# wiki round 6 ada

# 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.

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

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

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

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

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

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

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

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

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

#### 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 immunized 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**

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

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

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

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

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

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

I. INTRODUCTION

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

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

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

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

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

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

#### Breaches fund terror and organized crime

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

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

Cyber Threats

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

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

Cyber Criminal Trends

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

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

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

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

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

Nation State Activities: China

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

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

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

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

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

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

Threats Exposing Vulnerabilities on Critical Infrastructure Networks and the Public

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Independently, effective regulations solve extinction

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

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

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

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

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

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

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

Introduction

IN just three relatively obscure antitrust cases, 1

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

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

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

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

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

III. DOCTRINAL CRITICISM

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

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

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

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

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

IV. PROPOSED SOLUTIONS

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

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

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

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

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

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

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

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

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

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

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

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

B. Spillover Effects and Antitrust Federalism

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Parker and its Progeny

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Federalism-Based Objections to Sherman Act Preemption

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Potential FTC Moves

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

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

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

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

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

Gaining Attention

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

State Action

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

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

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

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

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

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

#### Enforcement high now and thumps links

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

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

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

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

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

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

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

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

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

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

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

Warning Letters After the Close of HSR Waiting Periods

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

More Intensive Merger Investigations

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

More Onerous Consent Decree Provisions

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

Withdrawal of the Vertical Merger Guidelines

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

Rescinding the Consumer Welfare Standard

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

Labor Market Scrutiny

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

Looking Ahead to the Year to Come

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# 2ac

## innovation

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

#### No, *you*

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

Graphical user interface, website

Description automatically generated

#### Not us

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

Graphical user interface, application, website

Description automatically generated

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

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

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

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

Is Theory Justifying the Results or Vice Versa?

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

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

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

Is the CPS an Appropriate Dataset for the Analysis?

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

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

Flaws in Empirical Methodology

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

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

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

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

## federalism

## adv cp

#### the CP causes massive delays – effective reform and supervision *necessarily* produces inefficiencies

Allensworth 17 (Rebecca Haw Allensworth, professor of Law, Vanderbilt Law School; “Foxes at the Henhouse: Occupational Licensing Boards Up Close” California Law Review, Vol. 105, No. 6 December 2017, Page 1603, DOI: <https://dx.doi.org/10.15779/Z38CJ87K75>) MULCH

Finally, supervision may be an unattractive alternative because it could be perceived as adding to delay and ossification in occupational regulation. An extra layer of review will may make professional regulation slower and less nimble than states prefer. Substantive supervision necessarily involves some duplication of effort and analysis, creating the risk of inefficiencies.182 In states where small government is prized, supervisory structures may be seen as adding another layer of red tape.

## devolution cp

### Devolution CP – Federalism NB – 2AC

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

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

Conclusion

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

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

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

#### Failure to address regulatory externalities devolve into fiefdoms that destroys causes factionalism

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

1. Compacts meet “Federalism 3.0”

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

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

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

2. Horizontal harms in practice

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

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

#### 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

## tax cp

### Taxation CP – 2AC

#### Tax fails

Yent 21 [Kellen Yent, Senior Tax Associate, PwC (Washington, D.C.), A Response to “A New Corporate Tax”, 2021 https://taxprof.typepad.com/taxprof\_blog/2021/10/a-response-to-avi-yonahs-a-new-corporate-tax.html]

Avi-Yonah proposes that the CIT should revert back to its original purpose from when it was proposed in 1909, which was the limitation and regulation of corporate behavior and, in a narrower sense, monopolistic tendencies. 10 This is in contrast with what Avi-Yonah calls the “traditional aim,” which is the indirect taxation of rich shareholders (i.e. the aim in which this paper has chosen to evaluate all other justifications and modifications of the CIT). 11 The current CIT provides a tax when income is earned through the corporation (i.e. the shareholders), and not just when those shareholders earn a dividend.12 The current CIT therefore maintains the idea that the income inside the corporation cannot just be held passively by rich shareholders and deferred until it is earned to them through a distribution of dividends, but that it will be taxed as earned to the corporation (i.e. the controllers of the corporation). Taxation on earnings realized is one of the main pillars of US taxation, and can be best exemplified through I.R.C. §1001 (gain on amounts realized). 13 Avi-Yonah, however, suggests that because of the incidence problem mentioned above, there are better ways to target those wealthy shareholders, thus mitigating the incidence issue.14 In his view, the corporate tax was instituted in the early 20th century in order to regulate monopolistic behavior and the accumulation of wealth, by incentivizing corporations to engage in antimonopolistic behavior. 15 Avi-Yonah proposes a completely new corporate tax with such antitrust incentives in mind: the new tax base will be large corporations, the shareholders will be taxed on a mark to market basis, and there will be a tax on the distribution of dividends.16 Importantly, the tax will be highly progressive so as to restrain such large, mega-corporations corporations from forming (and incentivize them to break up). Avi-Yonah states: I would suggest that the effective tax rate on normal corporate profits…be zero. On super-normal returns, since the main concern is monopolies and quasi-monopolies, the tax should be progressive, with a very high tax rate (e.g., 80%) for profits above a very high threshold (e.g., $10 billion). In between, there should be a series of graduated tax rates, similar to the individual rate schedule before 1980.17

This rate structure would allow very little tax to be paid by the normal/small corporations, thus effectively eliminating corporate tax on that end of the profits spectrum. However, the highly progressive structure captures those massive corporations (such as Big Tech, Big Pharma, etc.) in such a high tax rate that there is little incentive to get so big (or stay so big). Furthermore, under this structure, only the corporations with “super-normal returns” (rents) will be targeted by such a policy, as it is those major corporations who have super-normal returns. This means that anything that is not a return on capital (i.e. normal return) should be taxed. Though Avi-Yonah’s modification to the CIT would still target wealthy stakeholders, it would only target those wealthy stakeholders of monopolies or near monopolies (or those large enough to generate rents). This means that a wealthy shareholder of a medium to small sized corporation with just returns on capital will go untaxed on corporate profits, thus going against this paper’s accepted justification for the CIT: to tax all wealthy shareholders.

The fact that Avi-Yonah’s new corporate will give effectively zero corporate tax on those smaller corporations, or those who only have normal returns on capital, is not inadmissible. Interestingly, some critics of the current CIT would agree with this part of his proposal, and would go further to suggest a total elimination of the CIT or a replacement with something more direct, in the hopes of curbing the aforementioned incidence problems. 18 Entin argues that the incidence of the CIT falls on labor to a large extent.19 He suggests that the classical modeling of incidence misses the allocation of burden falling onto labor, which suppresses investment, productivity, and wages. He also takes issue with how the traditional models use “super-normal” returns to apportion incidence between labor and capital, suggesting that these models include portions that should not be attributed to such “supernormal” returns and which are actually highly sensitive to tax.20 In light of this data, it may be questioned whether a tax on “super-normal” returns is proper for the CIT.

Gordon and Sarada have analyzed the traditional concept of taxing super normal returns in order to come up with a new and improved CIT which better maintains productive efficiency while better taxing the realization of gains to corporations (i.e. to mitigate the deferral factor), suggesting that the role of the corporate tax is solely to mitigate deferral of corporate earned profits. 21 They propose that, in a fully closed economy, corporate tax should be set at a rate that harmonizes with personal income tax, thus eliminating the benefit of deferral to the corporate shareholders. In an open economy, however, productive efficiency will only be maintained if the overall rate of the firm’s income is the same regardless of the jurisdiction in which it is reported.22 Thus, the anti-deferral regimes, which militate towards a higher percentage of profits brought back into the US jurisdiction for taxation purposes, help to increase the effectiveness of the CIT. Gordon and Sarada argue, though, that the distortion between the CIT and personal income tax has lowered the overall effectiveness of income tax as a source of revenue.23 They are instead in favor of a consumption tax as a replacement to personal taxation, and, therefore, the CIT. This would limit the ability to shift personal income into the corporate sector, where the income gets reduced tax rates or deferral, thus capturing those wealthy shareholders much better. 24 This proposal has its merits, as consumption taxes are said to be more direct and just, taxing people on what they consume, instead of what income is earned. Thus, the wealthy, who spend more on expensive or luxury items will be taxed in proportion to their spending. The consumption tax is outside of the scope of this paper, but it should be noted that this approach does have merit.

II. Other Traditional Justifications: Revenue Raising and Distributive Justice?

Other rationales for taxing wealthy shareholders indirectly through the CIT include revenue raising and distributive justice. According the to the Tax Policy Center, the corporate income tax raised $230.2 billion in 2019, which equates to about 6.6% of the total federal revenue raised.26 This equates to anywhere between 4-10% of revenue raised in any given year.27 Furthermore, this only equates to about 1-7% of GDP per annum.28 In comparison to the personal income tax and the payroll tax, the CIT brings in substantially less revenue.29 These figures are surprising given its popularity, which Norton suggests may be due to the fact that it does indeed raise revenue, no matter how small in relation to the income tax. However, he suggests that the most compelling reason for the CIT’s popularity is the fact that the incidence, as stated, is not known: because no one political constituency actually sees itself as the primary taxpayer, none are willing to lobby for change.30 This may be a stretch given that 52% of Americans are in favor of high CIT rates, suggesting that the proponents of the CIT may be winning. 31 It should also be noted that the incumbent Biden administration have proposed increase for the CIT rates, solidifying the idea that the CIT is probably here to stay.32 Overall, while there is strong evidence that the CIT is popular, there is also equally strong evidence that such tax does not actually fall on the correct target (i.e. the wealthy), and further that the CIT is not as strong of a revenue raiser as most might believe. Thus, the revenue raising justification might not be particularly on point.

The argument against distributive justice being the primary justification for the CIT is much within the same vein. Distributive justice justifications for the CIT insinuate that such tax is present in order to promote equity and fairness within the tax system. The Tax Justice Network is very concerned with the CIT and states adamantly that the CIT is necessary for a just and democratic society.33 They further suggest the CIT regime helps to curb political and economic inequalities and rebalance distorted economies.34 These are large claims and very hard to measure. However, the evidence provided above on revenue raising indicates that distributive justice (i.e. rebalancing economies) may not be the CIT’s main goal. The amount of revenue raised as a percentage of GDP is incredibly small, and, as stated, the incidence is not actually known, suggesting that fairness considerations are not presently shown, or are at least very muddled.35

III. Is there a correct justification for corporate tax policy aims?

As discussed, it is very hard to find cohesive justifications for the CIT, signifying that there may not be one specific justification for the CIT, or that the CIT may be based on a multitude of rationale. Brauner agrees with the former, stating that any justifications for the current CIT are not convincing given the stated incidence problems and the low percentage of revenue raised. 36 While some are completely against the corporate tax altogether, others like Brauner advocate for a corporate tax in a different form.37 He suggests a “tax on the appreciation of stakes (shares) in publicly traded corporations” with a mirroring look-though tax for shareholders of non-publicly traded corporations.38 This would eliminate the double layer of tax, and put all of the corporate tax liability on the wealthy shareholders, thus eliminating the stated incidence problems. While this system might have the advantage of clearly allocating the burden of the tax to those who should be the target of the CIT (i.e. the wealthy shareholders), there are certain practical problems that might stand in the way.

Looking past the fact that that this would mean a total overhaul of the CIT regime as it stands presently, there may be a conflict with the traditional principles of tax law, namely the concept of taxation upon realized gain (i.e. income earned). 39 This tax would be placed on the appreciation of shares held by an investor or corporate owner. Appreciation on shares is not earned, it is just passive growth of a share price. The income becomes earned when there is an event in which such appreciation can be realized (i.e. sale or other disposition).40 Moreover, even if timing issues are solved (i.e. when such gain on appreciation is to be “realized”), there may be issues with valuation, as publicly traded corporations have volatile market valuations. Closely held corporations might have an even more difficult time in valuing their shares, as there is not a general public valuations index like seen with publicly traded corporations in the stock market; though these private business could be valued at their asset basis potentially. These two issues can be easily solved with conventions,41 but it may be more difficult to deal with issues of depreciation. Manipulating the price of a corporate stock in order to evade tax in certain years may be difficult to regulate and enforce against. Overall, this method of taxation could be implemented with conventions and regulation on the shareholders, which is compelling, given its advantages in fixing the incidence problem. Therefore, this could be a better tool for the taxation of rich shareholders than the current CIT.

IV. Other considerations when revising corporate tax policy?

It might be worth considering the effect of CIT policy in the wider international context. Because the CIT is such a competitive tax, incentivizing production and capital movement based on lower tax rates, any proposed changes to the CIT may have to be instituted internationally. Such reforms are generally organized through the Organization for Economic Cooperation and Development.42 It would be very hard, in a practical sense, for any major change in CIT structure to happen nationally, as there would be major incentives for corporations to flee the newly reformed area in search of more competitive rates, especially if the newly reconstructed CIT would have the effect of better capturing corporate income (or income earned by shareholders). On April 5, 2021, US Treasury Secretary Janet Yellen advocated for a global minimum corporate tax.43 Politically this message was conveyed to ensure a decrease in jobs shifting overseas and a “race to the bottom on corporate tax rates.”44 In fact, just two days after Yellen’s address, the G-20 announced that it hopes to come to an agreement on global minimum low tax rates by mid-2020.45 This does suggest that a major overhaul of the national corporate tax regime in accordance with the aim of taxing shareholders more directly would be more doable, as it looks like there is going to be a major reconfiguration of the global corporate tax regime. Furthermore, after such international reforms, there would be less incentive to move outside of the US in search of marginally lower rates, even if the US tax regime was more efficient at taxing wealthy shareholders.

V. Conclusion

In light of the above discussion on the CIT’s justifications, given the stated aim of taxing wealthy shareholders, it can be seen that there is no one true justification for placing an indirect tax on shareholders through the earning of corporate profits. Though the aim is to tax wealthy shareholders, it can be seen that justifications for such tax do not fall directly within a revenue raising or distributive justice rationale. The further problem of who bears the ultimate burden of this tax muddles matters even further: does it actually meet the aim of taxing these wealthy shareholders if economists are unsure of where the incidence lies? Lastly, modifications proposed to the CIT by Avi-Yonah may fall short of the ultimate aim of taxing the wealthy corporate owners, as only those at the top of the profit’s spectrum will be captured by his anti-monopolistic corporate tax. All of this said, major changes to the global corporate tax regime may be coming, which may give policy makers in the future the chance they need to recalibrate the CIT or eliminate it completely, in favor of taxes like those proposed by Brauner or maybe even a consumption tax.

#### No impact

Kareiva 12 (Peter Kareiva et. al, – Chief Scientist and Vice President of the Nature Conservancy, Michelle Marvier, Robert Lalasz, “Conservation in the Anthropocene Beyond Solitude and Fragility”, The Breakthrough, http://thebreakthrough.org/index.php/journal/past-issues/issue-2/conservation-in-the-anthropocene/)

As conservation became a global enterprise in the 1970s and 1980s, the movement's justification for saving nature shifted from spiritual and aesthetic values to focus on biodiversity. Nature was described as primeval, fragile, and at risk of collapse from too much human use and abuse. And indeed, there are consequences when humans convert landscapes for mining, logging, intensive agriculture, and urban development and when key species or ecosystems are lost.

But ecologists and conservationists have grossly overstated the fragility of nature, frequently arguing that once an ecosystem is altered, it is gone forever. Some ecologists suggest that if a single species is lost, a whole ecosystem will be in danger of collapse, and that if too much biodiversity is lost, spaceship Earth will start to come apart. Everything, from the expansion of agriculture to rainforest destruction to changing waterways, has been painted as a threat to the delicate inner-workings of our planetary ecosystem.

The fragility trope dates back, at least, to Rachel Carson, who wrote plaintively in Silent Spring of the delicate web of life and warned that perturbing the intricate balance of nature could have disastrous consequences.22 Al Gore made a similar argument in his 1992 book, Earth in the Balance.23 And the 2005 Millennium Ecosystem Assessment warned darkly that, while the expansion of agriculture and other forms of development have been overwhelmingly positive for the world's poor, ecosystem degradation was simultaneously putting systems in jeopardy of collapse.24

The trouble for conservation is that the data simply do not support the idea of a fragile nature at risk of collapse. Ecologists now know that the disappearance of one species does not necessarily lead to the extinction of any others, much less all others in the same ecosystem. In many circumstances, the demise of formerly abundant species can be inconsequential to ecosystem function. The American chestnut, once a dominant tree in eastern North America, has been extinguished by a foreign disease, yet the forest ecosystem is surprisingly unaffected. The passenger pigeon, once so abundant that its flocks darkened the sky, went extinct, along with countless other species from the Steller's sea cow to the dodo, with no catastrophic or even measurable effects.

These stories of resilience are not isolated examples -- a thorough review of the scientific literature identified 240 studies of ecosystems following major disturbances such as deforestation, mining, oil spills, and other types  of pollution. The abundance of plant and animal species as well as other measures of ecosystem function recovered, at least partially, in 173 (72 percent) of these studies.25

While global forest cover is continuing to decline, it is rising in the Northern Hemisphere, where "nature" is returning to former agricultural lands.26 Something similar is likely to occur in the Southern Hemisphere, after poor countries achieve a similar level of economic development. A 2010 report concluded that rainforests that have grown back over abandoned agricultural land had 40 to 70 percent of the species of the original forests.27 Even Indonesian orangutans, which were widely thought to be able to survive only in pristine forests, have been found in surprising numbers in oil palm plantations and degraded lands.28

Nature is so resilient that it can recover rapidly from even the most powerful human disturbances. Around the Chernobyl nuclear facility, which melted down in 1986, wildlife is thriving, despite the high levels of radiation.29 In the Bikini Atoll, the site of multiple nuclear bomb tests, including the 1954 hydrogen bomb test that boiled the water in the area, the number of coral species has actually increased relative to before the explosions.30 More recently, the massive 2010 oil spill in the Gulf of Mexico was degraded and consumed by bacteria at a remarkably fast rate.31

## ttc cp

### Consult TTC – 2AC

#### The process link is thumped and no consensus

Olson 21 [Stephen; 9/30/21; Senior Research Fellow at the Hinrich Foundation with over 30 years of international trade experience; "Quick Take: US-EU Trade and Tech Council reveals transatlantic fissures," https://www.hinrichfoundation.com/research/article/tech/us-eu-trade-and-tech-council-reveals-transatlantic-fissures/]

The inaugural meeting of the US-EU Trade and Technology Council (TTC) has just concluded in Pittsburgh. The purpose of the council is to deepen and expand transatlantic trade and investment ties and update trade rules to reflect 21st century realities. Specific issues to be tackled include technology standards cooperation, supply chain security, and data governance and technology platforms.

The official statement released at the conclusion of the meeting painted an upbeat picture. Both sides expressed their strong support for the continued growth of the technology, economic, and trade relationship. To accomplish this goal, 10 working groups were established along with five separate “annexes”, on investment screening, export control cooperation, artificial intelligence, semiconductor supply chains and global trade challenges.

Despite the positive spin, it is instructive to note the two very different perspectives each side brings to the endeavor. The council was proposed by the EU in the aftermath of Joe Biden’s election in November 2020. After four years of rocky relations under the Trump administration, the EU was eager to establish a vehicle that could put the relationship back on track. The Biden administration did not formally agree until June 2021. It quickly became evident that the US viewed the council as being as much (if not more) about China than transatlantic relations.

Here are the key takeaways from Pittsburgh:

Both sides needed a cooperative vibe to emerge from the meeting. The last official attempt to comprehensively deepen US-EU trade ties was the Transatlantic Trade and Investment Partnership (TTIP) launched during the Obama administration. That initiative promptly went nowhere fast. It was important therefore to send a clear signal that the TTC is not going to be the TTIP redux.

Both sides would like to normalize transatlantic relations, but face challenges in accomplishing that goal. The Biden administration has struck all the right rhetorical notes in expressing its commitment to the relationship. But it has been surprisingly unable or unwilling to follow through in concrete terms, failing to even consult with its “partners” on major strategic initiatives. European consternation over lack of consultation on the Australia-United Kingdom-United States (AUKUS) defense agreement was significant enough to threaten postponement of the Pittsburgh meeting.

The EU initially viewed the Biden administration as a “breath of fresh air” but is now increasingly wondering how much Biden will differ from Trump. The EU envisions a full partnership. It has no interest in serving as a mere adjunct to policies set in Washington. It remains to be seen how amenable the Biden administration will be in accommodating the European view, leaving Brussels to wonder whether the US is looking for partners or deputies.

Both sides largely agree on the challenge posed by China. The recent EU Indo-Pacific strategy paper highlighted many of the same concerns held by the US. But the devil is in the details, and there is wide divergence on tactics and strategies. The US is more comfortable with an overtly confrontational stance. The EU prefers a more oblique approach not specifically targeted at China, which it hopes will “nudge” China in the right direction.

The EU is attempting to walk a narrow tightrope. It wants to assert its interests vis-à-vis China and take a strong stand at least rhetorically when China’s actions violate European values. But it does not want to “rock the boat” economically or jeopardize the commercially beneficial arrangements so many European companies have in China. This will become progressively more difficult as China has signaled that the West should not hope to compartmentalize its relationship with China. For example, it will be difficult to criticize China’s human rights practices on one hand, and also look to cooperate on climate change or commercial matters. The picture is further complicated by divergent views across the 27 EU member nations on how to best engage China.

#### Global antitrust inevitable and thumps

Luniku 14 [Rubin. Ph.D. candidate in Economics, Wayne State University, “The Effects Of Competition Policy Changes On International Trade And Export Flows: Canada Case Estimates.” (2014). Wayne State University Dissertations. Paper 901. https://digitalcommons.wayne.edu/cgi/viewcontent.cgi?article=1900&context=oa\_dissertations]

Actually, approximately 113 countries have some type of competition law. About 83 of these laws took effect during the last two decades. This trend is likely to continue as more countries adopt competition laws and increase their enforcement in the future. Several countries have entered into either reciprocal or multilateral agreements to cooperate on competition policies and their enforcement. For example, U.S. has entered into bilateral agreements on procedural cooperation with Germany (1976), Australia (1982), EC (1991, 1998), Canada (1984 revised in 1995). Lately, the relations between E.U. and U.S. enforcement authorities have progressed toward a slow but steady convergence of review and mutual respect.

#### No spillover – TTC and competition talks are intentionally bifurcated

(Note: This is from UofM’s original UQ ev)

Cheek 10-11 [Marney; 2021; Member of the Council on Foreign Relations, [Stuart E. Eizenstat](https://www.globalpolicywatch.com/author/seizenstat/), [Holly Fechner](https://www.globalpolicywatch.com/author/hfechner/), [Marty Hansen](https://www.globalpolicywatch.com/author/mhansen/), [Lisa Peets](https://www.globalpolicywatch.com/author/lpeets/), [Bart Szewczyk](https://www.globalpolicywatch.com/author/bszewczyk/) & [Sebastian Vos](https://www.globalpolicywatch.com/author/svos/); Auswaertiges; Covington, “US-EU Trade and Tech Council: Takeaways and Next Steps,” https://www.globalpolicywatch.com/2021/10/us-eu-trade-and-tech-council-takeaways-and-next-steps/]

TTC’s Separate Track from US-EU Technology Competition Policy Dialogue

Alongside the TTC is another US-EU dialogue on technology competition policy. Whereas the former is about coordinating policies, the latter is about coordinating enforcement actions, e.g., between the Federal Trade Commission and DG Competition, or between the Justice Department and European counterparts. Although at the surface the two dialogues might appear to overlap, they are intentionally kept separate and involve different groups of individuals from the US and EU.

## ftc cred da

### FTC Cred Bad DA – 2AC

#### Wins inevitable – enforcement’s exploding and their ev’s about tech cases

Swartz 1-1-22 (Jon Swartz, senior reporter at MarketWatch, has covered technology for more than 20 years, previously at Barron's and USA Today, “Big Tech heads for ‘a year of thousands of tiny tech papercuts,’ but what antitrust efforts could make them bleed?” MarketWatch, last updated 1-1-2022, first published 12-27-2021, https://www.marketwatch.com/story/big-tech-heads-for-a-year-of-thousands-of-tiny-tech-papercuts-but-what-antitrust-efforts-could-make-them-bleed-11640640776)

As Amazon, Apple, Facebook, Google and Microsoft hover around $10 trillion in market value, regulators expected to try to cut off acquisitions and pass new laws amid a raft of antitrust lawsuits

Antitrust enforcement of Big Tech is expected to take place on a scale never before seen in 2022, following years of escalating rhetoric from Washington.

So far, Wall Street has shrugged as the five companies under the microscope — Google parent Alphabet Inc. GOOGL, 0.19% GOOG, 0.39%, Facebook parent Meta Platforms Inc. FB, 1.02%, Apple Inc. AAPL, 2.45%, Amazon.com Inc. AMZN, 2.10%, and, yes, Microsoft Corp. MSFT, -0.77% — have been targeted by governments and rivals across the globe. Despite a steady drumbeat of negative headlines, tech’s quintet of heavy hitters boasted a cumulative market value of nearly $10 trillion as 2021 neared an end, after producing a collective $2.4 trillion in revenue over the past two years of pandemic misery.

The stock prices of tech companies have only been “minorly impacted because investors do not tend to make decisions based on the mere possibility of legislation,” Ashley Baker, director of public policy at the Committee for Justice, told MarketWatch.

Many investors have simply looked back on history and shrugged, according to one Silicon Valley venture capitalist.

“There is more antitrust noise, but investment people remember the Microsoft and IBM IBM, 1.77% [antitrust investigations] in which waves of innovation followed those investigations and proved they did not own the industry,” Alexandra Sasha Johnson, president of Global Tech Symposium, a Silicon Valley investment conference, told MarketWatch. “Until the Big Tech companies buy each other, this is not a problem.”

This could finally change in 2022 as it did in the late 1990s, when some tech companies struck a cautious stance during the Justice Department’s investigation of Microsoft for monopolistic practices, Syed said.

“The difference is that we’re talking about interconnected companies that own an industry versus just one company [with Microsoft],” she said. “And there is bipartisan support, which makes it easier politically.”

With more than a dozen pieces of anti-tech legislation, a plethora of lawsuits and regulatory fines escalating in the U.S. and abroad, as well as the Biden administration rounding out Big Tech’s nightmare team of government agency heads, 2022 is shaping up as a seminal year for tech regulation after decades of inaction.

In rapid succession this year, Biden named and nominated an antitrust team of Tim Wu (to the newly created position of head of competition policy at the National Economic Council), Lina Khan (chair of the Federal Trade Commission) and Jonathan Kanter (head of the antitrust division of the Justice Department). Each is a heralded anti-monopolist advocate who has written extensively on the topic or represented companies making antitrust claims against Big Tech.

The trio have been referred to as members of a “New Brandeis movement,” named after Supreme Court Justice Louis Brandeis, whose decisions limited the power of big business in the early 20th century. With the New Brandeis trifecta in place, and Congress evaluating more than dozen possible anti-tech bills, next year is “shaping up to be the year of Tech Takedown,” Bhaskar Chakravorti, dean of global business at the Fletcher School at Tufts University, told MarketWatch.

More troubling for tech CEOs, he said, are the “many tiny actions at the FTC, Justice Department and Congress that will continue to keep feeding the news cycles with a steady stream of actions” that add up to a “a year of thousands of tiny tech papercuts.”

Big Tech’s treacherous path to antitrust enforcement has three potentially damaging roads: federal agencies challenging acquisitions and mergers; legislation tailored to stimulate competition and curtail the influence of tech’s dominant platforms; and federal and state lawsuits.

#### Two recent disgorgement wins BOTH thump their court victories link – BUT also their impact because they terminally flatlined FTC’s institutional legitimacy

Kruckenberg 1-3 (Caleb Kruckenberg, attorney at Pacific Legal Foundation, “The FTC's rebellion against the judiciary,” The Hill, 1-3-2022, <https://thehill.com/opinion/judiciary/587728-the-ftcs-rebellion-against-the-judiciary>)

The Federal Trade Commission (FTC) must be held accountable for its open defiance of the Supreme Court’s directives.

For decades, the FTC relied on a statute authorizing “permanent injunctions” to obtain monetary fines. That always seemed strange. After all, neighboring sections of the law allow the commission to seek limited monetary penalties, while injunctions normally only prevent future action and do not entail an award of any damages. Yet “disgorgement” awards — the return payment of supposedly illegal gains — became so pervasive that in 2019, for example, courts ordered that $723.2 million be paid to the government in such awards.

The Supreme Court seemingly put that practice to an end in April, in AMG Capital Management, LLC v. FTC, when it unanimously held that the statute never allowed the “Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement.” Disgorgement was just an illegal power grab.

Since then, the agency has scrambled to find a replacement for its most significant enforcement tool. In a memo sent to FTC staff when she assumed her role, Chair Lina Khan stressed the need to use the agency’s “full set of tools and authorities … post-AMG.”

So, when the FTC bragged in a recent news release about obtaining $21 million “for consumers” in a case involving alleged unfair practices, we wondered just how the agency managed to get such a large award without disgorgement.

It turns out not to be so hard when you ignore the Supreme Court. Khan must have meant that the agency would simply ignore any Supreme Court decisions it dislikes. The $21 million was part of a settlement, approved by a federal judge, ordering restitution with any remainder “to be deposited to the U.S. Treasury as disgorgement.” And looking further, we realized that the FTC entered into the same kind of settlement just a few weeks earlier. The agency is acting like the AMG decision doesn’t exist.

This conduct would be stunning if it weren’t so predictable. In a recent interview, Khan was direct about her vision for the agency — worrying not about “overreaching” but about “neutering the tools” available to the agency. It is peak hypocrisy for the agency charged with protecting the public from unfair and deceptive practices to employ tactics it knows are illegal to strong-arm settlements in litigation. Make no mistake: Forcing illegal disgorgement payments is akin to extortion.

Consider a typical case. The FTC obtains an injunction against a defendant with no notice or opportunity for the defendants to challenge it, which forces the target company into receivership. Many defendants first learn about the enforcement action when a receiver arrives with a court order to take over the business. To defend themselves, defendants must petition the receiver for the release of funds to pay their legal fees.

With both hands tied behind their backs, companies unjustly accused of wrongdoing can barely muster a fight. But when disgorgement is possible and the agency can ask for, and a court can order, essentially unlimited fines, the stakes become truly dire. Few dare to fight the charges, even when they are unfounded.

Disgorgement is not a legal option, though. Congress instead limited the FTC’s authority, likely to protect against such asymmetry in power. A unanimous Supreme Court confirmed as much just months ago. And if the FTC can ignore the law to demand payment through disgorgement in exchange for a settlement, it’s no better than the mob demanding protection money.

Maybe the commission thought no one would notice. After all, few people regularly read the details of its settlement agreements. But we did.

The FTC should have to answer for its continued abuses. The Supreme Court’s directives were clear, but the agency has not followed its legal duty. Perhaps it’s time for another branch — Congress — to demand answers.

This isn’t just about the FTC or unfair practices. It’s about power. And power has been the driving force at the Khan-led FTC. If any ordinary American ignored the law, they’d be held responsible. And so should those tasked with enforcing the law.

That’s particularly true today when punishments have ballooned. Crushing civil fines can shut down a company overnight. They ought to at least have the chance to know the potential penalties they face. Yet, if FTC gets its way, companies’ futures will hinge on the whim or caprice of regulators unbounded by congressional statutes, the Supreme Court, or any legal constraint. That’s a kind of power that undermines not only the FTC’s institutional legitimacy but the rule of law itself.

#### Ukraine thumps ILO

**Lynch 22** [David J. Lynch joined The Washington Post in November 2017 from the Financial Times, where he covered white-collar crime 3-5-2022 <https://www.washingtonpost.com/business/2022/03/05/global-economy-russia-ukraine/>]

Russia’s invasion of Ukraine and the financial reckoning imposed on Moscow in response are proof that the triumphant globalization campaign that began more than 30 years ago has **reached a dead end**.

Fallout from the fighting in Ukraine will take a **meaningful bite out of**the global economic **recovery** this year, with the greatest impact in Europe, economists said. **A spike in oil prices** to more than $110 per barrel and renewed **supply chain disruptions** — including fresh headaches for the auto industry — also are likely to **aggravate** U.S. **inflation**, already at a 40-year high.

But the war’s long-term consequences could be more **profound**. Even before Russian President Vladimir Putin sent tanks and missiles hurtling toward Ukraine, years of deteriorating U.S.-China relations and failed global trade talks had **stalled** the tighter **integration** of finance and trade flows that had been anticipated during globalization’s heyday.

What comes next is unlikely to mirror the Cold War’s distinct blocs. Even as **the global economic order fractures**, no rival ideologies compete for supremacy. And China’s harsh authoritarian turn under President Xi Jinping co-exists with extensive commercial ties to the United States, Europe and Japan. But governments, corporations and investors all are adjusting to a **new reality**.

“It’s the end of one era and the beginning of another, which is a less complete form of globalization than we had ambitions for in the immediate post-Cold War era,” said Michael Smart, managing director of Rock Creek Global Advisors. “We have to think differently about what we mean by the global trading system. There are certain requirements that, if you don’t meet them, you’re not part of it. You can’t be in the club.”

With the United States, Europe, Canada, Britain and Japan uniting to punish Russia with unprecedented financial sanctions, the war has triggered a **“major geopolitical realignment”** akin to the aftershocks from the 9/11 terrorist attacks, according to Citibank analysts.

Virtually overnight, most major Russian banks were blocked from moving money across borders. Moscow’s stock market has been closed for a week. Russian customers are cut off from much of the world’s most advanced technologies.

On Friday, Russia’s isolation deepened as the country’s communications regulator blocked access to Facebook, one of the few sources of information that the government already did not control, saying it had discriminated against Russia media.

End of carousel

In Washington, top Democrats and Republicans have begun demanding that the United States stop importing oil from Russia, a move that would intensify Moscow’s financial plight if European nations followed suit. Meanwhile, the International Monetary Fund warned Saturday that the war and rapidly accumulating sanctions on Russia would “have a severe impact on the global economy.”

“This event does seem to be one that is **a game changer** and will be with us for a very long time,” Federal Reserve Chair Jerome H. Powell told Congress last week.

Russia’s financial exile caps more than a decade of **erosion in globalization**, beginning with the 20**08** financial crisis and continuing through the rise of Xi in 2012, the U.S.-China **trade war** that began in 2018, and diplomats’ repeated failures to agree on **trade liberalization**. The **coronavirus** pandemic, which highlighted the risk of ocean-spanning supply lines and restricted international travel, further thinned cross-border links.

## chilling da

### Merger Chilling – 2AC

#### Khan will go ahead on mergers – chilling signal is the squo

Scola 10-27 [Nancy Scola - Tech reporter that’s quoting/interviewing Khan as part of this piece - “Lina Khan Isn’t Worried About Going Too Far” – NY Mag: Intelligencer - OCT. 27, 2021 https://nymag.com/intelligencer/article/lina-khan-ftc-profile.html]

The rash of changes Khan has already made — tossing an Obama-era statement limiting the scope of the “unfair practices” cases the agency can bring; naming herself or an appointee rather than an administrative judge the decision-maker in some procedures; reserving the right to go back and vet already consummated mergers — has coalesced into a narrative: that Khan is something of a consolidator of power herself, taking it away from minority commissioners and staff and rattling the corporate sector in the process. The two Republican members have called it “a disturbing trend of pulling the rug out from under honest businesses and the lawyers who advise them.” Senator Mike Lee, the top Republican on the Senate Antitrust Subcommittee, has called it a “progressive putsch.”

Khan’s allies would agree there’s been an ouster. “What we’ve done is we’ve restored the American tradition from 1776 to 1981,” says Lynn, referring to the year that Bork’s analysis went mainstream. “We’ve driven the radicals out of the temple.”

Khan told me she worries about the “existential stakes of underreaching” — of “neutering the tools” available to the agency, constantly disappointing both Democrats and Republicans in Congress, and having the public forget the FTC even exists. Going too far? Doing too much? “When identifying the top ten threats to this agency,” she said, “that’s not on the list.”

#### Parker immunity is only about state-sanctioned monopolies – like utilities and licensing boards – mergers in that context are nonsensical because there’s no competitor to acquire – regardless, mergers are NOT eligible – and their ev’s obviously not contextual

Lopatka 86 (John E. Lopatka, Associate Professor of Law, University of Illinois, “The State of "State Action" Antitrust Immunity: A Progress Report,” Louisiana Law Review, 46(5), May 1986, https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=4987&context=lalrev)

The principle also applies when the conduct of a private party is challenged as an antitrust violation. If the state acted in such a way that the challenged conduct of the private party was a likely consequence, immunity should be granted in favor of the private party A grant of immunity requires a causal relationship flowing from the conduct of the state to the challenged actions of the private party. However, the probability that the anticompetitive conduct will occur need not approach certainty. For instance, if a state permitted the conduct, rather than required it, the probability that it would occur would be smaller. Nevertheless, the conduct would be a likely consequence and the private party would be granted immunity. Thus, if the state explicitly provides that raisin growers may fix prices, subsequent price-fixing by the producers is a likely consequence and, therefore, the producers should be granted immunity. Conversely, if a state's corporation laws permit stock acquisitions, an anticompetitive merger of two firms would not be a likely consequence, and, therefore, the firms should not be immune.

# 1ar

## adv cp

#### Second, federal fails – Mcginnis EXPLAIN – more ev

Strifling 10(David, Freedman Fellow, Temple University Beasley School of Law, “ENVIRONMENTAL FEDERALISM AND EFFECTIVE REGULATION OF NANOTECHNOLOGY,” http://www.msulawreview.org/wp-content/uploads/2012/10/2010-4\_Strifling.pdf)

As noted in Part I, the presence of interstate externalities, whether physical, economic, intertemporal, or psychological, is considered by many scholars on both sides of the federalism debate to be the best justification for centralized regulation.240 That recognition is why the consideration of externalities is the first part of the contextual analysis proposed in Part I. As this Part will discuss, the question of whether nanotechnology production, emissions, and use will generate significant externalities is the first of many knowledge gaps that are likely to plague regulators attempting to regulate nanotechnology and other emerging technologies. The question of physical externalities is perhaps easiest to begin assessing. Many nanoparticles are incorporated into products and seem more likely to be found in solid waste as opposed to air emissions.241 For example, nanoparticle-silver is often incorporated in ordinary consumer products like socks because it has antibacterial and odor-fighting properties. But, the nanosilver can leach into wash water during ordinary laundering, and will ultimately join the solid waste stream when the socks are thrown away. Solid wastes are typically handled locally and therefore have a more limited transport range than pollutants released in air emissions.242 This makes it less likely, although not impossible, that significant interstate externalities will result, and may weigh in favor of decentralization. However, such conclusions should be drawn only with caution because studies have shown that at the nanoscale, even small changes in production methods may lead to different toxicological properties and perhaps increased mobility.243 Geographically, it is difficult to quantify how much of a particular nanoparticle is produced in a given state, region, or country.244 This makes application of the “[m]atching [p]rinciple” difficult.245 It may be that certain emerging technologies will be produced within a single state, or that they will be national in scale. At this point, it appears that nanotechnology production will not be limited to a single state or region, but it is not clear how dispersed the activity will be. It is possible that as with other emerging technologies, nanotechnology development may occur within localized or regional hot spots of activity. At this stage, it is more difficult to assess the possibility of economic, intertemporal, or psychological externalities. The presence or absence of economic and psychological externalities will become apparent as the technology proliferates. Intertemporal externalities are perhaps the toughest to assess immediately. Because nanoparticles have characteristics that differ from macro-scale equivalents (for example, nanosilver has different physical properties than macro-scale silver), it cannot be proven that they will not also have different long-term consequences.246 At least at the outset, it seems likely that state regulators will be better equipped than federal regulators to form an opinion as to whether nanotechnology generates significant externalities. Most obviously, they will be aware of whether their individual states are on the receiving end of “nanopollution” from other states. State and local regulators can, of course, report their experiences of this kind to their federal counterparts for compilation and comparison with similar information from other states. This process will provide a solid base of knowledge with which to assess the next generation of regulations. B. Knowledge Gap Two: What Are the Costs and Benefits of Nanotechnology Regulation? The second part of the contextual analysis described in Part I recommends examining the economies of scale associated with federal or state regulation. Professor Esty remarked that it will most likely be inefficient for every “hamlet” to perform detailed and highly technical analyses of nanotechnology.247 That is intuitive, although the costs and benefits involved with either centralized or decentralized regulation of nanotechnology are difficult to measure. In particular, the difficulty in estimating the benefits of nanotechnology will make economically efficient regulation (i.e., maximizing the difference between benefits and costs) impossible, but finding the most cost-effective policy (i.e., minimizing the costs) may eventually become an achievable goal. The governance scheme should also provide incentives for new research and development efforts to better control future nanoparticle emissions. This likely counsels against the use of a federal command and control scheme rooted in the uniform imposition of a particular control technology across state jurisdictions.248 Such standards tend to “freeze” the development of technology because a company that develops one may be “‘rewarded’ by being held to a higher standard of performance and thereby not benefit financially from its investment.”249 Here, too, the diverse experiments and experiences of various state regulators will help to illustrate the differences between various policy choices. It may be that a particular state’s regulatory approach maximizes the economic benefits of nanotechnology while another state is devoted to maintaining environmental quality. The balance between the two can best be struck if the consequences of these differing approaches are known. C. Knowledge Gap Three: Do Regulators Have the Tools to Successfully Monitor and Enforce Compliance with Standards? The third part of the contextual analysis described in Part I recommends analyzing whether regulatory failures are likely to occur. As discussed in more detail later in this Paper, one of the difficulties with using existing statutory authority to regulate nanotechnology is that it is uncertain whether those authorities adequately cover particles at the nanoscale.250 Similarly, some existing authorities contain minimum thresholds (typically weights) below which entities are accepted from regulations. Those limits may not be low enough to cover comparatively large cumulative quantities of nanoparticles. A related question is whether regulators have the technological tools to successfully monitor compliance with the standards that are ultimately enacted. Many environmental statutes are set up such that the governing standards are set at the federal level, and enforcement is handled locally.251 But, such standards cannot be effectively implemented if they cannot be enforced. To give one example, state regulators cannot discern the quantity of nanoparticles emitted due to their miniscule size. State experimentation with varying enforcement methods can provide useful information both to the federal government and to other states in at least three ways. First, states can supplement limited federal enforcement resources. As in the context of water and air regulation, it is extremely unlikely that the federal government has the resources to successfully police all regulated firms. Placing some enforcement control in the hands of the states multiplies the resources available for this task. Second, and more relevant to the point of filling knowledge gaps, the success or failure of di- verse state experiences can help tailor future enforcement efforts both in other states and at the federal level. For example, if one state chooses a method of compliance verification (e.g., self-monitoring and reporting) and that method proves effective and less resource-intensive, other jurisdictions may choose to adopt it to preserve their own resources. Finally, a cooperative state and federal scheme would offer more adaptability, which as discussed above is critically important to successful governance of emerging technologies.252 D. Knowledge Gap Four: How Will the Public React to Widespread Deployment of Nanotechnology? The fourth facet of the contextual analysis considers democratic ideals and public involvement. As previously discussed, Professor Revesz has suggested that public choice theory (suggesting that concentrated industry pressure will dominate diffuse pro-environment interests) is overtaking—or has already overtaken—externalities as the top justification for federal environmental regulation.253 It is not surprising, then, that several scholars have suggested that stakeholder involvement, and especially public involvement, is an important facet of an equitable governance scheme.254 This is true even though the public may not have the technical expertise to evaluate these questions.255 At first glance, it would seem that such involvement is more likely under a decentralized regulatory scheme. However, there are conflicting reports about what the public actually wants. One line of thinking is that even though most of the public has no technical expertise, they prefer not to give up control over emerging technology policy.256 For example, one survey reported that only about one-fourth of Americans believe that “decisions about the issue of genetically modified food are so complicated that it is a waste of time to consult the public on this subject.”257 But in another survey nearly three-fourths said they would prefer that the views of experts guide scientific policy.258 Yet, another survey reported that three-fourths of the public preferred that technology decisions be made on the basis of science rather than morals.259 The upshot of these studies is that about half of the public is happy with the status quo of experts making decisions based on science.260 The other half would prefer that decisions about technology “be influenced by some combination of moral and ethical principles shared by average citizens.”261 Perhaps the bottom line is that scientific experts are better qualified to judge science, but average people are better qualified to judge ethics and morality.262 State and local governments are likely better equipped to handle public information campaigns as opposed to the federal government. For example, the city of Cambridge, Massachusetts has created the Cambridge Nanomaterials Advisory Committee, which the City Manager charged with developing recommendations for oversight of local nanotechnology activities.263 One of the Committee’s recommendations was that the city “[o]ffer up-to-date health information to residents on products containing nanomaterials and sponsor public outreach events.”264 The Committee recommended two specific strategies to accomplish this goal. The first is to post on the City’s website basic information about nanotechnology and, to the extent possible, about the types of nanomaterials being used in Cambridge.265 The second is to sponsor public forums to discuss nanotechnology with Cambridge residents, including gathering information about the residents’ preferred methods to receive information about nanotechnology.266 Both of the Cambridge strategies would be impossible to successfully implement at the federal level simply because of the scale of the undertaking. The best that federal regulators can likely do in this direction is to post general information about nanotechnology on the internet, as the EPA has done.267 This illustrates the advantage of state and local involvement in public outreach efforts. And if national use of this information becomes desirable, state and local agencies can simply compile the information they have gained into an aggregated database or survey instrument. E. Knowledge Gap Five: What Substantive Standards Should Govern Nanoparticle Emissions? The final and perhaps the most daunting knowledge gap consists of the types of substantive controls and standards that are necessary to successfully regulate nanotechnology to appropriately protect public health and the environment while authorizing safe technological development.268 The case for state and local involvement here is less clear than those related to the other knowledge gaps because it seems likely that the initial scientific and technical standards that will govern nanotechnology will likely be developed at the federal level.269 And yet, state and local regulators can provide valuable data that their federal counterparts can use in ongoing standards development. For example, the first recommendation of the Cambridge Nanomaterials Advisory Committee was that the City should “develop an inventory of commercial, industrial, and research facilities in Cambridge that manufacture, process, handle, or store engineered nanoscale materials (excluding nanomaterial-containing consumer products).”270 The Committee noted that “[l]essons learned from the information gathered through this survey will be incorporated into further efforts to provide technical assistance to encourage best practices for health and safety.”271 It also noted that to the extent firms have concerns about sharing such information, they could be protected as confidential business information under state public records laws.272 To the extent that confidentiality is a concern, state and local governments could simply aggregate the information collected without identifying specific responders, as the totals (rather than individual responses) would likely be more useful to federal regulators working on standards development. Some commentators have called for entirely new regulatory regimes to govern nanotechnology.273 There is no question that creating a new environmental law out of whole cloth, or totally overhauling existing regimes, is very expensive. In this fractured political climate, it may also be politically impossible. Congress has not passed significant environmental legislation since the Clean Air Act Amendments of 1990.274 In 2009, Congress expected to, but failed to, pass comprehensive energy legislation despite Democratic majorities in both houses as well as a Democratic president.275 As such, it appears unlikely that Congress will enact a new statutory scheme to govern nanotechnology. However, both the EPA and a series of American Bar Association (ABA) analyses have suggested that in practice, existing statutory schemes provide the necessary authority to regulate nanotechnology.276 But, this strategy has its shortcomings, as demonstrated in the following convoluted hodgepodge of statutory authority described in the EPA’s 2008 Draft Nanomaterial Research Strategy: Regulatory decisions regarding nanomaterials are covered under current statutes. EPA intends to review nanomaterial products and processes, pursuant to its authorities under the Toxic Substances Control Act (TSCA), the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Clean Air and Water Acts (CAA and CWA), the Safe Drinking Water Act (SDWA)[,] Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and Resource Conservation and Recovery Act (RCRA). Under the Toxic Substances Control Act . . . [t]here is some question as to whether nanomaterials are “new” compounds. Under FIFRA nanomaterials added to an existing pesticide product may require reapproval, and the EPA must determine whether the altered product might cause unreasonable adverse effects on the environment including human health risks. The CAA allows for the development of air quality criteria for pollutants anticipated to endanger public health and welfare, mandates the identification of the sources and the issuance of technology-based emissions standard for 189 pollutants, and requires that any mobile source fuel or additive be registered. Risks from airborne nanomaterials may reasonably need assessing in all of these areas. Wastewater streams containing nanomaterials might be controlled through effluent limits in permits established under the CWA. If nanomaterials enter drinking water they may be subject to regulation using Maximum Contaminant Level Goals and Maximum Contaminant Levels under SDWA. Risks from nanomaterials in waste sites would be evaluated and controlled under the authority of CERCLA and RCRA.277 However, other assessments of these existing schemes have concluded that existing federal regulatory schemes are inadequate to assess and respond to the prospective risks posed by nanotechnology.278 Significant regulatory coverage gaps (and in some cases, gulfs) would manifest upon any effort to use existing federal regulatory authority, and only that authority, to regulate nanotechnology.279 These gaps can take multiple forms. For example, some existing environmental statutes (such as the Toxic Substances Control Act (TSCA) and the Resource Conservation and Recovery Act (RCRA)) are triggered based on volume or mass.280 Such measures are inappropriate for nanotechnology regulation.281 Alternatively, the fundamental incapacity to detect and measure nanoscale quantities will make regulation difficult.282 In practice, the experience of state and local regulators can ultimately help the EPA decide which regulatory authority works best. The discussion of potentially applicable federal statutes should make clear that even if nanotechnology is regulated at a centralized level, coordination difficulties will likely arise because nanotechnology arguably falls within the purview of a variety of different statutes and different agencies.283 Therefore, centralized regulation cannot be justified on the basis of improved coordination. Similarly, numerous emerging technology scholars have stressed the need for an adaptable scheme that can identify and fill regulatory gaps as time passes and new discoveries and applications for the technology arise.284 A unitary scheme across all jurisdictions would likely come with decreased flexibility, and some have argued that such an outcome is preferable because flexible regulation leads to power imbalances between concentrated corporate interests and diffuse public interests.285 On the other hand, use of the states as “laboratories” would allow increased experimentation and, perhaps, increased responsiveness to developments in the technology. As noted above, the scientific and technical knowledge gaps will make it difficult to utilize solely centralized federal regulation to govern emerging technologies.286 This is especially true as to the lack of capacity to monitor and control emissions, traditionally a state function.287 On the other hand, widespread involvement of states and local governments could generate significant amounts of data and help to fill these knowledge gaps. The next and final Part elaborates on this conclusion and reviews an example of the roles that state and local governments might play in information generation to fill knowledge gaps and to simplify ultimate decisions about nanotechnology regulation through the contextual analysis or otherwise. IV. CONCLUSION The foregoing discussion illustrates the daunting knowledge gaps that will hamper attempts to regulate nanotechnology. And yet, it is necessary to formulate governance strategies now that preserve options and flexibility while averting the necessity to act later under emergency conditions. The solution to this quandary is to build our knowledge base as quickly as possible while retaining the flexibility to adapt the regulatory scheme as time goes on. In practice, such a system might develop as outlined in the following two steps. Initial scientific and technical analyses, including standard development, should take place at the federal level to preserve economies of scale. The EPA has already begun this process.288 Simultaneously, states and local governments can begin information collection efforts that inform the federal standards development process. Once the standards are issued, application and enforcement of those standards could be handled at the decentralized state or regional level in order to give due consideration to democratic ideals and public involvement. This approach will lead to diversification and expansion of our nanotechnology knowledge base because it would engender widespread familiarity with nanotechnology regulation at the state level. As more and more states fulfill roles as one of Justice Brandeis’s “laboratories,” the whole regulatory community will learn more about new approaches to nanotechnology regulation that can play a part in filling all of the knowledge gaps previously identified.289 Several arguments to the contrary are not convincing. First, some have claimed that inconsistent regulatory efforts in different jurisdictions could have a “chilling effect” on nanotechnology development, as would have been the case if “third car” standards had been allowed under the Clean Air Act.290 But it is not at all clear, or even likely, that individual jurisdictions would apply individual standards to nanotechnology design, as opposed to production, distribution, use, and disposal. Second, agency capture and race to the bottom are unlikely to occur. By definition, emerging technologies are new, and thus capture seems less likely because of the absence of the factors that are typically thought to cause it: a well-established industry lobby; agency officials with previous experience in industry, and vice versa; and little or no local political pressure.291 A race to the bottom seems unlikely for similar reasons. As noted above, the geographic distribution of nanotechnology production and use remains unclear. It is possible that some areas may have little to no nanotechnology development, making a race to the bottom less likely because nanotech industries will prefer to locate plants in states and regions with an existing nanotechnology base. Therefore, arguments against decentralization do not overcome the substantial benefits that will arise from using the information generated by state and local governments to fill knowledge gaps. And yet, the valuable information obtained during early regulatory efforts will only be useful if the regulatory system initially put in place has the flexibility to assimilate and respond to the new information. Initial regulatory schemes must therefore provide the opportunity to revisit both substantive and administrative provisions as time goes by.

## innovation

### 1ar – redbird

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

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

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

Is Theory Justifying the Results or Vice Versa?

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

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

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

Is the CPS an Appropriate Dataset for the Analysis?

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

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

### Innovation – A2: Cara 17

#### Cara concludes an ABR crisis is coming and only innovation can solve

MSU = Blue

Cara 17

Ed Cara, science writer for The Atlantic, Newsweek, and Vocativ, Vocactiv, January 27, 2017, “The Attack Of The Superbugs”, http://www.vocativ.com/394419/attack-of-the-superbugs/

Antibiotic-resistant infections kill at least 700,000 people worldwide a year right now, according to an exhaustive report commissioned by the UK in 2014, and without any substantial medical breakthroughs or policy changes that slow down resistance, they may claim some 10 million deaths annually by 2050 — eclipsing cancer in general as a leading cause. These deaths largely won’t come from pan-resistant infections, just tougher ones. A preventable death there, a preventable death here.

Leaving that aside, antibiotics, along with proper sanitation and nutrition, gird our entire way of living. Most every invasive surgery, pregnancy, organ transplant and chemotherapy session we go through will become riskier. Other diseases like HIV, malaria or influenza will become deadlier, since bacteria often exploit the opening in our immune system they leave behind. And already precarious populations like those living with cystic fibrosis, prisoners, and the poor will lose years off their lives.

For all the warranted gloom, though, Farewell does think there are reasons to be hopeful. “I don’t think we are doing enough, but the scientific community along with many governmental and private foundations are very actively involved in finding not only new antibiotics, but new solutions to this problem,” she said. There’s been a noticeable change in attitude and increased urgency surrounding antibiotic resistance, she said, one that she hadn’t seen even five years ago, let alone twenty.

Until recently, that attitude change could be seen from places as high up as the U.S. federal government. In 2014, former President Obama issued an executive order aimed at addressing antibiotic resistance, the first real acknowledgement of the problem from an administration, devoting funding and outlining a national action for combatting resistance. Through its federal agencies, the administration pushed to reduce antibiotic use on farms and encouraged doctors to stop using them in excess.

“There has been a lot of work done the last couple of years, much of it spurred by [Obama’s] National Action Plan,” said Dr. David Hyun, a senior officer for Pew Charitable Trusts’ Antibiotic Resistance Project. The CDC, in particular, has used its funding to open up regional labs that allow them to better detect and respond to antibiotic-resistant outbreaks like the Nevada case, he said. They ultimately hope to create an expansive surveillance system that can easily keep track of resistance rates on a national, state and regional level. A parallel system also exists for monitoring resistance in the food chain, shepherded by the CDC and the U.S. Department of Agriculture.

In fact, it was this sort of cooperation between national and local health agencies that enabled Nevada doctors to stop the worst from happening, said Dr. Lei Chen. The swift identification of a possible CRE strain by the hospital, coupled with the woman’s medical history, led to a precautionary quarantine, while also prompting Chen’s public health department and eventually the CDC into action. And it may help prevent future cases from spilling into the public. According to Chen, the CDC has allocated funding this year to all of Nevada’s state public health departments so they can better detect CRE and other dangerous resistant strains.

Under the Trump administration, there’s no telling how these small victories will hold up or whether they will advance. All references to antibiotics once found on the Whitehouse.gov site have been removed, including a link to the Obama administration’s national action plan, and the fact that they’re already tried to bar USDA scientists from discussing their work with the public while stripping funding from other public health agencies isn’t encouraging.

Even with the best public policy, however, there’s no clear light at the end of the tunnel. Antibiotic resistance has gradually been worsening, even within the last 15 to 20 years, when superbugs like methicillin-resistant Staphylococcus aureus (MRSA) first became widely known, said Hyun. The effort needed to develop new drugs has been in short supply, hamstrung by pharmaceutical companies’ inability to recoup the costs of bringing new antibiotics to market. That’s because, unlike the latest heart medication, any new antibiotics will have to be treated like the last drops of water during a drought, used as little as possible — the exact opposite way to make money off a new product. Yet, much like climate change, the financial toll of not doing anything will total in the trillions years down the road. And it already numbers in the billions now, according to the CDC.

Of course, we need bacteria to survive. And most need or pay no mind to us in return. Even pan-resistant bacteria don’t really mean harm. Some have been found in perfectly healthy people, a fact that’ll either comfort you or keep you awake at night, only causing problems when our immune system wavers. There’s no army of sentient E. coli that will rise up and someday overthrow the human race.

But barring the cavalry showing up, a new fear of ours will learn to settle in, almost unnoticed. It’ll creep in when we pick our heads up from a nasty fall that scrapes our skin open or breaks our bones; when we wave goodbye to our loved ones before they enter an operating room, or when we cradle our newborns into a world teeming with the living infinitesimal, wishing there was still a way to shield them from it as our parents once could for us. A fear of naked vulnerability.

The antibiotic apocalypse will be gentle, if it fully arrives, but it won’t be any less devastating to the human spirit.

## da

### FTC Cred Bad DA – Legislation Thumper – 1AR

#### Huge FTC wins coming now – new antitrust legislation will pass

Swartz 1-1-22 (Jon Swartz, senior reporter at MarketWatch, has covered technology for more than 20 years, previously at Barron's and USA Today, “Big Tech heads for ‘a year of thousands of tiny tech papercuts,’ but what antitrust efforts could make them bleed?” MarketWatch, last updated 1-1-2022, first published 12-27-2021, https://www.marketwatch.com/story/big-tech-heads-for-a-year-of-thousands-of-tiny-tech-papercuts-but-what-antitrust-efforts-could-make-them-bleed-11640640776)

As U.S. regulators prepare to crack down, legislators are ramping up bills for votes, the culmination of years of hearings and policy discussions.

“This is a watershed moment for Big Tech accountability, and 2022 will be the year that these companies finally face the regulation that will end their harmful and deceptive practices,” Sen. Edward Markey, D-Mass., told MarketWatch. Markey, author of the landmark Child Online Protection Act of 1998, has toiled on a sequel for years and is confident it will happen in 2022.

Next year could shape up as the biggest for tech legislation since Bill Clinton’s presidency, when the Telecommunications Act of 1996 significantly amended the Communications Act of 1934, according to Jim Steyer, CEO of Common Sense Media, a lobbying and advocacy organization, and co-chair of the Future of Tech Commission, appointed by White House in April.

Steyer anticipates changes to privacy law, with a federal law modeled after California’s CCPA in 2018, and platform accountability in the form of revisions to Section 230 of the Communications Decency Act. Most important, the $1 billion in funding for FTC and Justice as part of the evolving Build Back Better bill would give regulators the ability to enforce.

“Laws without enforcement are like sharks without teeth,” he told MarketWatch.

Facebook whistle-blower Frances Haugen’s impact “energized Congress on bipartisan bills” while Biden’s executive order “sent a clear message” that acquisitions won’t occur at the same pace. “The federal government, in the form of the FTC and Justice, will take longer looks at potential combinations” like Nvidia and Arm, Steyer said.

The House has introduced six bills, the Senate has at least three major pieces of legislation, and more are expected. Rep. David Cicilline, D-R.I., a key architect of the House’s six bills, has said he expects “we’ll be in a position to bring the bills to the floor” by the fall.

Big Tech has attempted to throw money at the problem. Amazon ($15.33 million), Facebook ($14.65 million) and Alphabet ($8.95 million) ranked among the top 20 spenders in lobbying efforts on government policy this year, according to the nonprofit OpenSecrets, even as the debate over antitrust efforts took down a major Silicon Valley lobbying group.

#### OR on mergers OR state venue – their ev assumes the Klobuchar and Cicilline bills – our ev’s explicitly comparative and CAN overcome their barriers

Perlman 1-3 (Matthew Perlman, senior competition reporter at Law360, “Bill Tracker: Antitrust Legislation To Watch In 2022,” Law360, 1-3-2022, https://www.law360.com/articles/1447707/bill-tracker-antitrust-legislation-to-watch-in-2022)

Congress heads into the new year with an impressive stack of bills aimed at tackling antitrust and competition issues and, unlike the smattering of competition proposals in previous years, some even appear to have a chance of passing thanks to mounting scrutiny of corporate consolidation and the power of technology platforms.

Here, Law360 breaks down the antitrust legislation that Congress will be mulling in 2022.

The global reckoning bearing down on large digital companies has sparked a lively debate in Congress over the adequacy of existing antitrust laws and the potential need for new forms of regulation.

Lawmakers have held countless hearings in the last two years examining the dominance of large technology platforms, questioning company leaders and other industry stakeholders about a host of issues from privacy and data use to conservative censorship. The discussion has also come from both sides of the aisle, with Democrats and Republicans in both chambers contributing, though often for different reasons and with different concerns.

"Congress has kind of painted itself into a corner by talking a big game about antitrust in the context of big technology platforms," said Paul Swanson, of counsel with Holland & Hart LLP. "They almost have to do something."

Kellie Lerner, a partner with Robins Kaplan LLP and co-chair of the firm's antitrust and trade regulation group, told Law360 there is bipartisan support for antitrust reform and said it stems from an increase in corporate consolidation generally over the last decade or so. While this has impacted other industries, she said, the tech space is the prime hook right now.

"Everyone seems to agree that the tech companies have too much power," Lerner said.

But Lerner also cautioned that it's not a "kumbaya moment" for stronger antitrust enforcement and that the concerns raised by some Republicans have more to do with the push against so-called cancel culture than competition.

Rep. David Cicilline, D-R.I., chair of the antitrust subcommittee, has taken the lead in the House, following up on the panel's 16-month investigation into the dominance of Apple, Amazon, Facebook and Google that wrapped in 2020. Cicilline helped push a package of six bills with bipartisan cosponsors through the House Judiciary Committee in June, including several targeting the tech industry, plus proposals to increase merger filing fees and boost antitrust enforcement by state attorneys general.

Versions of the Merger Filing Fee Modernization Act, which would increase the fees companies pay when reporting large deals, and the State Antitrust Enforcement Venue Act, which would ensure state attorneys general can pursue antitrust suits on their home turf rather than having them transferred to other states, have both been advanced in the Senate as well, giving them good prospects for this Congress.

Swanson also noted that, given the midterm election year ahead and the focus over the past year by lawmakers on big issues outside of antitrust, these might be the only competition bills enacted in 2022.

"I think that the political capital to get a big deal on antitrust reform done … has been spent," Swanson told Law360.

### Enforcement Thumper

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

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

The Biden Administration issued a press release and fact sheet on Feb. 28, 2022, titled "Lowering Prices and Leveling the Playing Field in Ocean Shipping." The release builds on a series of ongoing efforts (see previous Holland & Knight alert, "DOJ to Collusive Price Gougers Exploiting Supply Disruptions: We Will Prosecute You," Feb. 18, 2022) to tackle supply chain disruptions by leveraging the Shipping Act and antitrust laws. The main takeaways are: The U.S. Department of Justice (DOJ) is expanding its cooperation with the Federal Maritime Commission (FMC). Building on the DOJ-FMC 2021 memorandum of understanding (MOU), the DOJ will "provide the FMC with the support of attorneys and economists from the Antitrust Division for enforcement of violations of the Shipping Act and related laws." Likewise, the FMC will share shipping industry experience with the DOJ for Sherman Act and Clayton Act enforcement actions. The FMC has already taken steps to audit ocean carriers, based on complaints received from cargo owners. In addition, the DOJ recently announced an initiative to investigate and prosecute antitrust activities in other parts of the supply chain. In its most recent initiative, the Administration is again focusing on ocean shipping, and highlighted high shipping costs and practices perceived to contribute to congestion and cost increases. Shipping Act Reform. The Biden Administration called on Congress to "provide additional tools ... to address problems in the ocean shipping industry" and expressed encouragement with current legislative efforts. The Administration is referring to bills under consideration in the U.S. House of Representatives and Senate — the Ocean Shipping Reform Act of 2021 (OSRA 2021) (H.R. 4996) and the Ocean Shipping Reform Act of 2022 (OSRA 2022) (S. 3580) — proposing an array of different changes to the Shipping Act intending to target congestion, practices and charges. OSRA 2021 passed the House in December 2021 with bipartisan support. The Senate companion bill, OSRA 2022, is under consideration in that chamber. Despite the common purposes, the bills have significant differences that must be worked out. Changes to Antitrust Immunity? The Administration also called on Congress to "address the immunity of alliance agreements from antitrust scrutiny under current law." According to the White House Fact Sheet, "Congress steadily deregulated the industry — expanding the antitrust immunity while weakening ocean carriers' obligations to publicly disclose prices and fees and treat businesses and their customers fairly." Further details were not provided, but neither OSRA 2021 nor OSRA 2022 appear to directly address antitrust immunity. The White House also indicated that existing oversight efforts would continue, reported on progress with the FMC's audit program, new investigations, a new data initiative, and a pending FMC rulemaking on Demurrage and Detention billing currently open for public comment (through March 17, 2022). Conclusion and Considerations Coming on the eve of President Joe Biden's State of the Union address on March 1, it is anticipated that President Biden will highlight these and other efforts to address supply chain issues. Moving forward, expect continued activity on the legislative and regulatory fronts. Stakeholders with interests in the legislation and the current rulemaking still have opportunities for involvement. Regarding the enhanced DOJ-FMC cooperation, the initiative points yet again in the direction of heightened scrutiny ahead, with the potential for more robust investigations, more enforcement capacity and harsher penalties. As Holland & Knight has advised previously, supply chain stakeholders should review their practices and antitrust compliance protocols, proceed cautiously and engage legal counsel before initiating discussions or entering into agreements with marketplace counterparties.

#### New merger guidelines thump

Scarborough 2-4 [Michael W. Scarborough Skyler Hicks Sheppard, Mullin, Richter & Hampton LLP, 2-4-2022 https://www.natlawreview.com/article/looking-ahead-to-tougher-merger-guidelines-and-enforcement

Although the number of corporate mergers surged during President Biden’s first year in office, all signs point to a tougher regulatory environment for deals going forward.

In 2021, $5.8 trillion changed hands as a result of corporate mergers across the globe.[1] This 64 percent increase over 2020 far surpassed the previous annual record,[2] and now the Biden Administration appears to be taking steps toward fulfilling the President’s goal of ramping up antitrust enforcement.[3]

[Footnote 3] [3] Executive Order on Promoting Competition in the American Economy | The White House

One such measure includes taking a more critical approach when evaluating proposed mergers, and federal agencies have already filed several high-profile investigations.[4]

On January 18, the Federal Trade Commission and the U.S. Department of Justice’s Antitrust Division jointly announced plans to “modernize federal merger guidelines to better detect and prevent illegal, anti-competitive deals.”[5] These are expected to overhaul both the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines, presumably in a unified set of new guidelines.[6]

The FTC and DOJ joint press release noted that “many industries across the economy are becoming more concentrated and less competitive” and this new rulemaking effort seeks to modernize current guidelines to better reflect evolving markets.[7] Instead of relying solely on traditional antitrust metrics such as consumer prices, the new guidelines appear poised to adopt additional assessment criteria that take into account factors such as a merger’s impact on privacy or how even low-priced marketplaces can exercise monopoly power.[8]

FTC Chair Lina Khan has been a vocal critic of big-tech and is expected to push new guidelines that would make it harder for large tech companies to consolidate. However, Khan has commented that she intends for the new rules to apply to all industries in light of the market consolidation taking place across the board in industries ranging from retail to healthcare.[9] While Jonathan Kanter, the newly-installed head of the DOJ’s Antitrust Division, appears aligned with many of Khan’s concerns, it remains to be seen whether he will push as aggressively as Khan when it comes to the updated guidelines, including as to potential reforms to the traditional economic analyses undergirding prior iterations of the guidelines.[10]

The two Republican FTC Commissioners voiced their concern in a joint statement that the new guidelines could “discount or ignore [the value of] efficiencies when analyzing mergers” and that the new rules might also unduly focus on mergers that harm competition without asking the more pertinent question of whether or not a consolidation that hurts business rivals also “benefit[s] consumers through lower prices, enhanced quality, and more innovation.” [11]

While companies will need to prepare for the increased likelihood that their mergers will face heightened scrutiny, the new rules will likely not be finalized for some time. Both Khan and Kanter aim to finalize the new guidelines before the end of the year,[12] but the process could extend into 2023. In addition, inasmuch as the enforcers remain “severely under-resourced,” they will likely have to continue to selectively pick and choose which mergers to investigate and potentially challenge.[13] Nevertheless, companies should begin to anticipate how a far more progressive antitrust agenda might apply new metrics that could subject them to expensive and drawn out merger investigations going forward.

### Judicial thumper

#### Judicial antitrust enforcement now

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

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

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

Background and FTC Decision

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

Fifth Circuit Decision

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

Conclusion

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