# ADA Rd. 1- MSU KV vs. Texas Tech TT

# MSU KV policy 1AC

### Innovation – 1AC

#### Advantage One: Innovation

#### Specifically, 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]) MULCH

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/>) MULCH

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>) MULCH

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.

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 Those stifle innovation – incumbent regulations are outdated and block new entrants.

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

INTRODUCTION

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

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

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

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

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

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

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

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

I. WHY ANTICOMPETITIVE REGULATION SUCCEEDS

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

A. The Generic Story

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

B. Additional Considerations Affecting Product Market Innovation

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

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

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

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

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

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

C. An Illustration from Automobile Distribution

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

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

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

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

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

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

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

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

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

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

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

A. Lochner, anti-Lochner, and Parker

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

B. The Potential for an Increased Level of Judicial Scrutiny

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Considering Governmental Justifications for Restraints on Competition

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

C. Institutional and Procedural Distinctions

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

### Plan

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

### Advantage Two: Federalism

#### Nextgen tech is emerging at an exponential rate – effective state regulatory experimentation avoids downsides and maximize the benefits of AI and nano

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

#### U.S. model is key to stable emerging tech

Work 19 Robert Orton Work is an American national security professional who served as the 32nd United States Deputy Secretary of Defense for both the Obama and Trump administrations from 2014 to 2017. “The American AI Century: A Blueprint for Action.” DECEMBER 17, 2019. Foreword. <https://www.cnas.org/publications/reports/the-american-ai-century-a-blueprint-for-action> {DK}

We find ourselves in the midst of a technological tsunami that is inexorably reshaping all aspects of our lives. Whether it be in agriculture, finance, commerce, health care, or diplomatic and military activities, rapid technological advancements in fields like advanced computing, quantum science, AI, synthetic biology, 5G, miniaturization, and additive manufacturing are changing the old ways of doing business. And AI—the technologies that simulate intelligent behavior in machines—will perhaps have the most wide-ranging impact of them all. This judgment is shared by many countries. China, Russia, members of the European Union, Japan, and South Korea all are increasing AI research, development, and training. China in particular sees advances in AI as a key means to surpass the United States in both economic and military power. China has stated its intent to be the world leader in AI by 2030 and is making major investments to achieve that goal. The United States needs to respond to this technological challenge in the same way it responded to prior technology competitions, such as the space race. U.S. leadership in AI is critical not only because technology is a key enabler of political, economic, and military power, but also because the United States can **shape how AI is used around the world**. As this report explains, while AI can be used for incredible good by societies, it already is being abused by authoritarian states to surveil and repress their populations. And advances in AI technology are enabling future malign uses, such as launching sophisticated influence attacks against democratic nations. The United States must make sure it leads in AI technologies and shapes global norms for usage in ways that are consistent with democratic values and respect for human rights.

#### 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 artificial intelligence is developed, this provides a great resource for improving outcomes and mitigating all types of risk.585 Artificial intelligence 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.

#### 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

#### 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.

#### The aff preserves state authority to enforce antitrust but absent clarification on the transboundary effects from broad Parker 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.

#### 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.

# Round 1 2AC

## ASPEC

Counter interp- we did specify the actor multiple times by having you see our 1AC as well as saying the actor is USFG we do not have to definitively say courts or congress pre round- this is debate- its not our fault if you didn’t understand what our plan was pre round- judge kick this

We don’t violate- they asked preround we answered and said they could ask in cross ex and said that our actor is USFG we have no obligation to give them more than that especially preround- that would be like us asking them to specifically tell us their args preround before the debate starts. How is the aff supposed to play the game of debate if they get all the answers preround

Voter

Fairness we don’t moot all preround prep they have had apt time to look through our 1AC and decide themselves and we answered in the way that allows for aff ground.

Education- how are we supposed to learn from debate if we disclose all parts we already gave them our whole 1AC and our wiki is up to date, if they are upset about that they don’t even have a wiki up meaning that they killed our ability to have an indepth debate if we are talking about preround judge this is a stupid arg and should be kicked we gave them our actor and still maintained our own aff ground in the debate

## Politics:

### Biden Good – PC – 2AC

#### Plan’s popular and XO thumps

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### No internal link – issues are compartmentalized and Harris can push the plan

### Courts – 2AC

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

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

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

#### Plan’s announced in June

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

Next Steps and Timing of Litigation

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

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

#### Not existential AND their models fail.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Even multi-trillion does NOT solve their climate impacts – most recent IPCC report

Thomsen-Cheek 8-13-21 (Kira Thomsen-Cheek, aka SninkyPoo, Communications Manager focusing on healthcare, IT and HR, University of Washington Medicine ICD-10 Program, BA Michigan State University, “Climate Code Red: We Have 5.5 Years.” Daily Kos, 8-13-2021, https://www.dailykos.com/stories/2021/8/13/2045542/-Climate-Code-Red-We-Have-5-5-Years)

With the IPCC report’s klaxons blaring “CODE RED,” the question arises: what is it in our power as individuals to do to ensure that the world does not warm beyond 1.5°C by 2100?What actions would YOU be wiling to take? Voting for Democrats got us the White House back, and (slim) majorities in both houses of Congress. As tremendous as that was, it won’t have been enough.

As reported in Earth and Sky– and ultimately derived from the IPCC report:

“The speed at which atmospheric carbon dioxide has increased since the industrial revolution (1750) is at least ten times faster than at any other time during the last 800,000 years, and between four and five times faster than during the last 56 million years.

About 85% of carbon-dioxide emissions are from burning fossil fuels. The remaining 15% are generated from land use change, such as deforestation and degradation.”

On August 9th, Greta Thunberg tweeted:

According to the new IPCC report, the carbon budget that gives us the best odds of staying below 1,5°C runs out in less than 5 and a half years at our current emissions rate. Maybe someone should ask the people in power how they plan to “solve” that?

The people in power who could make the biggest difference – the leaders of the countries with the highest percentage of global emissions – are presidents Joe Biden and Xi Jinping.

Under President Biden, the infrastructure bills currently making their way through the congressional sausage factory are woefully insufficient to cope with the need to reduce carbon emissions enough –or swiftly enough – to meet the US’s burden under the Paris Agreement. Biden’s stated goal is to cut the nation’s emissions by at least 50 percent by the end of this decade.

That is a worthy aim, but it is not enough. The United States is responsible for only 15% of global emissions annually, and per the IPCC report, our global carbon budget does not last until the end of this decade. It lasts until about 2027.

Even the $3.5 trillion dollar plan largely written by Bernie Sanders (and crafted in response to the known reality that Republicans would force Dems to water down the first plan) is unlikely to include enough action on, or money for, the rapid slashing of emissions and radical retooling of the economy that will be required to keep us under the 1.5°target.

As for the rest of the world? China is responsible for 28% of current annual global emissions – almost twice our rate. Russia produces 5% of the world’s annual emissions, while India produces 7%. Every other country on Earth, lumped together, produce the remaining 21%.

While President Xi Jinping may have talked a good story at this past April’s virtual climate summit, his stated goals are, as with President Biden’s, woefully insufficient.

"China will strive to peak carbon dioxide emissions before 2030 and achieve carbon neutrality before2060," the president said. "China has committed to move from carbon peak to carbon neutrality in a much shorter time span than what might take many developed countries, and that requires extraordinary hard efforts from China. We will strictly control coal-fired power generation projects. We will strictly limit the increase in coal consumption over the 14th five-year-plan period and phase it down in the 15th five-year-plan period."

Unless I am missing something, that was substantially the same as China’s position in 2020. The website Climate Action Tracker categorized China’s climate response then as “highly insufficient,” and consistent with global warming within 3°C and 4°C by 2100 – i.e., more than double the 1.5° that is now generally agreed upon as the upper “acceptable” limit.

With the 2 largest emitters on Planet Earth both doing far, far less than is needed to reduce emissions, perhaps there is a global push to at least stop looking for new sources of fossil fuels to plunder?

That would sound reasonable. It is not, in fact, the case.

Yesterday, I happened upon the following thread tweeted out by Extinction Revolution Cambridge. It appears to be immaculately sourced. It is terrifying.

Here’s just a taste:

US: Drilling in Alaska; record offshore oil and gas exploration, extracting 17m barrels a day, $323bn to be spent in 4 years(expenditure on climate under Biden’s infrastructure plan is $36bn).

UK: recently granted 113 licenses over 259 drilling blocks in the North Sea, two new platforms installed just last week (tweet was from this June).

Canada: the tar sands produce 3m barrels a day. Trudeau government just greenlit 3 new offshore sites off Newfoundland.

Uganda: \*423\* new wells with drilling led by Chinese national oil and gas company. Oil coming on stream 2025.

Nigeria: 100 new oil and gas sites coming into production between 2021 and 2024, one site alone producing 650,000 barrels every day, starting next year.

New Zealand: new exploration in the waters off the poster child for progressive climate politics.

Iran: 2.4 million barrels a day, up 400,000 barrels a day from April 2020. New discovery adds 2.2 billion barrels a day.

In sum, under current policies – and policies currently in the pipeline – emissions will not be slashed enough, or quickly enough, to avoid warming of more than 1.5°C.

Nations across the globe are continuing to seek out new sources of fossil fuels to power their growing populations and economies.

Leaders – the politicians who enact policies and the global billionaire ruling class who buy so many of those politicians (cough –Joe Machin – cough) – appear to be perilously close to adopting a modified “business as usual” stance. What would that look like, if it were to be what was happening right now in the United States?

A few strong words about climate change that appear to acknowledge our shared global peril.

A few hard-won (over the strenuous objections of Republicans) incremental policies that may have been enough if they’d been enacted 30 or 40 years ago.

Strong resistance to any change from the usual suspects.

Meetings with other global leaders to gather opinions, try to gain consensus, and agree on what can be done. Statements to follow. Inaction, dithering, and kicking the can down the road to follow that.

## States:

### States CP – Enforce Antitrust – 2AC

#### Perm --- do both --- shields the link

#### Conditionality is a voter --- creates time and strategy skews, argumentative irresponsibility, and dispo solves their offense

#### State’s fiat is a voter --- contrived, no literature assumes uniformity, not reciprocal, and illogical because no single decision-maker could choose

#### Doesn’t solve federalism – broad Parker precedent is a barrier to effective state experimentation – Sack and Kobyashi

#### Doesn’t solve innovation – our market barrier args are about how Parker is applied – application of antitrust enforcement is irrelevant – Crane

#### Perm --- do both --- shields the link

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#### State’s fiat is a voter --- contrived, no literature assumes uniformity, not reciprocal, and illogical because no single decision-maker could choose

#### Doesn’t solve federalism – broad Parker precedent is a barrier to effective state experimentation – iterative process of trial and error is bypassed by the counterplan – Sack and Kobyashi

#### Only federal legal remedies solve – failure to explicitly narrow Parker over-immunizes private entities and chills states

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.

#### No solvency advocate – the process of the CP isn’t a real thing – not real world, no aff ground or predictability – reject this plank of the CP. The burden to prove solvency is on the neg not to have the aff disprove. We provides a causal internal link chain that is sufficient – be skeptical of the CP claims absent ev from the neg.

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

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

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

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

1. Midcal Foreseeability

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

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

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

2. Active Supervision

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

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

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

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

**States CP – Links to Politics – 2AC**

#### States link to politics-turns their CP and DA

Kiely 12 – Eugene, Washington Assignment Editor for USA Today, “Did Obama ‘Approve’ Bridge Work for Chinese Firms?”, Fact Check, 2-17, http://www.factcheck.org/2012/02/did-obama-approve-bridge-work-for-chinese-firms/

Who’s to blame, if that’s the right word, if the project ends up using manufactured steel from China? The National Steel Bridge Alliance blames the state railroad agency. The Alliance for American Manufacturing says the federal Buy American laws have been “weakened with loopholes and various exemptions that make it easier for bureaucrats to purchase foreign-made goods instead of those made in American factories with American workers.” So, how did Obama get blamed for the decisions by state agencies and for state projects that, in at least one case, didn’t even use federal funds? The answer is a textbook lesson in how information gets distorted when emails go viral. We looked at the nearly 100 emails we received on this subject and found that Obama wasn’t mentioned at all in the first few emails. Typical of the emails we received shortly after the ABC News report aired was this one from Oct. 11, 2011: “I just got an email regarding Diane Sawyer on ABC TV stating that U. S. Bridges and roads are being built by Chinese firms when the jobs should have gone to Americans. Could this possible be true?” The answer: Yes, it’s true. End of story, right? Wrong. Days later, emails started to appear in our inbox that claimed ABC News reported that Chinese firm were receiving stimulus funds to build U.S. bridges — even though the broadcast news story didn’t mention stimulus funds at all. (The report did include a clip of Obama delivering a speech on the need to rebuild America’s bridges and put Americans to work, but said nothing about the president’s $830 billion stimulus bill.) Still, we received emails such as this one on Nov. 4, 2011, that included this erroneous claim language: “Stimulus money meant to create U.S. jobs went to Chinese firms. Unbelievable….” It didn’t take long for Obama to be blamed. That same day — Nov. 4, 2011 — we received an email that made this leap to Obama: “SOME CHINESE COMPANIES WHO ARE BUILDING ‘OUR’ BRIDGES. (3000 JOBS LOST TO THE CHINESE FIRM)…..AND NOW OBAMA WANTS ‘MORE STIMULUS MONEY’…..THIS IS NUTS ! ! ! If this doesn’t make you furious nothing will….” This year, Obama’s name started to surface in the subject line of such critical emails — raising the attack on the president to yet another level and perhaps ensuring the email will be even more widely circulated. Since Jan. 17, we have gotten more than a dozen emails with the subject line, “ABC News on Obama/USA Infrastructure,” often preceded with the word “SHOCKING” in all caps. The emails increasingly contain harsh language about the president. Since Jan. 11, 23 emails carried this added bit of Obama-bashing: “I pray all the unemployed see this and cast their votes accordingly in 2012!” One of those emails — a more recent one from Feb. 8 — contained this additional line: “Tell me again how Obama’s looking out for blue collar guys. He cancels pipelines, and lets Chinese contractors build our bridges…” And so it goes, on and on. All from a news report that blamed state officials — not Obama — for spending taxpayer money on Chinese firms to build U.S. bridges.

#### Perm flies under the radar

Gluck 13 – Abbe R. Gluck, Professor of Law and the Faculty Director of the Solomon Center for Health Law and Policy at Yale Law School, expert on Congress and the political process, legislation, federalism, state and local government, civil procedure, and health law, and is chair of Section on Legislation and the Law of the Political Process for the Association of American Law Schools, Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble, Published in 2013, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5710&context=fss\_papers

Other motivations may be instrumental. State administration of new federal programs may make federal legislative expansions more **politically palatable** for those who prefer (at least the appearance of) "small" government. Running controversial federal programs through the states also may **diffuse federal accountability**. Sometimes, these moves are "nationalist" in nature: a use of the states to increase federal power in a **below-the-radar fashion**. Other times (or perhaps simultaneously), they may be an effort to effectuate values that we normally associate with "federalism," even as Congress steps in to regulate. For example, a federal law that relies on state implementation might be a way of expressing a preference for experimentation, local control, or respect for areas of traditional state expertise.

#### States links to state politics – it’s career ending

Goldstein 12 [Jacob Goldstein is a reporter at NPR’s “Planet Money,” a podcast and blog, 6-12-2012 https://www.nytimes.com/2012/06/17/magazine/so-you-think-you-can-be-a-hair-braider.html]

A bolder idea, of course, would be for states to get rid of the licensing rules that are doing more harm than good. A group of economists, including Alan B. Krueger, now the chairman of President Obama’s Council of Economic Advisers, proposed something along these lines last year. But pushing this sort of policy, beyond being a logistical nightmare, can be [career-ending] “~~political suicide,”~~ says Morris Kleiner, a University of Minnesota economist who co-wrote the proposal. “When you talk about reductions in licensing, you have every occupation from the plumbers to the C.P.A.’s to the electricians lining up to argue why regulation should not be reduced,” he says. Arguing for the other side you have, basically, Jestina Clayton.

This is the pattern that creates regulatory capture — the people with the biggest stake in any regulation are usually the ones who are being regulated. When there’s a public hearing on, say, implementing new rules for trading derivatives, most of the people who show up are the people who trade derivatives. And these people, who generally know the most about trading derivatives, can use their expertise to try to create rules that benefit themselves. In the high-school-­civics model, the insiders would be countered by smart, well-informed opponents who could argue for the public interest. But real life has nothing to do with high-school civics.

## Case

#### *Advantage One: Innovation*

Extend Sage’17- parker immunity discourages healthcare innovation – distort competition and hampers market’s ability to generate competition

Extend Shaikh’15 – disruptive innovation in healthcare solves pandemics – necessary to prevent, detect, and respond

Extend Diamandis’21 – new pandemics coming and cause extinction and shutdown civilization, preventive measures

Extend Crane’19 – narrowing parker immunity, increase scope of federal antitrust law

### Advantage Two: Federalism

Extend McGinnis’11 - effective state regulatory experimentation avoids downsides and maximize the benefits of AI and nano, decentralization for experimentation

Extend Pamlin’15 cards – Uncontrolled synthetic pathogens could wreck ecosystems- safe AI resource for mitigating risk – AI risks worsening nano risks- success solves every impact- NEED strong risk reduction

Extend Allensworth 16 – court narrowed Parker immunity to limit deference to the states in antitrust law, antitrust federalism important to the state-fed balance of power

Extend Sack 21- limiting regulatory externalities key to account for interstate spillovers, current interpretation fails to – spillover requires national gov to regulate costs and benefits

Extend Kobayashi’20 – current doctrine does not promote federalism or spillover effects- allow anti competitive legislation – reduce competition among states - when power is divided ex-ante between the federal and state governments in clearly defined terms, can mitigate direct conflicts between state and federal authorities

Extend Adler 20 – when states not held accountable – optimal state experimentation destroyed must account for externalities in interjurisdictional competition - interstate spillovers encourage polices that externalize harms

**Parker immunity impedes disruptive health innovation by gatekeeping against new entrants and novel approaches – those are vital to combat inevitable pandemics that cause extinction –**Sage, Shaikh, and Diamandis

### Health Innovation – Innovation K2 Disease

**Capacity for innovation solves invisible thresholdsfor 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 ofdisease 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

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

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

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

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

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

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

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

# 1AR

# MSU KV policy 1AR

### Case

We outweigh on magnitide, timeframe, and probability – Sheikh and Didmandis

Our impacts will happen in the neg world and they trigger their own net benefits meaning only case and perm can solve - Antitrust enforcement is already happening,

They aren’t answering what we said…

### Innovation – 1AR

Our evidence outdates, meaning we get the higher ground on climate, impact turned

#### Advantage One: Innovation

Their Moeller 99 evidence is from 99 and doesn’t have to do with our aff because it does not take into account pandemics- impacts of covid, see our sage’17 evidence, doesn’t relate ev is very outdated .. covid was not “falsely sensationalized…” no answer during cross ex, doesn’t relate to our advantage.. no answer during cross

Extend Sage’17- parker immunity discourages healthcare innovation – distort competition and hampers market’s ability to generate competition

Extend Shaikh’15 – disruptive innovation in healthcare solves pandemics – necessary to prevent, detect, and respond

Extend Diamandis’21 – new pandemics coming and cause extinction and shutdown civilization, preventive measures

Extend Crane’19 – narrowing parker immunity, increase scope of federal antitrust law

Extend Penn’21

Our args outweigh because our impacts ais disease – extincition - pandemic, extinction – all they have is US ranks first in innovation globally **Atkinson 20**, that doesn’t mean much if we are dead

#### US Big Pharma key to stop Chinese biotech

**Gupta 21**- a physician and founder of the biotechnology investment firm ascendant BioCapital

Look ^ at the author for this, obviously he would say bg pharma would stop Chinese biotech… he is big pharma “Biotech” INVESTMENT firm , this doesn’t address what we said

#### Status quo solves – small firms innovating now Bulik, 21 – : the threat for extinction outweighs and our plan solves for that through antitrust, look at our Diamandis

**All Asay and Bair cards No date – we solve for NEW innovation, these cards don’t talk about DISRUPTIVE innovation, there is an important distinction, new companies that big pharma can buy, small businesses (which they said do nothing fyi) – but We didn’t talk about vaccines either way , we t between innovation and disruptive innovation by limiting state action immunity doctrine, they are agreeing with us… disruptive healthcare innovation is more than vaccines– new treatments, new testing, look at diamnadis**

**They have no specific answeres to disruptive innovation as to how the AFF has defined it, they don’t know what it is.. its not about small or large innovation but NEW innovation, chemical knowledge’21 card GOES AFF because we never said big pharma was bad or getting rid off – better disruptive innovation – smaller firms that can create new things that big pharma can buy if small firms wish to sell – more rights for smaller firms – narrowing makes it so the smaller firm have a voice with big pharma – disruptive innovation what the aff is doing, is what the neg is agreeing with**

#### Bypasses all defense

Pamlin and Armstrong 15 – Dennis Pamlin, Executive Project Manager, Global Challenges Foundation, Stuart Armstrong, James Martin Research Fellow, Future of Humanity Institute, Oxford Martin School & Faculty of Philosophy, University of Oxford, Global Challenges: 12 Risks that Threaten Human Civilization, Global Challenges Foundation, Feb. 2015, http://www.astro.sunysb.edu/fwalter/HON301/12-Risks-with-infinite-impact-full-report-1.pdf

Infectious diseases have been one of the **greatest causes of mortality** in history. Unlike many other global challenges pandemics have happened recently, as we can see where reasonably good data exist.

Plotting historic epidemic fatalities on a log scale reveals that these tend to follow a power law; with a small exponent: many plagues have been found to follow a power law with exponent 0.26.261

These kinds of power laws are heavy-tailed262 to a significant degree.263 In consequence most of the fatalities are accounted for by the top few events.264 If this law holds for future pandemics as well,265 then the majority of people who will die from epidemics will likely die from the **single largest pandemic**.

Most epidemic fatalities follow a power law, with some extreme events – such as the Black Death and Spanish ‘Flu – being even more deadly.267

There are other grounds for suspecting that such a high impact epidemic will have a **greater probability** than usually assumed. All the features of an extremely devastating disease **already exist in nature**: essentially incurable (Ebola268), nearly always fatal (rabies269), extremely infectious (common cold270), and long incubation periods (HIV271). If a pathogen were to emerge that somehow **combined these features** (and influenza has demonstrated antigenic shift, the ability to combine features from different viruses272), its **death toll would be extreme**. Many relevant features of the world have changed considerably, making past comparisons problematic.

The modern world has better sanitation and medical research, as well as national and supra-national institutions dedicated to combating diseases. Private insurers are also interested in modelling pandemic risks.273 Set against this is the fact that modern transport and dense human population allow infections to spread much more rapidly274, and there is the potential for urban slums to serve as breeding grounds for disease.275

Unlike events such as nuclear wars, pandemics would not damage the world’s infrastructure, and initial survivors would likely be resistant to the infection. And there would probably be survivors, if only in isolated locations. Hence the risk of a civilisation collapse would come from the ripple effect of the **fatalities and the policy responses**.

These would include political and agricultural disruption as well as economic dislocation and damage to the world’s trade network (including the food trade).

#### Extinction---defense is wrong

Piers Millett 17, Consultant for the World Health Organization, PhD in International Relations and Affairs, University of Bradford, Andrew Snyder-Beattie, “Existential Risk and Cost-Effective Biosecurity”, Health Security, Vol 15(4), http://online.liebertpub.com/doi/pdfplus/10.1089/hs.2017.0028

Historically, disease events have been responsible for the greatest death tolls on humanity. The 1918 flu was responsible for more than 50 million deaths,1 while smallpox killed perhaps 10 times that many in the 20th century alone.2 The Black Death was responsible for killing over 25% of the European population,3 while other pandemics, such as the plague of Justinian, are thought to have killed 25 million in the 6th century—constituting over 10% of the world’s population at the time.4 It is an open question whether a future pandemic could result in outright human extinction or the irreversible collapse of civilization.

A skeptic would have many good reasons to think that existential risk from disease is unlikely. Such a disease would need to spread worldwide to remote populations, overcome rare genetic resistances, and evade detection, cures, and countermeasures. Even evolution itself may work in humanity’s favor: Virulence and transmission is often a trade-off, and so evolutionary pressures could push against maximally lethal wild-type pathogens.5,6

While these arguments point to a very small risk of human extinction, they do not rule the possibility out entirely. Although rare, there are recorded instances of species going extinct due to disease—primarily in amphibians, but also in 1 mammalian species of rat on Christmas Island.7,8 There are also historical examples of large human populations being almost entirely wiped out by disease, especially when multiple diseases were simultaneously introduced into a population without immunity. The most striking examples of total population collapse include native American tribes exposed to European diseases, such as the Massachusett (86% loss of population), Quiripi-Unquachog (95% loss of population), and theWestern Abenaki (which suffered a staggering 98% loss of population).

In the modern context, no single disease currently exists that combines the worst-case levels of transmissibility, lethality, resistance to countermeasures, and global reach. But many diseases are proof of principle that each worst-case attribute can be realized independently. For example, some diseases exhibit nearly a 100% case fatality ratio in the absence of treatment, such as rabies or septicemic plague. Other diseases have a track record of spreading to virtually every human community worldwide, such as the 1918 flu,10 and seroprevalence studies indicate that other pathogens, such as chickenpox and HSV-1, can successfully reach over 95% of a population.11,12 Under optimal virulence theory, natural evolution would be an unlikely source for pathogens with the highest possible levels of transmissibility, virulence, and global reach. But advances in biotechnology might allow the creation of diseases that combine such traits. Recent controversy has already emerged over a number of scientific experiments that resulted in viruses with enhanced transmissibility, lethality, and/or the ability to overcome therapeutics.13-17 Other experiments demonstrated that mousepox could be modified to have a 100% case fatality rate and render a vaccine ineffective.18 In addition to transmissibility and lethality, studies have shown that other disease traits, such as incubation time, environmental survival, and available vectors, could be modified as well.19-2

#### Pandemics risk extinction

Benson 17 – Richard Benson, English Biographer, Journalist and Critic, Writer for Wired, “Apocalypse, Now? The 10 Biggest Threats Facing Civilisation, From Asteroids to Tyrannical Leaders”, Wired, 2-12, http://www.wired.co.uk/article/10-threats-civilisation-ai-asteroid-tyrannical-leader

2. Pandemic diseases threaten humanity

One possibility is the disgruntled individual who might create or steal a virus and travel around the world releasing it

Natural and engineered pandemic disease is one of the most-studied global risks. It is an area given new urgency by the controversy over "gain of function" experiments. These involve taking a known pathogen and adding extra, risky functionality. For example, in 2011, virologists Ron Fouchier and Yoshihiro Kawaoka created a strain of the bird flu virus that could be transmitted between ferrets. This was done in order to better understand the conditions in which the virus might develop transmitability in the wild. Such experiments can head off certain risks but create an arguably greater one, in that the modified organism might escape the lab and cause a global pandemic.

The risk here is particularly great because it is self-replicating. Whereas a nuclear explosion is localised, in our highly connected world a synthetic, incurable virus could spread around the planet in days. In the past, natural pandemics such as the black death have killed millions and effected wholesale social changes. In the 21st century, advanced biotechnology could create something that makes the black death look like a nasty cold.

### Advantage Two: Federalism

Haven’t addressed impacts or link to our plan, fundamental misunderstanding of our plan

DROPPED AI\_ not answered in 1NC – prove they did it in the 1NC because w ebrought it up even if we addressed it, we don’t get rid of big pharma

We aren’t talking about tech, only states and their rights in narrowing parker doctrine… answer TURF wars and how that would cause major conflict, centralization does not solve… Allensworth’16

HOR’21 – we are USFG, other actors inovled that could take on externalities, more fed-state balamnce, stop turf wars (still not answered, our impacts outweigh), we aren’t just congress, this was discussed during cross ex and before the round

Extend McGinnis’11 - effective state regulatory experimentation avoids downsides and maximize the benefits of AI and nano, decentralization for experimentation

Extend Pamlin’15 cards – Uncontrolled synthetic pathogens could wreck ecosystems- safe AI resource for mitigating risk – AI risks worsening nano risks- success solves every impact- NEED strong risk reduction

Extend Allensworth 16 – court narrowed Parker immunity to limit deference to the states in antitrust law, antitrust federalism important to the state-fed balance of power

Extend Sack 21- limiting regulatory externalities key to account for interstate spillovers, current interpretation fails to – spillover requires national gov to regulate costs and benefits

Extend Kobayashi’20 – current doctrine does not promote federalism or spillover effects- allow anti competitive legislation – reduce competition among states - when power is divided ex-ante between the federal and state governments in clearly defined terms, can mitigate direct conflicts between state and federal authorities

Extend Adler 20 – when states not held accountable – optimal state experimentation destroyed must account for externalities in interjurisdictional competition - interstate spillovers encourage polices that externalize harms

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### ASPEC

Thats aff ground

we don’t have to have specific plan text and aff

thats the debate game

they made ASPEC based off of preround

we proved that they made aff ground worse because of no wiki

kick the arg and don’t vote on it

its stupid and we’ve proven that they still have neg ground and the aff does not need to send that specific of answers preround, where is our ff ground then aff

this shouldn’t be a voting issue judge

### Politics DA – 1AR

### Biden Good – PC – Link Turn – 1AR

#### Plan has wide bipartisan support – recognize harms of anticompetitive regs

Cooper 17 [James C. Cooper, Associate Professor of Law and Director, Program on Economics & Privacy, Antonin Scalia Law School, George Mason University 11-13- 2017, https://regproject.org/wp-content/uploads/RTP-Antitrust-Consumer-Protection-Working-Group-Paper-Occupational-Licensing.pdf]

Occupational licensing reform currently enjoys wide bipartisan support. For example, the FTC has a long history — across Republican and Democratic administrations — of competition advocacy and enforcement actions aimed at state and local restraints on competition. The focus of these advocacy efforts has been to articulate the harm to consumers that can result from actions by public actors that restrict the number of suppliers or raise the cost of entering a particular market. In addition, a report from the Obama administration’s Council of Economic Advisors in the summer of 2015 described the effect licensing restrictions have on labor markets. The report provided evidence that occupational licensing requirements create income inequality — licensed professionals earn more than non-licensed professionals even when controlling for education and other factors. What is more, in the wake of NC Dental, states are looking for guidance.

### States CP

Trigger their own net benfift because they link to politics on the CP and trigger net benefit of our case- trigger our impacts, theres no reason not have the perm

#### Perm --- do both --- shields the link

#### Conditionality is a voter --- creates time and strategy skews, argumentative irresponsibility, and dispo solves their offense

#### State’s fiat is a voter --- contrived, no literature assumes uniformity, not reciprocal, and illogical because no single decision-maker could choose

#### Doesn’t solve federalism – broad Parker precedent is a barrier to effective state experimentation – Sack and Kobyashi

#### Doesn’t solve innovation – our market barrier args are about how Parker is applied – application of antitrust enforcement is irrelevant – Crane

#### Perm --- do both --- shields the link

#### Conditionality is a voter --- creates time and strategy skews, argumentative irresponsibility, and dispo solves their offense

#### State’s fiat is a voter --- contrived, no literature assumes uniformity, not reciprocal, and illogical because no single decision-maker could choose

#### Doesn’t solve federalism – broad Parker precedent is a barrier to effective state experimentation – iterative process of trial and error is bypassed by the counterplan – Sack and Kobyashi

#### Only federal legal remedies solve – failure to explicitly narrow Parker over-immunizes private entities and chills states

Weber 16