attempted to examine whether it is desirable or realistic to aim for a global agreement on competition policy. In order to assess this question, a thorough analysis of certain central actors in the development of competition policy was undertaken. The WTO is regarded as perhaps the most suitable forum for compiling an integrated competition agreement due to its vast membership and inherent capacity to undertake such a task. However, is it is argued that this seemingly positive attribute is also the WTO’s weakness, in that this divergence of membership, and the accompanying varied interests these members share, means a coherent and fair policy is difficult to establish. The fact that the WTO is first and foremost a trade organisation, whose main function is to facilitate global trade and eliminate trade barriers, means the WTO may not be perfectly suited to implementing global competition policy. The OECD was also analysed, and while it appears the organisation may be a valid forum for the creation of a global competition agreement, it is not without its shortcomings. While the OECD has an exemplary track record in publishing guidelines and best practices and is held in high esteem by its peers, the exclusive nature of the OECD and its lack of institutional structure has not gone unobserved. The writer did however assert that the OECD may indeed be the preferred avenue for developing an international competition agreement. This assertion stems from the fact that the OECD is not only deemed an authoritative figure among other institutions, but it has made a tangible effort in trying to introduce non-members to some of its best practices. Finally, the ICN was examined. The ICN is the only institution that deals exclusively with competition related issues and is regarded as the most effective convergence vehicle. Its inevitable shortcomings stifle its aim to become the leader in the preparation and application of competition policy. The ICNs lack of a headquarters and secretariat means the ICN simply acts as a ‘virtual’ network, where no physical policy implementation occurs. The non-binding nature of its recommendations also means its suggestions serve as guidance at best.

### WTO CP – Global Corporatism NB – 2AC

#### Squo solves – your ev says plurilateral agreements have blossomed and are an effective alternative

FYI. MSU = Blue.

Hufbauer 8—(nonresident senior fellow, the Institute's Reginald Jones Senior Fellow from 1992 to January 2018, Maurice Greenberg Chair and Director of Studies at the Council on Foreign Relations (1996–98), the Marcus Wallenberg Professor of International Finance Diplomacy at Georgetown University (1985–92), senior fellow at the Institute (1981–85), deputy director of the International Law Institute at Georgetown University (1979–81), deputy assistant secretary for international trade and investment policy of the US Treasury (1977–79), and director of the international tax staff at the Treasury (1974–76)). Gary Clyde Hufbauer & Jisun Kim. 4-11-2008. Peterson Institute for International Economics. "International Competition Policy and the WTO." <https://www.piie.com/commentary/speeches-papers/international-competition-policy-and-wto>. Accessed 6/2/2021.

Bilateral and Regional Agreements

While WTO negotiations on an international competition regime have stalled, some countries have addressed competition policy issues in their bilateral or regional agreements. The most successful case is the European Union. Over several decades, the European Commission has developed a body of European law (drawing on the laws of member states), and has worked out a division of competence between the European Commission and national authorities. As a result, the European Union has made great strides toward creating a single market, now covering 27 countries. The United States has enacted its own laws related to international competition policy, notably the International Antitrust Enforcement Assistance Act (IAEAA) of 1994. This statute authorizes US authorities to enter into agreements for sharing business information in the context of investigations of cross-border transactions.

Bilateral and regional trade agreements have blossomed since the early 1990s, and they have become an effective alternative to the WTO for addressing competition policy questions. According to the UNCTAD (2005), of the 300-odd bilateral and regional trade agreements in force or in negotiation, over 100 contain provisions related to competition policy. The main reason is to ensure that efforts to liberalize trade by eliminating border barriers are not undercut by restrictive practices behind the border. The United States is quite active among countries that have incorporated competition policy provisions in trade agreements. Several US free trade agreements (FTAs), either in force or awaiting congressional ratification, include chapters on competition policy.7 However, by contrast with competition laws in the European Union and ASEAN, which promote high-level economic integration, the competition provisions in most bilateral and regional agreements are not binding commitments, and instead depend on the goodwill of the parties to have meaningful effect.

Nonetheless, these agreements may offer an opportunity for developing countries to level up their competition policy. In its study, the OECD (2006) analyzed 86 trade agreements that include competition-related provisions, and found that about two-thirds were between developing countries (often referred to as South-South agreements), and more than a fourth covered signatories from developing and industrialized economies (so-called North-South agreements).8 This pattern suggests an opportunity for developing countries to address their own competition policy concerns in bilateral or regional trade agreements.

Perspectives on Future Competition Policy under the WTO

A multilateral agreement on competition policy may be highly desirable. Given sharply divergent views, however, the prospect for a WTO agreement covering all 150-odd members is remote. Over the next decade (after the Doha Round is concluded or abandoned), the best prospect is for a plurilateral agreement reached among a subset of WTO members. Within this more limited ambit, it would be important to have some developing countries on board. An acceptable agreement under WTO auspices should thus resolve some issues of interest to developing countries, such as export cartels and the anticompetitive aspects of large M&A deals. To end on an optimistic note, scope exists for a constructive WTO competition policy agenda that covers the interests of both developed and developing countries.

#### Universal harmonization is impossible but the squo solves through informal cooperation and treaties

Murray 19 [Allison Murray, JD from the Loyola Law School, Los Angeles Law School, BS in Business Administration from the University of Redlands, Judicial Law Clerk at the U.S. Bankruptcy Courts, Former Corporate Paralegal at Boeing, Degree in Economics and Management from the University of Oxford, “Given Today's New Wave of Protectionism, Is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade's Coffin?”, Loyola of Los Angeles International and Comparative Law Review, Volume 42, Number 1, 42 Loy. L.A. Int'l & Comp. L. Rev. 117, Winter 2019, p. 117-119]

B. Informal Harmonization and Cooperation

Efforts to informally harmonize international competition laws have continued despite the failure of formal international laws. The Organization for Economic Cooperation and Development (“OECD”) and the United Nations Conference on Trade and Development (“UNCTAD”) each adopted codes that outlined negotiations and agreed to competition law principles.135 The codes were completely informal and non-binding.136 Although the OECD’s latest recommendations for antitrust cooperation were revised relatively recently in 1995, the agreement is still a “law . . . of the softest variety.”137 This is in part because Western industrialized nations seek to address anticompetitive behavior, while the burgeoning countries are more concerned with promoting economic development and regulating multinational corporations.138

The International Competition Network (“ICN”) is another institution that encourages cooperative action on antitrust principles.139 However, the ICN, much like other informal networks, does nothing to limit or minimize the protectionist behaviors of countries, which is common in the face of uncertainty and lack of consensus on topics such as antitrust.140

Lack of enforceability aside, these negotiations and cooperative efforts “established a framework that has been reasonably successful and has set the stage for more binding commitments on a bilateral basis.”141 The fact of the matter is that there is no economic model that is globally or unanimously accepted by all nation-states, so there can be no truly successful global harmonization.142 To internationalize the law, even in an informal capacity, would require the policy behind the laws to be agreed upon.143 How can one agree to perfect and protect an economic policy that is not itself uniform amongst all nations?144

C. Regional and Bi-lateral Treaties

In addition to informal harmonization efforts, certain regional and bilateral treaties have been put in place to encourage cooperation on antitrust enforcement.145 In 1991, the U.S. and E.U. entered into a cooperative antitrust agreement.146 Other nations have also entered into antitrust cooperation agreements.147 These agreements are not harmonized, vary widely, and contain different levels of required cooperation.148 Yet, they are a country’s best bet for solidifying any kind of binding cooperation with another country on antitrust laws.

## devolve cp

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

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

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

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

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

1. Midcal Foreseeability

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

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

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

2. Active Supervision

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

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

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

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

#### Links to FTC da

Ellis 94 (Richard, Professor of Politics – Willamette University, Presidential Lightening Rods, p. 2)

An American president, Laski maintains, cannot deflect blame onto subordinates. A president’s position as head of the executive branch, Laski insists, “makes him a target to be attacked by every person or interest at all critical of his purposes. He is there in all cases, to be blamed; and there is no one, in any real sense, who can help to bear the burden of the blame.” In contrast to England, where we blame an anonymous entity ‘the Government’ if things go wrong, … in the United States it is the president who is blamed. A decision of the Supreme Court is regarded as adverse to his policy; a defeat in Congress is a blow to his prestige; the mid-term congressional elections affect his policy, for good or ill. No one thinks of them in terms of their effect upon his cabinet.

### Federalism – 2AC

#### Their federalism links don’t apply – states can still ENFORCE antitrust broadly post-plan

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.

#### Failure to meaningfully constrain anticompetitive effects from Parker causes the Court to obliterate state role

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]

Conclusion

It is common to observe that since Garcia v. San Antonio Metro, there are no judicially-enforced boundaries between federal and state power. Federalism, in other words, is dead. 284 But in fact, judicially-enforced federalism - lurking behind an obscure and technical area of law known as state action antitrust immunity - is very much alive. For most of the last century, the Court quietly tinkered away with the contours of this federalism, struggling under the false formalism of a discernable boundary between state regulation and private cartels. But with the Court's last three antitrust cases, the tinkering has given way to reformation.

What used to be a doctrine with deep roots in constitutional federalism - the sort now declared "dead" - is now a doctrine with close ties to the federal administrative state where courts sit in judgment of an agency's procedure. The change is a welcome one, both because the old antitrust federalism was unworkable and because the new regime of accountability review addresses the inherent capture at the heart of modern state regulation, while affording some deference to state regulatory choices. Accountability review mitigates the risk of delegated self-regulation while retaining some deference - without which antitrust federalism would not be federalism at all.

The success of the new regime depends on how the Court defines its requirement that states "actively supervise" self-regulation or else expose it to antitrust challenge. The Court should only find "active supervision" where the state's politically accountable actors have taken transparent responsibility, not only for the regulation in general, but also for its specific anticompetitive effects. Without giving accountability review such bite, states will continue to selectively repeal the Sherman Act in the guise of self-regulation. If the new antitrust federalism fails to rein in the self-dealing epitomized by the current state of professional licensing, [\*1445] for example, the Court may be forced to take a heavier hand against the states and sacrifice federalism at the altar of competition. But abandoning the federalism of antitrust federalism is strong medicine; better to give the new antitrust federalism a fighting chance and save its obliteration for another day.

## ftc mean cp+da

### 2AC

#### Expanded scope isn’t the problem, better policy solves the link

MSU = (go) green

1NC Sokol 12/13—(Green Professor of Law at the USC Gould School of Law and an Affiliate Professor of Business at the Marshall School of Business). D. Daniel Sokol & Abraham L. Wickelgren. December 13, 2021. “Populism at the FTC Undermines Enforcement”. ProMarket. <https://promarket.org/2021/12/13/ftc-populism-antitrust-enforcement-sokol-wickelgren/>. 1/9/22.

This is a symptom of the larger process problem: The majority statement on the withdrawal cited the agency’s experience—yet the staff was likely not consulted. If they had been, they could have ensured the statement made the economically-defensible case for stricter merger review.

\*\*MINNESOTA BEGINS\*\*

Leaders of well-managed organizations listen to staff, but the FTC staff, Commissioner Christine S. Wilson recently said, has become increasingly marginalized in decision-making, noting “current leadership has sidelined and disdained our staff.” This leads the staff to invest less in the agency and the best employees to find other employment. What keeps talented staff making less money in the government is the knowledge that they make a difference. Without motivated and high-quality staff, the FTC cannot effectively maintain current work levels, let alone effectively expand enforcement. In her testimony, Wilson said that staff have been silenced externally—or as Commissioner Wilson states more directly, FTC leadership has been “muzzling staff internally and externally”—forbidden to speak publicly and present their scholarship. Ignoring and disrespecting staff undermines the agency’s capabilities and leads to enforcement errors and court losses.

Internal decision-making. Studies across fields show the importance of diverse viewpoints in creating more effective outcomes. Yet the FTC, said Wilson, has erected walls between majority Democratic and minority Republican Commissioners—they no longer share drafts of decisions, which is unprecedented in modern antitrust history.

Due process. The FTC hastily created public meetings without sufficient opportunity for stakeholders to respond with comments; for example, the public had only a week to respond to the plan to drop the vertical merger guidelines to offer comments to update the reality of the merger guidelines, after roughly a year since their introduction and with arguments for its withdrawal being challenged by the leading antitrust law and economics professors and the Department of Justice expressing reservations about the hasty withdrawal. Further, the FTC invites only one-minute commentary for stakeholders and only after it has voted (often along partisan lines—a change from prior administrations where agreement on harms created more legitimacy for enforcement).

The increase in political polarization has now bled into antitrust, and the FTC has become political in a way that it had not been for more than a generation. This violates accepted norms of proper notice and comment and creates a sham version of input. Further, the FTC’s abandonment of the vertical merger guidelines while the Department of Justice Antitrust Division has kept them (at least for now, though it is possible that AAG for Antitrust Kanter may withdraw) means that when a deal is reviewed by one agency, the companies arbitrarily will be treated differently than they would by the other antitrust enforcer.

Undermining accountability. Populists have criticized antitrust policy as insufficiently accountable to the democratic process, making it odd the FTC is assuming authority to make competition rules without explicit Congressional authorization. Odder still, the FTC claims that Section 5 of the FTC Act should be expanded to its 1914 original intent, but at the same time expands the pre-merger review law to include the notification of debt in merger filings—against the express original intent of that law. And when companies comply with the law and then complete their mergers, the FTC is issuing letters threatening to sue at some indefinite later time, defeating the purpose of pre-merger review and eliminating a critical bargaining chip that incentivizes companies to give the FTC sufficient time to conduct its review.

A Way Forward

First, Commissioners should embrace procedural fairness principles of due process, transparency, and genuine openness to input. Such an embrace creates better evidence to shape outcomes.

Second, the FTC should create substantive legitimacy. Deliberation on the substance requires acknowledging both the benefits and costs. The best way to do this is to seek out non-partisan expertise, as well as input from stakeholders, rather than relying on ideological predispositions in which economic analysis takes a backseat to other amorphous factors. Economic analysis provides an empirical basis for action and tools to understand evidence and data. As economics changes, it allows antitrust to embrace new theoretical insights informed by facts. Durable change requires good process, dispassionate analysis and buy-in from multiple external stakeholders as well as from the courts. Legitimacy in substantive outcomes based on careful deliberation will make such outcomes less likely to be overturned by future administrations. This greatly reduces the risk of unintended or harmful consequences.

Third, use the expertise and experience of the FTC staff. If the best antitrust lawyers and economists feel disrespected and ignored, they have no reason to stay in public service for much less money than they could make in the private sector. Without them, the FTC cannot perform its essential role of keeping our economy competitive.

#### 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.

#### 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 expertise avoids the link

Hoofnagle 19 [Chris Jay Hoofnagle is an American professor at the University of California, Berkeley 8-8-2019 https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress/]

Given these constraints, FTC attorneys make pragmatic choices in their case selection. At any given time, line attorneys are investigating many companies and weighing decisions on where to target limited enforcement resources. The FTC can only bring actions against a small fraction of infringers, and it has chosen cases wisely to make loud statements to industry about how to protect privacy.

Even with these severe limitations, it has managed to bolster important norms and send strong signals to industry that have influenced the practices of many companies. It has become a significant enforcement agency that industry pays attention to. It has an enforcement record that compares quite well to other agencies in the US as well as around the world.

#### 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.

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

#### FTC can’t solve AI – limited scope and implementation challenges

Heaven 21 (Will Douglas Heaven, senior editor for AI at MIT Technology Review, covers new research, emerging trends and the people behind them. Previously, founding editor at the BBC tech-meets-geopolitics website Future Now and chief technology editor at New Scientist magazine, April 21st 2021, “This has just become a big week for AI regulation” MIT Technology Review <https://www.technologyreview.com/2021/04/21/1023254/ftc-eu-ai-regulation-bias-algorithms-civil-rights/>) MULCH

One big limitation common to both the FTC and European Commission is the inability to rein in governments’ use of harmful AI tech. The EU’s regulations include carve-outs for state use of surveillance, for example. And the FTC is only authorized to go after companies. It could intervene by stopping private vendors from selling biased software to law enforcement agencies. But implementing this will be hard, given the secrecy around such sales and the lack of rules about what government agencies have to declare when procuring technology.

## floodgates

### Floodgates – 2AC

#### No link – Section 5 isn’t privately enforceable

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.

#### And – their ev says floodgates is about Section 4 of Clayton

Their card for reference. MSU = Blue.

Stern 3—(BA, JD Candidate at University of Pennsylvania Law School). Toby J. Stern. 2003. “Federal Judges and Fearing the "Floodgates Of Litigation". 6 U. Pa. J. Const. L. 377. <https://scholarship.law.upenn.edu/jcl/vol6/iss2/8/>. Accessed 11/4/21.

\*\*Clayton Act Section 4 is the basis for private rights of action in antitrust—it establishes damages for "any person injured in his business or property by reason of anything forbidden in the antitrust laws”

Another set of cases in which the floodgates argument recurs are those involving the enforcement of the antitrust laws under Section 4 of the Clayton Act.3 9 Floodgates arguments are particularly applicable to Section 4 cases. That statute mandates treble damages and attorneys' fees to a successful antitrust litigant,40 providing an incentive for 41 someone with a marginal claim to sue.

For example, in Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., the Second Circuit Court of Appeals considered "the question whether one who is not a 'target' of an alleged antitrust conspiracy has standing under § 4 of the Clayton Act., 42 In answering the question in the negative, the court argued against opening the floodgates to "every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected."4 Specifically, the court claimed that "the lure of a treble recovery, implemented by the availability of the class suit... would result in an overkill." 44 The dissenting judge, however, held fast to his view of the relevant Supreme Court precedents, claiming that the Court "has constantly recognized that antitrust laws should be given the broadest and most liberal interpretation in order to effectuate Congressional intent."45

A similar situation arose in In re Industrial Gas Antitrust Litigation.4 In that case, the Seventh Circuit held that a fired and blacklisted gas worker was not entitled to bring a private treble damages suit against his employer under Section 4.47 The court echoed the fear expressed in Calderone (and cited the language quoted from Calderone above), claiming that "[u]nless § 4's phrase 'by reason of' is interpreted to require a direct causal link between the antitrust violation and the resulting injury, the courts would be flooded with antitrust litigation.”48

Thus the floodgates argument can appear in many types of cases, but tends to recur in those cases where a litigant seeks to establish a new right or cause of action. 49 At the appellate level, it is as likely to be found in dissenting opinions as it is in those of the majority.

#### NC Dental thumps – only a risk the aff solves

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

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

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

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

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

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

Conclusion

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

#### Clogged now – COVID 19 has doubled caseloads – and, it’s getting worse

Griff Witte and Mark Berman 12/19/21, Griff Witte is a national correspondent for The Washington Post, Mark Berman is a national reporter for The Washington Post, “Long after the courts shut down for covid, the pain of delayed justice lingers,” Washington Post, https://www.washingtonpost.com/national/covid-court-backlog-justice-delayed/2021/12/18/212c16bc-5948-11ec-a219-9b4ae96da3b7\_story.html

When the coronavirus struck American shores in early 2020, the red-brick courthouse that has stood sentry on Main Street in Newport, Vt., since the late 19th century abruptly shut down.

So did courthouses nationwide. But unlike most, the one in Newport — a small, lakeside community nestled a short drive from the Canadian border — has never fully reopened.

With jury trials still suspended, cases are being dismissed by the dozen. Defendants live with charges they can’t shake. And Dick Collier lies awake at night, wondering if he will die before the man accused of killing his daughter faces justice.

“That’s my fear,” said Collier, 81, and in precarious health. “That I might not live long enough to see him go to trial.”

Nearly two years after the American justice system was paralyzed by a pandemic, the repercussions continue to radiate through communities nationwide, from tiny towns to the largest cities.

District attorneys face some of the longest case backlogs in living memory. Defendants languish in jails that have become breeding grounds for the coronavirus. Others are set free — and, some prosecutors say, may be contributing to a spike in violent crime that is only compounding the pileup.

Although the shutdown in Newport is extreme — most courthouses are back in action, even if they are not yet at their pre-pandemic capacity — legal officials from coast to coast say justice delayed by covid-19 will continue to be a feature of the American landscape for several years to come. And that’s assuming the courts don’t have to shut down again for omicron or another new variant.

“This is a three-year project to get the number of pending cases back to what it was. And I’m an optimist,” said Dan Satterberg, prosecuting attorney in King County, Wash., which includes Seattle. “It’s a historic challenge that we’re facing right now.”

The backlogged system has had deadly consequences, officials say.

In Wisconsin, Darrell Brooks was set to stand trial this year for allegedly firing a gun at his nephew. Prosecutors were ready, as was the defense. But there was no courtroom available. With the system unable to deliver the speedy trial that Brooks had requested — and that the state was required to deliver — he was released on $500 bail.

While out, court records show, the 39-year-old allegedly tried to use his car to run over the mother of his child and was arrested once more. But an overburdened junior prosecutor juggling a jury trial and two dozen other felony cases set his new bail at $1,000 — an amount the district attorney would later call “a mistake” — and Brooks was released again.

Just days later, on Nov. 21, prosecutors say Brooks plowed his car into the Christmas parade in the Milwaukee suburb of Waukesha, hitting 60 people — and killing six. This time, his bail was set at $5 million.

While critics have focused on the low bail amounts, Milwaukee District Attorney John Chisolm said the case was better understood as the tragic consequence of when courts can’t keep up.

“This is a system issue right now, and it’s only going to get worse,” Chisholm told reporters this month. “These backlogs aren’t going to magically disappear.”

Delays in the U.S. court system are nothing new, of course. Long before the coronavirus, America stood out among its industrialized peers for the extensive wait times from charges filed to verdict delivered.

“It’s not that the criminal justice system was a model of efficiency prior to the pandemic,” said Christopher Slobogin, a law professor at Vanderbilt University. “But now things have gotten much worse, and ultimately that’s not good for anybody.”

When the pandemic struck, the impact on the courts was immediate and far-reaching: The Pennsylvania Supreme Court declared a “statewide judicial emergency” and extended filing deadlines. Virginia’s Supreme Court issued an order suspending nonessential proceedings in circuit and district courts. The Iowa Supreme Court announced that it was pushing back criminal trials, while Alabama’s Supreme Court suspended in-person court proceedings.

Because criminal defendants have a constitutional right to face their accusers, criminal trials — unlike civil and family law cases — generally could not be conducted remotely. And amid fears of superspreader events, jury trials in cramped quarters seemed especially unwise.

The shutdowns reverberated nationwide, but to varying degrees. Some states reopened far more quickly than others. Now, even as certain areas report lengthy delays, others say their backlogs are gone. A survey by the Thomson Reuters Institute released in August found that the average backlog in state and local courts had increased by about a third.

Vera Institute of Justice Vice President Insha Rahman said that, on the whole, the courts were slow relative to other parts of society in getting back up and running. And the reason, Rahman said, is insidious: The courts disproportionately “process cases for people who are poor, who are Black and brown. If the courts were filled with cases of White kids from suburban, wealthy parts of our communities, there would have been more urgency to bring things back to normal.”

#### No spillover – they’ll use MDL to handle higher caseloads

Wendy Behan 13, is a partner with San Diego-based CaseyGerry and a member of its pharmaceutical and medical device litigation practice team, 11/4/13, “Multidistrict Litigation Helps Relieve Clogged Courts,” http://www.caseygerry.com/bylined-articles/multidistrict-litigation-helps-relieve-clogged-courts

Large-scale litigation makes especially huge demands on an already over-burdened system. Designed to streamline the process, multidistrict litigation (MDL) refers to a special federal legal procedure created to consolidate a range of cases — such as pharmaceutical and other product liability suits, patent infringement and investment fraud cases.¶ In fact, for cases involving common questions of fact, multidistrict litigation has grown to become the preferred method by parties and the courts as it is an effective tool to centralize a large number of individual cases.¶ Statistics from the U.S. Judicial Panel on Multidistrict Litigation indicate a sharp rise in MDLs. From 1968 through 2012, there were 415,995 civil actions centralized for pretrial proceedings in MDLs, up from 393,676 in 2011 and 349,913 in 2010.¶ MDLs can be confusing — even for seasoned attorneys. Although it’s possible for multidistrict cases to include class actions, MDL is not a type of class action (a civil proceeding usually brought about on the behalf of multiple clients with common or similar injuries caused by the same product or action). Unlike class actions, in an MDL there is not a single trial that resolves all the cases; rather, the individual cases are consolidated under a single federal judge.¶ For cases to be considered for MDL, the judicial panel must find one or more common questions of fact. Since commonality is also a required element for a class action, class actions are often included in MDLs.¶ Created by an act of Congress (28 U.S.C. Section 1407) in 1968, the U.S. Judicial Panel on Multidistrict Litigation is comprised of seven federal judges, each from a different judicial circuit. The panel was originally developed in response to problems in courts related to a nationwide antitrust conspiracy among electrical equipment manufacturers. Lawmakers and the judiciary agreed that the panel could coordinate such complex cases — which are frequently filed in multiple federal court districts.¶ With this in mind, the panel was developed to determine whether individual cases involving similar issues should be moved from various courts to a single federal district court for pretrial proceedings. Typically, cases are consolidated under one federal judge who handles common pretrial discovery matters. The goal of this process is to conserve resources — avoiding duplication of discovery and preventing inconsistent pretrial rulings.¶ Some states, including California with its Judicial Council Coordinated Proceeding, have a similar mechanism known as multicounty litigation. A similar body or the state high court makes the decision to transfer at the state court level. As with MDL, a single judge oversees and administers the cases so that they can be resolved efficiently.¶ Since its inception, the judicial panel has considered motions for centralization in hundreds of thousands of cases — ranging from airplane crashes and train wrecks to drugs and other products liability cases; patent validity and infringement; antitrust price fixing; securities fraud and employment practices.

### Econ – 2AC

#### 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).”

## bbb

### Politics – General – 2AC

#### No vote switching --- ideology, party affiliation and commitments overwhelm

Edwards 16 – George C. Edwards III, Distinguished Professor of Political Science and Jordan Chair in Presidential Studies at Texas A&M, 2016, “The Potential of Presidential Leadership”, Study Done for the White House Transition Project

The best evidence is that presidential persuasion is effective only at the margins of congressional decision making. Presidential legislative leadership operates in an environment largely beyond the president’s control and must compete with other, more stable factors that affect voting in Congress in addition to party. These include ideology, personal views and commitments on specific policies, and the interests of constituencies. By the time a president tries to exercise influence on a vote, most members of Congress have made up their minds on the basis of these other factors.

### Biden Good – PC – 2AC

#### Plan’s popular and XO thumps

Financial Press, 8-21 [2021 “The best job-market fix you've never heard of: 'occupational licensing reform' may be having a moment”]

It's an issue progressives and libertarians can agree on. It has unique potential to help service workers at a moment when many of those professions have been upended. And it just got some attention from the White House.

'Occupational licensing reform' may be the most awkwardly-named, little-discussed labor topic in the American economy today. The idea is simple: the number of occupations for which an American worker must be licensed has exploded, to nearly 30% of all jobs now, up from 5% in the 1950s. That throws up barriers to entry, crimps competition, and keeps workers less mobile. Examples include service jobs such as cosmetology, floral arranging, tooth-whitening and others. As the issue gathers more attention, more workers may find it easier to access occupations that might have had requirements keeping them out — and consumers may have a broader set of choices, as well. 'Lots of people lost their jobs during the pandemic, so making sure we don't have artificial barriers to jobs is important,' said Shoshana Weissmann, a fellow and the senior manager of digital media at the R Street Institute, a free-market think tank. 'Also, when you have fewer professionals in an industry, those services can become more expensive.'

The White House, in a July executive order[1], described it this way: 'In certain occupations, such as skilled construction trades, licensing is critical to protecting public health and safety and increasing wages for workers who acquire in-demand skills and knowledge. In other occupations, however, it can impede worker mobility without countervailing benefits.'

There are nearly as many explanations about why occupational licensing is mushrooming as people taking an interest in reforming it. Ryan Nunn is a researcher at the Minneapolis Fed, and previously worked on the issue as part of the Obama administration[2]. In an interview with MarketWatch, Nunn noted that some of the licensing sprawl over the past few decades comes from the country's broad shift to a service-based economy. But, he says, research shows that two-thirds of the increase is due to 'professionalization of the workforce.' 'Occupations are organizing themselves, setting up common standards and industry groups,' Nunn said. 'Then it becomes a short leap to getting licensed. They go to the state legislature and ask for requirements to be licensed. They may see that as the final step.' That evolution is a classic example of what economists call 'rent-seeking.' It privileges those already working in the profession and makes it harder for new people to enter, which means incumbents may be able to charge more for their services, benefitting themselves at the expense of consumers. It may also be the case that giving that professional group what it wants leads to happier outcomes — contributions — for legislators. Weissmann also points to what she calls the 'there oughta be a law!' kind of outrage that so often boils up when something goes wrong. 'That's not always a bad impulse,' she said. But it may be misguided. Take the example of the New Jersey dog groomers. Dozens of dogs died over the course of a decade after being groomed at privately held PetSmart stores around the state, prompting a 2018 local news investigation[3] and a push for legislation that would require licensing for groomers. 'Bijou's Law'[4] failed to pass initially but has been re-introduced. 'There's better ways to achieve a lot of the same outcomes that people want,' Weissmann told MarketWatch: inspections, for example. (Dog-grooming safety seems to strike a special chord for Americans: a recent Twitter kerfluffle erupted after a local television reporter in Washington, DC, seemed to suggest dogs were being murdered by groomers.)

Nunn points to North Carolina State Board of Dental Examiners v. Federal Trade Commission, a Supreme Court case decided in 2016, as an example of overreach and reform. The high court agreed with the FTC[5] that a state licensing board made up of practitioners needed some supervision. 'Their concern was the state was delegating too much authority to the industry,' Nunn said in a MarketWatch interview. 'The dentists got to regulate themselves.'

Even though nearly all licensing is done on the state level, Nunn believes there's a role for the federal government to play, as the FTC did in that North Carolina case. There's also the bully pulpit that the White House and others can command, he said — issuing an executive order, as the Biden administration did, or convening a task force of state leaders, as the Obama administration did.

#### Tons of thumpers including antitrust

Kang 1-20 [Cecilia Kang covers technology and regulation and joined The Times in 2015, 1-20-2022 https://www.nytimes.com/2022/01/20/technology/big-tech-senate-bill.html]

Lawmakers on Capitol Hill are readying a major push on bills aimed at restraining the power of the country’s biggest tech companies, as they see the window of opportunity closing quickly ahead of the midterm elections.

A Senate committee is expected to vote Thursday on a bill that would prohibit companies like Amazon, Apple and Google from promoting their own products over those of competitors. Many House lawmakers are pressing a suite of antitrust bills that would make it easier to break up tech giants. And some are making last-ditch efforts to pass bills meant to strengthen privacy, protect children online, curb misinformation, restrain targeted advertising and regulate artificial intelligence and cryptocurrencies.

Most of the proposals before Congress are long shots. President Biden and top Democrats in Congress have said addressing the industry’s power is a high priority, but numerous other issues rank even higher on their list. These include passing voting rights legislation, correcting labor and supply chain constraints, enacting a social services package and steering the nation out of the Covid-19 pandemic.

#### PC fails and doing more benefits the agenda

Waldman 20 – Paul Waldman, opinion writer for the Plum Line blog, “Joe Biden has to move fast,” 12/3/20, The Washington Post, https://www.washingtonpost.com/opinions/2020/12/02/joe-biden-has-move-fast/

Once you realize that the public is neither aware of nor particularly concerned about process questions, you can stop worrying about whether Republicans will squawk at this appointment or that executive order — because they’ll squawk no matter what you do. If it’s a good idea and you think the results will be good, then just do it. As quickly and comprehensively as possible.

As David Roberts of Vox observes: In 2009, Obama and his aides made the mistake of thinking that their major initiatives had to be rolled out one at a time in sequence, because he had a finite store of “political capital” that had to be spent carefully. But political capital is not something that exists apart from any particular issue; it isn’t a special sauce that has to be poured on a policy in order to make it palatable.

And with the parties as polarized and unified as they are, political capital has become all but meaningless. There may have been a time when a popular president possessed so much capital that a senator from the opposition party would feel compelled to support him on part of that president’s agenda, but that time is long gone. There is no account Biden can draw on to turn Republican “no” votes into “yes.”

So setting up a series of high-profile policy battles may be the opposite of what Biden should do. The unfortunate fact is that he may not have the opportunity to do much in the way of big legislation on health care or climate change or anything else, and if he has only executive power to work with, it makes it all the more urgent to move quickly.

Which means getting staff in place immediately and then unleashing them. The Revolving Door Project argues that Biden should give as much authority as possible to the agencies to let them dismantle their particular corners of the Trump legacy on their own, because the task “simply will not happen if approached sequentially or micromanaged” by a White House staff with limited bandwidth.

That means moving on every policy area all at once. There’s nothing to be gained by putting off any part of Biden’s agenda. Whatever he can do given the limits of his power, he should do as soon as possible, in a flood of policymaking.

### Courts – 2AC

#### Courts don’t link – avoids gridlock, horse-trading and takes the blame for elected branches

Ward 9 [Artemus, Professor – Political Science – Northern Illinois University “Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court”, Congress & the Presidency, Jan-Apr, (36)1; p. 119]

After the old order has collapse the once- united, new-regime coalition begins to fracture as original commitments are extended to new issues. In chapter 3 Whittington combines Skowronek's articulation and disjunctive categories into the overarching "affiliated" presidencies as both seek to elaborate the regime begun under reconstructive leaders. By this point in the ascendant regime, Bourts are staffed by justices from the dominant ruling coalition via the appointment process - and Whittington spends time on appointment politics here and more fully in chapter 4. Perhaps counter-intuitively, affiliated political actors - including presidents - encourage Courts to exercise vetoes and operate in issue areas of relatively low political salience. Of course, this "activism" is never used against the affiliated president per se. Instead, affiliated Courts correct for the overreaching of those who operate outside the preferred constitutional vision, which are often state and local governments who need to be brought into line with nationally dominant constitutional commitments. Whittington explains why it is easier for affilitated judges, rather than affiliated presidents, to rein in outliers and conduct constitutional maintenance. The latter are saddled with controlling opposition political figures, satisfying short-term political demands, and navigating intraregime gridlock and political thickets. Furthermore, because of their electoral accountability, politicians engage in position-taking, credit-claiming, and blame-avoidance behavior. By contrast, their judicial counterparts are relatively sheltered from political pressures and have more straightforward decisional processes. Activist Courts can take the blame for advancing and legitimizing constitutional commitments that might have electoral costs. In short, a division of labor exists between politicians and judges affiliated with the dominant regime.

#### Plan’s announced in June

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.

### BBB Chunks – 2AC

#### Won’t pass and states solve

Adler 1-20 [Ben Adler is the senior climate editor for Yahoo News. 1-20-2022 https://www.yahoo.com/author/ben-adler]

With action to address climate change stalled in Congress, states across the country are ramping up efforts to reduce their greenhouse gas emissions.

In his State of the State speech on Jan. 11, Washington Gov. Jay Inslee asked state legislators to appropriate $626 million in 2022 for combating climate change, including $100 million in rebates for buying electric vehicles and $100 million in grants for institutions installing solar panels. Although passage is hardly guaranteed, the Washington state Legislature is controlled by Inslee's fellow Democrats, who have so far reacted positively to his proposal.

“The world looks to our state as leaders in climate innovation,” Inslee said, noting that he led a group of 68 local governments in a delegation at the recent U.N. Climate Change Conference in Glasgow, Scotland. Referring to a 2021 law that commits the state to reducing the pollution that causes global warming, he added, “It is our state’s legal obligation to reduce emissions — but it is also practical, and most importantly, it is a moral obligation.”

The day before, down the coast in California, Gov. Gavin Newsom proposed spending $22 billion on the environment, including climate initiatives such as $6.1 billion over five years to subsidize electric vehicles and to create 100,000 new charging stations, $750 million to deal with drought, $1 billion in tax incentives for developing green energy technologies and $380 million for developing longer battery storage — which is key to developing an all-renewable energy portfolio.

The week before Newsom and Inslee rolled out their agendas, New York Gov. Kathy Hochul unveiled an ambitious climate plan of her own, including $500 billion for offshore wind energy generation and what would be the first ever statewide ban on gas hookups in new buildings.

Coming on the heels of an announcement by Sen. Joe Manchin, D-W.Va., in December that he would not provide his crucial vote for President Biden’s Build Back Better agenda, which contains an unprecedented $555 billion in spending to address climate change over the next 10 years, environmental experts say state governments are now where the action is.

“There absolutely needs to be federal leadership on national and international goals and commitments,” Maryland Environment Secretary Ben Grumbles, who is president of the Environmental Council of the States, recently told US News. “But for the nation to meet its national commitments, it’s truly up to the states to implement them.”

States have considerable power to regulate electric utilities, for example. A majority of states have already made commitments to produce a larger proportion of power from clean energy sources, such as wind, solar and nuclear.

“There are lots of states that are already pointing toward 100 percent clean power in the coming decades,” Leah Stokes, an environmental policy expert at the University of California, Santa Barbara, told Yahoo News. Many of those goals have been set for the middle of the century: In California it’s 2045, and in Colorado it’s 2050.

“What states could do to go farther is ratchet those targets up, bring those timetables forward, so target 100 percent clean power by 2035, which is President Biden’s goal,” Stokes said. “In California, for example, they could ratchet up the clean-electricity standard statewide, and I think that could be on the agenda this year.”

While Democrats have led the transition away from fossil fuels at the state level, the politics of climate change are less polarized on party lines the further one gets from the federal government. In the very red state of Nebraska, for example, electric utilities are publicly owned. Although the state government has no climate action plan, in December the Nebraska Public Power District, the state’s largest electric utility, voted in favor of adopting a nonbinding goal of net-zero emissions by 2050. Last September, when Illinois became the first Midwestern state to plan a full phaseout of fossil fuels, some Republicans backed the bill because it included nuclear subsidies beneficial to their districts.

#### No bill

Bolton 1-21 [Alexander Bolton, Senior Reporter at The Hill, 1-21-2022 https://thehill.com/homenews/senate/590698-democrats-hope-to-salvage-bidens-agenda-on-manchins-terms]

Manchin on Thursday told reporters that he’s ready to rip up the Build Back Better Act. “We’re going to start with a clean sheet of paper and start over,” he said.

Manchin dismissed the idea that any proposals are guaranteed to be included in any package he’s likely to support, insisting that negotiators will “just be starting from scratch.”

Speaker Nancy Pelosi (D-Calif.) on Thursday suggested dropping the name “Build Back Better” to help the talks get off to a fresh start.

“What the president calls ‘chunks’ I would hope would be a major bill going forward. It may be more limited, but it is still significant,” she said.

It’s quite a reversal from last year, when Democrats promised Build Back Better would be a transformational bill that would tackle income inequality by increasing taxes on the wealthy and dramatically expanding an array of social services.

### Warming Impact – 2AC

#### It’s not key – they have cards infrastructure intersects with emissions, not that it SOLVES

#### Not existential AND their models fail.

Piper 19---Kelsey Piper, citing John Halstead climate change mitigation researcher at the Founders Pledge. [Is climate change an "existential threat" — or just a catastrophic one? 6-28-2019, https://www.vox.com/future-perfect/2019/6/13/18660548/climate-change-human-civilization-existential-risk]

I also talked to some researchers who study existential risks, like John Halstead, who studies climate change mitigation at the philanthropic advising group Founders Pledge, and who has a detailed online analysis of all the (strikingly few) climate change papers that address existential risk (his analysis has not been peer-reviewed yet).

Halstead looks into the models of potential temperature increases that Breakthrough’s report highlights. The models show a surprisingly large chance of extreme degrees of warming. Halstead points out that in many papers, this is the result of the simplistic form of statistical modeling used. Other papers have made a convincing case that this form of statistical modeling is an irresponsible way to reason about climate change, and that the dire projections rest on a statistical method that is widely understood to be a bad approach for that question.

Further, “the carbon effects don’t seem to pose an existential risk,” he told me. “People use 10 degrees as an illustrative example” — of a nightmare scenario where climate change goes much, much worse than expected in every respect — “and looking at it, even 10 degrees would not really cause the collapse of industrial civilization,” though the effects would still be pretty horrifying. (On the question of whether an increase of 10 degrees would be survivable, there is much debate.)

Does it matter if climate change is an existential risk or just a really bad one?

That last distinction Halstead draws — of climate change as being awful but not quite an existential threat — is a controversial one.

That’s where a difference in worldviews looms large: Existential risk researchers are extremely concerned with the difference between the annihilation of humanity and mass casualties that humanity can survive. To everyone else, those two outcomes seem pretty similar.

To academics in philosophy and public policy who study the future of humankind, an existential risk is a very specific thing: a disaster that destroys all future human potential and ensures that no generations of humans will ever leave Earth and explore our universe. The death of 7 billion people is, of course, an unimaginable tragedy. But researchers who study existential risks argue that the annihilation of humanity is actually much, much worse than that. Not only do we lose existing people, but we lose all the people who could otherwise have had the chance to exist.

In this worldview, 7 billion humans dying is not just seven times as bad as 1 billion humans dying — it’s much worse. This style of thinking seems plausible enough when you think about past tragedies; the Black Death, which killed at least a tenth of all humans alive at the time, was not one-tenth as bad as a hypothetical plague that wiped us all out.

Most people don’t think about existential risks much. Many analyses of climate change — including the report Vice based its article on — treat the deaths of a billion people and the extinction of humanity as pretty similar outcomes, interchangeably using descriptions of catastrophes that would kill hundreds of millions and catastrophes that’d kill us all. And the existential risk conversation can come across as tone-deaf and off-puttingly academic, as if it’s no big deal if merely hundreds of millions of people will die due to climate change.

Obviously, and this needs to be stressed, climate change is a big deal either way. But there are differences between catastrophe and extinction. If the models tell us that all humans are going to die, then extreme solutions — which might save us, or might have unprecedented, catastrophic negative consequences — might be worth trying. Think of plans to release aerosols into the atmosphere to reflect sunlight and cool the planet back down in the manner that volcanic explosions do. It’d be an enormous endeavor with significant potential downsides (we don’t even yet know all the risks it might pose), but if the alternative is extinction then those risks would be worth taking.

But if the models tell us that climate change is devastating but survivable, as most models show, then those last-ditch solutions should perhaps stay in the toolkit for now.

Then there’s the morale argument. Defenders of overstating the risks of climate change point out that, well, understating them isn’t working. The IPCC may have chosen to maintain optimism about containing warming to 2 degrees Celsius in the hopes that it’d spur people to action, but if so, it hasn’t really worked. Maybe alarmism will achieve what optimism couldn’t.

That’s how Spratt sees it. “Alarmism?” he said to me. “Should we be alarmed about where we’re going? Of course we should be.”

Swedish teenager Greta Thunberg has taken an arguably alarmist bent in her advocacy for climate solutions in the EU, saying, “Our house is on fire. I don’t want your hope. ... I want you to panic.” She’s gotten strong reactions from politicians, suggesting that at least sometimes a relentless focus on the severity of the emergency can get results.

So where does this all leave us? It’s worthwhile to look into the worst-case scenarios, and even to highlight and emphasize them. But it’s important to accurately represent current climate consensus along the way. It’s hard to see how we solve a problem we have widespread misapprehensions about in either direction, and when a warning is overstated or inaccurate, it may sow more confusion than inspiration.

Climate change won’t kill us all. That matters. Yet it’s one of the biggest challenges ahead of us, and the results of our failure to act will be devastating. That message — the most accurate message we’ve got — will have to stand on its own.

# 1ar

## health

### Innovation – A2: Gray 21 – Irrelevant Snark – 2AC

#### No, *you*

UMN ND (“Morris Kleiner Professor” University of Minnesota, Hubert H. Humphrey School of Public Affairs, <https://www.hhh.umn.edu/directory/morris-kleiner>) MULCH

Graphical user interface, website

Description automatically generated

#### Not us

MSU ND (MSU People Search, You need a msu login but trust me lol, Michigan State University, <https://search.msu.edu/people/index.php>) MULCH

Graphical user interface, application, website

Description automatically generated

### Innovation – A2: Gray 21/Redbird Study

#### The Redbird study is methodological *junk* – other academics agree with Kleiner, not Grey!

Timmons 18 (Edward J. Timmons is Professor of Economics and Director of the Knee Center for the Study of Occupational Regulation at Saint Francis University, Darwyyn Deyo, Assistant Professor of Economics at San Jose State University, Research Affiliate and current Visiting Scholar at the Knee Center for the Study of Occupational Regulation, Morris M. Kleiner, lives in a basement in St. Paul, Minnesota, Professor of labor policy at the Humphrey School of Public Affairs at the University of Minnesota, “A Response to “New Closed Shop: The Economic and Structural Effects of Occupational Licensure” Mercatus Institute, mercatus.org/publications/corporate-welfare/response-“new-closed-shop-economic-and-structural-effects) MULCH

Occupational licensing, a practice whereby individuals must get permission from the government to work for pay, impacts about a fifth of American workers in jobs from doctor, dentist, and barber, to florist, travel agent, upholsterer, and more.[1] Historically, studies on the effects of occupational licensing have found that when a job becomes subject to licensure, employment in that occupation falls and wages rise.[2] In addition, prices for consumers usually go up when buying services in licensed industries.[3] These results follow the standard decrease—or shift to the left—of the supply curve often taught in a principles of economics class. However, a new sociological study on occupational licensing in the American Sociological Review has been generating attention because it finds that employment increases in licensed occupations and that wages do not increase.bThe results of the study are that the supply of labor increases as a result of licensing, the demand for licensed services decreases, wages are not affected by licensing, and there is increased entry into licensed professions by historically disadvantaged groups. However, the study has many issues that limit the validity of the findings for policy analysis and decision-making. We will focus on three major issues in the study: (1) the study does not begin with a theoretical framework, (2) there are issues with the data used to generate the study results, and (3) the study suffers from flaws in its empirical methodology. In the sections that follow we highlight several of the problems that we have identified.

Is Theory Justifying the Results or Vice Versa?

Although using varied datasets may produce novel results, if these results exist without a theoretical or logical context it is difficult to explain why a result exists. Correlation is not the same as causation. Before the results of the empirical study were considered, the author should have set forth a formal theoretical model or consistently logical approach that explains why employment would increase after the passage of occupational licensing. Instead, the paper first presents a series of empirical results that defies existing economic theory and common sense, and then attempts to produce a theory that is not formally developed. In addition, little attempt is made to explain the new results in the context of the existing literature. Instead, the author seems to disregard the approaches and findings of decades of existing economic research and empirical results on the effects of licensing without offering a rigorous alternative model.

Despite occupational licensing often receiving public support on the grounds of improving public health and safety, the research literature suggests that occupational licensing significantly limits entry and employment opportunities in a given occupation.[5] Licensing may also increase demand or perceived quality because consumers consider a licensed service to be of higher quality and are willing to pay more for it.[6] Practitioners in licensed occupations often face multiple barriers to entry in that market, including requirements for several years of additional education and job training, passing exams set by state licensing boards (often overseen by their future competitors), and paying large entry fees upfront and on a yearly basis.[7] Defenders of occupational licensing argue in favor of these restrictions because, they claim, occupational licensing protects the public from undue harm from incompetents and charlatans.

The author’s contribution to the theory on the effects of occupational licensing (provided after a discussion of the empirical results) is that licensing enhances entry into an occupation by formalizing entry requirements that were previously nonstandardized or that were applied unevenly from group to group. In the words of the author, “It is more appropriate to think of licensure not as the introduction of closure, but as a shift in the type of closure that entrants face.”[8] The author also proposes a theory of “diffusion,” suggesting that “the supply of labor increases in a licensed occupation as the license is adopted by a greater number of states.”[9] However, this theory does not explain why the presence of more specific barriers to entry would make an occupation more attractive to potential new entrants compared with occupations that are unlicensed or less widely licensed. The theory also fails to explain why professional associations fiercely lobby to obtain and maintain occupational licensing. In addition, if we apply this theory to its logical conclusion, we would expect that when all states separately require occupational licensing, the labor supply for that occupation would be significantly higher than any comparable scenario with fewer licensed states. However, the author’s own results contradict this theory and an alternative theory of prestige and status is advanced instead.[10] Unfortunately, the author does not test this model of the evolution of licensing. Developing a more carefully defined theory prior to presenting the empirical results would have helped address these issues.

Is the CPS an Appropriate Dataset for the Analysis?

The second major limitation of the study comes from the fact that the data sample used to generate the findings is extremely small, especially when considering that most licensing takes place at the state level. The study uses data from the CPS from 1983 to 2012, totaling about 4.6 million observations for individual employment and wages by states, years, and occupations in the full sample.[11] Although 4.6 million observations may appear to be a large number at first, this total is meant to represent individuals over 50 states over a span of 30 years.[12] That total breaks down to an average of 3,061 observations per state per year. Once the hundreds of occupations in the study are accounted for, the sample size is estimated to be in the single digits for each state, year, and occupation.[13] This is a small sample size, and is by no means large enough to estimate the effects of licensing on employment or wages. It is also likely that some occupations do not have multiple observations in a given state—especially in states with small populations such as Rhode Island and Wyoming—and for each year, making it even harder to estimate the effect of licensing on employment and wages over time. We also cannot assume there are representative observations for both licensed and unlicensed occupations with this sample size in each of the states. Even if the results confirmed previous findings about occupational licensing, this sample size would be too small. Further, the sample size used for the significant findings on wages and employment is actually about 1.8 million observations.[14]

In addition to the small sample size, the CPS fails to include wages for the self-employed. Previous estimates suggest that approximately 14 percent of licensed workers are self-employed.[15] As a result, the author excludes all self-employed workers from the analysis. All medical professions (e.g., doctor and dentist), where the barriers presented by occupational licensing are substantial, are ignored. The author does note this limitation, and a robustness check was performed on the pooled sample of all occupations, but this limitation is not fully addressed within the broader interpretation of the empirical findings.[16] This pooling approach also does not account for differences in self-employment across occupations. Using the pooled sample for the robustness tests would conflate the effects of licensing with the effects of occupation-specific factors related to the corresponding labor supply and wages.

Flaws in Empirical Methodology

Beyond providing insufficient justification of a new theory and using a dataset that is likely not appropriate for the analysis, the empirical methodology used in the study also has serious flaws. Combining approximately 462 occupations,[17] some of which have lengthy requirements for entry (such as dentist), with others (such as notary and manicurist) whose requirements are minimal, causes the estimates of the analysis to be biased downward. The merger of these occupations would naturally drive the results toward a finding of no effect. Unfortunately, the skill level or fixed cost required to be licensed are not taken into account in the analysis.

Perhaps most importantly, the author fails to differentiate occupational licensing “coverage,” where there is a law governing the specific occupation, from “attainment,” where the person has a specific government license to do the work in that state. In other words, engineers are universally licensed in the United States. That is, engineers are “covered” by occupational licensing statutes in all 50 states. However, most engineers are able to practice without a license depending on the nature of their work. In other words, most engineers do not have to “attain” the license in order to work. The same can be said for accountants. The author acknowledges this limitation, but also falsely claims that “this is a limitation existing in all studies of licensing and wages.”[18] Studies using survey data by Morris Kleiner and Alan Krueger; Kleiner and Evgeny Vorotnikov; and Maury Gittleman, Mark Klee, and Kleiner are able to differentiate between coverage and attainment and consistently find evidence that licensing attainment results in increasing wages.[19] The failure to separately account for coverage and attainment downward-biases the study’s results on employment and wages, and the author’s discussion of this significant limitation is inadequate.

The study also makes a concerning error when calculating the primary results of the study. In the analysis that produces the surprising result of increased employment, the study uses a sample that is limited to observations for occupations that are at least “partially licensed after 1970.”[20] This means that the analysis lacks a true control group with which to compare the effect of licensing on occupations. An appropriate control group for the author’s analysis would require at least the inclusion of occupations that were never licensed, or comparing the same individuals or occupations before and after they were licensed. Although the control group of unlicensed occupations is currently unbalanced with the treatment group of licensed occupations, a careful study design could address these issues, and both licensed and unlicensed occupations could be included in this analysis. However, the CPS data would still not be the appropriate dataset for this study, given the methodology used by the author. The study includes occupations such as lawyer and doctor, where requirements are high, along with dog walker and florist, where requirements are small. The relevant question is what happens to people in the same occupation before and after licensing is required.[21] Further, if the CPS data are used, the number of occupations studied should be smaller and an effort should be made to make sure that the occupations are similar in terms of licensing requirements and other demographic factors. This will make sure that the study is comparing apples to apples, as opposed to apples to oranges. This issue undermines the fundamental validity of the study results.

In contrast to the Redbird 2017 study, extensive research and economic theory has found that occupational licensing restricts employment and increases wages for those already in the occupation, along with raising prices for consumers. One recent longitudinal study on licensing estimated the effects of “grandfathering” when occupational licensing is introduced. Grandfathering is a practice whereby existing practitioners of a newly licensed occupation are allowed to practice in the occupation but do not face the same entry costs to the market as future entrants.[22] The study considers a 75-year period (22 years of data) for 13 major universally licensed occupations (where most individuals in the occupation had to obtain a license in order to work), utilizing a sample of more than 11 million observations. The study authors found that licensing was positively associated with wages for continuing and grandfathered workers, a result consistent with decades of occupational licensing research and economic theory.

## Devolve CP

### Perm do the plan through the court

#### Doesn’t sever: plan’s silent on agent. USFG can be one branch.

Chicago 7 (University of Chicago Manual of Style, “Capitalization, Titles”, http://www.chicagomanualofstyle.org/CMS\_FAQ/CapitalizationTitles/CapitalizationTitles30.html)

Q. When I refer to the government of the United States in text, should it be U.S. Federal Government or U.S. federal government? A. The government of the United States is not a single official entity. Nor is it when it is referred to as the federal government or the U.S. government or the U.S. federal government. It’s just a government, which, like those in all countries, has some official bodies that act and operate in the name of government: the Congress, the Senate, the Department of State, etc.

### No solvency

#### Too slow

Zimmerman 4 **–** Ph.D., Professor of Political Science – Rockefeller College (Joseph, "Regulation of Professions by Interstate Compact", CPA Journal, May, 74(5), p. 22-28, Ebsco)

The Negotiation and Ratification Process The process of enacting a compact involves three steps: negotiators reaching an agreement on a tentative compact; enactment of the compact by concerned state legislatures; and congressional grant of consent if the compact is political in nature (see below). Political obstacles typically arise during each step, even for relatively simple compacts established or proposed in the past, and may become an insurmountable obstacle. Compact negotiations. Gubernatorially appointed members representing their state on joint commissions negotiated and drafted all interstate compacts until 1930. The advantages of this method include the prestige of the commission, staff assistance, and the ability to continue negotiations over a substantial period of time. This method has been supplemented with other approaches, as illustrated by the proposed Interstate Insurance Product Regulation Compact, which was drafted by the National Association of Insurance Commissioners (NAIC), and the Nurse Licensure Compact, which was drafted by the National Council of State Boards of Nursing. Commissioners critically examine each draft compact provision and seek to include only provisions perceived to be acceptable to their respective state legislatures. Individual negotiators may raise major administrative, financial, substantive, and technical issues that must be resolved. Unanimity must be reached on each issue, often an extremely difficult task, before the compact can be submitted to each concerned state legislature. A negotiated compact proposing creation of only a study commission charged with developing recommendations to solve a specific problem or of a commission financed entirely by user fees generally involves a limited financial commitment by each compacting state and may not encounter serious legislative opposition. One or more legislative leaders in each state, however, may inform negotiators that the compact will not be enacted unless it is amended to authorize specified forms of gubernatorial or legislative oversight. Fears that political checks on the activities of the proposed compact commission could impair its functioning provide additional impetus for prolonged negotiations. In addition, governors may instruct negotiators to ensure that their states' political interests are safeguarded. Not surprisingly, state legislators may redebate many of the issues addressed by compact negotiators. If the latter fail to keep in close contact with legislative leaders or the governor, the legislature may reject the compact bill or the governor may veto it. Negotiators also may be instructed to renegotiate certain contentious compact provisions. The establishment of a compact also may be delayed or complicated by political concerns. The process of obtaining the approval of each state legislature can be lengthy because each statute must be identical to statutes enacted by the other states. There are many examples of prolonged delays prior to the enactment of an interstate compact by all concerned state legislatures. Five years were required to secure the necessary enactments for the Atlantic States Marine Fisheries Compact, which became effective in 1942. The Illinois, Indiana, Michigan, Minnesota, and Wisconsin state legislatures enacted the Great Lakes Basin Compact in 1955, but enactment was delayed in Pennsylvania (1956), New York (1960), and Ohio (1963). Compact implementation also may be delayed or prevented if one or more of the concerned states make participation contingent upon specified other states enacting the compact, as illustrated by the Ohio River Valley Sanitation Compact. The party state legislatures or the compact also can make its execution conditional upon Congress initiating specific actions. Furthermore, a compact may not be self-executing and a governor may decide not to execute it. The 1936 New York State Legislature enacted a non-self-executing compact--the Interstate Compact for the Supervision of Parolees--and it was not executed for eight years because of the refusal of Governor Herbert H. Lehman to execute it.

## Bbb

#### They dropped the plan’s announced in June – here’s ev to support it

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.

## FTC

### Thumpers

#### Tons of thumpers

Lyons 9-23 (Kim, Writer for the Verge, 9-23-2021 “New FTC memo calls for a focus on ‘structural dominance’ from big companies” The Verge <https://www.theverge.com/2021/9/23/22690176/ftc-chair-lina-khan-focus-antitrust-consumer-amazon> MSU-MJS)

In a memo to staff this week, FTC Chair Lina Khan outlined her new priorities for the agency: to focus on power imbalance, reduce harms to consumers, and address “rampant consolidation.” Khan wrote that the agency should focus its efforts and adjust its strategic approach to deal with the issues created by “next-generation technologies, innovations, and nascent industries across sectors.” And without mentioning Amazon, Apple, or Facebook by name, Khan’s list of priorities for the FTC signals that the tech giants are likely to face much closer scrutiny from the agency. First, Khan said, the FTC should take a “holistic” approach to how it considers antitrust violations, which can prove harmful to independent businesses and workers as well as consumers. “Business models that centralize control and profits while outsourcing risk, liability, and costs also warrant particular scrutiny, given that deeply asymmetric relationships between the controlling firm and dependent entities can be ripe for abuse,” Khan wrote. Khan wants the agency’s enforcement efforts focused on root causes of and incentives for unlawful conduct, such as “conflicts of interest, business models, or structural dominance.” The concept of structural dominance is a familiar theme for Khan. She wrote about it while she was a student at Yale Law School, in a now-famous paper where she argued that Amazon had managed to skirt monopoly laws to the point that its structural power gives it vast influence across the economy. In that paper, Khan also excoriated the way investors “are willing to fund predatory growth,” citing Uber as an example of a company whose investors braced to endure significant losses with the belief that they would one day recover their losses and then some. Khan’s memo this week echoes her earlier argument, calling out “the growing role of private equity and other investment vehicles” in ways that “may distort ordinary incentives” and fuel unfair competition. “Research documents how gatekeepers and dominant middlemen across the economy have been able to use their critical market position to hike fees, dictate terms, and protect and extend their market power,” she writes, adding that “deeply asymmetric relationships between the controlling firm and dependent entities can be ripe for abuse.” In addition, Khan wants to find ways for the FTC to strengthen its merger enforcement, “to address rampant consolidation and the dominance that it has enabled across markets,” and examine how contracts can perpetuate “unfair methods of competition or unfair or deceptive practices.” She also named noncompete agreements that can restrict workers from which jobs they can take, and right-to-repair restrictions as examples of unfair contracts. Apple in particular has been criticized for the way it limits how much users can repair Apple devices they own, and the FTC said earlier this year that it would fight such restrictions. “Consumers, workers, franchisees, and other market participants are at a significant disadvantage when they are unable to negotiate freely over terms and conditions,” Khan wrote in the memo.

#### They have eight top priorities now

1. Right-to-repair
2. IP Abuse
3. Monopoly offense
4. IDACO (Interlocking Directors And Common Ownership
5. Manipulation conduct
6. Bias in algorithms
7. Acts affecting armed forces members
8. Acts affecting children

Gehl et al 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)

Last week saw two notable competition-related developments from the Federal Trade Commission (FTC). The first relates to the FTC’s approval of eight new compulsory process resolutions in high-priority areas. The second concerns the FTC’s withdrawal of its approval of the Vertical Merger Guidelines issued by the FTC and Department of Justice Antitrust Division in 2020. Compulsory Process Resolutions On September 14, 2021, the FTC voted 3-2 to approve new compulsory process resolutions in eight key enforcement areas with the goal of enabling more aggressive investigations of conduct in these areas. The eight new compulsory process resolutions concern: (1) repair restrictions, (2) abuses of intellectual property, (3) monopolization offenses, (4) interlocking directors & officers and common ownership, (5) deceptive and manipulative conduct on the internet, (6) bias in algorithms and biometrics, (7) acts or practices affecting United States Armed Forces Services members and veterans, and (8) acts or practices affecting children. The FTC uses the compulsory process as an investigatory tool through the issuance of demands for data, documents, and testimony via civil investigative demands (CIDs) or subpoenas. CIDs also permit the Commission to require recipients to file written reports or answer questions under oath. 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. FTC Commissioners Noah Phillips and Christine Wilson voted against the resolutions, asserting that they do nothing to make investigations more effective and merely remove the FTC’s oversight of investigations, leaving room for reduced accountability as well as errors, overreach, excess costs, and decision making rooted in political motivations. Chair Lina Khan and Commissioner Rebecca Slaughter disagreed, emphasizing that the dissenting Commissioners overlook the fact that a subpoena must always receive Commissioner signoff, that Commissioners can and do receive briefings on the state of investigations, and that no enforcement action can move forward without majority support from the Commissioners. This publication highlights those areas impacted by the resolutions that are immediately relevant to antitrust policy and enforcement. Repair Restrictions: Repair restrictions have been a recent focus of the FTC (as well as the recent Biden Executive Order on Competition), so it is of little surprise that the FTC approved a resolution in this area to attempt to expedite impending investigations. This resolution looks to build on the FTC’s recent Policy Statement on Right to Repair. According to the FTC’s press release, the resolution will cover a wide swath of conduct, including facilitating the FTC staff’s impending investigation of violations of the Magnuson Moss Warranty Act’s anti-tying provisions, which prohibit warrantors from conditioning warranties on a consumer’s use of an article or service identified by brand, trade, or corporate name unless that article or service is provided without charge to the consumer. Abuse of Intellectual Property: With this resolution, which permits staff to investigate abuses of intellectual property rights, businesses in the pharmaceutical, technology, and gasoline refining industries can expect increased investigations surrounding their intellectual property practices given the FTC’s emphasis on those industries in its press release. That said, the resolution itself is broadly worded and could result in a spike in investigations in other industries where intellectual property rights are prevalent. Monopolistic Practices: This resolution seeks to build on the FTC’s recent focus on perceived market power abuses by technology companies and other large businesses. In particular, businesses in digital markets can expect increased investigatory activity given the FTC’s emphasis on these markets in its press release. However, the resolution is broad and will apply to any industry where the FTC perceives that market power abuses are likely. In their Joint Statement, Chair Khan and Commissioner Slaughter specifically highlighted that small businesses, franchisees, and startups routinely report that dominant firms abuse their market power and preclude the smaller firms from competing. As a result, increased investigations are likely in markets where franchisees or startups may be struggling to gain a foothold. Interlocking Directors & Officers and Common Ownership: This resolution is aimed at facilitating investigations of anticompetitive ownership stakes in competing companies, as well as interlocking directorates (e.g., where a person simultaneously serves as an officer or director of two competing corporations), which may violate Section 8 of the Clayton Act. In approving this resolution, the FTC emphasized that interlocking directorates and common ownership continue to raise significant competitive concerns and are likely to receive increased scrutiny as a result of this resolution.

#### Khan just announced a Section 5 rulemaking

Kerkhoff 11-1 [John Kerkhoff, attorney at Pacific Legal Foundation, a nonprofit legal organization that defends Americans’ liberties when threatened by government overreach and abuse, “FTC tempts legal fate with power grab,” The Hill, 11-1-2021, https://thehill.com/opinion/judiciary/579130-ftc-tempts-legal-fate-with-power-grab]

Lina Khan had not even graduated from law school when she came onto the antitrust scene advocating reform that would amount to nothing short of a legal revolution. A few years later, Khan would be sworn in as chair of the Federal Trade Commission (FTC), the powerful independent agency long focused on antitrust enforcement and consumer protection. And since confirmed, Khan has taken a sledgehammer to the antitrust status quo. That agency now plans to extend its tentacles into vast new sectors of the economy.

Consider the FTC’s actions under Khan’s leadership. In July, the FTC threw a bipartisan Obama-era enforcement policy out the window, despite broad support, without providing new guidance. Khan also arrogated to herself the power to oversee fact-finding and rulemaking, and commissioners later axed a quarter-century-old practice on prior approval for mergers. Investigations, which traditionally went forward with support from a majority of commissioners, now need the sign-off of only one commissioner. The agency tossed the vertical merger guidelines (again without any replacement). And after the Supreme Court this year unanimously smacked down the FTC’s authority to obtain monetary penalties in federal court, the FTC plans to get around the court’s ruling by invoking other powers.

These moves have rattled the antitrust world. Chatter about disgruntled FTC staff — despite Khan’s attempt to muzzle the rank-and-file — has grown louder. A former commissioner has warned of the FTC’s Icarus moment. Even current commissioners have publicly pummeled the process used to make these changes.

Yet, the agency’s latest gambit may be its most ambitious to date: The FTC plans to limit (or ban) non-compete and exclusionary contract clauses.

On what authority? That’s unclear. The agency will rely on Section 5 of the Federal Trade Commission Act, which bans “unfair methods of competition.” The FTC has traditionally enforced Section 5 on a case-by-case basis through in-house adjudication. It’s never been used to issue rules like the current proposals — for good reason.

### FTC AI

#### FTC alone fails in AI – empirics prove they’re outmatched by tech firms

Robertson 21 [Adi Robertson, Senior Reporter at The Verge, 4-20-2021 https://www.theverge.com/2021/4/20/22393873/ftc-ai-machine-learning-race-gender-bias-legal-violation]

The US Federal Trade Commission has warned companies against using biased artificial intelligence, saying they may break consumer protection laws. A new blog post notes that AI tools can reflect “troubling” racial and gender biases. If those tools are applied in areas like housing or employment, falsely advertised as unbiased, or trained on data that is gathered deceptively, the agency says it could intervene.

“In a rush to embrace new technology, be careful not to overpromise what your algorithm can deliver,” writes FTC attorney Elisa Jillson — particularly when promising decisions that don’t reflect racial or gender bias. “The result may be deception, discrimination — and an FTC law enforcement action.”

As Protocol points out, FTC chair Rebecca Slaughter recently called algorithm-based bias “an economic justice issue.” Slaughter and Jillson both mention that companies could be prosecuted under the Equal Credit Opportunity Act or the Fair Credit Reporting Act for biased and unfair AI-powered decisions, and unfair and deceptive practices could also fall under Section 5 of the FTC Act.

“It’s important to hold yourself accountable for your algorithm’s performance. Our recommendations for transparency and independence can help you do just that. But keep in mind that if you don’t hold yourself accountable, the FTC may do it for you,” writes Jillson.

Artificial intelligence holds the potential to mitigate human bias in processes like hiring, but it can also reproduce or exaggerate that bias, particularly if it’s trained in data that reflects it. Facial recognition, for instance, produces less accurate results for Black subjects — potentially encouraging false identifications and arrests when police use it. In 2019, researchers found that a popular health care algorithm made Black patients less likely to receive important medical care, reflecting preexisting disparities in the system. Automated gender recognition tech can use simplistic methods that misclassify transgender or nonbinary people. And automated processes — which are frequently proprietary and secret — can create “black boxes” where it’s difficult to understand or challenge faulty results.

The European Union recently indicated that it may take a stronger stance on some AI applications, potentially banning its use for “indiscriminate surveillance” and social credit scores. With these latest statements, the FTC has signaled that it’s interested in cracking down on specific, harmful uses.

But it’s still in the early days of doing so, and critics have questioned whether it can meaningfully enforce its rules against major tech companies. In a Senate hearing statement today, FTC Commissioner Rohit Chopra complained that “time and time again, when large firms flagrantly violate the law, the FTC is unwilling to pursue meaningful accountability measures,” urging Congress and other commissioners to “turn the page on the FTC’s perceived powerlessness.” In the world of AI, that could mean scrutinizing companies like Facebook, Amazon, Microsoft, and Google — all of which have invested significant resources in powerful systems.

#### Squo solves algorithmic discrimination—And no impact, because backlash will spark correction

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

Code processes will be refined and improved; ethical issues are being worked out DAVID KARGER David Karger, a professor of computer science at MIT, said, “Algorithms are just the latest tools to generate fear as we consider their potential misuse, like the power loom (put manual laborers out of jobs), the car (puts kids beyond the supervision of their parents), and the television (same fears as today’s internet). In all these cases there were downsides but the upsides were greater. The question of algorithmic fairness and discrimination is an important one but it is already being considered. If we want algorithms that don’t discriminate, we will be able to design algorithms that do not discriminate. Of course, there are ethical questions: If we have an algorithm that can very accurately predict whether someone will benefit from a certain expensive medical treatment, is it fair to withhold the treatment from people the algorithm thinks it won’t help? But the issue here is not with the algorithm but with our specification of our ethical principles.” Respondents predict the development of “ethical machines” and “iteratively improved” code that will diminish the negatives. Lee McKnight, an associate professor at Syracuse University’s School of Information Studies, wrote, “Algorithms coded in smart service systems will have many positive, life-saving and job-creating impacts in the next decade. Social machines will become much better at understanding your needs, and attempting to help you meet them. Ethical machines – such as drones – will know to sense and avoid collisions with other drones, planes, birds or people, recognize restricted air space, and respect privacy law. Algorithmically driven vehicles will similarly learn to better avoid each other. Health care smart-service systems will be driven by algorithms to recognize human and machine errors and omissions, improving care and lowering costs.” Jon Lebkowsky, CEO of Polycot Associates, wrote, “I’m personally committed to agile process, through which code is iteratively improved based on practice and feedback. Algorithms can evolve through agile process. So while there may be negative effects from some of the high-impact algorithms we develop, my hope and expectation is that those algorithms will be refined to diminish the negative and enhance the positive impact.” Edward Friedman, emeritus professor of technology management at the Stevens Institute of Technology, expects more algorithms will be established to evaluate algorithms, writing, “As more algorithms enter the interactive digital world, there will be an increase of Yelp-type evaluation sites that guide users in their most constructive use.” Ed Dodds, a digital strategist, wrote, “Algorithms will force persons to be more reflective about their own personal ontologies, fixed taxonomies, etc., regarding how they organize their own digital assets or bookmark the assets of others. AI will extrapolate. Users will then be able to run thought experiments such as ‘OK, show the opposite of those assumptions’ and such in natural-language queries. A freemium model will allow whether or not inputting a user’s own preferred filters will be of enough value.” An anonymous chief scientist observed, “Short-term, the negatives will outweigh the positives, but as we learn and go through various experiences, the balance will eventually go positive. We always need algorithms to be tweakable by humans according to context, creating an environment of IA (intelligent assistants) instead of AI (artificial intelligence).” Another anonymous respondent agreed, writing, “Algorithms will be improved as a reactive response. So negative results of using them will be complained about loudly at first, word-workers will work on them and identify the language that is at issue, and fine-tune them. At some point it will be 50-50. New ones will always have to be fine-tuned, and it will be the complaining that helps us fine-tune them.” ‘Algorithms don’t have to be perfect; they just have to be better than people’ Some respondents who predicted a mostly positive future said algorithms are unfairly criticized, noting they outperform human capabilities, accomplish great feats and can always be improved.