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#### Parker immunity discourages disruptive healthcare innovation

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

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

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

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

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

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

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

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

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

#### Disruptive innovation in healthcare solves pandemics

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

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

I. WHY ANTICOMPETITIVE REGULATION SUCCEEDS

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

A. The Generic Story

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

B. Additional Considerations Affecting Product Market Innovation

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

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

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

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

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

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

C. An Illustration from Automobile Distribution

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

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

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

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

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

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

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

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

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

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

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

A. Lochner, anti-Lochner, and Parker

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

B. The Potential for an Increased Level of Judicial Scrutiny

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Considering Governmental Justifications for Restraints on Competition

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

C. Institutional and Procedural Distinctions

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

### Plan

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

### 1ac – federalism

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

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

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

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

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

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

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

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

#### Effective state 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.

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

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

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

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

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

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

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

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

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

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

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

II. Parker and its Progeny

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Federalism-Based Objections to Sherman Act Preemption

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Potential FTC Moves

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

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

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

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

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

Gaining Attention

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

State Action

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

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

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

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

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

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

#### Enforcement high now and thumps links

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

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

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

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

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

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

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

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

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

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

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

Warning Letters After the Close of HSR Waiting Periods

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

More Intensive Merger Investigations

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

More Onerous Consent Decree Provisions

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

Withdrawal of the Vertical Merger Guidelines

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

Rescinding the Consumer Welfare Standard

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

Labor Market Scrutiny

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

Looking Ahead to the Year to Come

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# 2ac

## innovation

### A2: Bee 20 – Emory

#### Bee is a perm card –

* lists multiple instances where *private companies* operated in a way *consistent with socialism* – proves the aff isn’t mutually exclusive with the alt because of the market in which it operates
* Combination of aff and alt solves “uncertainty” which is the only reason their ev advocates for a full socialist economy!
* You can’t vote neg on a card that says Google and Microsoft can innovate consistently with innovation on an assertion that the aff somehow cannot do that
* MSU = Green

Vanessa Bee 20 Senior Litigation Counsel at the Consumer Financial Protection Bureau with a JD from Harvard Law. Would We Have Already Had a COVID-19 Vaccine Under Socialism? No Publication. 4-20-2020. https://inthesetimes.com/features/covid-19-coronavirus-vaccine-capitalism-socialism-innovation.html

SHARING IS CARING—AND ABSOLUTELY NECESSARY CityLab reports that, in response to the pandemic and the scarcity of official information, “a group of coders, analysts, scientists, journalists and others are working to follow coronavirus testing across the country through an open-sourced database called the COVID Tracking Project.” Open-source communities have existed since the 1980s and have contributed to a range of innovations, from the creation of the internet to cheaper prosthetics and better disaster management systems. Typically, these online open-source collectives are made up of unpaid volunteers who contribute code and features meant to be used freely. A 2006 study from the University of Illinois set out to understand why coders would donate hours of their personal time to open-source projects. Researchers found that some enjoyed the freedom and creativity of managing their own work and disliked the hierarchical communities that claimed exclusive control over projects. Other coders said they had withheld their labor from more privatized projects because seeing their contributions redirected to private hands sapped both creativity and motivation. The European Organization for Nuclear Research in Switzerland, known as CERN, has long adhered to an “open-source” philosophy, the belief that “the recipients of technology should have access to all its building blocks … to study it, modify it and redistribute it to others.” This communal ethic has helped support incredibly innovative projects. CERN operates a massive particle physics laboratory; its Large Hadron Collider (LHC) particle accelerator runs 17 miles underground and relies on collaboration networks developed through the open-source cloud system OpenStack. The LHC discovered the Higgs boson particle in 2012, earning a Nobel Prize for physicists Peter Higgs and François Englert. Two years after the Higgs boson discovery, CERN made data from its LHC experiments free to the public through an open data portal, which CERN then-Director General Rolf-Dieter Heuer hoped would “support and inspire the global research community, including students and citizen scientists.” Some of the most innovative companies in America are now open-sourcing certain projects. On the heels of four years of lawsuits over a number of smartphone patents in 2014, for instance, Apple and Google announced they would settle out of court and “work together” on patent reform. The next year, Microsoft and Google co-founded the open-source Alliance for Open Media. A number of other companies came on board, including Apple, Amazon, Intel, Cisco, Facebook, Mozilla and Netflix. Its goal was to improve video compression technology, which had been held hostage by two patent holders charging millions in licensing fees. Netflix reported the new, open-source, royalty-free video technology improved its compression efficiency by 20%. Rather than causing the imagination to stagnate, the Alliance for Open Media’s adoption of socialist principles benefited all involved—the larger media industry and their consumers alike. Of course, as Google demonstrated when it recently fired five employees involved in union organizing, the corporations involved are not challenging the economic status quo—they benefit from the precarity of work and go to great lengths to protect their bottom line. It is also highly likely that, aside from open-source advocates like Mozilla, most members of the Alliance for Open Media joined because it was economically advantageous. Intel’s director of strategy and planning, for example, explained his company believed the open-source project would “lower delivery costs across consumer and business devices as well as the cloud’s video delivery infrastructure.” Without the likely economic benefit, it is difficult to say whether the Alliance for Open Media would have ever formed—and it is precisely because of this uncertainty that a more dramatic shift to a socialist economy is necessary to maximize new innovation. Those in power stand to benefit from sowing fear around socialism, but the rest of us would be better off in a society reorganized around democracy, equality, solidarity, autonomy and collective ownership. That shift would mean more publicly funded medical research and cheaper drugs reaching those in need faster. It would mean more fearless development, unimpeded by expensive shareholder lawsuits and patent disputes. It would mean life-saving drugs like Truvada being available for all, rather than all who can afford them, and widespread economic security through the kind of safety net that empowers anyone to explore their talents, rather than just the children of the welloff. It would mean labor rights that allow workers to shape their working conditions and turn workplaces into places where ideas can thrive. It would mean an expansion of the open-source philosophy to promote free knowledge and perspectives, with collective ownership of the discoveries fueled by collective investment. It would mean an unwavering commitment to the funding of public institutions and projects, without a constant eye toward financial return. And perhaps paramount in our minds in this moment: It would mean developing a vaccine against a disease as dangerous as COVID-19—before it could become a global pandemic. 

## federalism

## T - must be CWS

### Expanding the Scope – 2AC

#### We meet – plan increases the scope of antitrust law

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

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

#### Scope refers to BOTH the letter of the law and the application --- topical affs can expand EITHER

Surden 11 --- Harry Surden, Associate Professor of Law, University of Colorado Law School, “Efficient Uncertainty in Patent Interpretation”, 2011 https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1185&context=articles

One can understand scope-of-law issues through at least two distinct analytical frameworks: one oriented upon boundaries and the other upon function. In one sense, the scope of any legal right, including a patent claim, concerns the demarcation of legal boundaries. Within law the term "legal scope" refers to both the coverage and non-coverage of a given law.96 The concept of scope suggests that application of a given legal rule will be, in some sense, limited. To reference a law’s scope is to imply that a law will not apply to all future entities, objects, and behaviors, but to some limited subset.97 From that perspective, legal scope is related to the substantive criteria by which we differentiate, ex ante, the subset of legal actors, objects, behaviors, and states that will be subject to a law’s differential treatment or legal consequences.98 A scope boundary is the "line" distinguishing that which is covered by a law from that which is not. In this sense, critiques of legal scope generally tend to focus upon demarcation of legal boundaries via the legal criteria chosen ex ante.

Within the patent claim context, questions of literal scope are, in many respects, similarly concerned with boundary-defining criteria. A primary emphasis is on the claim words and interpretive information upon which a lay observer must rely to distinguish infringing products from noninfringing products.99

Legal scope can also be understood through a related but distinct functional definition. In this orientation, we are not so concerned with legal boundaries for their own sake; rather we ask how well those boundaries perform their functional role of distinguishing specific identifiable entities or behaviors that violate a given law and are accordingly subject to its differential legal consequences. This approach to scope directs us to decompose our abstract legal categories into particular legal entities and to make specific determinations as to whether they do or do not "violate" the criteria of the law. Under this functional conception, one can characterize formal notice about patent scope by the extent to which the words of the patent claim establish boundaries that distinguish real-world objects covered by a patent claim from those that are not.

This functional framing of patent claim scope highlights a key point— claim scope is a relative formulation. It is not sufficient to simply focus on the inadequacy of the claim-word boundaries in the abstract. Rather, we must evaluate the scope of a patent claim by its ability to effectively classify the relevant universe of potentially accused products and to do so in a way that is not over- or underbroad. Any inquiry into the sufficiency of the delineation of the patent claim’s scope should be considered relative to the class of accused devices potentially inside or outside its scope. If we aim to critique a claim for having an uncertain scope, we should do so in relation to the class of products that may or may not potentially infringe. The heart of the scope inquiry is functional—to delineate and distinguish those products that literally infringe from those that do not. The import of this functional and relational component of patent scope will be apparent later when exploring strategies for improving ex ante scope certainty.

#### It’s best---

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

#### Aff flex---“core” laws are so broadly written that they massively constrain the aff---requiring aff to change more than interpretive effect isn’t supported by lit

#### Overlimits---they box out nuanced industry-specific debates and force repetitive, stale, process debates

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

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

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

### Expanding the Scope – Must End CWS

#### Their interp misreads the rez – the phrase “expand the scope of core antitrust laws” is meaningfully distinct from the “core of antitrust” – core modifies laws not antitrust

#### CWS affs link to their interp – it’s purely interpretive and not codified by the core antitrust laws

Dameron 16 [Charlie Dameron is an associate in the Washington, D.C. office of Latham & Watkins and a member of the Litigation & Trial Department 2016 https://www.yalelawjournal.org/note/present-at-antitrusts-creation-consumer-welfare-in-the-sherman-acts-state-statutory-forerunners]

The judiciary’s evolving understanding of the Sherman Act has dramatically affected the scope of antitrust law in the United States. The Supreme Court first purported to strictly construe the Act’s prohibition of “every contract . . . in restraint of trade,” noting that “no exception or limitation can be added without placing in the act that which has been omitted by Congress.”8 The Court later set aside the statute’s plain meaning9 and seized upon the statute’s use of common-law language to derive a common-law “rule of reason” prohibiting only those agreements that “unreasonably” restrained trade.10

In the middle of the twentieth century, the dominant reading shifted. In the legislative history of the Sherman Act courts found a congressional intent to preserve competition for the benefit of other producers. In his famous Alcoa opinion, Judge Hand wrote that “Congress . . . was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character.”11 He cited the Congressional Record for the proposition that the Sherman Act was designed “to put an end to great aggregations of capital because of the helplessness of the individual before them.”12 In cases like United States v. Von’s Grocery Co., the Supreme Court invoked Congress’s general fear of “concentration,” and adopted the view that the purpose of the Sherman Act was “to prevent economic concentration in the American economy by keeping a large number of small competitors in business.”13

Change came yet again in 1966. Robert Bork, then an antitrust professor at Yale, delved into the Senate debates over the Sherman Act and concluded that Congress’s legislative intent in enacting the Sherman Act was to “maximiz[e] . . . consumer welfare,” without regard to the interests of competitors.14 Within a decade, lower federal courts began signing on to this proposition.15 In 1979 the Supreme Court unanimously concluded, “Congress designed the Sherman Act as a ‘consumer welfare prescription.’”16 The Court has since repeatedly affirmed that interpretation.17

## estados cp

### estados

#### Only federal legal remedies solve – failure to explicitly narrow Parker over-immunizes private entities and chills states – that’s **Weber 16** – precedent is key to innovation – Case-by-case state application is a disaster for regulated entities

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).

## regulations cp

### Regulation CP – 2AC

#### Perm – do the counterplan – not functionally competitive – wrecks aff ground and justifies worst normal means counterplans like the 9-0 counterplan

Robinhood 20 [Robinhood Financial LLC. “What are Antitrust Laws?”. 10-6-20. https://learn.robinhood.com/articles/4x5oCZOtg43uORfxEnxPRW/what-are-antitrust-laws/]

Antitrust laws are regulations that aim to promote fair business competition in an open market and protect consumers by banning certain predatory practices.

## notice and comment cp

### Notice and Comment CP – 2AC

#### CP’s rolled back – Courts and Congress

Jones and Kovacic 20 (Alison Jones, Professor of Law, King’s College London; and William E. Kovacic, King’s College London, George Washington University, United Kingdom Competition and Markets Authority; “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy,” The Antitrust Bulletin, 65(2), 3-20-2020, DOI: 10.1177/0003603X20912884)

B. Infirmities of Section 5 of the Federal Trade Commission Act

One possible solution to rigidities that have developed in Sherman Act jurisprudence is for the FTC to rely more heavily on the prosecution, through its own administrative process, of cases based on Section 5 of the FTC Act and its prohibition of “unfair methods of competition.”93 This section allows the FTC94 to tackle not only anticompetitive practices prohibited by the other antitrust statutes but also conduct constituting incipient violations of those statutes or behavior that exceeds their reach. The latter is possible where the conduct does not infringe the letter of the antitrust laws but contradicts their basic spirit or public policy.95

There is no doubt therefore that Section 5 was designed as an expansion joint in the U.S. antitrust system. It seems unlikely to us, nonetheless, that a majority of FTC’s current members will be minded to use it in this way. Further, even if they were to be, the reality is that such an application may encounter difficulties. Since its creation in 1914, the FTC has never prevailed before the Supreme Court in any case challenging dominant firm misconduct, whether premised on Section 2 of the Sherman Act or purely on Section 5 of the FTC Act.96 The last FTC success in federal court in a case predicated solely on Section 5 occurred in the late 1960s.97

The FTC’s record of limited success with Section 5 has not been for want of trying. In the 1970s, the FTC undertook an ambitious program to make the enforcement of claims predicated on the distinctive reach of Section 5, a foundation to develop “competition policy in its broadest sense.”98 The agency’s Section 5 agenda yielded some successes,99 but also a large number of litigation failures involving cases to address subtle forms of coordination in oligopolies, to impose new obligations on dominant firms, and to dissolve shared monopolies.100 The agency’s program elicited powerful legislative backlash from a Congress that once supported FTC’s trailblazing initiatives but turned against it as the Commission’s efforts to obtain dramatic structural remedies unfolded.101

#### Doesn’t solve – industries dismantle notice and comment

Sidney Shapiro & Richard Murphy 13, University Chair, Law, Wake Forest University; AT&T Professor of Law, Texas Tech University, "Public Participation without a Public: The Challenge for Administrative Policymaking," Missouri Law Review, Vol. 78, Issue 2, Spring 2013, pg. 490-492.

But what if the only members of the “public” who show up are readers of the Wall Street Journal? This concern is far from hypothetical: corporate interests dominate participation in the legislative rulemaking process in the United States.8 As such, we might expect Woody Allen’s observation (our second opening quote) to come into play. If eighty percent of success is indeed just a matter of showing up, then public participation schemes designed to promote accountability or to “democratize” rulemaking have the potential to distort rulemaking into favoring private, special interests. Determining the extent of such distortion presents a terrifically difficult problem— in part because there is no consensus baseline with which to measure departures from the public interest. Still, it seems safe to presume that profit-oriented, corporate interests perceive that they get something worthwhile from their large investments in regulatory proceedings—and we are inclined to trust this perception.9

As Isaac Newton taught us long ago, for every action there is an equal and opposite reaction. To the degree that unelected, unaccountable mandarins rule, the people do not. Regulatory agencies, headed by unelected administrators, can thus create a “democracy deficit” and, at least for those who believe government derives its legitimacy from democracy,, a legitimacy deficit, too. Various polities have addressed this democracy deficit by embedding public administration in “accountability network[s] of rules and procedures[.]”10 A requirement of public participation is one such procedure common to many countries and many situations. Whether public participation serves the public, however, depends on many factors, including the particulars of the public participation scheme, the agency’s regulatory tasks, the agency’s resources and competence to fulfill those tasks, and the resources and leverage of all those persons who may be affected by the agency’s actions.

Bearing the preceding points in mind, this brief Article raises three broad concerns relating to public participation in rulemaking. First, to assess whether public participation serves the public, it is important to understand why such participation is desirable in the first place. In recent decades, two answers in particular have dominated discourse. Following pluralistic conceptions of democracy, one might say that democracy is the way that multifarious private interests that constitute the “public” cut a deal among themselves. Insofar as agency policymaking amounts to coordination of such dealmaking, it is legitimized by its democratic nature.11 A deliberative democracy conception, by contrast, sees public participation as an integral part of a process that requires agencies to consider all relevant interests before acting and to publicly justify their actions with reasoned explanations.12 The debate over which of these conceptions is better remains unresolved, and the word “democracy” is certainly fuzzy enough to allow for both. But, as this Article will develop, these conceptions can lead to very different understandings of what public administration ought to be about, and, given a choice, we will take deliberation over deals.

Second, under either conception, there is an elephant in the room in the United States: corporate clout. Empirical work demonstrates that public interest groups only participate in some rulemakings, and when they do participate, their efforts are overwhelmed by the participation of corporate interests.13 While less certain as an empirical matter, the evidence also suggests that this domination biases the rulemaking process under either conception of public participation. 14

### Turns – Democracy

#### Aff alone solves democracy

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

INTRODUCTION

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

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

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

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

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

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

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

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

I. WHY ANTICOMPETITIVE REGULATION SUCCEEDS

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

A. The Generic Story

The generic story is largely familiar from public choice theory and the literature on the Parker state action doctrine. Democratic processes systematically fail to overcome two embedded hurdles to matching regulatory schemes to broad public preferences: (1) the asymmetrical distribution of costs and benefits of anticompetitive [\*1180] regulations, and (2) the externalization of costs on populations outside the boundaries of the relevant democratic unit. 6 In tandem, these hurdles to democratic correction of cronyistic dispensations of monopoly power by governmental regulators perpetuate regulatory schemes that a broad majority of citizens would vote to overturn if they understood the issue and were sufficiently motivated to invest political energy in correcting it. 7

The first democratic deficit, well documented in public choice literature, arises because producers typically receive a much more concentrated benefit from anticompetitive regulations in comparison to the relatively unconcentrated cost imposed on consumers. 8 A small band of producers may lobby aggressively to enact or maintain an anticompetitive scheme that permits the producers to collect significant monopoly rents. 9 Those rents, in turn, may be spread across thousands or millions of consumers, each one paying a relatively small increase in rent. 10 Collective action constraints--the cost of mobilizing consumer sentiment and action to oppose the regulation--give the producers a systematic advantage in maintaining the regulation. 11 As John Shepard Wiley explained in bringing public choice theory literature to bear on Parker immunity questions:

[I]f the group [of consumers] is large, individual members have little incentive to participate because participation is personally costly and contributes little to the group's chances for successful joint action. Small groups encounter fewer of such problems. If group members behave in this rational self-interested manner, then "there is a systematic tendency for exploitation of the great by the small"; less numerous, more intensely concerned special [\*1181] interests can predictably outmatch more numerous, more mildly concerned consumer or "public" interests in legislative or regulatory fora--even though the actions of special interests impose a net loss on society. 12

The second deficit arises when governmental units--whether state or local--externalize the costs of the anticompetitive regulation outside their jurisdiction. The classic example is Parker itself, in which 90 percent of the raisins subject to California's agricultural cartel mandate were sold outside of California. 13 Out-of-state consumers could not be counted on to mobilize democratically to oppose the California regulation, as they had no political voice in California. 14

## ftc overstretch

### FTC OS – 2AC

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

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

B. Institutional Constraints and Capacities

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Other entities can enforce.

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

C. Improving Capability: Agency Cooperation and Project Selection

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

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

#### States fill-in

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

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

#### Judicial antitrust enforcement now

Baker Botts 21 [4-16-2021 https://www.bakerbotts.com/thought-leadership/publications/2021/april/fifth-circuit-hands-ftc-win-in-ftc-first-fully-litigated-reverse-payment-case]

On April 13, 2021, the U.S. Court of Appeals for the Fifth Circuit upheld the Federal Trade Commission’s (“FTC” or “Commission”) ruling that the “reverse-payment” settlement agreement between Endo Pharmaceuticals Inc. (“Endo”) and Impax Laboratories LLC (“Impax”) violated federal antitrust laws. The Fifth Circuit’s decision—which upholds the FTC’s first fully-litigated reverse-payment case since the Supreme Court’s landmark 2013 ruling in FTC v. Actavis (“Actavis”)—found the FTC’s findings that Endo and Impax entered into an unlawful “pay-for-delay” agreement to be supported by “substantial evidence.” Significantly, the panel also rejected Impax’s primary argument that the FTC needed to do more under the rule of reason to balance the anticompetitive conduct against procompetitive justifications—namely that the FTC needed to evaluate the strength of the patents at issue and assess whether it was likely Impax would have entered the market earlier absent the settlement. The court “disagree[d] that Actavis requires the Commission to assess the outcome of the patent case in order to find anticompetitive effects”—focusing heavily on the mere size of the alleged payment—and found the fact that generic competition was “possible” absent the settlement, combined with the large payment, was enough to infer anticompetitive effect under the framework outlined in Actavis.

The Fifth Circuit’s decision leaves in place the FTC’s cease-and-desist order enjoining Impax from entering similar reverse-payment settlements going forward (as the decision noted, the FTC did not invalidate Impax’s agreements with Endo or impose any monetary sanctions). But the impact of the decision on the industry as a whole—and courts’ treatment of patent settlements—may be widespread. Indeed, according to the FTC’s acting chair Rebecca Slaughter, the panel’s decision represents an “important milestone in the decades of work by FTC staff to stop pay-for-delay agreements.” And while it remains to be seen how courts (particularly courts in other circuits) will view this decision—and in particular, the Fifth Circuit’s interpretation of the guidance set out in Actavis—the ruling here will certainly have an impact on how parties approach settlement agreements to resolve Hatch-Waxman suits in the future.

Background and FTC Decision

Endo, the brand-name pharma company in this case, began selling an extended-release formulation of oxymorphone (an opioid) called Opana ER in 2006. In 2007, Impax filed the first application to market generic extended-release oxymorphone. At the time, two of Endo’s patents for Opana ER would not expire until September 2013, and Endo sued Impax for patent infringement in January 2008. Under the Hatch-Waxman Act, this would delay any FDA approval of the generic for 30 months—until June 2010—unless the litigation concluded earlier in Impax’s favor. Early settlement talks between the two companies failed, and Endo purportedly projected that generic entry would cut Opana ER sales by 85 percent and cost it approximately $100 million in revenue within six months. Separately, Endo also planned to move customers to a new reformulated version of Opana ER that would be protected by new patents and not be therapeutically equivalent to Impax’s generic, thus precluding pharmacists from automatically substituting the generic in place of the brand when filling prescriptions—a move known as a product transition or “product hop.” But the success of Endo’s product hop depended on the reformulated Opana ER getting to market sufficiently in advance of Impax’s generic product. Endo also allegedly projected that the reformulated Opana ER would generate about $200 million in annual sales by 2016 if the market transitioned to the reformulated product before the generic entered, but only $10 million annually if the generic entered first. In June 2010, with the possible launch date for Impax’s generic imminent, the parties settled the patent litigation shortly after the patent infringement trial began and less than a week before the FDA granted final approval to Impax’s generic product. Under the settlement, Impax agreed to delay launching its generic until January 2013—two and a half years after it otherwise could have entered at risk, but several months before certain patents for Opana ER expired. In return, Endo agreed not to market its own generic version of extended-release oxymorphone until after Impax’s 180-day Hatch-Waxman exclusivity period expired in July 2013, and it agreed to pay Impax a credit if sales revenue for the original formulation of Opana ER fell by more than 50 percent between the dates of settlement and the date of Impax’s entry. The agreement to provide Impax with the credit protected Impax if Endo transitioned its customers to the reformulated Opana ER; which Endo did in March 2012, resulting in a $102 million credit to Impax. In January 2017, the FTC brought separate actions against Endo and Impax alleging that the settlements was an “unfair method of competition” in violation of Section 5 of the FTC Act and an unreasonable restraint of trade under the Sherman Act. Endo settled, but Impax chose to litigate. The case proceeded in the FTC’s administrative court. In May 2018, following a three-week trial with 37 witnesses and over 1,250 exhibits, the FTC’s administrative law judge (“ALJ”) D. Michael Chappell concluded that although the reverse-payment agreement restricted competition, it was nonetheless lawful because “as a whole” its procompetitive benefits outweighed the anticompetitive effects because it allowed Impax to enter the market before the Opana ER patents would have expired. Specifically, he found that “the evidence proves that consumers have benefitted from the [Endo-Impax agreement] by having uninterrupted and continuous access to generic Opana ER since January 2013,” and that the “real-world effect procompetitive benefits of the Endo-Impax Settlement are substantial.” Judge Chappell also found that any anticompetitive harm was “largely theoretical” because there was little chance of Impax entering the market earlier absent a settlement, and Impax would not have launched “at risk.” The full Commission reviewed the ALJ’s decision de novo and reached an entirely different conclusion. The Commission unanimously reversed the ALJ, finding that to be procompetitive, the benefits of the “pay-for-delay” agreement must be directly linked to the restraint of competition to outweigh the proof that the restraint harms competition—which the Commission held was not the case here. The Commission further held that Impax’s procompetitive justifications failed because there were less restrictive ways of achieving the purported benefits. Impax’s appeal to the Fifth Circuit followed.

Fifth Circuit Decision

On appeal, the Fifth Circuit upheld the Commission’s ruling, holding that the FTC had “substantial evidence” to conclude that the reverse payments replaced “the possibility of competition with the certainty of none.” The panel found that the over $100 million in payments from Endo to Impax did not represent the fair value of services rendered or avoided litigation expenses, nor was it otherwise linked to the restraint of competition in a way that would outweigh the proof that the agreement harmed competition. The opinion also rejected Impax’s argument that the rule of reason required the FTC to do more to balance the harm with the procompetitive justifications—specifically, Impax contended that the FTC should have looked at the strength of the patents and assessed whether Impax could have entered the market earlier absent the settlement. The court held that Actavis does not require Impax’s proposed analysis, and the fact that generic competition was “possible,” combined with the large payment, was enough to infer anticompetitive effect. Indeed, in evaluating the parties’ arguments, the panel placed great emphasis on the size of the payment in evaluating the settlement. And despite holding that the FTC was not required to assess the strength of the patents or predict the outcome of the patent infringement action, the panel nonetheless reasoned that if Endo was actually “highly likely” to prevail in the infringement suit, then Impax would have likely settled for early market entry only—without any payment at all. The more than $100 million Endo ultimately paid to Impax would have been a “windfall” if Impax was likely to lose the infringement suit. The court held that the “need [for Endo] to add that substantial enticement” indicates that at least some portion of the payment was for exclusion beyond the point that would have resulted from litigating the case to conclusion. In other words, the court found the objective of the payment to Impax was to delay its product so Endo could maintain supra-competitive prices for Opana ER, the profits from which it then shared with Impax rather than face a competitive market. Impax also argued that, in hindsight, the settlement was not anticompetitive for two primary reasons. First, Endo obtained additional patents after-the-fact and has proven their validity in court. And second, Endo’s alleged “product hop” ultimately failed because in 2017 Endo voluntarily withdrew the reformulated Opana ER from the market due to safety concerns. Impax’s generic version of extended-release oxymorphone—which it began marketing in January 2013—is the only version available on the market today. But the Fifth Circuit rejected this argument as well, holding that it is “a basic antitrust principle that the impact of an agreement on competition is assessed at the time it was adopted,” and that principle applies equally in reverse payment cases. So, the focus of the inquiry is on the facts as they existed when the parties adopted the settlement. The panel concluded that because the payments at issue were unquestionably “large” and “[n]either the saved costs of forgoing a trial nor any services Endo received justified these payments,” “[s]ubstantial evidence supports the Commission’s finding that the reverse payment settlement threatened competition.” The panel next addressed the question of whether Impax could show procompetitive benefits, which the Commission concluded it could not. Although the ALJ concluded that the settlement benefitted competition, the Commission found that the procompetitive benefits did not “flow from the challenged restraint—the reverse payments themselves.” As a result, the Commission did not treat Impax’s ability to enter the market nine months before the patents expired as benefits to be weighed against the anticompetitive effects of the reverse payments. The Commission assumed arguendo that Impax could connect the settlement’s purported procompetitive effects with the challenged restraint, but nonetheless determined that even if that was the case, there was a “less restrictive alternative” because “Impax could have obtained the proffered benefits by settling without a reverse payment for delayed entry.” Given the Commission’s assumption, the panel reviewed only the “less restrictive alternative” finding—i.e., whether “substantial evidence” supports the Commission’s conclusion that FTC’s Complaint Counsel had established a less restrictive alternative. Impax argued that the evidence the FTC relied on was not probative of whether it in fact ever had the opportunity to enter in a no-payment settlement or could have done so. The panel nonetheless found that the FTC’s findings—relying on “industry practice,” as well as fact and expert witness testimony—would “allow a reasonable factfinder to conclude that the no-payment settlement was feasible.” And because there was “more than enough evidence” to uphold the Commission’s view that a less restrictive alternative was viable,” the panel held that it “must uphold” the Commission’s conclusion that the reverse-payment settlement was an agreement to preserve and split monopoly profits and amounted to an unreasonable restraint of trade.

Conclusion

The Fifth Circuit’s opinion handed both the FTC and private plaintiffs a huge win in the years-long battle against purported “pay-for-delay” settlements. But the panel’s interpretation of the guidance set out in Actavis—particularly the Supreme Court’s guidance that only “large and unjustified payments” should be subject to antitrust scrutiny—potentially places outsized importance on the size of the alleged payment (and in effect treats the payment itself as the restraint), regardless of the strength of the patents at issue or the parties’ valuations of the patent infringement action. This interpretation goes beyond what Actavis and other courts have held. And while the court’s decision may have been impacted by the highly deferential and highly nebulous “substantial evidence” standard which the FTC is accorded in its appeals, the opinion will inevitably have a significant impact on future patent settlements.

#### Antitrust links thumped – Biden’s pushing, enforcement is up, and more is coming

Morrissey 3-1 [Gerald A. Morrissey III, Partner at Holland & Knight, 3-1-2022 https://www.hklaw.com/en/insights/publications/2022/03/biden-administration-intensifies-offensive-against-ocean-shipping]

The Biden Administration issued a press release and fact sheet on Feb. 28, 2022, titled "Lowering Prices and Leveling the Playing Field in Ocean Shipping." The release builds on a series of ongoing efforts (see previous Holland & Knight alert, "DOJ to Collusive Price Gougers Exploiting Supply Disruptions: We Will Prosecute You," Feb. 18, 2022) to tackle supply chain disruptions by leveraging the Shipping Act and antitrust laws. The main takeaways are:

The U.S. Department of Justice (DOJ) is expanding its cooperation with the Federal Maritime Commission (FMC). Building on the DOJ-FMC 2021 memorandum of understanding (MOU), the DOJ will "provide the FMC with the support of attorneys and economists from the Antitrust Division for enforcement of violations of the Shipping Act and related laws." Likewise, the FMC will share shipping industry experience with the DOJ for Sherman Act and Clayton Act enforcement actions.

The FMC has already taken steps to audit ocean carriers, based on complaints received from cargo owners. In addition, the DOJ recently announced an initiative to investigate and prosecute antitrust activities in other parts of the supply chain. In its most recent initiative, the Administration is again focusing on ocean shipping, and highlighted high shipping costs and practices perceived to contribute to congestion and cost increases.

Shipping Act Reform. The Biden Administration called on Congress to "provide additional tools ... to address problems in the ocean shipping industry" and expressed encouragement with current legislative efforts. The Administration is referring to bills under consideration in the U.S. House of Representatives and Senate — the Ocean Shipping Reform Act of 2021 (OSRA 2021) (H.R. 4996) and the Ocean Shipping Reform Act of 2022 (OSRA 2022) (S. 3580) — proposing an array of different changes to the Shipping Act intending to target congestion, practices and charges. OSRA 2021 passed the House in December 2021 with bipartisan support. The Senate companion bill, OSRA 2022, is under consideration in that chamber. Despite the common purposes, the bills have significant differences that must be worked out.

Changes to Antitrust Immunity? The Administration also called on Congress to "address the immunity of alliance agreements from antitrust scrutiny under current law." According to the White House Fact Sheet, "Congress steadily deregulated the industry — expanding the antitrust immunity while weakening ocean carriers' obligations to publicly disclose prices and fees and treat businesses and their customers fairly." Further details were not provided, but neither OSRA 2021 nor OSRA 2022 appear to directly address antitrust immunity.

The White House also indicated that existing oversight efforts would continue, reported on progress with the FMC's audit program, new investigations, a new data initiative, and a pending FMC rulemaking on Demurrage and Detention billing currently open for public comment (through March 17, 2022).

Conclusion and Considerations

Coming on the eve of President Joe Biden's State of the Union address on March 1, it is anticipated that President Biden will highlight these and other efforts to address supply chain issues. Moving forward, expect continued activity on the legislative and regulatory fronts. Stakeholders with interests in the legislation and the current rulemaking still have opportunities for involvement.

Regarding the enhanced DOJ-FMC cooperation, the initiative points yet again in the direction of heightened scrutiny ahead, with the potential for more robust investigations, more enforcement capacity and harsher penalties. As Holland & Knight has advised previously, supply chain stakeholders should review their practices and antitrust compliance protocols, proceed cautiously and engage legal counsel before initiating discussions or entering into agreements with marketplace counterparties.

#### 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.

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

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### 2ac – fw

#### Framework—debate is about the plan’s desirability—self-serving neg frameworks deck fairness and remove predictable engagement with the links

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

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

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

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

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

Conclusion

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

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

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

### 2ac – sustainability

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

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

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

### 2ac – link

#### Antirust K all wrong. Reductionist *and* rejects tools that curtail violence.

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

Paul 22 Sanjukta Paul - Assistant Professor of Law, Romano Stancroff Research Scholar, Wayne State University - J.D., Yale Law School - From the article: “A Democratic Vision for Antitrust” - From the Journal – Dissent - Published by University of Pennsylvania Press - Volume 69, Number 1, Winter 2022, pp. 56-62 (Article) – modified for language that may offend - available via Project Muse

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

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

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

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

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

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

#### Market shaping avoids your links

Mazzucato 21 (Mariana Mazzucato is Professor in the Economics of Innovation and Public Value at University College London where she is the founding director of the UCL Institute for Innovation and Public Purpose. She is winner of international prizes including the 2020 John von Neumann Award and the 2018 Leontief Prize for Advancing the Frontiers of Economic Thought. January 28th 2021, “Mission Economy: A Moonshot Guide to Changing Capitalism” via kindle, pages 171-173) CULTIV8

Markets: shaping not fixing

The collective creation of value, which should be at the centre of a common-good approach, requires justifying policy in terms of actively creating and shaping markets, not fixing them. Market failure theory (MFT) assumes that markets are efficient and, when they fail, government should fix them. Government steps in to correct the sources of market failures such as positive externalities (where, due to the high spillovers,there is underinvestment by the private sector, requiring government to fund areas such as basic research); negative externalities (such as pollution, which might require government to impose carbon taxes); and asymmetric information (which can mean that banks don’t know enough about new companies, requiring SME lending by governments).

MFT has major flaws as a theory but it has nevertheless been adopted as a guide to public policy. It uses as a benchmark perfectly competitive markets characterized by perfect information, completeness, an absence of transaction costs and frictions and so on. So, to measure real markets – that is, markets in which firms compete through innovation and which will often be oligopolistic or characterized by monopoly power (e.g. because of the presence of patents) – MFT argues that the distance from a perfectly competitive market must be ascertained. Yet empirically, perfectly competitive markets don’t exist: markets are nearly always incomplete and imperfect.7 Government may therefore always be able to improve upon a decentralized market outcome, regardless of whether the result of government intervention is inefficient in a Pareto-optimal sense. This does not mean that it is incorrect to tackle market failures, such as pollution, through instruments such as carbon taxes. It just means that we need a better theory of competition to serve as the benchmark. And given that innovation is central to how firms compete, the drivers of innovation and issues around its direction should be at the centre of how we think about competition, not relegated to a list of ‘imperfections’. Furthermore, in economies aiming for transformational growth trajectories (e.g. in a green transition), it will be hard to simply ‘fix’ failures to get there.

And indeed, the examples we looked at in Chapters 4 and 5, from the moon landing to trying to tackle the SDGs, have required government doing much more than just fixing market failures. They require imagining new landscapes, not fixing existing ones, and aligning policies to inspire different actors who can spot opportunities for investment they did not see before. This is not about facilitating investment but catalysing it through the creation of new markets. This happened with the moon landing, which stimulated decades of investments in areas such as software. And it has happened more recently with the green economy: only after government led with high-risk, capital-intensive investments in green technology (e.g. early investments in solar and wind) did the private sector follow, eventually rendering the technologies more competitive.

This means that a broader view of policy can be based on market shaping, not only market fixing, which begins with the question: what sort of markets do we want? Attention needs to be paid both to the quantity of investment needed and also to its quality – and the underlying governance mechanisms. So in the health area, this would require broadening the notion of health to well-being, and investing not only in new remedies but also in new forms of preventative care and governing the intellectual property regime to deliver the outcomes desired. When patents are seen purely from a regulation angle, this perpetuates the idea that innovation occurs in the private sphere and is simply fixed in the public one. But, given the enormous public investments in creating value, patents should deliver in the public interest. This means they should be weak (easy to license), narrow (not used for purely strategic reasons) and not too far upstream (so the tools for research remain in the open domain).8

#### Advantage links are backwards too – national innovation regulation is key to the case

Stiglitz 21 (Joseph Stiglitz is an American economist and public policy analyst, who is University Professor at Columbia University. He is a recipient of the Nobel Memorial Prize in Economic Sciences and the John Bates Clark Medal, May 15th 2021, “A call to arms to change capitalism” The Lancet, VOLUME 397, ISSUE 10287, P1797-1799, <https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)01004-7/fulltext#%20>) CULTIV8

This view of the positive role of government to solve global challenges even within our capitalist society is part of a long tradition, especially in developmental economics. From Alice Amsden's early work on South Korea and Robert Wade's on Taiwan, to the World Bank's study on the East Asian Miracle, scholars have focused their attention on the central role of government in development—the developmental state. Similarly, scholars such as Richard Nelson, Christopher Freeman, and Bengt-Åke Lundvall, in their discussion of national innovation systems, have emphasised the key role of government.

Given her belief in the state's crucial role in driving science and innovation, it is understandable that Mazzucato should disparage much of mainstream economics, which gives primacy to markets and keeps the role of government to a minimum. Such mainstream economics embraces the view that government shouldn't be picking winners. That approach ignores the leadership role of the government in helping shape public purpose, and even its pivotal contributions in support of development and science and creating an inclusive society.

Of course, critics of government point to the instances in which government has backed losers. But these critics, not surprisingly, ignore the many failures in the private sector. Indeed, in the private sector such failures are praised as evidence of risk-taking—nothing ventured, nothing gained. But exactly the same argument applies to the public sector: if there were no failures, it would imply that the government was not taking sufficient risk. What matters is the average return, and in research and development (R&D), a few big successes like the development of the internet and the discovery of DNA can make up for a lot of failures. The average return on government R&D is in fact far, far higher than returns on private investments. As Mazzucato points out, government has often (as in the case of Tesla) not been smart about ensuring that it appropriates for itself and the public the full upside, but that's a very different matter from picking winners. In a particularly inspiring passage in the book, she writes:

“What if government, instead of being viewed as cumbersome while the private sector takes the risks, bears the greatest level of uncertainty and reforms its internal organization to take such risks? Imagine the transformation: from a bureaucratic top-down administration to a goal-oriented stimulator of new ideas from the ground up. Imagine government transformed across the board, from how procurement operates, to how research grants are made, to how public loans are structured and costs and budgeting are understood—all to fulfill public purpose. If we could think and act in this way, we could realize a new vision for sustainable cities or inspire business investment in the social infrastructure and health-care innovations required for a new understanding of well-being, or tackle the greatest challenges of our time such as climate change and health pandemics.”

Having been in government and advised governments, this is a vision that I've seen before. The challenge is to bring it about. Just willing or wishing it—or clearly articulating it—is not enough. There are political and economic forces at play, and without tackling them, it will be hard to realise this vision. It might, for instance, have been helpful if Mazzucato had more fully explained why we need government in the arena of innovation. Producing knowledge is very different from producing steel: there are important benefits to society that accrue from research and innovation that are not appropriated by researchers and those who finance them. Consequently, as the great economist Kenneth Arrow showed almost 60 years ago, markets are not efficient in either the production or use of knowledge. The failures relate both to the levels of investment and the direction of research—we need more research on saving the planet and less on trying to replace unskilled labour.

### 2ac – perm – neolib

#### Perm – double bind – if the alt overcomes “capitalism’s crisis” then it solves the links

#### Perm – do the plan and non-competitive parts of the alt – mixed economies key to alt solvency

Mazzucato 21 (Mariana Mazzucato is Professor in the Economics of Innovation and Public Value at University College London where she is the founding director of the UCL Institute for Innovation and Public Purpose. She is winner of international prizes including the 2020 John von Neumann Award and the 2018 Leontief Prize for Advancing the Frontiers of Economic Thought. January 28th 2021, “Mission Economy: A Moonshot Guide to Changing Capitalism” via kindle, pages 204-210) CULTIV8

This book has applied what I believe is the immensely powerful idea of a mission to solving the ‘wicked’ problems we face today. In it, I have argued that tackling grand challenges will only happen if we reimagine government as a prerequisite for restructuring capitalism in a way that is inclusive, sustainable and driven by innovation.

First and foremost, this means reinventing government for the twenty-first century – equipping it with the tools, organization and culture it needs to drive a mission-oriented approach. It also means bringing purpose to the core of corporate governance and taking a very broad stakeholder position across the economy. It means changing the relationship between public and private sectors, and between them and civil society, so they all work symbiotically for a common goal. The reason for the emphasis on rethinking government is simple: only government has the capacity to bring about transformation on the scale needed. The relationship between economic actors and civil society shows our problems at their most profound, and this is what we must unravel.

We can start by recognizing that capitalist markets are an outcome of how each actor in the system is organized and governed, and how the different actors relate to one another. This holds for the private and public sectors and for other sectors such as non-profits. No particular kind of market behaviour is inevitable. For example, the market pressure often cited as forcing a business to neglect the long term in favour of the short term, as too many companies do today, is the product of a particular organization of the market. Nor is there anything inevitable in government bureaucracies being too slow to react to challenges such as digital platforms and climate change. Rather, both are outcomes of agency, actions and governance structures that are chosen inside organizations, as well as the legal and institutional relationships between them. It is all down to design within and between organizations.

Capitalism is, indeed, in crisis. But the good news is that we can do better. We know from the past that public and private actors can come together to do extraordinary things. I have reflected on how, fifty years ago, going to the moon and back required public and private actors to invest, to innovate and to collaborate night and day for a common purpose. Imagine if that collaborative purpose today was to build a more inclusive and sustainable capitalism: green production and consumption, less inequality, greater personal fulfilment, resilient health care and healthy ageing, sustainable mobility and digital access for all. But small, incremental changes will not get us to those outcomes. We must have the courage and conviction to lift our gaze higher – to lead transformative change that is as imaginative as it is ambitious, aiming for something far more ambitious than sending a man to the moon.

To do this successfully, governments need to invest in their internal capabilities – building the competence and confidence to think boldly, partner with business and civil society, catalyse new forms of collaboration across sectors, and deploy instruments that reward actors willing to engage with the difficulties. The task is neither to pick winners nor to give unconditional handouts, subsidies and guarantees, but to pick the willing. And missions are about making markets, not only fixing them. They’re about imagining new areas of exploration. They’re about taking risks, not only ‘de-risking’. And if this means making mistakes along the way, so be it. Learning through trial and error is critical for any value-creation exercise. Ambitious missions also have the courage to tilt the playing field.

If government is indeed a value creator that is driven by public purpose, its policies should reflect and reinforce that. Too many green policies today are just minor adjustments to a trajectory that still favours the old waste-prone behaviours and the financial casino that worsens inequality. A healthy economy that works for the whole of society must tilt the playing field consistently to reward behaviours that help us achieve agreed and desirable goals. That means achieving coherence in a multiplicity of fields, from taxes to regulation, from business law to the social safety net.

As emphasized throughout the book, it is key to not pretend that social missions are the same as technological ones. With challenges that are more ‘wicked’ it is essential that moonshot thinking is linked with support to underlying government systems. For example, a moonshot around disease testing or health priorities must interact closely with the public-health system, not replace or circumvent it. Similarly, a moonshot around clean growth must interact with transport systems and planning authorities and understand behavioural change. Thus it is critical to perceive missions not as siloed projects but as being intersectoral, bottom-up, and building on existing systems (such as innovation systems, among others).

Governments cannot pursue missions alone. They must work alongside purpose-driven businesses to achieve them. As I’ve argued in this book, this requires addressing one of the biggest dilemmas of modern capitalism: restructuring business so that private profits are reinvested back into the economy rather than being used for short-term financialized purposes. Missions can accelerate this shift by shaping expectations about where business opportunities lie and also getting a better return for public investment. In this sense they can begin to walk the talk of stakeholder value. This means creating a more symbiotic form of partnership and collaboration in different sectors, whether in health, energy or digital platforms. A market-shaping perspective requires governing these interactions so that intellectual property rights, data privacy, pricing of essential medicines and taxation all reflect what needs to happen to reach the common objective. In health that must mean health innovation driven by the mission of better health care for all; in energy it must mean divestment from fossil fuels and the creation of public goods like green infrastructure and green production systems that protect the earthly oasis that Armstrong referred to; and in the digital domain it must mean the use of digitalization to improve the access of all people to the power of the technologies of the twenty-first century – while ensuring both data privacy and that our welfare states are strengthened, not weakened, by digital platforms.

Doing capitalism differently requires reimagining the full potential of a public sector driven by public purpose – democratically defining clear goals that society needs to meet by investing and innovating together. It requires a fundamentally new relationship between all economic actors willing and able to tackle complexity to achieve outcomes that matter.

#### Anti-monopoly framing solves residual links

Berk 19 [Gerald Berk, Professor of Political Science at the University of Oregon, 11-25-2019, "Antimonopoly and the Democrats," Dissent Magazine, <https://www.dissentmagazine.org/online_articles/antimonopoly-and-the-democrats>]

At first blush, it looks like antimonopoly heightens the conflict between socialists committed to overcoming capitalism and establishment centrists seeking to save it from populist attacks on the left and right. But antimonopoly once contributed to mobilization, coalition building, and sustained reform across the liberal-left spectrum, and it might do so again today.

The Antimonopoly Tradition

Democracy and markets are fragile and demanding systems, easily corrupted by formidable concentrations of power. The antimonopoly tradition recognizes this fragility, and it makes no sharp distinction between economic and political power. Excessive concentrations of political power undermine economic prosperity no less than excessive concentrations of economic power corrupt democracy. The problem for law and public policy in a democracy with markets seems simple: how to check the constant tendency to concentrated power. There’s no clear-cut way to do that, because those who seek to attain power and lock in privilege are endlessly inventive. Under the right conditions, institutions designed to check power can be used to opposite ends. As a result, antimonopoly is far more than an ideology. It is a political project that requires vigilance, action, and constant adaptation.

Reformers have drawn on the antimonopoly tradition—which is far more wide-ranging than just antitrust, a set of policies designed to prevent predatory competition and break up concentrations of economic power—throughout U.S. history. In the 1830s, Jacksonians used it to authorize privatization, dismantling the Second Bank of the United States because it locked in the privilege of an overweening aristocracy. Abolitionists in the 1840s and 1850s drew on the antimonopoly tradition to dismantle the slave power. In the 1880s, populists enacted state antitrust laws to check the growth of corporate power. In the first decades of the twentieth century, Progressives went further, breaking up corporate power and boosting countervailing forces in government, unions, and proprietary enterprise. In the New Deal, the antimonopoly tradition broke the power of banks and industrial corporations and paved the way for regulation, collective bargaining, and welfare provision. In the 1940s, liberals drew on it to outlaw discriminatory pricing and check the predatory power of chain stores. In the 1950s and 1960s, antitrust administrators broke up patent monopolies, opening the way to high technology.

The antimonopoly tradition, as this sketch demonstrates, has enabled diverse political projects. In the first Gilded Age, it provided a challenge to laissez-faire constitutionalism—the legal doctrine that markets were autonomous from politics, and that property and contracts always protected individual liberty. In today’s Gilded Age, the antimonopoly tradition confronts market fundamentalism: the belief that liberty is best realized in market transactions insulated from democratic interference; that it is possible to organize markets effectively without government supervision; and that we ought not worry about concentrations of economic power, either because they are efficient or temporary.

The turn to market fundamentalism had a major impact on the practice of antitrust, severing it from its roots in the antimonopoly tradition. The University of Chicago–trained lawyer Robert Bork, who published The Antitrust Paradox in 1978, convinced Reagan’s Justice Department that antitrust blocked efficient forms of business organization. Left alone, corporations and capital markets could decide better than government regulators whether mergers, hostile takeovers, outsourcing, or breaking up and selling off corporate assets would serve consumers. If the result was concentrated power, so be it. In time, the Democrats agreed that the only goal of antitrust was to protect consumers. By 1992, antitrust had disappeared from their platform for the first time in a century.

The resurgence of the antimonopoly tradition among Democrats indicates a sea change in how they approach economic governance. Rather than limiting debate to after-the-fact redistribution, they have begun to ask how markets and business organizations can be structured to check concentrations of power. Many Democrats are converging on a platform to rebuild a more democratic economy, even as they disagree in fundamental ways over what that means, who should benefit, and how to achieve it. Still, the antimonopoly tradition’s shared appeal could open new possibilities for party politics and reform. This might seem overly optimistic, but a closer look at how the antimonopoly tradition has informed three ideological factions within the Democratic Party—democratic socialists, (neo)liberals, and antimonopolists proper—illustrates the potential for a broader politics focused on challenging concentrated power and building a more democratic economy.

### 2ac – alt

#### Vague alts are a voter for mooting clash and justify 1ar perm modifications

#### Alt fails and causes war

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

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

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

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

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

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

#### The alt fails and generates backlash-from-above that only the perm can resolve through mixed strategies

Slobodian 21 (Quinn, Associate professor at Wellesley College, previously was a Residential Fellow at the Weatherhead Center for International Affairs, Harvard University, “The Backlash Against Neoliberal Globalization from Above: Elite Origins of the Crisis of the New Constitutionalism,” April 7th, 2021, https://doi.org/10.1177/0263276421999440)//NRG

One can see why critical scholars of global political economy favored the narrative of a ‘backlash from below’ (Frieden, 2018). The storyline of ‘an epic struggle between globalization and a resurgent nationalism’ (Crouch, 2019: 1) is attractive in its elegance and has the advantage of confirming the priors of scholars who found the legitimacy of the status quo unsustainable. It finds the seeds of discontent where they expected to find them: among those suffering economic loss, wage stagnation, and demographic change. It offers clear binaries: open versus closed, free trade versus protectionism, Smith versus Fichte, globalists versus populists, ‘citizens of nowhere’ versus ‘citizens of somewhere’ – perhaps, as the title of this special issue proposes, even neoliberalism versus post-neoliberalism.

The reliance on such binaries in interpretations of the backlash is striking. This article contends that it is also a partial story that obscures important origins of the current predicament. The backlash-from-below narrative relies on a stark scalar divide between an upper stratum of interlocked states, supranational institutions, and capitalist elites, and a lower stratum of fragmented national populations subject to their decisions. Theories of neoliberal constitutionalism support this binary by asserting, both implicitly and explicitly, a coherence of interests at the elite level around projects of free trade and neoliberal globalization. Even if qualifications about the ‘internal contradictions’ among capitalist elites were routine in the literature, the fundamental unity of the ‘Transnational Capitalist Class’ (Robinson, 2014) was maintained in practice. Because the super-stratum was comprised of globalization’s winners, by definition, the sub-stratum must contain its losers. By lumping too many interests together, the interpretative straitjacket of New Constitutionalism made it difficult for critical scholars to differentiate between the backlash from the left and the right. Thus, Bernie Sanders and Trump become common symptoms of a backlash or a ‘global organic crisis’ (Gill, 2018).

My argument – which is also a self-critique – is that scholars of New Constitutionalism may have read their opponents too closely and reproduced their arguments too faithfully. By adopting the framing of neoliberals themselves, the relatively static diagnosis of New Constitutionalism partakes in its own kind of ‘End of History’ delusion, reifying what was ultimately one of many competing propositions about organizing global political economy.

Ran Hirschl reminds us that trends toward constitutionalization in the 1990s arose from ‘a sense of threat, not hubris’ (Hirschl, 2014: 106). To defenders of the multilateral free trade order, the enemy was from outside the business community, including NGOs and civil society groups in the Global North, and untrustworthy electorates in the Global South. But the threat was also from within the business community: the pleading of corporate lobbyists and special interests for preferential treatment. Law has distributive effects and forms part of distributive struggles (Kennedy, 2016). Any global economic legal settlement ‘represents a political deal brokered in the context of power and special interests’ (Pauwelyn, 2005: 331), not the interests of a putatively unitary ‘capital’ in the abstract. To understand the dimensions of the current rupture, we must be attentive not only to the ‘left behinds’ (Ford and Goodwin, 2014) of globalization in the electorate but those sectors of capital who have felt left behind in the movement to freer trade.

This article proposes that the elite losers of the 1990s settlement are neglected forces in the disruption of the status quo of US trade policy. The US steel industry, in particular, has been disproportionately influential as an opponent of free trade. Though steel manufacturing plays a minor role in the US economy, accounting for less than 1 percent of employment and exports, it is symbolically important to issues of deindustrialization, unemployment, and masculinity, especially in the Midwestern states key to Trump’s victory (Sandbu, 2017). Steel lobbyists, including Nucor’s Dan DiMicco, framed a critique of actually existing neoliberal globalism that Trump adopted and acted on as part of his trade war. As we will see, the steel industry is a red thread linking Trump’s primary advisers on matters of trade, US Trade Representative Robert Lighthizer, Commerce Secretary Wilbur Ross, and Director of Trade and Manufacturing Peter Navarro. By looking at one particular sector of the disgruntled corporate elite, we see that the contemporary challenge to neoliberal globalization and the New Constitutionalism is not simply a backlash from below; it is also a backlash from above.

Robert Lighthizer and Competitive Liberalization

The so-called neoliberal era has been marked by frequent deviations from the rules of multilateral free trade implied by the New Constitutionalism. Perhaps most notably, the 1980s saw an extension of the New Protectionism of the 1970s (Green, 1981), when Ronald Reagan used a series of quotas, ‘orderly marketing arrangements’ and ‘voluntary export restraints’ to protect threatened domestic economic sectors. The 1980s saw a so-called Super 301 investigation added to the already existing Section 301 investigation included in the 1974 Trade Act. These legal instruments allowed for investigations by the US Trade Representative leading to the unilateral levying of tariffs or quotas on imports from countries deemed to be practicing ‘unfair trade’.

Far from gestures toward isolationism or autarky, these were market-opening maneuvers, driven by US frustration at their perceived disadvantage in the global legal landscape (Destler, 2005: 124). One such expression of frustration came from the real estate magnate Donald J. Trump, who declared in 1986 that ‘I believe it’s very important that you have free trade. But we don’t have free trade right now’ because of barriers to economic investment in booming countries like Japan and Saudi Arabia (Trump and King, 1987). The idea that one might have to break the rules of multilateral free trade through unilateral action to get to the end point of free trade in practice – also known as ‘competitive liberalization’ (Bergsten, 1996) – was a common sentiment of the decade. Some have gone as far as to call this ‘neoliberal protectionism’ (Wraight, 2019) in its use of state power to achieve the end goal of more open global markets.

One actor involved in 1980s trade negotiations would later become Trump’s most powerful trade official, Robert Lighthizer. A native of Ohio born in 1947 who attended Georgetown at the same time as former President Bill Clinton, Lighthizer served as the chief counsel for the Finance Committee under Senator Bob Dole beginning in 1978 before being appointed Reagan’s Deputy USTR in 1983. He was the chair of the US-Japan Investment Committee and helped negotiate limits on the import of Japanese steel. The US negotiated export restraints with Japan in 1984, two years after it had negotiated similar ones with the European Community (Destler, 2005: 195). Cresting on an established record of deploying state power to protect private interests, Lighthizer returned to the private sector in 1985, working for the storied Wall Street law firm Skadden Arps and acting as a lobbyist for the steel industry and ‘lead counsel for U.S. Steel in trade litigation’ (Johnson, 2018: 710). When Lighthizer became Trump’s USTR in 2017, he brought multiple members of the firm along, including the new ambassador to the WTO (Politi, 2018).

Free trade economists were ambivalent about the so-called export protectionism of the 1980s. Jagdish Bhagwati read Reagan’s rampant use of executive action on trade as a symptom of what he called ‘diminished giant syndrome’, where the US lashed out in fear of its loss of industrial dominance and compelled its trading partners to take measures that increased US competitiveness. While he disapproved of the method, Bhagwati acknowledged that these actions often functioned in the interest of opening markets. He and economist Douglas Irwin described the approach as ‘the return of the reciprotarians’, comparing it to the ‘fair traders’ of the late 19th century in Britain who also used trade deals to open new markets (Bhagwati and Irwin, 1987). Many others saw the unilateral actions of the US as productive. The measures did not conform to the spirit of the New Constitutionalism but they did help drive nations to the negotiating table for the WTO, which many weaker nations perceived as a second-worst option to dealing with the erratic executive action of the United States.

On its face, the WTO, inaugurated in 1995, was an entirely different animal than the Reaganite repertoire of export protectionism. Its champions claimed it ushered in a world economy governed by ‘rules’ as opposed to the ‘power’ of its forerunner organization, the GATT (Jackson, 1978: 98). From one perspective, the WTO’s architects were extraordinarily successful. Speaking at the neoliberal think tank, the Institute of Economic Affairs, in 2015, the WTO’s first director, Peter Sutherland, paid homage to a neoliberal icon when he said that the WTO’s framers ‘drew on two of Hayek’s key insights – the role of the price system in conveying information and the importance of the rule of law’ (Slobodian, 2018b: 273). The two features of Rule of Law for Hayek – isonomy or ‘same law’ and enforcement – were indeed covered in the WTO by the gradual elimination of special treatment for developing nations and the creation of a Dispute Settlement Mechanism with binding judgements. One of the active participants in framing the WTO enthused that it could serve as a model to help make ‘market freedoms’ into universal human rights (Petersmann, 1996–7).

Scholars who deploy the framework of the New Constitutionalism often adopt Sutherland’s framing as read. They take for granted that the state was bound in a two-level game, and decision-making was removed to an international space. Not all observers agreed. As many noted, it was easy to overstate the constitutional status of the WTO. The ‘constitutional conceits’ (Dunoff, 2006) propagated by some of those involved exaggerated the power of the WTO, which remained, as with all forms of international law, only as powerful as the states permitted it to be (Howse and Nicolaïdis, 2001). While novel in some respects, the WTO was, from another perspective, just another forum for pursuing special interests.

How did different sectors of US capital fare under the WTO settlement? Some were served well by the WTO’s ‘North-South Grand Bargain’ (Ostry, 2002). Pharmaceuticals, apparel, software and entertainment, in particular, saw their demands for intellectual property law covered despite the fact that, as some economists protested, their demands were not even trade-related (Bhagwati, 1994). Finance was clearly aided by the liberalization of services and capital movements. By contrast, textiles lost the special protection they had enjoyed under the export quotas of the Multi-Fiber Arrangement, and heavy industry was opened up to new overseas competition, especially after the accession of China to the WTO in 2001.

Within a decade of the WTO’s passage it was clear that the most disruptive domestic opponents of the new multilateral settlement would not be the labor and environmental groups that free traders feared most (Barfield, 2001). Rather, it would be the elite losers: those industries undercut by imports enabled by the expansion of free trade and liberalization of investment flows. While some sectors of capital had secured their interests by way of the WTO deal, others would seek the same protection from the state by other means.

Wilbur Ross and the Protectionist Put

Steel offers an illustration of the recurrence of state protectionism again. The Asian Financial Crisis of 1997–8 flooded the US market with cheap steel imports, contributing to the loss of nearly 200,000 jobs in the sector as factories closed or went bankrupt (Irwin, 2017: 661). The steel industry’s requests for 1980s-style protection fell on deaf ears at first but scored a victory in 2002 when the Bush administration placed a tariff of up to 30 percent on some steel imports (Irwin, 2017: 673). The response from WTO member states was swift and the Geneva trade body ruled against the US, leading Bush to drop the tariffs within 18 months. The interlude of the Bush steel tariffs is usually read as a mere footnote in trade history (Destler, 2005: 245). One might even read it as an affirmation of the strength of the new free trade consensus were it not for the way that it previewed the dynamics that would return with Trump’s trade war.

The tariffs were consequential for their effect on the fate of someone who would become Trump’s second most influential trade official: future Commerce Secretary Wilbur Ross. Ross spent the first decades of his career at Rothschild advising in bankruptcy proceedings, including Trump’s own in 1990, when he advised the creditors of the Trump Taj Mahal. Ross was known as the ‘King of Bankruptcy’, helping restructure $200 billion in liabilities in an era when filing for Chapter 11 bankruptcy went from being a source of personal shame and a sign of failure to a profitable corporate strategy (Delaney, 1992; Skeel, 2003). In 2000, Ross set up his own so-called vulture fund specializing in acquiring, restructuring and reselling distressed assets. His biggest victory happened as a direct result of the Bush steel tariffs.

Beginning in 2001, Ross bought a series of ailing or bankrupt steel companies, restructured and merged them as the International Steel Group. With US steel prices momentarily buoyed by the tariffs, Ross sold the company to Lakshmi Mittal in May 2005 at a profit of $260 million (Fong, 2005). Ross held a seat on the board of directors of what would become the world’s largest steel company, ArcelorMittal, until taking the post of Commerce Secretary in 2017. The business press dubbed Ross a ‘man of steel’ (Olijnyk, 2004) for his successful tactic of ‘betting on protection’ in the Mittal deal (Tejada, 2003). The passing use of protection was apparently not in conflict with Ross’s own statement that he and Mittal were both ‘strong believers, first, in globalization’ (Anonymous, 2004).

On display here was a skill that Ross deployed during his whole career: taking advantage of the nexus of law, policy, and market to maximize personal profit. Journalists observed that Bush’s actions on steel taught Ross ‘the value of government intervention’ (Malone, 2003). In responding to recriminations on the campaign trail about his record of bankruptcies, Trump’s stock response was a similar one. He shrugged that he had ‘used the laws of the land’ (Anonymous, 2016). Ross’s approach reflected the understanding he would bring to the White House. Policy was not aimed at goals of universal welfare or efficiency but was an appendage of particular private interests. Capitalism worked best by leveraging the state in service of private profit.

Ross’s attitude toward trade policy was led by a bloodless pragmatism. In September 2003, he launched a new lobbying group of which he was founder and chairman: the Free Trade for America Coalition. The group brought together a ‘coalition of steel, textile, glass, copper and brass, cattle, honey and sugar companies with the Paper, Steel and Textile Unions’, in Ross’s words, ‘to educate the American people and their elected representatives of the consequences associated with international trade deficit and to campaign against unfair international trade practices’ (Anonymous, 2003). Ross boasted of being the first representative from management to attend an anti-free trade rally of the United Steelworkers and he vocally opposed further trade liberalization in the Americas at their meetings (McCarthy, 2003). His hope was that the protection given to steel would be extended to another sector as he sought to repeat his success with the International Steel Group with an International Textile Group, snapping up bankrupt companies in that sector.

When a second coming of what we could call the ‘protectionist put’ was not forthcoming, Ross deftly flipped his message, supporting precisely the kind of treaty he’d opposed in the Central American Free Trade Agreement (CAFTA), earning the justified label of ‘turncoat’ from his former allies in organized labor (Patterson, 2004). He explained his logic when he discussed the addition of a denim plant in Guatemala City to his already existing overseas textile manufacturing operations: ‘Guatemala is a very logical place from a CAFTA point of view … The normal wage in this industry is a little under $200 a month. That is getting down toward the China level’ (Malone, 2004). The following year, he went to the bottom of the wage scale, breaking ground for a textile factory outside of Shanghai, performing the act he had vociferously condemned to US textile workers just two years earlier (Fong, 2005).

Ross’s self-defense was telling. Asked by a reporter at a press conference whether he was advocating protectionism to preserve his own investments, he responded ‘it absolutely is. I don’t see any reason [why] that should be criticized. Do you believe the foreign governments are protecting anyone’s interest but their own? I doubt it’ (Nash, 2003). When pushed on his reversal in support for CAFTA, he repeated the theme: ‘I believe that everyone in the industry should be acting in his or her own self-interest’ (Patterson, 2004). Ross’s status as distressed investor meant an endless motility of rhetoric: a belief that an asset must always be talked down until the right point to buy and up until the most advantageous moment to sell. We see here a surface loyalty to the logic of shareholder value (Davis, 2009) and a deeper commitment to what Martijn Konings calls ‘the logic of leverage’ (Konings, 2018b). Far from the tropes of neoliberal constitutionalization ensuring uniform predictability of economic exchange, Ross practiced the nimbleness of speculation under conditions of uncertainty (Feher, 2018).

Peter Navarro and Heartland Sinophobia

Wilbur Ross’s interest in steel faded with his personal stake in the industry. More engaged was the third figure destined to play an influential role on Trump’s trade team as his Director of Trade and Manufacturing: University of California-Irvine economics professor Peter Navarro. In 2011, Navarro co-wrote a book with business school professor Gene Autry called Death by China: Confronting the Dragon – A Global Call to Action (Navarro and Autry, 2011). The book was a sensationalist reflection on China’s economic rise, including a barrage of anecdotes about China’s adulterated food products, alleged collaboration with dictators, and unregulated pollution. Beginning with an epigraph from Albert Camus that ‘it is the job of thinking people not to be on the side of the executioners’, the authors accused China of becoming ‘the planet’s most efficient assassin’ under whose regime of unfair competition the ‘American blue-collar worker has become an endangered species’ (Navarro and Autry, 2011). The book targeted US business organizations as ‘soldiers in the pro-China lobby’ and accused politicians of a similar complicity.

Navarro adapted Death by China into a documentary film of the same name narrated by Martin Sheen (and streamed well over a million times online as of late 2020). The film is replete with startling animations. Blood spurts out of the US Midwest as a hunting knife marked ‘made in China’ plunges into it. Chinese bombs reading ‘income tax breaks’ and ‘illegal export subsidies’ pulverize American factories. Bayonets reading ‘slave labor’ and ‘child labor’ parade in front of Mao Zedong’s portrait. A shell game shows China taking ‘jobs’, multinational corporations taking ‘profits’, and the US government holding ‘debt’. The flags of Microsoft, GE, Caterpillar, and Boeing are hoisted over both the US Capitol building and Beijing’s Forbidden City. The effect is heartland Sinophobia: a hybrid spirit of the patriotic globalization critique of the films of Michael Moore and long-standing tropes of Chinese treachery and civilizational depravity.

Journalists later revealed that funding for the film came from the country’s second-largest steel company, Nucor, funneled through a non-profit organization (Timiraos and Ballhaus, 2018). Both film and book followed closely the talking points of Nucor’s CEO at the time, Dan DiMicco. Singled out as an exemplary CEO in Death by China, DiMicco is also quoted as saying: ‘We’ve been in a trade war with China for more than a decade. But they are the only ones firing the shots!’ (Navarro and Autry, 2011: 66, 242). DiMicco spoke on behalf of one of the perceived losers of free trade globalization as employment in steel had been hit by the so-called ‘China Shock’ of import competition alongside the much more consequential increase in productivity (Griswold, 2019). He pioneered many of the points later taken up by Trump, including the attack on China’s ‘mercantilist and predatory trading practices’, including currency manipulation and illegal subsidies, and the call for domestic energy independence and protection of domestic manufacturing (DiMicco, 2009). In an op-ed co-authored with Navarro, DiMicco described China as a global threat that needed to reform or ‘be engulfed in a trade war largely of its own making’ (Navarro and DiMicco, 2010).

The echoes of DiMicco in Trump’s rhetoric are not coincidental. DiMicco was one of Trump’s campaign advisors, alongside Navarro and a range of hedge fund managers and real estate CEOs, along with veterans of the neoliberal think tank archipelago like Stephen Moore of ALEC and Club for Growth and the inspiration to Reagan’s top marginal tax cuts, Arthur Laffer (Matthews, 2016; Moore and Laffer, 2018). DiMicco took the lead on trade policy for Trump, steering the transition team on the USTR and interviewed for the job himself before the selection of Lighthizer (Fares and Lawder, 2016). True to DiMicco and Navarro’s threats, among the first acts of the new government was the commencement of a trade war through steel and aluminum tariffs with China as a primary target. This was done first through a ‘national security clause’ (Section 232) followed by further tariffs authorized by a Section 301 investigation led by Lighthizer (Park and Stangarone, 2019; Slobodian, 2018a). A 25 percent tariff was placed on steel in 2018, lifted for Canada and Mexico in 2019. Trump tweeted regularly about steel, perhaps most memorably on 2 March 2018, when he wrote: ‘We must protect our country and our workers. Our steel industry is in bad shape. IF YOU DON’T HAVE STEEL YOU DON’T HAVE A COUNTRY.’

How to make sense of the steel industry’s apparent capture of US trade policy? In sponsored vehicles for their message like Death by China, steel lobbyists crafted a persuasive narrative about the immiseration of the heartland and those left behind by globalization, reproduced by many journalists and politicians despite the sparse evidence that tariffs have the capacity to reverse the symptoms identified. Protection did pay off in the short run for Nucor’s shareholders as the stock price doubled from January 2016 to January 2018, though it has fallen since. Was Trump’s steel-friendly trade policy the opposite of New Constitutionalism? A ‘post-neoliberal’ return to ‘power’ after the 1990s dogma of ‘rules’?

One must draw distinctions between the economic imaginaries of Trump’s advisors. Lighthizer continues to adhere to ‘competitive liberalization’, according to which unilateral action can be market-opening, producing a more ‘level playing field’ (to use the common metaphor) and perhaps even a future multilateral settlement (Wraight, 2019). Arriving at this destination requires many of the tools of the New Constitutionalism. Lighthizer is keen on extending the purview of economic juridicization well beyond the Chinese border into its court system to ensure compliance with intellectual property laws. In this sense, we see an intensification of some aspects of the legalized political economy of the 1990s and certainly the market-opening protectionism of the 1980s (Miller, 2018).

Navarro, by contrast, tends toward the more radical demand of ‘decoupling’ the US economy from China. Rather than a transitional phase of tariffs to arrive at a free trade telos, he foresees manufacturing supply chains disentangled permanently to protect against national security vulnerabilities (Irwin and Bown, 2019). Navarro’s concern extends to infrastructure, placing military concerns ahead of economic interests in a version of what scholars have called ‘weaponized interdependence’ (Farrell and Newman, 2019) and ‘geoeconomics’ (Roberts et al., 2019). The gap between Lighthizer and Navarro’s policy vision makes clear that the desire of state protection by certain sectors of capital may be constant but the larger strategy within which this desire is fulfilled is an object of ongoing contestation.

Conclusion

The central metaphor of the New Constitutionalism comes from Homer’s Odyssey. Passing the island of the beguiling Sirens, Ulysses requests to be bound to the mast to enjoy their songs without wrecking his ship (Teubner, 2012). The metaphor of constitutional ‘pre-commitment’ (Elster, 1977) is deployed by both neoliberal theorists and their critics to describe the constraints placed on governments, and by extension, the populations that elect them to ward off the seductive appeal of trade protection and the blandishments of special interests (Brennan and Buchanan, 2000: 82; Lal, 1984: 25; Tucker, 2018: 223). The narrative logic is unforgiving: to loosen the bonds would mean total destruction.

Much of the alarm (or elation) since 2016 has sprung from a common impression of Ulysses unbound. The ‘liberal international order’ was undone, we were often told, and the ships of economy and state roved free at the risk of scuttling themselves. Yet compare the metaphor to reality. Even if neoliberal ideologues like Hayek and Buchanan believed that the sovereign itself had to be bound, the US as hegemon was only ever provisionally persuaded to engage in limiting itself by trade rules. Even the preeminent theorist of precommitment, Jon Elster, conceded that ‘in politics, people never try to bind themselves, only to bind others’ (Elster, 2000: ix). The Ulysses metaphor misleads by compressing all state and capitalist interests into a single figure, thus eliding important divisions.

Nevertheless, returning to the metaphor may accommodate the alternative reading proposed in this article. Recall that the Sirens tempted Ulysses by promising him not just pleasure but foresight. Homer wrote that ‘he who listens [to their song] will go on his way not only charmed, but wiser’, for the songs ‘can tell you everything that is going to happen over the whole world’. It was precisely such reassurances about the future that special interests sought through the protections afforded by the legal repertoire of the state, whether it was Ross exploiting state intervention for a short-term sale, Lighthizer’s clients seeking countervailing duties from a US administration, or DiMicco seeking semi-permanent protection for his sector of manufacturing.

Scholars argue that the neoliberal mode of rule defaults to a repetitive two-step by governing through uncertainty in the surrender of control over the economic future to private actors within a market framework followed by inevitable episodic interventions to rescue the wealthy in the moments of systemic crisis that follow (Davies and McGoey, 2012; Gindin and Panitch, 2012; Konings, 2016). This formula of privatizing profit and socializing risk is especially applicable to the financial sector, where losses can be as profitable as gains, depending on the direction of one’s wager. Neoliberalism studies have, for good reason, been dominated by a focus on finance (Fine, 2009; Konings, 2018a). Yet trade and manufacturing operate differently, requiring more regularity and longer time horizons. From the point of view of the capitalist engaged in export manufacturing, one sees less the binary option of Ulysses bound or freed but, more pragmatically, an ongoing effort to forge alliances with the Sirens on a choppy sea as sources of knowledge about the future. The lobbying of Congress, the Commerce Department and the USTR for special attention is part of a hope to ‘lock in’ a different future than that usually envisioned by the New Constitutionalism literature: not a neutral grid for entry and exit but a partisan effort at preserving market share in a field of rising competitors.

Attempts so far to explain Trump from within the framework of neoliberalism studies have been somewhat tortured. Descriptions of Trump as ‘neoliberalism’s Frankenstein’ (Brown, 2018) have productively pointed to the unexpected consequences of neoliberal policies, but they can also serve to re-inscribe a chiliastic framework of neoliberalism in the process of unraveling. The eschatological mode has not served the study of neoliberalism well, as the trail of announcements of its demise attest. Every death of neoliberalism, as it is now routine to observe, portends a new ‘mutation’ (Callison and Manfredi, 2019; Ong, 2006; Sornarajah, 2011).

It may be that the effort to arrive at a single storyline has been one of our primary obstacles. The influence of the Regulation School has pushed for the identification of sequential eras, stages, or epochs. The story offered in this article suggests that we can best understand Trump’s trade policy as born within the range of legal instruments indigenous to the ‘neoliberal era’ of the last 40 years. Because free trade and protection coexisted, the before/after frame is changed into one of uneven coevality.

As we have seen, the tendency of the New Constitutionalism to homogenize the needs and aims of capital in the abstract overlooked the ongoing power of those sectoral capital interests disadvantaged by free trade globalization. By giving the impression of an overly coherent package, critics underestimated the power of particular sectors of capital in bending legal structures to their benefit. Attending to the distributive effects of new legal regimes within the capitalist class itself helps us to find prefigurations of later crises. We must take seriously the fact that it is in the commanding heights as well as in the suffering provinces that the roots of the current split in the US philosophy of global economic governance can be found.

# 1ar

**Innovation**

**Red innovation**

**Red innovation fails – extend slobodian – it’s captured – elites like steel lobbyists will use anti-globalization ethics to spur pro-competition regimes and consolidate power – this turns their offense and is a net benefit to the perm**

**Stiglitz 21** (Joseph Stiglitz is an American economist and public policy analyst, who is University Professor at Columbia University. He is a recipient of the Nobel Memorial Prize in Economic Sciences and the John Bates Clark Medal, October 7th 2021, “Yet Another Covid Victim: Capitalism” New York Times <https://www.nytimes.com/2021/10/07/world/covid-pandemic-capitalism-stiglitz-berville.html>) MULCH

You point out in your books and speeches that markets pay no attention to social justice and income distribution. Yet capitalism is built on the notion of free markets. **How are we going to change things?**

**Through politics** **and** through **a change in societal norms**. Let me just give you a couple of examples. This kind of awareness has led the vast majority of the people in the Business Roundtable [an association of chief executives of leading U.S. companies] **to support a move away from shareholder capitalism** to stakeholder capitalism. Even if not all of them really mean it in their heart of hearts, **that change in the way they conceive of it will have effects over time**.

I’ve been at meetings where a C.E.O. of a large company said: “I hadn’t realized how bad we’d been paying our workers, that a large fraction of our workers were not getting a livable wage. And when I recognized it, I changed it.” His consciousness, before, was minimizing his labor costs. And his consciousness now is much more: What kind of enterprise do we want to have?

**Notice and Comment CP**

### Notice and Comment CP – Rollback – 1AR

Any risk of roll back or capture turns the nb because it proves the cp is not democratically accountable

#### Courts hoard jurisdiction – will strike down the counterplan absent fiat

Crane 10 [Daniel A. Crane - Professor of Law, University of Michigan. “Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel” - The CPI Antitrust Journal (Competition Policy International) – February, 2010, (2) - https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2369&context=articles]

In recent years, the Commission has frequently tied itself to the Sherman Act.11 Why would it choose to accept that baggage? Of late, the FTC has been shell-shocked by its treatment in the courts when it has invoked an independent Section 5. There is a wide gulf between the theoretical availability of an expansive Section 5 and actual judicial affirmation of FTC decisions to enjoin behavior that would not violate the Sherman Act. The courts have frequently quashed the FTC’s efforts to develop an independent Section 5, even while paying lip service to the independence principle.12 As Bill Kovacic remarked during his opening comments at the FTC’s October 2008 workshop on the meaning of Section 5, it is difficult to find even ten successfully litigated Section 5 antitrust cases over the Commission’s nearly hundred-year history.13

The reason is institutional. Courts tend to be jealous of their jurisdiction. To cite a venerable precedent to which we will return at end, courts are loathe to abandon their prerogative “to say what the law is.”14 In an early decision—subsequently overruled but never quite forgotten—the Supreme Court applied a Marbury v. Madison thematic to the FTC: “The words ‘unfair competition’ are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include.”15 Courts are wary of agency assertions that the agency should be accorded independent space to develop legal norms. As Bob Pitofsky has explained, a construction of Section 5 that would make the same behavior lawful at the Department of Justice and unlawful at the FTC is “untenable.”

#### They’ll read down any statutory delegation to avoid enforcement

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.

#### Agency deference is not true in this context

Baer 20 [Bill Baer Visiting Fellow The Brookings Institution, JD from Stanford Law School, served as Assistant Attorney General in charge of the Antitrust Division of the US Department of Justice from 2013 to 2016, and as Director of the Bureau of Competition at the Federal Trade Commission from 1995 to 1999, 10-1-2020 https://docs.house.gov/meetings/JU/JU05/20201001/111072/HHRG-116-JU05-Wstate-BaerW-20201001.pdf]

So where do we go from here? One strategy has the antitrust enforcers developing new policy guidance in areas such as vertical mergers, standard essential patents, and high tech platforms to nudge the courts towards a less skeptical view of the need for assertive enforcement. The joint DOJ/FTC Horizontal Merger Guidelines have, as I noted earlier, over time increasingly been relied on by the courts as providing a framework for determining whether the combination of two rivals risks harm to consumers and to competition.

There are at least two reasons to doubt whether reliance on that strategy will be sufficient. First, it took years for the courts to embrace the soundness of the merger guidelines—indeed more than a decade. Can we afford to wait that long? Second, there is no guarantee that the courts will embrace that new guidance. The mindset that antitrust enforcers are more likely to be wrong than right, and that as a result, we should at all costs avoid the risk of over-enforcement, is pretty well-entrenched in antitrust jurisprudence. Absent some further direction from Congress, those biases are unlikely to change.

**Cap**

**1ar – link (:30)**

**Antirust K all wrong. Reductionist *and* rejects tools that curtail violence.**

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

**Paul 22** Sanjukta Paul - Assistant Professor of Law, Romano Stancroff Research Scholar, Wayne State University - J.D., Yale Law School - From the article: “A Democratic Vision for Antitrust” - From the Journal – Dissent - Published by University of Pennsylvania Press - Volume 69, Number 1, Winter 2022, pp. 56-62 (Article) – modified for language that may offend - available via Project Muse

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

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

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

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

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

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

**1ar – sustainability (:40)**

**No “bubble” either**

**Gelzinis ‘21** [Gregg; 5/11/21; associate director for Economic Policy at American Progress; "Addressing Climate-Related Financial Risk Through Bank Capital Requirements," https://www.americanprogress.org/issues/economy/reports/2021/05/11/498976/addressing-climate-related-financial-risk-bank-capital-requirements/]

In either an orderly or a disorderly scenario, banks with overly risky balance sheets that are not aligned with a low-carbon economy could face severe losses, increasing risks to the economy, communities, the Deposit Insurance Fund, and other public funds. Research suggests that the direct and indirect exposures to carbon-intensive sectors could propagate stress throughout the financial system and trigger broader instability in the banking system.41 Banking regulators should ensure that banks are **resilient** to the **heightened credit**, **market**, **operational**, **reputational**, and **liquidity** risks created by the clean energy **transition** and are **well-positioned** to meet the needs of a **low-carbon** economy.42 Immediate financial **regulatory action** can help **prevent the carbon bubble** from **bursting suddenly**, an event that former Governor of the Bank of England Mark Carney has referred to as a “climate ‘Minsky moment.’”43 As an early and important step toward that end, banking regulators should increase the risk-weighted capital requirements for the bank exposures facing the most acute transition-related risks. Accounting for severe transition risks in the capital framework quickly would **improve** the **resiliency** of banks and prevent the inevitable clean energy transition from causing instability in the banking system.

**Speed flips try or die**

\*fyi, the policies mentioned here are widely advocates by dedev authors and can be applies to more than Hickel (Alexander, Trainer, etc)

**Piper 21** (Kelsey, writing with Vox, citing Zeke Hausfather, climate scientist at the Breakthrough Institute, and Michael Mann, climatologist at Penn State, “Can we save the planet by shrinking the economy?,” 8/3/21, <https://www.vox.com/future-perfect/22408556/save-planet-shrink-economy-degrowth)//NRG>

As a policy program, degrowth suffers from being both too radical and not radical enough. There’s a lot of **broad-brush policy** prescriptions in the degrowth lit, but those **details never** really **add up**. While it’s not a short book, Less Is More feels surprisingly sparse when it comes to envisioning how the changes it recommends could be brought about. The chapter on **solutions** recommends cutting the workweek and changing tax policy — two solid proposals — but then rounds that out by recommending ending technological obsolescence, advertising, food waste, and student debt. I’m not particularly opposed to those policies. But they seem laughably inadequate for the magnitude of the task at hand: confronting the climate crisis. Degrowth successfully persuades that guiding humanity and our planet through the 21st century will be really, really hard — **but not in a way degrowth particularly solves**. Where degrowth literature is **relentlessly pessimistic** about the prospect of our problems being solved under our current economic system, it turns oddly optimistic about the prospect that they’ll be solved once we embrace a different way of **viewing wealth** and progress. If cutting carbon emissions fast enough to matter requires shrinking the global economy by 0.5 percent a year indefinitely, starting right now, as the Nature paper estimates, that’ll take policy measures much larger and more ambitious than any proposed in Less Is More. “If we are to avert catastrophic warming, we have to lower carbon emissions by a factor of two within the next 10 years. I find it **highly implausible** that capitalism/market economics will be abandoned by the world on that time frame,” Pennsylvania State University climatologist Michael Mann told me. “That means we have to act on the climate crisis **within the framework of the current system**.” In that sense, there’s actually something anti-radical about any climate plan so radical that it can’t be concretely brought about in the next decade.

**1ar – perm – neolib (:45)**

**The perm’s iteration checks the market**

**Mazzucato 21** (Mariana Mazzucato is Professor in the Economics of Innovation and Public Value at University College London where she is the founding director of the UCL Institute for Innovation and Public Purpose. She is winner of international prizes including the 2020 John von Neumann Award and the 2018 Leontief Prize for Advancing the Frontiers of Economic Thought. January 28th 2021, “Mission Economy: A Moonshot Guide to Changing Capitalism” via kindle, pages 174-175) CULTIV8

To co-create value and shape markets, **public and private** organizations need **dynamic capabilities of experimentation** and learning. While the need to be a learning organization is often emphasized in the private sector, it is not so true in the public sector which has, as discussed in Chapter 3, been relegated to the role of a simple market fixer and enabler of value created by business. A more proactive, **market-shaping approach** requires rethinking the ways in which public organizations create and implement strategic actions (from leadership capabilities to how they engage with groups, other organizations and even individuals in society), rethinking how the civil service is developed (from training to performance assessment and promotion), and rethinking how work in public organizations is managed (from cross-sectoral teams to **iterative experimentation**, a process which goes through several stages, developing the concept and testing it to produce a **workable innovation**).9

**Perm solves**

**Mazzucato 21** (Mariana Mazzucato is Professor in the Economics of Innovation and Public Value at University College London where she is the founding director of the UCL Institute for Innovation and Public Purpose. She is winner of international prizes including the 2020 John von Neumann Award and the 2018 Leontief Prize for Advancing the Frontiers of Economic Thought. January 28th 2021, “Mission Economy: A Moonshot Guide to Changing Capitalism” via kindle, pages 204-210) CULTIV8

This book has applied what I believe is the immensely powerful idea of a mission to solving the ‘wicked’ problems we face today. In it, I have argued that tackling grand challenges will only happen if we reimagine **government as a prerequisite for restructuring capitalism** in a way that is inclusive, sustainable and **driven by innovation**.

First and foremost, this means reinventing government for the twenty-first century – equipping it with the tools, organization and culture it needs to drive a mission-oriented approach. It also means bringing purpose to the core of corporate governance and taking a very broad stakeholder position across the economy. It means changing the relationship between public and private sectors, and between them and civil society, so they all work symbiotically for a common goal. The reason for the emphasis on rethinking government is simple: **only government has the capacity to bring about transform**ation **on the scale needed.** The relationship between economic actors and civil society shows our problems at their most profound, and this is what we must unravel.

We can start by recognizing that capitalist markets are an outcome of how each actor in the system is organized and governed, and how the different actors relate to one another. This holds for the private and public sectors and for other sectors such as non-profits. **No particular kind of market behaviour is inevitable**. For example, the market pressure often cited as forcing a business to neglect the long term in favour of the short term, as too many companies do today, is the product of a particular organization of the market. **Nor is there anything inevitable in government bureaucracies** being too slow to react to challenges such as digital platforms and climate change. Rather, both are outcomes of agency, actions and **governance** structures that are chosen inside organizations, as well as the legal and institutional relationships between them. It is all down to design within and between organizations.

Capitalism is, indeed, in crisis. But the good news is that we can do better. We know from the past that public and private actors can come together to do extraordinary things. I have reflected on how, fifty years ago, going to the moon and back required public and private actors to invest, to innovate and to collaborate night and day for a common purpose. Imagine if that collaborative purpose today was to build a more inclusive and sustainable capitalism: green production and consumption, less inequality, greater personal fulfilment, **resilient health care** and healthy ageing, sustainable mobility and digital access for all. But small, incremental changes will not get us to those outcomes. We must have the courage and conviction to lift our gaze higher – to lead transformative change that is as imaginative as it is ambitious, aiming for something far more ambitious than sending a man to the moon.

To do this successfully, governments need to invest in their internal capabilities – building the competence and confidence to think boldly, partner with business and civil society, catalyse new forms of collaboration across sectors, and deploy instruments that reward actors willing to engage with the difficulties. The task is neither to pick winners nor to give unconditional handouts, subsidies and guarantees, but to pick the willing. And missions are about making markets, not only fixing them. They’re about imagining new areas of exploration. They’re about **taking risks**, not only ‘de-risking’. And if this means making mistakes along the way, so be it. Learning through trial and error is critical for any value-creation exercise. Ambitious missions also have the courage to tilt the playing field.

If government is indeed a value creator that is driven by public purpose, its policies should reflect and reinforce that. Too many green policies today are just minor adjustments to a trajectory that still favours the old waste-prone behaviours and the financial casino that worsens inequality. A healthy economy that works for the whole of society must tilt the playing field consistently to reward behaviours that help us achieve agreed and desirable goals. That means achieving coherence in a **multiplicity of fields**, from **taxes** to **regulation**, from **business law** to the **social safety net**.

As emphasized throughout the book, it is key to not pretend that social missions are the same as technological ones. With challenges that are more ‘wicked’ it is essential that moonshot thinking is linked with support to underlying government systems. For example, a moonshot around disease testing or **health priorities** must interact closely with the public-health system, not **replace** or **circumvent** it. Similarly, a moonshot around clean growth must interact with transport systems and planning authorities and understand behavioural change. Thus it is critical to perceive missions not as siloed projects but as being intersectoral, bottom-up, and building on existing systems (such as **innovation systems**, among others).

Governments cannot pursue missions alone. They must work alongside purpose-driven businesses to achieve them. As I’ve argued in this book, this requires addressing one of the biggest dilemmas of modern capitalism: **restructuring business** so that private profits are reinvested back into the economy rather than being used for short-term financialized purposes. Missions can accelerate this shift by shaping expectations about where business opportunities lie and also getting a better return for public investment. In this sense they can begin to walk the talk of stakeholder value. This means creating a more symbiotic form of partnership and collaboration in different sectors, whether in health, energy or digital platforms. A market-shaping perspective requires governing these interactions so that intellectual property rights, data privacy, pricing of essential medicines and taxation all reflect what needs to happen to reach the common objective. In health that must mean health innovation driven by the mission of better health care for all; in energy it must mean divestment from fossil fuels and the creation of public goods like green infrastructure and green production systems that protect the earthly oasis that Armstrong referred to; and in the digital domain it must mean the use of digitalization to improve the access of all people to the power of the technologies of the twenty-first century – while ensuring both data privacy and that our welfare states are strengthened, not weakened, by digital platforms.

**Doing capitalism differently** requires reimagining the full potential of a public sector driven by public purpose – democratically defining clear goals that society needs to meet by investing and **innovating together**. It requires a fundamentally new relationship between all economic actors willing and able to tackle complexity to achieve outcomes that matter.