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# 1ac

## 1ac – msu gk – districts

### 1ac – innovation

#### Parker immunity discourages disruptive healthcare innovation

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

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

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

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

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

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

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

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

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

#### Disruptive innovation in healthcare solves pandemics

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

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### 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 significantly increase prohibitions on anticompetitive business practices by the private sector shielded by application of the state action immunity doctrine.

### 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.

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### Private Sector – 2AC

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

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

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

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

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

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

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

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

Private Sector

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

## eu cp

### Trade DA – A2: Extraterritoriality Link – 2AC

#### General links are thumped – all their links say it’s applied that way IN THE SQUO and Biden increasing general antitrust

Park 17 [S. Nathan Park. Career in Law Teaching Fellow, Columbia Law School; Adjunct Professor of Law, Georgetown Law Center; Of Counsel, Kobre & Kim LLP. “Equity Extraterritoriality”. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1515&context=djcil]

2. Strife in Diplomatic Relations

Because Equity Extraterritoriality infringes upon a foreign sovereign’s interest, it frequently causes diplomatic strife. The Argentina bond case, litigated before a New York federal court, provided anti-American fodder to Argentina’s politicians.232 Reporters for the Restatement have noted the level of friction and acrimony caused by extraterritorial discovery orders.233 Extraterritorial orders issued pursuant to U.S. antitrust laws have “provoked the loudest and most consistent foreign protests.”234 Discussing American antitrust laws, a Canadian government official did not mince words: “For one government to seek to resolve the conflict in its favor by invoking its national law before its domestic tribunals is not the rule of law but an application, in judicial guise, of the principle that economic might is right.”235 Foreign governments would file amicus curie briefs objecting to U.S. extraterritoriality, but the U.S. court’s deference to such views is not consistent. The In re Uranium Antitrust Litigation opinion is an example of hostility, in which the Seventh Circuit called the governments of Australia, Canada, South Africa, and the United Kingdom “surrogates” of the foreign corporation defendants who “subversively presented for them their case.”236 The Uranium court’s hostility toward the foreign states prompted the State Department to inform the court that the opinion “has caused serious embarrassment to the United States in its relations with some of our closest allies.”237

It is a significant problem that the unelected judiciary, which is often a state court or a federal court applying state law, is effecting foreign policy consequences. When a court issues an extraterritorial order, it is conducting an indirect type of diplomacy against its constitutional mandate.238 The problem is worse when a state law is involved. Territoriality principles prohibit a state law from being applied beyond state borders, much less beyond U.S. borders.239 Yet under Equity Extraterritoriality, a state law may be applied anywhere in the world, causing diplomatic strife with foreign sovereigns.

### AO – nam

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

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

ABSTRACT:

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

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

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

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

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

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

INTRODUCTION

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

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

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

#### Extinction

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

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

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

## Sunsets cp

### Sunsets CP – 2AC

#### Uncertainty creates a confused doctrine that chills states

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

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

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

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

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

#### Links to politics and proves say no (their author)

McGinnis 14 [Anne McGinnis, JD Michigan, "Ridding the Law of Outdated Statutory Exemptions to Antitrust Law: a Proposal for Reform," University of Michigan Journal of Law Reform 47, no. 2 (Winter 2014): 529-[vi]

Once in place, exemptions are rarely revisited,112 and powerful industries continue to lobby for new ones.113 For example, regardless of whether the McCarran-Ferguson Act remains warranted or not, every attempt to repeal the Act has failed. In fact, every recent attempt to reform any current statutory exemption has failed.114

[Footnote 114] 114. Members of Congress occasionally introduce bills repealing or limiting existing statutory exemptions, but over the past few years such attempts have died in committee. See Health Insurance Industry Antitrust Enforcement Act of 2013, H.R. 99, 113th Cong. (2013) (eliminating most of the McCarran-Ferguson’s insurance industry exemption); Internet Radio Fairness Act of 2012, H.R. 6480, 112th Cong. (2012) (limiting current statutory exemptions for joint ventures between sound recording copyright holders).

The harm, or, at the very least, the ineffectiveness of many of these statutory exemptions is neither partisan nor heartily contested by antitrust experts.115 But efforts to repeal exemptions rarely gain traction. Interest groups advocating for an exemption may be powerful and strongly motivated, but groups advocating against an exemption are often fragmented and have little stake in pursuing repeal.116

[Footnote 115] 115. This does not mean, however, that the repeal of many of these antitrust exemptions will face little resistance. The industries currently benefitting from exemptions earned the exemptions initially because those industries had the political clout to raise their issue to lawmakers. For many exemptions, participants in the benefitted industries have profited, often enormously, from the lack of antitrust regulation, and will likely fight against any attempted repeal. Additionally, it is likely that the repeal of certain antitrust exemptions, such as those that benefit farmers or labor, will be politically charged. But, even disregarding the more contentious exemptions, there are a significant number of exemptions that serve no continuing purpose and are unlikely to draw wide support in Congress.

## Unions da

### 2ac – unions

#### Unionization Low

Eidelson 22 Josh Eidelson- Bloomberg reporter. “U.S. Labor’s Watershed Year Failed to Boost Union Memberships.” January 20, 2022. <https://www.bloomberg.com/news/articles/2022-01-20/u-s-labor-s-watershed-year-failed-to-boost-union-memberships> {DK}

After a year marked by weekslong labor strikes and unprecedented movements to organize at some of the largest corporations in the U.S., unionization levels fell back to historic lows. The rate of union membership, or the percentage of wage and salary workers who were part of a union, **dropped to 10.3% in 2021**, matching the record low in 2019, according to Bureau of Labor Statistics data released Thursday. Among private-sector workers, the **numbers** were **even bleaker**: union members made up just 6.1% of that workforce, compared to 33.9% of the public sector. “There’s no denying that there has been an upsurge in worker activism over the last few years, and it’s obvious that large numbers of workers are fed up, and the conditions of the pandemic just aggravated it,” Wilma Liebman, who chaired the National Labor Relations Board under President Barack Obama, said before the latest data was released. “But it’s not translating into increased numbers for unions.” Historic Lows The percentage of U.S. union workers has halved in about four decades Source: Bureau of Labor Statistics Last year, U.S. workers seized attention through individual choices like quitting their jobs in record numbers and collective action including strikes by union members at Deere & Co., Kellogg Co., and Columbia University -- as well as non-union walkouts at companies like Activision Blizzard Inc. and McDonald’s Corp. They also mounted high-profile unionization campaigns at top U.S. companies, including a failed union vote among thousands of Amazon.com Inc. workers in Alabama, and a successful ones among a few dozen Starbucks Corp. staff in New York. But these actions **didn’t translate into more overall members**. That’s partly because successes like those at Starbucks remained limited in scope, and workers at big corporations like Amazon have voted against unionization, sometimes out of fear that otherwise the company would shut their workplace down. For decades, organizers have struggled to secure major unionization wins in the nation’s many union-scarce industries. Such efforts tend to come up short in part because U.S. law allows companies to deploy well-honed tactics to derail campaigns. They have included mandatory meetings where managers warn workers about the dire consequences of organizing. Because the NLRB isn’t allowed to fine companies punitive damages, the penalties for firing workers in retaliation for organizing have usually been limited to things like posting a notice agreeing to follow the law, and reinstating the terminated activist with backpay, sometimes years after a campaign has already lost steam. Even when a union wins a labor board election, **companies aren’t required** to make major concessions in negotiations, and in the majority of cases workers still haven’t secured a contract a year later, according to a 2009 study. Victories in 2021 that unionized only a handful of workers, or improved non-union employees’ working conditions without unionizing anyone, could lay the groundwork for bigger future gains, said Seattle University labor law professor Charlotte Garden. “Any time there’s a demonstration of workers’ collective power, that helps create the conditions for more workers’ collective action,” she said. But under the current legal system, she said, “unionizing really requires employees to take a leap of faith.” Organized labor’s decades-long decline has meant that even unions’ victories have less impact on surrounding firms’ norms and standards, said labor historian Nelson Lichtenstein at University of California, Santa Barbara.

### 2ac – Lochner

#### FTC avoids concerns about judicial review and Lochnerizing – unique expertise, politically responsive, and doesn’t establish private cause

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

The institutional concerns about judges substituting their own economic preferences for those of legislators and members of the executive branch might have less force in a context in which an administrative agency--here the FTC--reviewed state and local regulations for compatibility with federal antitrust law. Historically, the political coalitions that opposed economic substantive due process during the Progressive and New Deal eras were comfortable with delegating extensive regulatory powers to federal administrative agencies 167 and rejected Lochnerism because of the political character of judicial activism by unelected judges even while [\*1209] supporting activism by theoretically more democratically accountable institutions such as the FTC. 168 Though ostensibly designed to be technocratic and politically detached, the FTC is in fact politically responsive to the will of Congress, which holds its purse strings. 169 It is thus a more evidently "democratic" institution than the courts are and has a legislative mandate from Congress to make economic policy, 170 which might lend legitimacy to its review of anticompetitive state and local regulation.

Entrusting review to an agency rather than a court would not entirely dissipate concerns about potential Lochnerizing; there would remain judicial review of the agency decision in the federal courts of appeal and, potentially, the Supreme Court. 171 Still, judicial review of agency decisions is more restricted than direct judicial review of state or local regulations. For example, agency factual findings are upheld so long as supported by substantial evidence, and the courts accord a degree of deference (albeit not Chevron deference) to agency decisions on complex economic matters. 172 While opportunities remain for the appellate courts to substitute their own judgment for that of state and local regulators, they could only do so by siding with the FTC, because there would be no judicial review in a case in which the Commission had decided to uphold a regulation as consistent with federal law. 173

As to the objection that Lochner represented a formalistic classical ideology that entrenched anti-redistributionist and laissez-faire baselines, simply handing off the review function to the FTC is not a complete answer to that concern. Enhancing the Commission's preemptive powers over state and local regulations would [\*1210] represent a shift toward deregulation, as the power could only be wielded to strike down regulations--not to require more regulation or to institute regulations of the Commission's own making. In ideological terms, state action immunity generally codes as a progressive doctrine designed to insulate regulatory schemes from challenge and, hence, many of the sharpest critiques of the Parker immunity doctrine have been aligned with the antiregulatory Chicago School 174 and probusiness Republican administrations. 175

At the same time, the FTC's preemptive agenda would be unlikely to focus on entrenching established economic interests and preserving the status quo in the distribution of property and income--the second vision of what is wrong with Lochner. To the contrary, as discussed earlier, the general tendency of anticompetitive state regulations is to entrench economic incumbents and incumbent technologies by denying entry to new firms and technologies. 176 In this context, enhanced antitrust preemption of state and local regulation would be a liberalizing force creating opportunities for new market entry--just the opposite of a set of doctrines protecting the status quo.

#### 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

## popularity

### DA

#### Won’t be inter-issue spillover

Redish 91 MARTIN H., Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University. ELIZABETH J., Law Clerk to Chief Judge William Bauer, United States Court of Appeals, Seventh Circuit. “CONSTITUTIONAL PERSPECTIVES: ARTICLE: "IF ANGELS WERE TO GOVERN": THE NEED FOR PRAGMATIC FORMALISM IN SEPARATION OF POWERS THEORY.”Duke Law Journal, 41 Duke L.J. 449, Lexis

Choper's assumption that the judiciary's institutional capital is transferable from structural cases to individual rights cases is no more credible. Common sense should tell us that the public's reaction to controversial individual rights cases -- for example, cases concerning abortion, n240 school prayer, n241 busing, n242 or criminal defendants' rights n243 -- will be based largely, if not exclusively, on the basis of its feelings concerning those particular issues. It is unreasonable to assume that the public's acceptance or rejection of these individual rights rulings would somehow be affected by anything the Court says about wholly unrelated structural issues.

#### Conservative perception inevitable and swamps the link

Sewer 9-10 (Adam, staff writer @ the Atlantic, “A Strategy of Confusion,” 9/10/21, <https://www.theatlantic.com/ideas/archive/2021/09/republicans-strategy-confusion/620029/)//NRG> \*edit in brackets [] to clarify the noun

“If this were New York passing a law creating a private right for citizens to sue someone for having a gun, the Court would step in in a heartbeat,” Adam Winkler, a law professor at UCLA, told me. “I don't think there's any doubt that the Court’s decison to allow Texas’s law to stand was a reflection of the justices’ belief that abortion is not a constitutionally protected right.” The notion that no harm was done here is risible—it is simply that the Texas law’s defenders are pleased with the outcome. Patients are already being turned away from clinics; those with the means to do so are going to other states for treatment, even though it is unclear whether the law allows the people who help them to be sued regardless. The Court’s supposedly narrow ruling also dissuades abortion providers from setting up a legal challenge to a law that is plainly unconstitutional under current precedent. These providers could just keep providing services and wait to be sued—mooting the weak procedural rationale on which the current majority opinion relies. But now that a majority of the Court has indicated that it no longer considers abortion a constitutional right, doing so would risk validating the Texas law rather than overturning it. “The Court's pretense that it's not sure it could do anything … is akin to someone pretending they're locked in a room while they themselves are holding the key all along,” Aderson Francois, a law professor at Georgetown University, told me. “It seems to me we've reached a point where we don't have to pretend that the Court is intellectually honest. It's not.” The Texas law’s critics have seized on its perverse social incentive—bribing Texans to inform on one another—as potentially creating a nightmare scenario, a kind of privatized surveillance state. But if no one ever sued, the law might avoid challenge and still achieve its objective, with the added reward of the law’s supporters being able to again characterize its critics as hysterical for accurately describing their means and ends. Of course, once you deputize the citizenry to seek bounties on one another, you can’t control who takes you up on the offer. The point of hiding behind proceduralism is to minimize political backlash by drawing muddled coverage of the decision. As Irin Carmon writes at New York magazine, the justices have “decided to confuse us with process.” Their political allies in the Republican establishment got the message, and are dutifully repeating it. This does not mean that Republicans are necessarily fearful of the political consequences of overturning Roe. The long-term Republican strategy—as opposed to that of the anti-abortion movement—has always involved cultivating a degree of uncertainty about the party’s objectives in order to minimize the political backlash. Few Americans support allowing abortions with no restrictions, but even fewer support outlawing the procedure entirely. In that environment, the Republican Party has pursued a balancing act—harnessing the commitment and passion of the anti-abortion movement while assuring centrist voters of a more moderate approach. The Trump era showed how easily media standards toward fairness could be manipulated to maximize uncertainty, and leave the public confused about the significance of any given development. As Laura Bassett wrote last week, Republican politicians have repeatedly insisted that their nominees to the bench would not seek to overturn Roe, and characterized critics as paranoid. Both Justice Brett Kavanaugh and Justice Amy Coney Barrett, whose defenders insisted that they were agnostic on the question, were in the majority last week. But the charade goes back decades. During his confirmation hearings, Justice Clarence Thomas insisted, “No judge worth his or her salt will prejudge a case,” and then he called Roe “plainly wrong” after less than a year on the bench. Donald Trump, with his characteristic subtlety, simply said that his appointees would overturn Roe, and they’ve given Americans little reason to believe otherwise. An upcoming case before the Court offers the justices the opportunity to overturn Roe formally, rather than by increment. Even if they do so, I am skeptical that a massive political backlash is necessarily in the offing—the era of social media has amplified the ability of committed propagandists to confuse masses of people about what is happening in their own country. The muddled media reaction to this [Texas] ruling is a case in point. Nor does the logical extension of the majority’s decision, that the entire Constitution can be nullified by states outsourcing enforcement of unconstitutional laws to private actors, mean that blue states will prevail if they, say, adopted a similar scheme to curtail gun rights. But the Republican appointees now have a majority even when they lose the vote of Chief Justice John Roberts, whose commitment to managing the Court’s reputation has occasionally placed him on the side of the Democratic-appointed justices. The conservative justices don’t fear the nullification of rights they recognize, because they know they have the power to do whatever they want. On Thursday, as the Justice Department filed suit to block the law, Attorney General Merrick Garland argued that “this kind of scheme to nullify the Constitution of the United States is one that all Americans—whatever their politics or party—should fear.” Under different circumstances, that would be true. It should be true. But the superficial proceduralism and ideological fanaticism of the Court’s unaccountable majority enable the conservative justices to allow what they want and bar what they don’t, while claiming that some legal technicality has dictated the result. The Court’s approach is ideal for hiding a radical result behind a veneer of propriety. But there’s no need for the public to be confused about what’s happening here.

#### Justices don’t think that way

Chemerinsky 99 – Erwin Chemerinsky, Alston & Bird Professor of Law and Professor of Political Science, Fall 1999, South Texas Law Review, 40 S. Tex. L. Rev. 943, p. 948

Choper, for example, concludes from this premise that the Court should not rule on federalism or separation of powers issues so as to not squander its political capital in these areas that he sees as less important than individual rights cases. Bickel argued that the Court should practice the "passive virtues" and use justiciability doctrines to avoid highly controversial matters so as to preserve its political capital. [19](http://web.lexis-nexis.com/universe/document?_m=e251872a6c6be190b8939629a1cff9d2&_docnum=1&wchp=dGLbVzb-zSkVA&_md5=f2e9151e48096b32cfe55e6fc38a5a93#n19) Other scholars reason from the same assumption. Daniel Conkle, for example, speaks of the "fragile legitimacy that attaches to Supreme Court pronouncements of constitutional law." [20](http://web.lexis-nexis.com/universe/document?_m=e251872a6c6be190b8939629a1cff9d2&_docnum=1&wchp=dGLbVzb-zSkVA&_md5=f2e9151e48096b32cfe55e6fc38a5a93#n20) I am convinced that these scholars are wrong and that the public image of the Court is not easily tarnished, and preserving it need not be a preoccupation of the Court or constitutional theorists. There is no evidence to support their assertion of fragile public legitimacy and almost 200 years of judicial review refute it.

### Turns – Democracy

#### Democracy resilient – overwhelming public backing supports gains

Wollack 16 ---- Kenneth, president of the National Democratic Institute, former co-editor of the Middle East Policy Survey, former senior fellow at UCLA’s School for Public Affairs, “How Resilient is Democracy?” This text is the transcript from an interview with Alexander Heffner, PBS – The Open Mind, 10/15, <http://www.thirteen.org/openmind/government/how-resilient-is-democracy/5553/>

Well I think we’re seeing a number of phenomena that take place. Um, first of all you have new democracies around the world, that are struggling to deliver for its people. New institutions, political institutions that for the first time have legitimacy among the people, but in order to succeed and sustain their democratic system, they have to deliver on quality of life issues for, for the entire population. And if those institutions don’t deliver in many of these new democracies that have emerged over the last forty years, uh, then you’re gonna see backsliding and people will either go to the streets or vote for a populist demagogue who promises to bring sort of instant solutions to their problems. And then in non-democratic countries, you have what is called authoritarian learning, and that is autocrats today that are smarter than they were before, uh, that are fearful of diffusion of political power, uh, fearful of losing power themselves. Um, and they are using uh, traditional means and new legal means in which to repress the population, prevent the emergence of civil society, and not to speak of opposition political parties. And then you have a situation that you see in a number of countries in the Middle East where you have a sectarian strife and conflict. Uh, but in all of these situations, what you find is democratic resilience. That people around the world basically want the same thing. They want to put food on their table, uh, they want to have jobs and shelter and they want a political voice. And that, those aspirations and those hopes, uh, and those desires as I said are universal, and if you look at public opinion polls around the world, uh, people do want to have democratic systems that allow them to participate in the political life of their country. And that is, we are in the optimism business, and we believe in people and I think that ultimately those efforts, um, will, will succeed. But they need a lot of support, they need backing, um, uh, in order for uh, some very brave and courageous people to, to move the democratic for—uh, process forward in some of the most unlikely places in the world.

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## Movements

#### Turns democracy

Rodriguez-Posea 21—(Professors of Economic Geography at the London School of Economics). Andrés Rodríguez-Posea, Neil Lee, & Cornelius Lipp. August 11, 2021. “Golfing with Trump. Social capital, decline, inequality, and the rise of populism in the US”. Cambridge Journal of Regions, Economy and Society. Accessed 10/2/21.

We hypothesise that low social capital alone is unlikely to have triggered the swing of voters to Donald Trump and that interpersonal inequality at the local level is unrelated to increases in Trump’s vote share. We propose that it is precisely the long-term economic and demographic decline of the places that still rely on a relatively strong social capital that is behind the rise of populism in the US. Strong, but declining communities in parts of the American Rustbelt, the Great Plains, and elsewhere, reacted at the ballot box to being ignored, neglected and being left-behind. The results of the analysis show that increases in populist vote in the US are fundamentally driven by the economic and demographic decline of strongly cohesive midtown and rural America. These places still have greater levels of social capital than more dynamic and unequal areas of the US. This social capital has played a role in the swing of votes within communities driven by a growing feeling of frustration, increasingly known as the rising geography of discontent (McCann, 2020) or the politics of resentment (Cramer, 2016). In small cities and rural areas of the US, scattered predominantly across the Rustbelt and the Great Plains, the rise in populist vote represents a reaction of strong communities in which individual losses are identified with collective losses. These so-called ‘places that don’t matter’ (RodríguezPose, 2018) have had enough of seeing their people leave and their jobs go and have used the ballot box to exact revenge on a system they consider offers little to them. By contrast, the more dynamic, mainly urban, areas of the US, where society is often less cohesive, where there is less social capital and where interpersonal inequalities are significantly higher, have, for the moment, shunned the calls of populism. We argue that our results have implications beyond the United States. In particular, work across Europe, including studies considering Brexit (e.g., Carreras et al., 2019; Lee et al., 2018) and Euroscepticism more generally (Dijkstra et al., 2020), have highlighted the importance of long-term decline in explaining the growth in populism. Yet the focus has tended to be on income and industrial decline, rather than employment and population decline, as a cause. The decline of previously tight-knit communities has been underplayed in this literature, but our results provide an important justification to investigate whether they can be generalised outside the United States. The paper is structured as follows. The next section studies the rise of Trumpism in the US. This is followed by a section looking at explanations for the growth of the Trump vote, focusing, in particular, on social capital, interpersonal inequality, and long-term economic and demographic decline. The methods and data used in the analysis are presented in the ensuing section, which is followed by the econometric analysis. The main conclusions of the study are put forward in the final section. The rise of populism in the US On 8 November 2016, Donald Trump was elected president of the US. Trump, a businessman with limited previous political experience, managed against the odds first to secure the Republican Party nomination and then the presidency on a political platform with strong nationalist and authoritarian populist tendencies (Norris and Inglehart, 2019). Trump’s election was achieved on the wings of winning the electoral votes of crucial swing states, such as Pennsylvania, Ohio, Michigan and Wisconsin. In these states, like very much everywhere else in the US, the votes for the Democratic candidate, Hillary Clinton, were geographically concentrated in the larger cities. Clinton triumphed in cities like Philadelphia, Pittsburgh, Columbus, Cincinnati, Cleveland, Detroit, Milwaukee and Madison, and took some university towns in Ohio and Pennsylvania. The suburbs, towns and rural areas, by contrast, provided fundamental support for Donald Trump (Rodden, 2019). Figure 1 shows the Trump margin, the swing in the share of votes towards the Republican Party between the 2012 presidential election, when Mitt Romney was the Republican presidential candidate, and the 2016 election. The Trump margin is highest in most of the mid-Atlantic, Midwest, and Great Plains states. The greatest swing took place in an arch surrounding the Great Lakes, drawing a semicircle expanding from northern Maine in the East to north-eastern Minnesota in the West (Figure 1). The geography of the Trump margin changed relatively little in the 2020 election (Figure 2). Despite losing the election to Joe Biden, Donald Trump increased his margin relative to the votes obtained by Mitt Romney in 2012 across many rural and small-town counties where he had already prevailed four years earlier. He also managed to make forays into territories traditionally relatively hostile to the Republican Party, such as southern Texas and parts of New Mexico (Figure 1). However, the main geographical traits of the 2016 election remained untouched in November 2020. The Trump margin was, once again, highest in rural and small-town communities around the Great Lakes, the Midwest and the Great Plains. In contrast, Donald Trump attracted less votes along both coasts and in large urban agglomerations everywhere in the US (Figure 1). Possible explanations for the rise of Populism Why did Donald Trump get elected in 2016? Why did he almost get re-elected in 2020? What are the reasons behind the rise of authoritarian populism in the US? The rise of Trumpism in the US has coincided with that of forms of authoritarian populism in other western democracies. Especially in the second half of the 2010s, researchers have tried to investigate the causes of populism from different perspectives. The main divide in the studies of populism has been between those focusing on cultural parameters versus those emphasising economic explanations. Those examining culture and values have centred their explanations around the role of values (Norris and Inglehart, 2019). Citizens embracing populism are those that feel ill at ease with what they increasingly regard as a different society from the one they grew up in or with the image of society transmitted to them by their parents and family. These citizens generally regard globalisation, migration and multiculturalism as key factors behind the rise of economic (but also cultural and identity) insecurities (Norris and Inglehart, 2019; Salmela and von Scheve, 2017). The change in cultural values threatens their identity and undermines family and religious traditions, transforming the environment they live in into one they no longer feel comfortable with (Norris and Inglehart, 2019). Gradually, this insecurity has morphed into anger and resentment towards a system that, in their view, no longer values them (Salmela and von Scheve, 2017). Economic explanations revolve around the economic insecurity brewed by deregulation and globalisation (Guiso et al., 2017). Factors such as the openness to trade and the exposure to Chinese goods (Autor et al., 2013, 2016; Colantone and Stanig, 2018) rank high in this strand of research. Recent economic transformations are exploited by populists, invoking protectionism while stoking economic nationalism, such as in Donald Trump’s ‘Make America great again’ 2016 campaign slogan. Post-financial crisis austerity has also been considered a driver of discontent (Gray and Barford, 2018). Cultural and economic transformations are causing rising resentment with a system, which is increasingly reflected in the electoral ballot. Voters supporting populist options are both swayed by their individual characteristics, such as age, race, education, exposure to new technologies, health, work status or welfare dependency, as well as by the conditions of the places where they live (Alabrese et al., 2019). At the intersection between culture and economics, two factors were signalled by Putnam as the main risks for American democracy. Social capital, as ‘the performance of […] democratic institutions depends in measurable ways upon social capital’ (Putnam, 2000: 349), and interpersonal inequality and the increasing polarisation of American society. Putnam argued these trends went hand in hand and reinforced one another (Putnam, 2000: 359): ‘the last third of the twentieth century was a time of growing inequality and eroding social capital. By the end of the twentieth century, the gap between rich and poor in the United States had been increasing for nearly three decades, the longest sustained increase in inequality in at least a century, coupled with the first sustained decline in social capital’. In the next subsections, we look at the potential role of both factors in the rise of populism, as well as that of long-term economic and demographic decline as a possible alternative. Social capital as a driver of populism Social capital has become one of the dominant concepts in the social sciences. The concept draws on a longstanding body of research, which suggests that social networks matter for all sorts of social and economic outcomes. Coleman (1988) defined social capital as a resource considering (a) obligations and expectations, (b) information channels and (c) social norms. These three aspects of social relationships reduce the coordination costs of shared action and improve outcomes, moving away from a static view of social relations and economic activity as being about individualised actors, towards a view that economic activities are relational rather than simply transactional (Rodríguez-Pose and Storper, 2006). Putnam took on this concept and defined it as ‘the features of social life— networks, norms and trust—that enable participants to act together more effectively to pursue shared objectives’ (Putnam, 1995: 664). Most views of social capital consider it a force for good. In his work on the strength of weak ties, Granovetter (1973) showed the importance of social relations in enhancing economic outcomes, while Putnam (2000: 394) indicated that social capital ‘strengthens our better, more expansive selves’. Hence, the long-term decline of social capital in the US posed a serious threat to American society and its democracy, as it pushes citizens to free-ride ‘by neglecting the myriad civic duties that allow […] democracy to work’ (Putnam, 2000: 349). However, there are also longstanding concerns that it can have negative consequences. Olson (1965) viewed associational behaviour as lapsing into special interest groups. Overall, closed networks may enable the development of social capital, but they can also allow the development of group-think and incentives to engage in factional behaviour rather than in the general interest (Rodríguez-Pose and Storper, 2006) and prevent the progress of new ideas and social change (Coleman, 1988). In short, a tight-knit community can entrench the ‘forces of tradition’ and restrict social change (Farole et al., 2011: 68). In terms of how social capital can affect voting behaviour, social capital is often seen as a pillar of a functioning democracy, something which goes back to Alexander de Tocqueville and his argument that civic association underpinned the US democratic model. Similarly, Putnam (1993) argues that the lack of adequate social capital in southern Italy undermined democracy and legitimate political representation. His arguments for the US are that declining social capital not only depresses civic engagement and political participation but that it also destroys connectedness and trust. The increasingly empty public forums that became the norm in the last third of the 20th century represented a threat to American democracy (Putnam, 2000: 412). In this respect, social capital can be considered as a form of protection against populism or demagoguery. Pre-dating the post-crisis resurgence of populism, Fieschi and Haywood (2004) indicated that a lack of trust in political institutions could fuel populism. Both Putnam (1993; 2000) and Fieschi and Haywood (2004) viewed social capital as essential for a healthy democracy and having a purely negative impact on populism (i.e., where there is greater trust, political relationships are healthier and more mutually respectful, and so populists are less able to blame elites). But this positive view of social capital has, more recently, also been challenged. Satyanath et al. (2017), for example, showed that German states with higher levels of social capital, proxied by associational behaviour, facilitated a rapid expansion of Nazi ideas and, in turn, Hitler’s accession to the Chancellery through higher shares of votes for the Nazi party. The presence of large and dense networks involving high levels of trust expedited a swift flow of information and a more rapid exposure to Nazi party propaganda. Interpersonal inequality and populism Putnam (2000) saw rising interpersonal inequality as the other main risk for American democracy. For him, the increase in interpersonal inequality and the decline of social capital were two sides of the same coin. On the one hand, the rise in inequality of the last third of the 20th century (Katz and Murphy, 1992) disrupted participation and reduced civic engagement. On the other, the decline in social capital accelerated the disintegration of American communities and eased the implementation of policies and the passing of legislation that fermented greater inequality. This process also had a geographical component as ‘the American states with the highest levels of social capital are precisely the states most characterised by economic and civic equality’ (Putnam, 2000: 359). This view of interpersonal inequality as a threat to democracy and, therefore, a driver of populism has been shared by many economists who have examined the roots of the recent rise of authoritarian populism in developed countries. The rise in wealth polarisation in American society, as well as elsewhere in the developed world, is a fundamental factor for the increasing support of extreme antisystem options at the ballot box. Economic transformations in recent decades, and, above all, globalisation and automation, have driven ‘multiple, partially overlapping wedges in society’ (Rodrik, 2018: 23). One of these wedges concerns income and wages. The economic system has been leaving increasing shares of the population behind, in conditions that are financially insecure (Eichengreen, 2018; Guiso et al., 2017). The concentration of wealth in a dwindling number of hands (Milanovic, 2016; Piketty and Saez, 2014)—the top 1% (Dorling, 2019)—and the parallel rise in the people at risk of poverty in developed countries (O’Connor, 2017; Rodrik, 2018) is considered tainted with a stigma of unfairness (Rodrik, 2018: 23). Citizens have come to believe that the growing wealth of the elites has been earned unfairly and, consequently, the tolerance towards inequality has decreased (Pastor and Veronesi, 2018). Hence, interpersonal inequality, often confounded with economic unfairness (Starmans et al., 2017), is, from this perspective, pushing voters towards illiberal and anti-system parties at the ballot box. Inequality is perceived to drive a reaction against the status quo, resulting in an erosion of democratic institutions and leading to nativism and plutocracy (Milanovic, 2016). For Putnam (2000: 359) ‘there is every reason to think that the twin master trends of our time—less equality, less engagement—reinforce one another’. Thus, fighting the decline of social capital is also a way to prevent the rise of inequality and vice versa. It is also the best way to combat the challenges besieging American democracy. The role of long-term economic decline Putnam’s work is about all sorts of decline. From that in civic engagement or in political participation to declines in bowling or card playing. All these declines are meticulously documented in Bowling alone. Yet, there is one type of decline that is conspicuously absent from Putnam’s (2000) analysis: that of smalltown and rural America. Similarly, the growth of territorial inequalities and the rising geographical polarisation in the US does not feature prominently in Putnam’s work. However, the demographic and economic decline of small-town and rural America has been documented for quite some time (e.g., Fuguitt et al., 1989; Johnson, 2006). Small towns and large swaths of rural areas have been losing population and jobs throughout the second half of the 20th and the beginning of the 21st century. The decline of these areas has been matched by the evolution of many large cities, such as Detroit, Cleveland, Buffalo, Milwaukee or Toledo, once among the most dynamic industrial hubs in the US (Hartt, 2018). Many of these cities articulated, and still articulate, large hinterlands in ‘Rustbelt’ states. Such decline has had important implications for social capital. According to Putnam (2000: 207), ‘the decline in social connectedness over the last third of the twentieth century might be attributable to the continuing eclipse of smalltown America’. This is because small-town and rural America have for long been the centres of civic engagement. In these areas, people have been and remain community-oriented (Wuthnow, 2019: 4). During most of America’s history this feeling of community, widespread across the whole of the US, was regarded as a force for good. ‘Residents of small towns and rural areas are more altruistic, honest and trusting than other Americans’, noted Putnam (2000: 205). They are viewed as deeply proud, caring about their communities and wanting the best for them (Wuthnow, 2019). Communities with a better endowment of social capital have been perceived as better able to cope with all sorts of economic and social challenges (Rupasingha et al., 2006). However, when these communities suffer long-term population and economic decline and when the way of life that created and sustained the feeling of community ebbs away (Rodríguez-Pose, 2018; Wuthnow, 2019),2 the very social capital behind the cohesiveness and former dynamism of these areas can also channel the growing anger and resentment felt by those being left behind. When the feeling of neglect becomes widespread, when there is growing resentment about the rising economic gulf between large cities and small communities (Cramer, 2016: 83), social capital at a local scale can become the mechanism to diffuse that anger and outrage at a system they feel no longer represents and serves them. Areas with a strong social capital develop a consciousness that helps shape their political views (Cramer, 2016) and this consciousness is inherently related to place. Locals concerned about the many problems afflicting their communities, from population loss, brain drain and ageing to social disintegration and increasing drug addiction, feel that their plights are ignored by the federal government (Wuthnow, 2019) and can react collectively at the ballot box. In this respect ‘place matters because it functions as a lens through which people interpret politics’ (Cramer, 2016: 12). This consciousness is both rooted in place and class, but also ‘infused with a sense of distributive injustice’ (Cramer, 2016: 12). And it may also be the mechanism that feeds the increasing call for attention of places that have seen far better times, have been devastated by economic processes such as globalisation or automation and where people are becoming effectively stuck because of lack of capacity and/or opportunities for mobility (Rodríguez-Pose, 2018: 202). These processes have contributed to render their economies redundant and, often, undermine the self-esteem and sense of purpose of many local dwellers. Such consciousness is contributing to spread out a geography of discontent (Dijkstra et al., 2020; McCann, 2020) and a politics of resentment (Cramer, 2016) to areas that have had a rough ride linked to both economic and cultural transformations and have seen their friends and neighbours leave, their jobs dwindle, and their services gradually disappear (Collantes and Pinilla, 2019; Guilluy, 2019). Social capital can, in this respect, provide the vehicle for this anger to come out into the open at the ballot box (Rodríguez-Pose, 2018) or, increasingly, through rebellion and revolt (Guilluy, 2019). Bringing together social capital, inequality, and demographic and economic decline What can be expected from the combination of dwindling social capital, rising inequality, and the demographic and economic decline of many cities, small towns, and rural areas in the US? Depending on the perspective adopted, two potential outcomes can emerge. On the one hand, as posited by Putnam (2000), the threats posed by populist tendencies to American democracy could be addressed by redressing the decline of social capital and the increase in inequality. Anger at the system would, therefore, be more prevalent in those places where there is a combination of high inequality and low social capital. That is, predominantly, in large American cities. In these places ‘efforts to strengthen social capital should go hand in hand with efforts to increase equality’ (Putnam, 2000: 359). On the other, remnants of strong social capital that foster a pervasive consciousness within declining cities, especially in small towns and rural areas across the US, could have served as a means to channel the growing anger of long-term decline to the ballot box in numbers and ways that would be impossible in places with lower social capital stock. The evidence of the 2016 and 2020 presidential elections points to the latter explanation. The demographically and economically more dynamic, mainly urban areas in the US, where society is less cohesive, but where interpersonal inequalities are significantly higher, shunned the calls of populism and voted in large numbers for the Democratic candidates. By contrast, many long-term declining communities with strong social capital embraced Donald Trump in far greater numbers than they had supported Mitt Romney, a far more mainstream Republican presidential candidate, in 2012. Hence, in this paper, we will argue that the rise of populism in the US, as proxied by the swing to Donald Trump, is not related, as feared by Putnam (2000), to low levels of social capital, high interpersonal inequality, or their combination, but mainly to long-term economic and demographic decline. We will also argue that strong social capital, civic engagement and cohesiveness may have contributed to the revenge at the ballot box of places left behind (Wuthnow, 2019) that have felt neglected and snubbed for a considerable amount of time (Cramer, 2016; McCann, 2020). Their strong social identity and local consciousness—in other words, their social capital—may have expedited the rise of Trumpism in ways that would have been impossible in the most dynamic US cities and towns. This form of American populism will thus be mainly driven by the long-term economic and demographic decline of the strong communities that built America, while the rise of interpersonal inequality, something that could generate future conflict, is, for the moment, not associated with populism. Model and data Model In order to demonstrate that: (a) Economic and demographic decline are fundamental factors in the rise of the Trump vote and that this process has become exacerbated in the tightly-knit communities with strong social capital that have witnessed an erosion of their relevance; (b) This process is not limited to the aftermath of the crisis, but goes back a long way, with roots that can be traced to, at least, the 1970s; and (c) Trumpism is more connected with long-term decline than with local interpersonal inequality, which tends to be far higher outside those tightly-knit communities; we will analyse the swing of votes to the Republican Party between the 2012, on the one hand, and the 2016 and 2020 presidential elections—the Trump margin—on the other and regress it on the three factors that might have driven the surge in vote for Trump: social capital, interpersonal inequality, and economic and demographic decline. In view of the theoretical framework developed above, we will also look at the interactions between those factors, as the Trump vote could have increased in a) those places having suffered a long-term decline that are more unequal; in b) places with high social capital that are more unequal; and c) in places having suffered a long-term decline, with a strong level of social capital. The model adopts the following form: TMc,20xx−2012 = α + β1 Income pcc,2016 + β2 Inequalityc,2016 +β3 Social Capitalc,2016 + β4 Economic & Demographic Changec,2016−t + γ1X¯c,t + νs + εc where, TMc, 20xx−2012 represents the Trump margin, that is the change in the share of the vote between Donald Trump in 2016 or 2020 and Mitt Romney in 2012; Income pcc,2016 denotes the income per capita in a county in 2016; Inequalityc,2016 is a measure of income inequality within a county in 2016; Social Capitalc,2016 depicts the level of social capital in a county in 2016; Economic & Demographic Changec,2016−t indicates changes in employment, population, average earnings, and average wages in a given county between 2016 and any year marking the start of a decade, going back to 1970; X¯c,t is a vector of other variables that could have affected a shift in the vote for Donald Trump. These include variables that have been identified in the scholarly literature as factors behind the rise in Trump and/or populist vote, including population density, levels of unemployment, education, the racial composition, the sex ratio, the age structure, the share of married adults, or the local impact of imports from China at the county level; finally, νsis a state − level f ixed − ef fect, while εc denotes the error term. Data Geographical units The analysis is conducted at county level. This approach allows us to investigate very long-term impacts on local areas in a consistent way. However, one critique of using counties as our unit of analysis is the ecological fallacy, as we are generalising from the individual to the county level. This is unlikely to be a major problem here, however, as studies show that local context is an important determinant of individual attitudes (e.g., Reeves and Gimpel, 2012).3 As the data are drawn from multiple sources and cover the last five decades, there was a need for some matching to reflect changes in county boundaries over the period of analysis. The data have, therefore, been levelled at the county geographical division used by the Bureau of Economic Analysis (BEA) in 2017. As county boundaries underwent extensive changes, particularly in the state of Virginia, some modifications have been included. In the case of Virginia 51 counties in the state have been assembled into 23 ‘county compounds’, or county-equivalents. Alaska, which also underwent considerable modification in local boundaries, is excluded from the analysis. In the rest of the US, county adjustments are either inexistent or very minor. 3067 of the 3143 county or county-equivalents across the US are included in the analysis.4 Dependent variable and independent variables of interest The dependent variable in our model is the ‘Trump Margin’ (Figure 1), which represents the difference in the share of voter support for Donald Trump in the 2016 or 2020 presidential election relative to that of the previous Republican candidate, Mitt Romney, in 2012. It uses data drawn from the MIT Election Data and Science Lab for 2012 and 2016 and from McGovern et al (2020) for 2020. Following Goetz et al. (2019) and Agnew and Shin (2019), we use the difference in share instead of Trump’s overall share of votes, as we deem that this margin better signifies the increase in populist vote between both elections.5 The three main independent variables of interest depict (following the theoretical discussion above) social capital, interpersonal inequality and economic and demographic decline. The measure for social capital is based on an update by researchers at Penn State for the year 2014 of Rupasingha’s et al. (2006) index. Rupasingha et al. (2006) created—inspired by Putnam’s (1993, 2000) concept of civic engagement and using principal component analysis—a social capital index at county level for the US including four key components. These were: a) the number of non-profit organisations in a county, excluding those with an international approach; b) the census response rates in 2010; c) voter turnout in the 2012 presidential election and d) a number of associational indicators, including bowling centres, business, civic and social associations, golf courses and country clubs, labour, professional, religious and political organisations, fitness and recreational sports centres and sports teams and clubs, with all these factors aggregated and divided by population. The four factors included in the index were standardised. The first principal component is considered as the index of social capital. Mapping this index at county level provides a very uneven geography of social capital across the US. The highest levels of social capital were concentrated around the Midwest and, especially, the Great Plains states. Both Dakotas, Iowa, Kansas, Minnesota, Montana, Nebraska and Wyoming boasted the highest level of social capital. Social capital was also high in the northwest (Oregon and Washington state) as well as in some areas around the Great Lakes, such as Wisconsin, rural Illinois, Ohio, eastern Pennsylvania and parts of New England. Social capital was, by contrast, significantly weaker in the South, particularly in Kentucky and Tennessee, and in some Mountain states, such as Arizona, Nevada and Utah (Figure 3). The second independent variable of interest, Interpersonal inequality, is based on data drawn from the 2013–2017 5-year American Community Survey (ACS). At the core of the analysis is the 2016 county-level Gini index of incomes in a county. Two alternative measures are considered for robustness. These are the share of the population in the county in the top income quintile and that in the top 5% of income. Income inequality in the US is highest in the Deep South, particularly in states such as Alabama, Arkansas, Louisiana, Mississippi, South Carolina and eastern Kentucky, as well as in the largest urban agglomerations, such as New York City, Los Angeles, Chicago, Houston, Miami, Detroit and the Bay Area (Figure 4). The lowest differences in income inequality are found in Midwestern states, and mainly in small-town and rural communities in Illinois, Indiana, Iowa, Missouri, Ohio and Wisconsin, as well as in some parts of the Mountain states such as Nevada, Utah or Wyoming (Figure 4). The third and final independent variable of interest is Economic and demographic decline. In the econometric analysis, we use four different proxies: three for economic change (employment change, change in average earnings per job, and change in average wages and salary) and population change as a proxy for demographic change. The benchmark measure of change at the county level is employment change between 1980 and 2016. However, in successive parts of the analysis all four economic and demographic change indicators are considered, covering, by decade, the period between 1970 and 2016. The data for 2016 are drawn from the 2013–2017 5-year ACS. For earlier years, we resort to Bureau of Economic Analysis data. To ensure a normal distribution of residuals, all change variables are transformed logarithmically. Figure 5 provides an indication of economic change across counties in the US. It represents changes in employment between 1980 and 2016. As expected, the biggest growth in employment over that period of 36 years took place along the Pacific coast, in the north-east urban corridor, and in southern Florida. The lowest levels of employment growth occurred in the Great Plains states, along a strip running from East Texas in the south to North Dakota in the north (Figure 4). Many areas south of the Great Lakes and in the South have also performed relatively badly in employment terms. However, all is not gloom around the Great Lakes, as the area between Chicago and Milwaukee witnessed considerable growth in employment, as did most of the counties on the shores of Lake Erie. Control variables In addition, several control variables, representative of factors that have been associated with the rise of populism in the US and elsewhere, are included in the analysis. First, we consider income per capita in 2016, as variations in the territorial levels of wealth have been related to populist vote. Population density has been highlighted by certain authors (e.g., Rodden, 2019) as a driver of populism. Traditional parties, and mainly those of the left, are increasingly struggling in suburbs and rural areas of the US (Rodden, 2019). Population density at the county level is represented by its value in 2016. Unemployment is frequently regarded as another determinant linked to the rise of discontent and populism (Algan et al., 2017; Guriev, 2018). We control for the unemployment rate at the county level in 2016. Education is also a prominent factor behind the rise in antisystem voting. Low levels of education have been seen to be crucial for Brexit, the election of Donald Trump and the rise of populist alternatives elsewhere (e.g., Essletzbichler et al., 2018; Goodwin and Heath, 2016; Sides et al., 2017). We, therefore, use an indicator of the percentage of adults with higher education in each county in 2016. The racial dimension has been recurrent in the analysis of the outcome of the 2016 US presidential elections, with some accounts highlighting that the role of race and racial attitudes may be more important than economic factors (e.g., Morgan and Lee, 2018; Reny et al., 2019; Sides et al., 2017). We control for the share of black population in 2016 in US counties and, in alternative specifications, for the share of whites in that year. Demographic variables have also featured prominently (e.g., Goodwin and Heath, 2016). We include three such variables: the sex ratio of the population, the young-age dependency ratio and the share of married adults. Finally, the ‘China shock’ is often signalled as a trigger of discontent at the ballot box (Autor et al., 2016). We, therefore, include a measure of imports from China at county level. A list of the variables in the analysis, together with their definitions and sources, is included in Supplementary Table A1 in the Supplementary Appendix. Descriptive analysis What is the connection between the dependent variable (the Trump margin) and the independent variables of interest? Plotting the correlation between the Trump margin in the 2016 and 2020 US presidential elections and the three independent variables of interest reveals that the correlation between social capital, inequality and employment change since 1980, on the one hand, and the Trump margin, on the other, is, at best, tenuous. The strongest correlation is between employment change and the swing in votes towards Donald Trump. Counties with a greater decline in employment over the period of analysis supported Donald Trump in far greater shares than they supported Mitt Romney in 2012. The link between interpersonal inequality and the increase in the Republican vote is inexistent, while places with a higher social capital 2014 showed marginally higher shifts in votes towards Donald Trump (Figure 6). The correlations among the independent variables of interest are similarly weak. There is no link between inequality and changes in employment, while counties with higher levels of social capital have, on average, slightly lower interpersonal inequality and witness marginally lower employment growth since 1980 (Figure 7). The link between county size and any of the correlations is highly imperfect, although larger counties are somewhat more unequal, have lower social capital, and experience, with notable exceptions, greater employment growth (Figure 7). Econometric analysis Basic model The question is whether these relationships stand when all these factors are included together with additional controls in a regression analysis. The results of regressing model (1), using simple ordinary least squares (OLS) and including state fixed-effects, are presented in Table 1. Regressions 1 through 5 report the estimation for the 2016 election, while Regression 6 does it for the 2020 election. We run both elections separately as the conditions of both elections were very different: in 2016 Trump voters were electing an outsider with a limited track record in politics, while in 2020 they were voting for an incumbent president. The results highlight that, once the income per capita of the different counties in the US and the conditions of their state are controlled for, interpersonal inequality, long-term employment change and differences in social capital across US counties are connected to a swing towards Donald Trump in the 2016 presidential election (Table 1, Regression 4). However, this connection is not always in the direction expected by Putnam (2000) in Bowling alone. The combination of social capital and lower inequality as a protector of American democracy is not discernible. While richer counties shifted towards Trump’s populist positions in lower numbers than poorer counties both in 2016 and 2020, more unequal areas of the country were less swayed by Trump’s brand of populism. By contrast, places with greater civic engagement and a stronger social capital opted in larger numbers for the more extreme option in 2016, although the connection is not significant in the 2020 election, once other control variables are included. Counties that have witnessed considerable destruction of employment since 1980 were also convinced to a greater extent by Trump’s discourse than areas that experienced greater job creation (Table 1). These results are robust to including the three independent variables of interest together in the regression (Table 1, Regression 4) and additional controls expected, according to the literature, to affect populist vote (Table 1, Regressions 5 and 6). They are also robust to clustering the standard errors at county level (Supplementary Table A2). The coefficient for inequality, which is significant and negative when all the controls regressed together in the 2016 election (Regression 5), becomes insignificant in the 2020 election (Regression 6). In 2016 citizens living in the more unequal counties of the US were far less inclined to swing towards Donald Trump, but this relationship became weaker four years later.6 The coefficients for the control variables are generally in line with expectations. More densely populated counties, counties with a higher share of university graduates, those with a higher share of black population, those less affected by imports from China, and those with a younger population swung less to Trump (Table 1). The unemployment rate yields insignificant coefficients in both elections, while the increase of support for Donald Trump is higher in places with a lower share of married adults.7 These results are robust to changing the share of black population in a county by that of whites (Supplementary Table A5), with counties with a greater share of white population swinging towards Donald Trump, and to changes in the measurement of inequality at the county level. Counties with a greater percentage of people in the top income quintile (Supplementary Table A6) and those with a higher proportion of individuals in the top 5% of the income distribution (Supplementary Table A6) had a lower Trump margin in 2016, but not in the 2020 elections. The introduction of interactions between the independent variables of interest barely alters the results emanating from the basic model. Changes in employment since 1980 and all the control variables, including income per capita at the county level, yield the same sign in the coefficients and similar levels of significance. Once again, counties that have seen a greater employment decline put more trust in Donald Trump than they did in Mitt Romney (Table 2). Social capital remains positive and significant, apart from Regression 2, where it becomes insignificant for the 2016 election, and insignificant in 2020. While inequality displays a negative coefficient that is significant for the 2016 election and in 2020, when the interaction between employment change and inequality is considered (Table 2). The significant interactions are those between employment change and interpersonal inequality in 2016 and 2020 and between employment change and social capital in 2020. In the case of the former, both coefficients are positive and significant, meaning that the swing to Donald Trump was more pronounced not only in poorer counties, in those with lower interpersonal inequalities, and those that had suffered a long-term employment decline, but also in counties where high levels of employment growth were matched by a high degree of interpersonal inequality (Table 2, Regressions 1 and 4). In the case of the latter, citizens living in counties with higher levels of social capital voted less for Trump in 2020, if employment had grown more than elsewhere in the previous 40 years (Table 2, Regression 6). Different types and time horizons of decline So far, we have concentrated just on one side of economic and demographic change: employment change since 1980. What happens if we consider different types of decline? In Table 3 we take into consideration, not just employment change, but also population change (Regressions 2 and 6), change in average earnings per job (Regressions 3 and 7), and in average wages and salaries (Regressions 4 and 8). The results indicate that long-term employment and population decline over a period of almost 40 years has been strongly connected with a swing to Donald Trump at the ballot box in both 2016 and 2020 (Table 3, Regressions 1, 2, 5 and 6). Declines in average earnings and in wages and salaries are, in contrast, disconnected from the Trump margin in 2016. By contrast, counties that increase their average earnings per job and average wages and salaries, once other factors are controlled for, swung more towards Trump in 2020. In these counties presence of strong social capital was also linked to a higher Trump margin (Table 3, Regressions 7 and 8). These results chime well with the literature highlighting that the rise of populism in the US has more to do with racial issues than individual economic factors (Norris and Inglehart, 2019; Reny et al., 2019) and with a sense of alienation of the white working classes (Cramer, 2016; Morgan and Lee, 2018; Walley, 2017), what Kimmel (2017) calls ‘angry white men’. However, they also powerfully relate to the literature that has focused on geographical dimensions and, in particular, with long-term economic decline, mostly in Europe (e.g., Guilluy, 2019; Rodríguez-Pose, 2018) but, increasingly, in the US (e.g., Wuthnow, 2019). However, in contrast to the findings for Europe, where the rise of anti-system voting at the ballot box has been linked to economic and industrial decline, but not to employment and demographic decay (Dijkstra et al., 2020), in the US it is the slow demise of still strong communities that have been losing employment and population for some time that triggers the reaction at the ballot box to a far greater extent than declines in earnings and salaries. Once we have established that long-term unemployment and demographic decline have a powerful connection to Trump’s vote margin, the question is whether this association waxes or wanes with time. Table 4 looks at the change in these relationships over time, including the link with changes in average earnings and wages and salaries, since 1970 in ten-year intervals. This implies that the regressions are the same as in Table 3, only substituting the time covered in each of the economic and demographic decline variables. Only the coefficients for these variables are reported, as there are no significant changes in the other coefficients. The coefficients displayed in Table 4 show that the link between employment and population decline at the county level and Trump’s vote margin is not a recent phenomenon. The coefficients for employment and population change are always negative and highly significant, regardless of the period and election considered. Counties that have been shedding employment and losing population since the 1970s have been more inclined to support Donald Trump than they did Mitt Romney in 2012. Having said that, the dimension of the negative coefficients is generally larger for the more recent periods than for longer time spans. The 2008 Great Recession has provided a springboard for the rise of populist discourse and a populist candidate, but the seed of discontent was planted, as indicated by Cramer (2016), quite some time earlier. Table 4 once again points to the fact that this reaction at the ballot box is more about the long-term decline of communities shedding jobs and people than about the loss of earnings, wages, and salaries. The coefficients for the change in average earnings per job are mostly insignificant. However, it is often the case that counties witnessing a higher increase in wages and salaries swung more towards Donald Trump, particularly in the 2020 election. Hence, ‘it is not the very poor that are threatening the political system but the large numbers of still relatively well-off people—often seen as the threatened middle classes—still living relatively comfortable lives but in declining places’ (Rodríguez-Pose, 2020: 1–2). Conclusions Two decades ago, Putnam (2000) warned that American democracy was at risk from the twin challenges of the decline in civic engagement and social capital on the one hand, and the rise in interpersonal inequality on the other. More Americans bowling alone and engaging to a far lesser extent than before in local communities and an increasingly divided society from an economic perspective represented a twin threat to the democratic institutions that had been built since independence. Sixteen years later his forecast materialised with the election of Donald Trump, an outsider and political novice with strong populist tendencies, who first stunned the Republican Party elite by securing its presidential nomination, and then went on to beat the Democratic party candidate, Hillary Clinton, in the November 2016 election. Yet, the election of a candidate that, by shaking the system, has stretched American democracy to the limit, may have had little to do with declining social capital and rising interpersonal inequality and much more with the long-term employment and population decline of many formerly prosperous American communities. These communities are precisely those where social capital—the very form of capital that, according to Putnam (2000), was supposed to provide the glue for America’s democratic institutions—has held stronger than elsewhere. This is what this paper has shown. By combining social capital with interpersonal inequality and long-term economic and demographic decline at county level in the US and linking it to the swing to Donald Trump at the ballot box in the 2016 and 2020 presidential elections, it has revealed that the rise in discontent identified by some scholars (e.g., Cramer, 2016; Kimmel, 2017; Wuthnow, 2019) is at the root of the Trump electoral tsunami. However, this analysis has provided evidence for the deep geographical roots of this phenomenon. It is not just simply the white working class that is rebelling against the system. There are plenty of white working-class voters on the West Coast, along the eastern megalopolis or in American large cities, as well as in medium-sized cities, towns and rural areas that did not swing and/ or did not vote for Donald Trump. It is middleand working-class individuals, who live in communities that have seen better times and have for long experienced a slow, but relentless employment and population decline, and where social capital has remained relatively strong, that cast the decisive votes to put Donald Trump in office in 2016. The link between social capital and the Trump margin became weaker in the 2020 election when considering population and employment decline, but not when taking into account changes in earnings per job and in wages and salaries. Hence, social capital and local civic engagement may not have acted as the positive forces envisaged by Granovetter (1973) or Putnam (2000), but, in most cases, more in the negative way suggested by Satyanath et al. (2017), through mechanisms possibly linked to local consciousness and identity (Cramer, 2016). The long-term economic and demographic decline of many tightly-knit American communities has driven the rise of Trumpism. A decline that can be traced back to the last quarter of the 20th century and that has created a malaise that goes well beyond the crisis and that is increasingly manifesting itself at the ballot box. Declining, but still rather cohesive communities with strong social capital are the drivers of this process. In mostly small-town and rural areas of the US, the rise in the populist vote is a consequence of a reaction of communities in which individual losses are strongly identified with collective losses. And social capital may act as one of the transmission mechanisms. Individuals living in these communities know that a loss for one is a loss for all. Therefore, the rise of populism in the US is fundamentally linked to the geography of decline; to places that, despite remaining relatively homogeneous in terms of interpersonal inequality, have witnessed considerable employment and demographic decay over the long term. The Great Recession of 2008 may have ignited the fuse that resulted in the election of Donald Trump as president, but the discontent has roots that are far deeper.