# Aff vs. Wayne KT- Kentucky Rd 3

# 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~~](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.~~

## Innovation Adv

### Innovation – IL

#### The current scope of Parker immunity wrecks innovation – it protects entrenched interests and creates barriers to entry

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

B. The Midcal Test and Representation Reinforcement

Although the language of the Parker opinion suggested a categorical rejection of federal antitrust preemption of state regulation, the Parker state-action immunity doctrine that subsequently developed allowed room for federal preemption. The Supreme Court eventually settled on a two-part test for Parker immunity, which it articulated in California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc. 50 Under this Midcal test, the anticompetitive policy must be “clearly articulated and affirmatively expressed as state policy” and actively supervised by agents of the state.51 Unless an anticompetitive state statute meets these requirements, it is preempted by the Sherman Act.

The instinct behind the Midcal test is grounded in a representation-reinforcement perspective that resonates with Carolene Products’s constitutional paradigm.52 If states wish to displace competition, they may do so, but only in a way that creates political accountability. Citizens affected by the potentially higher prices and reduced quality that attends the lessening of competition must be able to easily trace the policy back to state politicians and hold them accountable at election time. Should the citizenry fail to see net gains from the exchange, state politicians will feel it at the polls. Competition between states for business assets, citizens, and interstate business mobility should, over time, weed out bad regulations, while permitting those regulations that serve the public interest to survive.53

This representation-reinforcement theory of antitrust federalism holds up in only a modest subset of cases. The account works reasonably well as to regulatory schemes that benefit local producers (or some subset of local producers) at the expense of local consumers. Thus, for example, a zoning ordinance that restricts billboard advertising in Columbia, South Carolina, benefits the incumbent billboard company, harms its would-be rivals, and imposes costs on Columbia residents who presumably have to pay more for goods and services—whether because of the increased cost of advertising or because of the decreased amount of information caused by the decrease in advertising.54 The ordinance may also reduce obnoxious eyesores and crass commercialism. Local voters and community activists will have to balance the cost increases against the aesthetic benefits, all of which is the stuff of ordinary politics.

But this political accountability story runs into at least three significant obstacles in a wide swath of cases. First, it does not work well with anticompetitive regulations—the benefits of which are captured mostly by local producers and the costs of which are externalized to consumers who cannot vote in the jurisdiction that imposed the anticompetitive regulation. Parker itself provides the quintessential example of this cost-externalization problem.55 As noted, at the time of Parker, half of the world’s raisins, and almost all raisins sold in the United States, came from California.56 Further, more than 90 percent of the raisins grown in California were shipped outside of the state.57 Hence, California raisin producers were able to externalize the costs of their cartel on consumers who could not vote on or directly influence electoral outcomes in the regulating jurisdiction. Indeed, many anticompetitive schemes immunized from antitrust scrutiny under the Parker doctrine impose costs primarily on consumers who cannot vote in the relevant jurisdiction.58

This cost-externalization objection to Midcal’s implicit representation-reinforcement theory might be addressed by limiting Parker immunity to circumstances where voters within the relevant jurisdiction internalize most of the monopoly costs—a facet absent from the current state-immunity doctrine.59 But cost externalization is only one of three significant challenges to the representation-reinforcement theory of state-action immunity. A second one—alluded to at the outset of this Article—is the collective-action problem that arises from the asymmetry between the concentrated benefit to producers and the diffuse harm to consumers that comes with a monopoly.60 Democratic constraints on anticompetitive regulation are unlikely to be effective where the burden on millions of voters is relatively slight compared to the concentrated benefit that befalls a small number of producers willing to invest heavily in the political system to maintain their monopoly position.

It is not difficult to locate evidence of systematic competitive distortions arising from state regulations that favor a relatively small group of producers and impose diffuse costs on a large group of consumers. Automobile retailing is a prime example. State dealer-franchise statutes, in place since the mid-twentieth century, dramatically restrict retail competition through a hodgepodge of prohibitions on manufacturer-distribution decisions, including direct sales to consumers, competitive spacing of dealer locations, termination of ineffective dealers, and competitive warranty-reimbursement policies.61 Dealers spend heavily in state and local elections to maintain these restrictions, and—until recently, at least—there has been relatively little investment of resources by consumer groups to mount political challenges.62 These laws are probably impervious to antitrust challenge under the current constraints of the Parker doctrine, since the prohibitions emanate directly from state legislatures.63

And relying on overcharged consumers to mobilize to overturn anticompetitive regulations poses other problems—namely, the fact that existing laws benefit from inertia. Many state regulatory schemes currently being invoked to slow the competitive advent of new technologies were enacted many decades ago in very different economic and social circumstances.64 The dealer-protection statutes being asserted to thwart Tesla Motors arose at a time when the market was dominated by the “Big Three” Detroit automobile manufacturers, and franchisees were perhaps justifiably concerned about unequal bargaining power and manufacturer exploitation;65 the taxi cab regulations being asserted to limit competition from ridesharing and house-renting services arose long before internet-based transacting alleviated consumer concerns over peak-load pricing, fare opacity, universal service, and many other potential consumer risks.66

Even if not originally enacted for anticompetitive purposes, many state regulations entrench incumbent technologies and firms and perpetuate entry barriers long after the original rationales for the regulations have died.67 But, since it is much more difficult to overturn a regulatory regime than to protect it,68 challenges to the status quo face formidable political obstacles. Incumbency and inertia thus amplify the already significant survival advantages that anticompetitive regulatory schemes enjoy due to cost externalization and the asymmetry between producer gains and consumer losses.

In sum, the representation-reinforcement theory of Parker immunity fails, in important respects, to capture the dynamics of state anticompetitive regulations. Anticompetitive regulatory schemes with few justifications other than special-interest-group protection come into being and persist for lengthy periods because of cost externalization, incentive asymmetries between producers and consumers, and incumbency advantages.

### Innovation – IL – Exemptions

#### Expert consensus is on our side – broad antitrust exemptions wreck innovation

Kobayashi 20 (Bruce Kobayashi is the Paige V. and Henry N. Butler Chair in Law and Economics at the Antonin Scalia Law School at George Mason and Joshua D. Wright is University Professor and the Executive Director of the Global Antitrust Institute at Scalia Law School at George Mason University and holds a courtesy appointment in the Department of Economics, November 19th 2020, “Antitrust Exemptions and Immunities in the Digital Economy – introduction” Global Antitrust Institutehttps://gaidigitalreport.com/2020/10/04/exemptions-and-immunities/)

Antitrust’s goal of protecting competition is rarely, if ever, served by industry-specific antitrust exemptions; indeed, the consensus view is that such exemptions are much more likely to reduce consumer welfare than to enhance it. For example, the bipartisan Antitrust Modernization Commission has explained, “A proposed exemption should be recognized as a decision to sacrifice competition and consumer welfare. . . .”[4] Thus, any exemption from the antitrust laws should be narrowly tailored to address specific problems where procompetitive activity is likely to be deterred by the threat of mistaken antitrust liability, and blanket antitrust exemptions are economically unsound. This is because antitrust exemptions benefit small, concentrated interest groups while imposing costs broadly upon consumers at large in the form of higher prices, reduced output, lower quality, and reduced innovation.[5] Once protected from antitrust liability, private actors are free to collude with competitors and reduce innovation efforts once induced by vigorous competition. Moreover, codified antitrust exemptions are nearly impossible to abolish, resulting in long-term harm to competition in those specific industries.

### Innovation – A2: Link Turn – 2AC

#### It’s try or die – zero uniqueness specific to our scenario – Parker immunity stifles innovation by blocking new entrants and relying on outdated regulations – Crane

Even if they win innovation is eventually successful in reaching the market, the delays have linear impacts

Their generic innovation links don’t apply – we’re making a narrow claim about anticompetitive effects of state regulations not a broad endorsement of enforcement – they need to prove their links make sense in this context

And – their general “antitrust enforcement” links are thumped – Biden XOs, empowered FTC and DOJ

#### Err aff – entrenched businesses are fundamentally self-interested in their defense of regs – it blocks innovation

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]

Executive Summary

Every state has occupational licensing laws or regulations, which require individuals seeking to offer a certain service to the public first to obtain approval from the state. These laws and regulations raise numerous issues, including the economic freedom problems identified by the State and Local Working Group.1 This Paper focuses specifically upon the competitive implications of such regulations.

Occupational licensing requirements historically derive from a desire to protect unwitting consumers from bad actors. They were typically confined to professions where consumers struggled to ascertain the purported professional’s actual expertise and ability — and where the consumer’s misperceptions could have significant negative consequences. Thus, professions like medical and legal have long had self-imposed licensing regimes. The competitive concerns with occupational licensing generally do not arise at this fundamental level, when reasonable requirements directly tied to ensuring basic quality standards are established.

When, however, incumbents wield licensing requirements not as a defensive shield to protect consumers but as an offensive sword to exclude new entrants, serious concerns regarding the competitive implications of the licensing schemes arise. Self-interested incumbents have incentives that may differ from consumers, and these self-interested incumbents can — and sometimes do — impose requirements that do not enhance quality, but rather restrict output, increase prices, and hamper innovation. In other words, occupational licensing regimes can be contorted into schemes that exclude competitors and, in doing so, harm the very consumers they purport to protect. The likelihood of such abuses has increased tremendously in recent decades, as the number of licensed professions in the United States has skyrocketed:

Simultaneously, as new technologies and innovations have proliferated, these concerns have become increasingly pronounced.3 Today, incumbents relying upon older technologies frequently attempt to combat disruptive new entrants by imposing upon them licensing restrictions that are often outdated, irrelevant, or do not make sense to apply to the novel goods or services. For example, self-interested incumbents have established rules that would prevent the operation of innovative entrants and limit patients’ access to board-certified physicians in the state of Texas — a result particularly harmful in Texas, where there is a severe physician shortage.4

#### ~~And – their links are checked by the market – immunity is worse because innovation can’t overcome law~~

~~Bona 19 [Jarod M. Bona, CEO and Partner, Bona Law, J.D., Harvard Law School, 2001 9-1-2019 https://www.theantitrustattorney.com/applying-antitrust-laws-anticompetitive-state-local-government-conduct/]~~

~~There is another significant source of anticompetitive conduct, however, that is often ignored by the antitrust laws. Indeed, a doctrine has developed surrounding these actions that expressly protect them from antitrust scrutiny, no matter how harmful to competition and thus our economy. As a defender and believer in the virtues of competition, I am personally outraged that most of this conduct has a free pass from antitrust and competition laws that regulate the rest of the economy, and that there aren’t protests in the street about it. What has me so upset? You guessed it: state and local government restraints! Just about everyone concentrates on private restraints that, while possibly harmful to competition, are quite unstable. By that, I mean that it is very difficult for a company or companies to restrict competition for long, in most cases. If they form a cartel, the members have strong incentives to cheat (i.e. increase production, lower prices, or offer a better product). If a company engages in exclusionary or monopolistic conduct, it doesn’t take long before a new company or even a new market comes along and “disrupts” the monopoly. Competition is resilient like that. But state and local restraints are the worst because they are ingrained in an economy through the power of law. Even the greatest innovators can’t overcome that—unless, of course, they curry the right favor with the government. But that isn’t competition; that is cronyism. Former Chairman of the Federal Trade Commission, Timothy J. Muris, has a great description about government restraints and antitrust: “Attempting to protect competition by focusing solely on private restraints is like trying to stop the flow of water at a fork in a stream by blocking only one of the channels. Unless you block both channels, you are not likely to even slow, much less stop, the flow. Eventually, all the water will flow toward the unblocked channel.” To its credit, the FTC has been a strong advocate for stopping anticompetitive state and local government conduct.~~

~~State Licensing Boards~~

~~State and local governments engage in all sorts of anticompetitive conduct from limiting the number of taxi-cab licenses in a city to professional advertising restrictions to actual price or output restrictions. Several years ago, I published a law review article that explained how state licensing boards made up of participants of an industry—like a dental or medical board—were using their “state” power to eliminate their own competition by excluding other professions from competing with them. Since that article, the US Supreme Court decided North Carolina State Board of Dental Examiners v. FTC. The dental board (made up primarily of dentists) tried to lock out competition to dentists for teeth-whitening. This sort of activity is quite common among licensing boards, and I expect it to continue. In fact, I predict that over the next five to ten years you will see several battles between traditional doctors empowered by the state on official licensing boards and those that practice various forms of increasingly popular (and often quite effective, in my view) alternative medicine. My prediction is based upon the pattern that markets with strong incumbents (with market power) will commonly react to insurgent and effective competition with cheap tricks that are often anticompetitive. Traditional doctors, of course, are the strong incumbents that, as a class, like the status quo. But increasingly popular alternatives are arriving that threaten to disrupt this status quo. Clashes at the state medical board level are inevitable as traditional medicine struggles to keep hold of markets that it has dominated for years. Anyway, this could be a law review article by itself, so I will stop here. But watch for it over the next decade.~~

~~State-Action Immunity~~

~~The barrier to applying the antitrust laws to state and local government conduct is the state-action immunity doctrine. We have written about this extensively, but the short story is that federalism concerns have led the courts to exempt conduct by the state as a sovereign from antitrust scrutiny.~~

#### ~~Innovation lags cause China conflict and existential threats~~

~~Suchodolsk 20 [Jeanne Suchodolsk, attorney with the United States Navy Office of General Counsel, December 2020 https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1416&context=ncjolt]~~

~~Innovation, in particular, technology-based innovation, is the key driver for both economic competitiveness and national security. Other nations, with interests adverse to the United States, recognize this fact. In an increasingly interconnected world, nation states seek to accumulate innovation prowess, and hence economic strength, as a key element of their geopolitical power. Especially savvy nation states also pursue such ends as a mechanism to influence or diminish the national security and geopolitical power of the United States. There is no need to inflict upon the world the carnage of war if one’s geopolitical aims can be achieved via alternative competitive means.~~

~~Several authors suggest China’s long-term ambitions include unseating the United States as the world’s economic and political leader.1 More compelling than opinions, several United States (“U.S.”) government and private studies document a systematic and coordinated effort by China to achieve technical and economic dominance through misappropriation of U.S. technology.2 These efforts are additionally supported by a companion effort to weaken international economic institutions and norms designed to protect U.S. intellectual property and free trade.3 The Chinese tactics include illegal means, and sophisticated use of legal means, to misappropriate U.S. technology and weaken the U.S. innovation infrastructure including:~~

~~a) Leveraging the open university and laboratory ecosystem via direct sponsorship and engagement of Chinese nationals;4 b) Devaluing U.S. positions in patents and technology platforms;5 and c) Accessing private sector U.S. technology through acquisitions and ownership stakes in existing firms, funding of high-tech start-ups, and forced joint ventures and other contractual agreements as a prerequisite for entering the Chinese market.6 This particular form of competitive strategy targeting the innovation ecosystem in the United States is labeled by the Authors as “Innovation Warfare,”7 and it is defined as an executable competitive strategy: a) Reflecting an innovation, intellectual property, and technology strategy articulated and executed by the state (e.g. China); b) Using illegal means, political means, and legal economic activities—of the type previously residing solely in the province of commercial enterprise, to achieve the state’s objectives; c) Employing these economic and innovation activities to achieve both economic geopolitical power and to enhance military capabilities; and d) Functioning as a military, national security, and defense doctrine not solely as a reflection of the state’s economic policy goals nor commercial competition in the ordinary course.~~

~~Innovation Warfare does not just threaten American jobs and economic prosperity. By simultaneously co-opting and weakening the innovation capabilities of the United States, China seeks to advance its rise to world power. China’s prosecution of Innovation Warfare not only encompasses a rejection of a rules-based international order, but also poses an existential threat. A world where China dominates the technology landscape is not just about who earns the profits or prevails in an abstract geopolitical fight. According to the National Security Strategy of the United States of America (“National Security Strategy”), China pursues a world in which economies are less free, less fair, and less likely to respect human dignity and freedoms.8 China’s Innovation Warfare activities risk the type of economic and geopolitical aggressions that were a root cause of two World Wars.~~

#### ~~Arguments that the US will continue to beat China in innovation are highly risky assumptions – the US is losing its edge and is in danger of failing~~

~~Atkinson 19 (Robert David Atkinson is a Canadian-American economist. He is president of the Information Technology and Innovation Foundation, a public policy think tank based in Washington, D.C., that promotes policies based on innovation economics. He was previously Vice President of the Progressive Policy Institute, Caleb Foote is a research assistant at the Information Technology and Innovation Foundation NOT the actor from The Kids are Alright, unfortunately :/ April 2019, “Is China Catching Up to the United States in Innovation?” Page 6, Information Technology and Innovation Foundation~~ [~~https://projects.iq.harvard.edu/files/innovation/files/2019-china-catching-up-innovation.pdf~~](https://projects.iq.harvard.edu/files/innovation/files/2019-china-catching-up-innovation.pdf)~~)~~

~~The second factor relates to national security and the defense industrial base—a critical issue for the United States as U.S. defense superiority is based is in largely part on technological superiority. American service men and women go into any conflict with the advantage of fielding technologically superior weapons systems. But sustaining that advantage depends on the U.S. economy maintaining global technological superiority, not just in defense-specific technologies, but in a wide array of dual-use technologies. To the extent the United States continues to lose technological capabilities to China, U.S. technological advantage in defense over China will diminish, if not evaporate, as U.S. capabilities whither and Chinese ones strengthen. It is certainly a highly risky proposition to assume the United States can continue its weapons systems superiority over the Chinese if: 1) the Chinese continue to advance, largely through unfair, predatory practices, at their current pace; and 2) the United States loses a moderate to significant share of its advanced technology innovation and production capabilities. As ITIF wrote in 2014, “The United States defense system is still the most innovative in the world, but that leadership is not assured and is in danger of failing. This decline is not only impacting defense innovation and capabilities, but also overall commercial innovation and U.S. competitiveness.~~

## Federalism Adv

### Federalism – UQ

#### Interpretation of Parker immunity has ignored interstate spillovers

Rosch 12 [J. Thomas Rosch, Commissioner, Federal Trade Commission 10-3-2012 https://www.ftc.gov/sites/default/files/documents/public\_statements/returning-state-action-doctrine-its-moorings/121003stateaction.pdf]

The FTC’s State Action Report

Over a decade ago, the FTC became concerned that the lower courts had expanded the scope of the state action doctrine beyond what the Supreme Court had intended. In 2001, the FTC established a State Action Task Force, which issued a Report two years later that analyzed the current state of the law, identified areas of concern, and recommended clarifications to the law.28 The Report observed that the scope of the state action doctrine had expanded dramatically since first articulated by the Supreme Court in 1943. The doctrine had become unmoored from its original objectives, the report concluded, and was frequently invoked to protect private commercial interests with no relation to state policy.

The report identified a number of specific concerns with the way in which some lower courts had applied the state action doctrine. Chief among these was a persistent weakening of the clear articulation and active supervision requirements. In particular, some courts had found that a legislative grant of general corporate powers satisfied the clear articulation requirement. Although the exercise of these powers in the private sector had no particular antitrust significance, some courts had reached the opposite conclusion when the powers were granted through legislation.

The Report also found that there was a lack of clear standards to guide the application of the active supervision requirement. Without guidance on how to implement the various formulations of the requirement articulated by the lower courts, the active supervision requirement had had a minimal impact.

The Task Force raised several other concerns. Some courts, according to the Report, had interpreted the state action doctrine in a manner that ignored interstate spillovers, which forced the citizens of one state to absorb the costs imposed by another state’s regulations. In addition, some courts had interpreted the doctrine to shield virtually any municipal activity, despite the fact that municipalities were increasingly engaging in business on a for-profit basis, while simultaneously using their law-making power to block competitive challenges.

### Federalism – IL – 2AC

#### Court recently curbed state deference but ignored interstate spillovers cemented by broad interpretations of Parker immunity – Allensworth & Sack

The aff leaves UNTOUCHED the ability of states to enforce antitrust violations but divergent state immunity ensures turf wars that block effective antirust enforcement across the board – Kobayashi

tition for the benefit of their residents.

### Federalism – A2: Link Turn – 2AC

#### No turn – the aff PRESERVES state ENFORCEMENT against antitrust violations while addressing a narrow question about interstate spillovers from a broad interpretation of Parker – Kobayashi and Sack

#### Broad application of immunity turns their links – absent clarity on externalities, fed-state turf wars sideline state enforcers – Kobayashi

#### Empirically denied – NC Dental, Phoeby Parker, and Ticor already limited state immunity – Allensworth

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

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

B. Spillover Effects and Antitrust Federalism

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

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

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

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

### ~~Federalism – A2: Link Turn – No Link~~

#### ~~Failure to curb anticompetitive private actions will cause the Court to abandon deference to the states~~

~~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]~~

~~C. Does the Model Go Far Enough?: The Uncertain Future of Deference~~

~~The Court's new antitrust federalism strikes a balance that allows some deference to state regulatory policy, but that choice is not necessarily inevitable or permanent. Whereas in administrative law, courts face constitutional barriers to direct substantive review of agency decision making, in antitrust federalism there may be no equivalently strong barrier to invalidating a state regulation based on its anticompetitive effect because the Parker doctrine rests on statutory interpretation grounds. 218 Although the Court has never taken this path, the careful reader will find intonations of substantive review in the Court's antitrust federalism jurisprudence, and it is a theme that scholars have invoked in advocating more heavy-handed federal intervention. It may be that if the [\*1430] new antitrust federalism does not succeed in reining in state rent dealing, substantive review is next.~~

~~1. The Subtext of Substantive Review in the Old Antitrust Federalism~~

~~In theory, substantive federal review of the competitive effects of state regulation could take one of two forms. First, and most simply, substantive federal review of state regulation would result if the Court abolished state action immunity altogether, because then all state regulation would be subject to Sherman Act suits. Less dramatically, the Court could condition state action immunity on whether the state regulation is intolerably anticompetitive. For the most part, neither of these models of substantive review has found much traction with the Court. The Court has mostly maintained at least an appearance of agnosticism about substance, even of very anticompetitive state regulation, throughout its state action immunity jurisprudence. 219 Yet there are moments where the mask has slipped. And, with few exceptions, the Court has managed to find a way to impose Sherman Act liability for the most egregiously anticompetitive schemes, 220 suggesting that substance may not be entirely irrelevant to the Court's state action immunity regime. Finally, the notion of substantive review of state regulation for its competitive effects finds significant academic support, especially in scholarship from the 1970s. 221 The holding in Parker seemed to draw a bright line around state activity, regardless of its anticompetitive effect. Indeed, the raisin protectorate program challenged in the case was straightforward price fixing with very little economic justification beyond dealing rents to the raisin growers. 222 This notion that even extremely anticompetitive state regulation is outside of the Sherman Act's reach - provided that the state is [\*1431] truly regulating - has been repeated in state action immunity cases since Parker. For example, in Ticor, the Court explained that the supervision requirement exists "not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices," but rather to provide assurance that "the anticompetitive scheme is the State's own." 223 On the other hand, Justices have expressed skepticism about this agnosticism from time to time, although typically not in majority opinions. For example, Justice Scalia concurred in the result in Ticor, but wrote separately to note his belief that "state-programmed private collusion," however supervised, may not deserve immunity at all. 224 Justice Stevens dissented in a state action immunity case because he advocated a distinction between state regulation of economic activity and state regulation of "public health, safety, and [the] environment." 225 On his view, immunity turned on whether the substance of the regulation fell in one category or the other. 226 Some Justices have said that state action immunity is grounded in federal preemption. According to this perspective, denying immunity is equivalent to finding that the state-created restriction is preempted by the Sherman Act. 227 Although the opinions do not always acknowledge it, such a theory of state action immunity implies substantive review of the state regulation in question because a Supremacy Clause analysis requires determining whether the substance of the state law is in conflict with or frustrates the purpose of the federal law. 228 Such an analysis in the Sherman Act context would involve a substantive inquiry into the competitive effects of the state law. The best illustration of how a preemption theory of antitrust federalism is inherently substantive can be found in Justice Blackmun's full-throated case for Parker immunity as substantive review. In his concurrence in Cantor, he argued for a "rule of reason" for immunity, explaining [\*1432] that "state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits." 229 His proposal, grounded in the notion that state action immunity was justified by federal preemption, envisioned different rules for state regulation and private activity. For example, he imagined per se legality for "certain kinds of state enactments, such as the regulation of the classic natural monopoly." 230 Picking up on these mixed signals, several scholars have advocated substantive review of state regulation before conferring state action immunity. John Shepard Wiley's capture theory of antitrust federalism included a substantive component; one prong of his proposed test for immunity was whether the restriction "directly addressed a substantial market inefficiency." 231 Then-Professor Frank Easterbrook advocated an immunity test that would inquire into the interstate effects of the restriction and use the Sherman Act to invalidate only those with significant "spillovers." 232 Professor Paul E. Slater presaged Justice Blackmun's argument in Cantor by advocating state action immunity that turns on whether the state interest in the regulation outweighed the federal interest in competition. 233 Finally, a student note from 1977 argued that Goldfarb, Cantor, and Bates v. State Bar of Arizona 234 can be read together as vindicating Professor Slater's and Justice Blackmun's balancing view. 235~~

~~2. Is the New Antitrust Federalism a Step Towards Substantive Review?~~

~~Can the Court's new focus on accountability review be read as a step towards substantive review of anticompetitive state decision making? Perhaps, although at most that step is small. The Court is clearly concerned about the substance of state regulation, as evidenced especially by the opinion in NC Dental, where it identified the specific problem of overregulation of the professions. 236 And it has found against state action immunity in the only two antitrust federalism cases it has decided this [\*1433] century. It would be appropriate to conclude that this Court has a healthy appetite for invalidating anticompetitive state regulation.~~

~~But the credit-blame accountability in Phoebe Putney and NC Dental is a decidedly procedural, nonsubstantive constraint on the states. It may be justified by a belief that accountability will result in substantively better regulation, but ultimately, it defers to a state's (politically accountable) choices. If that justification proves weak - if accountability review cannot restore at least some competition to state-regulated industries - it is possible the Court will abandon its posture of deference and confront the ghost of Lochner after all.~~

~~This Article does not take a stance on whether the abandonment of deference - and therefore the abandonment of federalism - is inherently a bad thing, in part because defending a federalist system over a centralized government would require a sustained argument beyond the scope of this Article. But perhaps even without appeal to first principles, the Court can be commended for proceeding only incrementally in fashioning the new antitrust federalism. The common law method - by which almost all antitrust law has been created - works best by incremental change. 237 For this reason alone, perhaps, the new antitrust federalism and its deference to state regulatory choices ought to be given a fair shot before resorting to substantive review of state regulation for compliance with federal competition stan~~dards. That fair shot turns on the definition of "active supervision."

### China Competition/Tech Leadership Impact – 2AC

#### Infrastructure will be small if it passes at all, but even a big bill can’t catch up to China

Martin 21 (Peter Martin and Keith Laing, reporters for Bloomberg, March 23rd 2021, “Biden Starts Infrastructure Bet With U.S. Far Behind China” Bloomberg, <https://www.bloomberg.com/news/articles/2021-03-22/biden-starts-big-infrastructure-bet-with-u-s-far-behind-china>) MULCH

Even if he gets all he asks for, catching up to China on infrastructure won’t be easy.

While U.S. officials have been promising an approaching “infrastructure week” since the early days of the Trump administration, China has been plowing ahead for years. In February, Xi’s government set out a 15-year plan for the country’s transportation network. It pledges to extend China’s rail network from 146,300 kilometers (91,000 miles) in 2020 to about 200,000 kilometers by 2035 -- enough to circle the equator more than five times.

The plan also calls for adding 162 new civilian airports, after Beijing’s new $11 billion international airport opened last year.

Biden Team Weighs Long-Term Economic Plan of Up to $3 Trillion

In contrast, the U.S. has built just one major airport -- Denver international -- since the mid-1990s. And on rail, even a bipartisan effort to build the long-sought “Gateway” rail tunnel between New York and New Jersey -- part of the busiest rail line in the U.S. -- has foundered in recent years.

China’s infrastructure efforts aren’t limited to China. Since Xi introducing the so-called Belt and Road initiative in 2013, the World Bank estimated China has built or pledged to construct $575 billion in energy plants, railways, roads, ports and other projects across the globe from Sri Lanka to Greece. Morgan Stanley in 2018 said total spending on the effort could reach $1.3 trillion by 2027.

Biden is hoping to begin leveling the playing field. If he can win support for his plan in a deeply divided Congress, there’s certainly no shortage of projects to work on.

China's Giant Construction Project

President Xi Jinping calls China’s sprawling belt and road initiative the “project of the century”, but many challenges remain. In this Bloomberg QuickTake, we explore one of the largest construction projects in modern history. (Source: Bloomberg) The U.S. got an early start on all its infrastructure, but much of it is now aging or decrepit. According to the American Society of Civil Engineers 2021 Infrastructure Report Card, 43% of U.S. public roadways are in poor or mediocre condition, and 42% of the nation’s 617,000 bridges are at least 50 years old. About 7.5% of them are considered structurally deficient. “The United States is entering what could be a decades-long competition in which economic and technological power will matter just as much, if not more, than military might,” Jonathan Hillman, a senior fellow at the Center for Strategic and International Studies, wrote last month. “Starting this race with decaying infrastructure is like lining up for a marathon with a broken ankle.” The engineering report doesn’t go into another challenge that may have a defining imprint on competitiveness between the U.S. and China: technology infrastructure. The U.S. is still mired in domestic political debates about how to get broadband technology rolled out across the nation. More than a third of Americans in rural areas still lack high-speed access, according to the Federal Communications Commission. Money to help close that gap is expected to be part of any new U.S. proposal. Basic materials stocks are among those likely to benefit from increased spending on infrastructure projects such as roads and bridges, traditional favorites of lawmakers. “Activity in the U.S. cement industry is poised to surge through 2021, with a potential government infrastructure package expected to spur an acceleration” in second-half demand, Bloomberg Industries analyst Sonia Baldeira wrote in a March 16 note. Cemex SAB’s American depositary receipts surged 29% this year through Monday, about six times the gain in the Standard & Poor’s 500 Index. Construction supplier Eagle Materials Inc. leaped 26%, while aggregates producer Martin Marietta Materials Inc. jumped 13%.

Rail Failures

Despite Biden’s impulse to push for big spending, the track record of recent presidents suggest he’s likely to fall short. Donald Trump, a real estate developer who was touted as a potential “builder president” upon his arrival in Washington, proposed a $1 trillion infrastructure plan -- funded mostly by private investment -- that never won approval. President Barack Obama vowed to bet big on high-speed rail as a tool to help the U.S. emerge from the 2008 financial crisis. He spoke frequently in his first term about developing a rail network that could grow to rival the interstate highway system and included $8 billion in his 2009 economic stimulus package for high-speed rail lines. But Republican governors in states like Ohio, Wisconsin and Florida rejected the money, and a decade later a line in California that most of the rejected money was funneled to is still only in its early stages. “Shovel-ready was not as shovel-ready as we expected,” Obama said in 2011 when reflecting on his struggles to harness infrastructure projects to jump-start the economy. Biden could face similar hurdles and it’s not a given that the new president will get his plan approved. He is expected to make his case for his so-called Build Back Better program in a joint address to Congress in April. Democratic aides have increasingly expected the program will be split into more than one package, given legislative challenges.

China’s Example

Meanwhile, China has had access to cheaper labor, engineering prowess and experience in massive infrastructure projects, both at home and abroad. It also had the benefit of building much of its infrastructure from scratch over the past few decades as its economy boomed, with little fiscal scrutiny and fewer protections for workers, the environment or property rights.

The government has long relied on big infrastructure spending to boost the domestic economy and, more recently, to generate international support through investing or providing aid overseas.

#### No China impact – exaggerated threats are cottage industry that ignore reality

Swaine 21 [Michael D. Swaine, director of the East Asia program at the Quincy Institute. 4-21-2021 https://foreignpolicy.com/2021/04/21/china-existential-threat-america/]

It has become a cottage industry in Washington and in parts of Europe these days to highlight all the many ways in which China threatens U.S., Western, and Asian interests. Politicians, military officers, and pundits take turns describing the dangers posed by Beijing’s “expansionist” and “aggressive” military, “implacably hostile” ideology, “predatory” economic and tech policies, and “insidious” overseas influence operations.

Despite shunning the Trump administration’s habitual use of most of these inflammatory adjectives, U.S. President Joe Biden and Secretary of State Antony Blinken nonetheless depict Beijing as challenging the entire “rules-based order that maintains global stability” and as the major focal point of a global struggle between democracy and authoritarianism, which is now, according to Biden, at an “inflection point.”

Such language echoes the premise of various strategy documents of the Trump administration and the speeches of former Secretary of State Mike Pompeo: that the United States is now locked in a strategic, great-power rivalry with China that overshadows any other foreign (or even domestic) threats or concerns facing the country.

There is no doubt that Beijing’s behavior in many areas challenges existing U.S. and allied interests and democratic values. Particularly under Xi Jinping, China has used its greater economic and military power to intimidate rival claimants in territorial disputes and punish nations that make statements or take what Beijing views as threatening or insulting actions. It has engaged in extensive commercial hacking and theft of technologies and favors military intimidation over dialogue in dealing with Taiwan. And it has employed draconian, repressive policies in Tibet and Xinjiang and suppressed democratic freedoms in Hong Kong.

This deeply troubling behavior certainly requires a strong, concerted response from the United States and other nations. But to be effective, such a response also requires an accurate assessment of China’s future impact on the United States and the world.

And in this regard, it is extremely counterproductive to U.S. interests to assert or even imply, as many now do, that the above Chinese actions constitute an all-of-society, existential threat to the United States, the West, and ultimately the entire world, thereby justifying a Cold War-style, zero-sum containment stance toward Beijing. Such an extreme stance stifles debate and the search for more positive-sum policy outcomes while leading to the usual calls for major increases in defense spending.

In fact, there isn’t much actual evidence to support the notion of China as an existential threat. That does not mean that China is not a threat in some areas, but Washington needs to approach this issue based on the facts, not dangerous rhetoric. Unfortunately, right-sizing the challenges that China poses seems to be an impossible task for Washington.

In the most basic, literal sense, an existential threat means a threat to the physical existence of the nation through the possession of an ability and intent to exterminate the U.S. population, presumably via the use of highly lethal nuclear, chemical, or biological weapons. A less conventional understanding of the term posits the radical erosion or ending of U.S. prosperity and freedoms through economic, political, ideational, and military pressure, thereby in essence destroying the basis for the American way of life. Any threats that fall below these two definitions do not convey what is meant by the word “existential.”

As a military power, China has no ability to destroy the United States without destroying itself. China’s nuclear capabilities are far below those of the United States, and its conventional military, while regionally potentially powerful, has a fraction of the budget of that of the United States.

Some argue that China could militarily push the United States out of Asia and dominate that region, denying the country air and naval access and hence support for critical allies. This would presumably have an existential impact by virtue of the supposedly critical importance of that region to the stability and prosperity of the United States. Yet there are no signs that Washington is losing either the will or the capacity to remain a major military actor in the region and one closely connected to major Asian allies, which are themselves opposed to China dominating the region. In reality, the greater danger in Asia is that Washington could so militarize its response to China that its actions and policies become repugnant even to U.S. allies.

This leaves the unconventional threats. Here they are presumably twofold: economic and technological, and in the realm of ideas and influence operations within the United States and other Western countries, including the export of China’s so-called “model” of authoritarian rule to the rest of the world.

The former threats would presumably consist of China attaining a level of total superiority over both economic and technological levers of influence globally and with regard to the United States (perhaps combined with a successful military blocking of U.S. sea lines of communication) that would so impoverish the country as to threaten its existence as a stable and prosperous democracy and bring it under Chinese control. Presumably, the specific basis of such leverage would consist of near-absolute global Chinese dominance over both trade and investment relations and supply chains with the United States and other countries and over all the key technologies driving future growth and military capabilities.

It is virtually inconceivable that China could achieve such a level of dominance over the United States. The United States possesses abundant energy, human, technological, and other resources; a huge and dynamic domestic market; enormous levels of accumulated wealth and capital stocks; and the globe’s financial reserve currency.

In contrast, while China boasts a highly entrepreneurial and dynamic workforce, it labors under major structural and political constraints such as insufficient arable land, a rapidly aging society, a heavy reliance on energy imports, and stifling ideological and state-centered controls across society.

Beijing has certainly used its economic leverage (such as market access) to pressure foreign companies and governments to support Chinese policies or stop what it regards as unacceptable behavior, e.g., regarding Taiwan. While such economic coercion is by no means unique to China, it certainly can erode freedom of speech, thus threatening one of democracy’s core principles. But this hardly rises to the level of an existential threat to American values, given both the limited reach of Chinese economic power and the countervailing global economic power and political influence of democratic states.

Some observers claim that Beijing could somehow set standards in critical technology areas and install tech hardware around the world, to the extent that China would be able to relegate the United States to a permanently inferior status in both the commercial and military realms, thus threatening the very existence of the country. This is also highly unlikely.

Chinese companies are certainly participating in standard-setting in key areas, including 5G. But this process is highly competitive globally, and U.S., Asian, and European companies all hold major portions of the standards and the standard-essential patents that undergird the global technology ecosystem. There is little if any chance that Chinese companies could come to dominate this process. Many tech experts state that the most likely worst-case outcome of Chinese gains regarding standards and hardware would be a fragmented technology ecosystem that would impoverish all countries, not give China a level of power that would enable it to vanquish the United States.

More realistically, Beijing might over time exclude high-tech companies in the United States and other countries from its market, which might make it difficult for them to continue to grow and innovate. And Chinese financing power and supply chains could conceivably create a kind of “turnkey” solution in some developing countries that lock them into a Chinese tech ecosystem. But such developments would come nowhere near to constituting an existential threat to the United States, given the global reach of non-Chinese high-tech companies and the overall limited reach of any Chinese high-tech ecosystem in the developing world in the face of such competition.

Finally, the latter set of supposedly existential normative or ideological threats consists of many elements, including Beijing’s possible overturning of the so-called global liberal international order, Chinese influence operations aimed at U.S. society, the export of China’s political values and state-directed economic approach, and its sale of surveillance technologies and other items that facilitate the rise or strengthening of authoritarian states. These threats all seem hair-raising at first glance. But while significant, they are greatly exaggerated and do not rise to the level of constituting an existential threat.

Beijing has little interest in exporting its governance system, and where it does, it is almost entirely directed at developing countries, not industrial democracies such as the United States. In addition, there is no evidence to indicate that the Chinese are actually engaged in compelling or actively persuading countries to follow their experience. Rather, they want developing nations to study from and copy China’s approach because doing so would help to legitimize the Chinese system both internationally and more importantly to Beijing’s domestic audience.

In addition, the notion that Beijing is deliberately attempting to control other countries and make them more authoritarian by entrapping them in debt and selling them “Big Brother” hardware such as surveillance systems is unsupported by the facts. Chinese banks show little desire to extend loans that will fail, and the failures that do occur are mostly due to poor feasibility studies and the incompetence and excessive zeal of lenders and/or borrowers. Moreover, in both loan-giving and surveillance equipment sales, China has shown no specific preference for nondemocratic over democratic states.

Even if Beijing were to attempt to export its development approach to other states, the actual attractiveness of that approach would prove to be highly limited. The features undergirding China’s developmental success are not replicable for most (if any) countries. These include a high savings rate; a highly acquisitive and entrepreneurial cultural environment; a state-owned banking system and nonconvertible currency; many massive state-owned industries that exist to provide employment, facilitate party control over key sectors, and drive huge infrastructure construction; and strong controls over virtually all information flows. Moreover, such a model (if you can call it that) is almost certainly not sustainable in its present form, given China’s aging population, extensive corruption, very large levels of income inequality, inadequate social safety net~~, and the fact that free information flows are required to drive global innovation.~~

~~Although China’s combination of economic reform policies and authoritarian political system has been around since the early 1980s, not a single nation has adopted that system either willingly or under Chinese compulsion. There are certainly many authoritarian states and fragile democracies on China’s periphery, but none of them were made that way by China.~~

~~China’s challenge to the so-called global liberal international order is also exaggerated. In the first place, it is highly debatable whether in fact a single coherent global order even exists. What observers usually refer to as the “liberal international order” (a relatively recent term) actually consists of an amalgam of disparate regimes with different origins, including international human rights pacts, multilateral economic arrangements, and an international court.~~

~~The United States certainly plays an important or leading role in many of these regimes. But it did not create and does not drive all global regimes—and in fact does not support some of them, such as the International Court of Justice, and has not ratified some critical pacts such as the United National Convention on the Law of the Sea. And many very important global regimes (e.g., regarding the proliferation of weapons of mass destruction, trade and investment, climate change, and pandemics) have no deep connection to liberal democratic values per se and are supported by Beijing, albeit sometimes more in letter than in spirit.~~

## Notice and Comment CP

#### Perm – do both – solves the notice and comment good links

#### Perm – do the plan and use counterplan process to enforce – they sub-specify an enforcement mechanism that we can logically perm

[Perm Text] Do the plan and enforce through delegating antitrust rulemaking authority to a new expert agency notice-and-comment rulemaking to substantially increase prohibitions on anticompetitive business practices by at least expanding the scope of 15 §§ 41-58 to increase FTC anti-trust investigations to limit state action immunity.

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

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

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

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

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

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

#### Perm – do the CP – plan doesn’t commit to an agent, exec functionally is the USFG. Not textually competitive – text is best: most objective and avoids the worst counterplans.

#### No neg fiat --- no “should not” in the resolution, potential CPs are infinite

#### Perm – do the plan as the outcome of the counterplan – it’s certain and we get to perm the delay aspects of the counterplan

#### Counterplan’s delayed – by definition it’s meant to take longer

#### Conditionality is a voter – creates time and strategy skews, not reciprocal – undermines argument responsibility – dispo solves

#### Perm – do the plan and delegate antitrust rulemaking authority to a new expert agency – solves overstretch links

### Single Payer – 2AC

#### Single payer worse for health outcomes

Pipes 14 — Sally Pipes, President, CEO, and Thomas W. Smith Fellow in Health Care Policy at the Pacific Research Institute, former assistant director of the Fraser Institute, 8-4-14 (“Wait times and single-payer health care”, *Pacific Research Institute*, Accessed Online at https://www.pacificresearch.org/wait-times-and-single-payer-health-care/)

The Veterans Affairs scandal may seem like it can’t get any worse – yet bad news continues to mount.

An audit of the VA hospital system has revealed that over 57,000 patients have been forced to wait at least 90 days for an appointment.

More than 63,000 patients in the past decade have requested appointments that were never even scheduled. And many have died while waiting for care.

These are the natural consequences of a government-run, single-payer health care system – whether it’s in Phoenix or a foreign nation, like Canada or the United Kingdom.

Single-payer’s champions claim that the system can restrain health costs by reducing administrative spending. One payer theoretically has more market power to demand better prices – and can streamline spending on claims processing and the like that’s currently handled by insurers.

But single-payer systems are prone to cost overruns. Between 2007 and 2012, the VA’s budget grew faster than its patient population – a 76 percent bump in spending, versus a 13 percent increase in the number of patients.

Yet the system is still cash-strapped. The Congressional Budget Office estimates that the VA is staring at a 75 percent budget shortfall.

The same is true of single-payer systems abroad. The one in Canada – the country of my birth – is $537 billion in the red. Taiwan’s has had to borrow heavily to cover excess costs.

Single-payer administrators effectively have one option for containing ballooning costs – rationing. They artificially restrict access to drugs and services. Patients experience those restrictions in the form of long waits – or outright denials of care.

This causal chain played out to dangerous effect in the VA. The Phoenix facility at the heart of the scandal stashed at least 1,600 vets on secret waiting lists. About 7,000 were backlogged at facilities in Columbia, South Carolina, and Augusta, Georgia.

Forty-five percent of vets suffering from mental health issues – among the most serious threats to their post-combat well-being – have had to wait 14 days or more just to get an appointment. In one particularly egregious case, a soldier who had served a 10-month tour in Iraq came home only to face a four-month wait for a mental health appointment at a VA hospital ein South Carolina.

These delays in treatment are even worse in single-payer systems abroad.

According to the latest research from the Fraser Institute, a think tank, the average Canadian has to wait 18 weeks between referral from a general practitioner and receipt of treatment from a specialist. Those north of the border are collectively waiting for more than 928,000 procedures. Nearly 3 million people are on waiting lists in the United Kingdom.

Rationing doesn’t just come in the form of restricted access to doctors.

System administrators also routinely deny coverage for cutting-edge drugs and treatments.

The VA system maintains a restrictive drug formulary that covers only about a third of the medicines available to Medicare patients. Every year, the United Kingdom’s National Health Service denies about 52,000 patients coverage for basic services like cataract operations and varicose veins treatment.

Single-payer rationing also exerts a huge human toll.

Consider the case of Edward Laird, a 76-year-old Navy veteran. He faced an astonishing two-year delay to get a biopsy for cancerous blemishes that ultimately cost him half his nose.

For 71-year-old veteran Thomas Breen, a months-long wait to get treated for a urinary tract infection proved fatal. No less than 18 veterans at the now-infamous Phoenix facility died before getting care.

It’s hard to square these realities with the conclusions of the VA’s defenders, like Princeton economist Paul Krugman, who has described the Veterans Health Administration as “our little island of socialized medicine in the United States. And it does very well.”

In Canada, long wait times have played a role in the deaths of 44,200 female patients over the last two decades. More than 8,600 Australians in that country’s single payer system have died while on waiting lists.

Over the last four years, more than 50,000 British patients have had to wait two months or more for chemotherapy, radiotherapy or cancer surgery.

#### And crushes innovation

Pitts 16 “Op-ed: Single-payer health care unworkable, too costly” Leonard Pitts Jr., president of the Center for Medicine in the Public Interest and a former Food and Drug Administration associate commissioner, The Philadelphia Inquirer March 8, 2016, http://www.philly.com/philly/opinion/20160308\_Op-ed\_\_Single-payer\_health\_care\_unworkable\_\_too\_costly.html

The real problem with a single-payer system, however, is much simpler: The approach has failed everywhere it has been tried - from Europe to Canada to Sanders' own state of Vermont. In almost every instance, government-run health care has suppressed medical innovation and made it harder for patients to get the treatment they need at a price they can afford. Both candidates ought to be discussing practical ways to fix our health system's most serious flaw - too much government intervention. Instead, they're quibbling over the many faults of a single-payer program that would dramatically lower the quality of care for all Americans. While he has yet to provide many serious details, Sanders' proposal creates a single-payer health program that would "cover the entire continuum of health care," from inpatient care to hearing, vision, and oral health. Sanders tends to frame his plan as a way to "join every other major industrialized nation on Earth and guarantee health care to all citizens." But one need only look at these other nations to understand why Sanders' vision is a step in the wrong direction. As anyone who has ever stood in line at the Department of Motor Vehicles can understand, government-run systems are invariably wracked by inefficiencies. When it comes to health care, one size doesn't fit all. For instance, Canadian patients hoping to see a specialist physician can expect to wait more than 18 weeks. An MRI scan in that country takes more than 10 weeks. Waiting times have grown so long in Sweden's single-payer system that one in 10 citizens has opted for private coverage. In order to contain health costs, Sanders promises to "stand up to drug companies and negotiate fair prices for the American people." But again, the disastrous effects of drug price controls have been clearly demonstrated throughout Europe. To take one example, the United Kingdom's National Health Service (NHS) consistently denies patients access to the most up-to-date treatments if they are deemed too expensive by regulators. These decisions often lead to avoidable suffering for those in need of care. Last summer, in fact, British health administrators refused to pay for a breakthrough ovarian cancer drug until patients had undergone three rounds of chemotherapy. Drug price controls also come at the expense of medical innovation, as they weaken the incentive for pharmaceutical firms to invest in research and development. In the 1970s, four European countries invented 55 percent of the world's new drugs. Decades of increasing price controls in Europe pushed drug development ~~efforts - representing hundreds of billions of dollars of investment and economic activity - to the United States. Between 2000 and 2010, those four countries accounted for a third of pharmaceutical innovation, while the U.S. share rose to 57 percent. The nonpartisan National Bureau of Economic Research cautions that "cutting [drug] prices by 40 to 50 percent in the U.S. will lead to between 30 to 60 percent fewer R&D projects being undertaken." Less research means fewer new medicines~~

## Courts CP

#### Perm – do both – solves the link

#### Perm – do the CP – plan doesn’t commit to an agent, exec functionally is the USFG. Not textually competitive – text is best: most objective and avoids the worst counterplans.

#### Normal means competition is bad – CP’s must compete on a mandate of the plan – anything else forces the aff to research infinite abnormal means and kills the search for the best policy option because the neg can just agree

#### Agent CPs are a voter --- crushes fairness by doing all the Aff and undermines education by focusing on trivial details

#### No neg fiat --- no “should not” in the resolution, potential CPs are infinite

#### Conditionality is a voter – creates time and strategy skews, not reciprocal – undermines argument responsibility – dispo solves

#### ~~Congressional opposition~~

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

~~D. Political Backlash As we have already indicated, the government’s prosecution of high stakes antitrust cases often inspires defendants to lobby elected officials to rein in the enforcement agency. Targets of cases that seek to impose powerful remedies have several possible paths to encourage politicians to blunt enforcement measures. One path is to seek intervention from the President. The Assistant Attorney General of the Antitrust Division serves at the will of the President, making DOJ policy dependent on the President’s continuing support. The White House ordinarily does not guide the Antitrust Division’s selection of cases, but there have been instances in which the President pressured the Division to alter course on behalf of a defendant, and did so successfully.125 The second path is to lobby the Congress. The FTC is called an “independent” regulatory agency, but Congress interprets independence in an idiosyncratic way.126 Legislators believe independence means insulation from the executive branch, not from the legislature. The FTC is dependent on a good relationship with Congress, which controls its budget and can react with hostility, and forcefully, when it disapproves of FTC litigation—particularly where it adversely affects the interests of members’ constituents. Controversial and contested cases may consequently be derailed or muted if political support for them wanes and politicians become more sympathetic to commercial interests. The FTC’s sometimes tempestuous relationship with Congress demonstrates that political coalitions favoring bold enforcement can be volatile, unpredictable, and evanescent.127 If the FTC does not manage its relationship with Congress carefully, its litigation opponents may mobilize legislative intervention that causes ambitious enforcement measures to the founder. Imagine, for a moment, that the DOJ and the FTC launch monopolization cases against each of the GAFA giants. Among other grounds, these cases might be premised on the theory that the firms used mergers to accumulate and protect positions of dominance. The GAFA firms have received unfavorable scrutiny from legislators from both political parties over the past few years, but the current wave of political opprobrium is unlikely to discourage the firms from bringing their formidable lobbying resources to bear upon the Congress. It would be hazardous for the enforcement agencies to assume that a sustained, well-financed lobbying campaign will be ineffective. At a minimum, the agencies would need to consider how many battles they can fight at one time, and how to foster a countervailing coalition of business interests to oppose the defendants~~.

#### Doesn’t solve federalism – arg is about Court interpretive precedent allowing states to experiment – Sack and Kobayashi

## Food Price DA

#### NO link COVID proves ag industry resilience

#### US not key – global supply chains create redundance

#### No food wars

Rosegrant 13 – M ark W., Director of the Environment and Production Technology Division at the International Food Policy Research Institute, et al., 2013, “The Future of the Global Food Economy: Scenarios for Supply, Demand, and Prices,” in Food Security and Sociopolitical Stability, p. 39-40

The food price spikes in the late 2000s caught the world’s attention, particularly when sharp increases in food and fuel prices in 2008 coincided with street demonstrations and riots in many countries. For 2008 and the two preceding years, researchers identified a significant number of countries (totaling 54) with protests during what was called the global food crisis (Benson et al. 2008). Violent protests occurred in 21 countries, and nonviolent protests occurred in 44 countries. Both types of protest took place in 11 countries. In a separate analysis, developing countries with low government effectiveness experienced more food price protests between 2007 and 2008 than countries with high government effectiveness (World Bank 201la). Although the incidence of violent protests was much higher in countries with less capable governance, many factors could be causing or contributing to these protests, such as government response tactics, rather than the initial food price spike.

Data on food riots and food prices have tracked together in recent years. Agricultural commodity prices started strengthening in international markets in 2006. In the latter half of 2007, as prices continued to rise, two or fewer food price riots per month were recorded (based on World Food Programme data, as reported in Brinkman and Hendrix 2011). As prices peaked and remained high during mid-2008, the number of riots increased dramatically, with a cumulative total of 84 by August 2008. Subsequently, both prices and the monthly number of protests declined.

Several researchers have studied the connection between food price shocks and conflict, finding at least some relationship between food prices and conflict. According to Dell et al. (2008), higher food prices lead to income declines and an increase in political instability, but only for poor countries. Researchers also found a positive and significant relationship between weather shocks (affecting food availability, prices, and real income) and the probability of suffering government repression or a civil war (Besley and Persson 2009). Arezki and Bruckner (2011) evaluated a constructed food price index and political variables, including data on riots and anti-government demonstrations and measures of civil unrest. Using data from 61 countries over the period 1970 to 2007, they found a direct connection between food price shocks and an increased likelihood of civil conflict, including riots and demonstrations.

Other researchers have broadened the analysis by considering government responses or underlying policies that affect local prices, and consequently influence outcomes and the linkage between food price shocks and conflict. Carter and Bates (2012) evaluated data from 30 developing countries for the time period 1961 to 2001, concluding that when governments mitigate the impact of food price shocks on urban consumers, the apparent relationship between food price shocks and civil war disappears. Moreover, when the urban consumers can expect a favorable response, the protests only serve as a motivation for a policy response rather than as a prelude to something more serious, such as violent demonstrations or even civil war.

Many in the international development community see war and conflict as a development issue, with a war or conflict severely damaging the local economy, which in turn leads to forced migration and dislocation, and ultimately acute food insecurity. Brinkman and Hendrix (2011) ask if it could be the other way around, with food insecurity causing conflict. Their answer, based on a review of the literature, is "a highly qualified yes," especially for intrastate conflict. The primary reason is that insecurity itself heightens the risk of democratic breakdown and civil conflict. The linkage connecting food insecurity to conflict is contingent on levels of economic development (a stronger linkage for poorer countries), existing political institutions, and other factors. The researchers say establishing causation directly is elusive, considering a lack of evidence for explaining individual behavior. The debate over cause and effect is ongoing.

## Politics DA

### Debt Ceiling – 2AC

#### Won’t pass

Cochrane 9-30 [Emily Cochrane is a reporter in the Washington bureau, covering Congress, 9-30-2021 https://www.nytimes.com/2021/09/30/us/politics/senate-debt-ceiling.html]

The Senate took its first procedural step on Thursday to advance a stand-alone bill that would lift the statutory limit on federal borrowing until December 2022, even though it is all but guaranteed to fail amid a Republican filibuster.

Senate Democrats pushed forward with a party-line 50-to-43 vote on the legislation, which cleared the House on Wednesday. A day earlier, the Treasury Department warned that it would hit the limit by Oct. 18 and inaction would risk a first-ever default on the federal debt.

Congress raises the debt limit to cover spending it has already approved, and failure to address that ceiling could force the Treasury Department to default on its loans and struggle to pay Social Security payments and crucial benefits.

Republicans continue to insist that Democrats, who control the White House and both chambers of Congress, should act to lift the debt ceiling without any votes from the minority party. Democrats, who helped raise the cap under the Trump administration, have argued that Republicans should help shoulder the political responsibility for such measure.

But in the Senate, where both parties control 50 seats, Republicans are adamant that they will not help Democrats clear the 60-vote threshold needed to advance most pieces of legislation.

#### No systemic default – Fed backstop

Garvey 21 [Padhraic Garvey, CFA Regional Head of Research at ING, 8-4-2021 https://think.ing.com/opinions/the-approach-of-the-us-debt-ceiling-x-date-and-why-it-matters]

As an important counter to this, the Federal Reserve is currently providing an overt example of monetary financing, where in the extreme the Fed could simply finance redemptions by hoovering up new issuance. This would not avert breaching above the debt ceiling by the way, as Fed holdings are included in the measure of overall government debt (rightly or wrongly). But it would appease any talk of systemic default. Even if there were a technical default (e.g. one coupon payment missed), we know (with some confidence) that it would be made good in due course as in the extreme the Fed is always there as a backstop if things ever got really severe.

### 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 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.

# 1AR

### Case

Our case outweighs and is not turned by the Das

No great power war because PC is not key

### Innovation – 1AC

#### 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 because broad anti-trust exemptions wreck innovation

#### Innovation lags cause China conflict and existential threats

Suchodolsk 20 [Jeanne Suchodolsk, attorney with the United States Navy Office of General Counsel, December 2020 https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1416&context=ncjolt]

Innovation, in particular, technology-based innovation, is the key driver for both economic competitiveness and national security. Other nations, with interests adverse to the United States, recognize this fact. In an increasingly interconnected world, nation states seek to accumulate innovation prowess, and hence economic strength, as a key element of their geopolitical power. Especially savvy nation states also pursue such ends as a mechanism to influence or diminish the national security and geopolitical power of the United States. There is no need to inflict upon the world the carnage of war if one’s geopolitical aims can be achieved via alternative competitive means.

Several authors suggest China’s long-term ambitions include unseating the United States as the world’s economic and political leader.1 More compelling than opinions, several United States (“U.S.”) government and private studies document a systematic and coordinated effort by China to achieve technical and economic dominance through misappropriation of U.S. technology.2 These efforts are additionally supported by a companion effort to weaken international economic institutions and norms designed to protect U.S. intellectual property and free trade.3 The Chinese tactics include illegal means, and sophisticated use of legal means, to misappropriate U.S. technology and weaken the U.S. innovation infrastructure including:

a) Leveraging the open university and laboratory ecosystem via direct sponsorship and engagement of Chinese nationals;4 b) Devaluing U.S. positions in patents and technology platforms;5 and c) Accessing private sector U.S. technology through acquisitions and ownership stakes in existing firms, funding of high-tech start-ups, and forced joint ventures and other contractual agreements as a prerequisite for entering the Chinese market.6 This particular form of competitive strategy targeting the innovation ecosystem in the United States is labeled by the Authors as “Innovation Warfare,”7 and it is defined as an executable competitive strategy: a) Reflecting an innovation, intellectual property, and technology strategy articulated and executed by the state (e.g. China); b) Using illegal means, political means, and legal economic activities—of the type previously residing solely in the province of commercial enterprise, to achieve the state’s objectives; c) Employing these economic and innovation activities to achieve both economic geopolitical power and to enhance military capabilities; and d) Functioning as a military, national security, and defense doctrine not solely as a reflection of the state’s economic policy goals nor commercial competition in the ordinary course.

Innovation Warfare does not just threaten American jobs and economic prosperity. By simultaneously co-opting and weakening the innovation capabilities of the United States, China seeks to advance its rise to world power. China’s prosecution of Innovation Warfare not only encompasses a rejection of a rules-based international order, but also poses an existential threat. A world where China dominates the technology landscape is not just about who earns the profits or prevails in an abstract geopolitical fight. According to the National Security Strategy of the United States of America (“National Security Strategy”), China pursues a world in which economies are less free, less fair, and less likely to respect human dignity and freedoms.8 China’s Innovation Warfare activities risk the type of economic and geopolitical aggressions that were a root cause of two World Wars.

### 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

### China Tech Leadership/ Competition Impact

Extend our Martin 21, A big bill would not be able to catch up to China, in other words there is no china impact (Swaine 21) , there is not much evidence to support China as an existential threat

### Single Payer – Fails – 1AR

#### Single payer worse for health outcomes, their CP fails, does not solve

Pipes 14

#### There’s less medical technology and longer wait times—this negatively impacts health—profit incentives improve care.

Adorney and Phillips 16 — Julian Adorney, Young Voices advocate and economic historian, 2016 Thorpe Fellow with Foundation for Economic Foundation, and Grant Phillips, contributor to the Libertarian Republic and host of Unbiased America Live, 2-19-2016 ("Single Payer Is Inherently Problematic", *RealClear Policy*, Accessed Online at http://www.realclearpolicy.com/blog/2016/02/19/single\_payer\_is\_inherently\_problematic\_1558.html)

Advocates of single-payer nevertheless claim that it works: Just look at other countries. It is true that health care is often less expensive in single-payer countries, but with health care you get what you pay for.

In countries with single-payer, advanced medical technology is often hard to come by. The United States has four times as many MRI machines per capita as Canada and five times as many as Britain. Similar shortages are found in CT scanners. Fewer women get mammograms in single-payer countries, which leads to lower five-year cancer survival rates.

Advanced procedures are often rationed. In 2010, Norway, Sweden, and Canada reported that over half of patients waited more than four weeks for specialist appointments.

Even basic care is rationed, as “free” health care creates a mismatch between supply and demand. Patients in Canada, for instance, wait an average of 13 weeks for surgical and diagnostic treatment. Compare that to three weeks for Americans.

Rationing often hits the poor hardest, because the wealthy have more freedom to wait (they can take time off work, for instance) and can often afford to travel abroad or obtain additional private health-care coverage.

The lack of profit incentive also leads to mistakes. The U.K. and other single-payer countries have higher mortality rates within 30 days of hospital admission for a heart attack, as well as increased risk of postoperative complications. Half of Canadian discharged patients are not given post-treatment instructions on follow-up care, contacts, or treatment options. Compare that to only about a quarter of patients in the U.S.

Profit-maximizing hospitals work hard to decrease complications, because complications are expensive. They hurt the hospital’s brand, deter future customers, can cost thousands to fix, and even leave the hospital vulnerable to a lawsuit.

### Notice and Comment CP – Enforcement Perm – 1AR

#### Extend the perm to do the plan and use the counterplan’s process to enforce –

[Perm Text] Do the plan and enforce through delegating antitrust rulemaking authority to a new expert agency notice-and-comment rulemaking to substantially increase prohibitions on anticompetitive business practices by at least expanding the scope of 15 §§ 41-58 to increase FTC anti-trust investigations to limit state action immunity.

#### Their evidence that compares judicial remedies with administrative agencies is an enforcement question – none of their links contextualize to the aff’s SCOTUS ruling that greenlights administrative enforcement to be enforced

#### And, our specific aff avoids any residual Court bad arguments – the aff empowers agencies to enforce outside traditional adjudication – that’s Crane

## Courts CP

#### Perm – do both – solves the link, they never said how it doesn’t solve… no evidence and no severance – they admitted to this during cross ex

#### Perm – do the CP – plan doesn’t commit to an agent, exec functionally is the USFG. Not textually competitive – text is best: most objective and avoids the worst counterplans.

#### Normal means competition is bad – CP’s must compete on a mandate of the plan – anything else forces the aff to research infinite abnormal means and kills the search for the best policy option because the neg can just agree

#### Agent CPs are a voter --- crushes fairness by doing all the Aff and undermines education by focusing on trivial details

#### No neg fiat --- no “should not” in the resolution, potential CPs are infinite

#### Conditionality is a voter – creates time and strategy skews, not reciprocal – undermines argument responsibility – dispo solves

#### Courts shield the link to politics – avoids political pressure or gridlock – they take the blame for Biden – no political costs – Ward

#### NO backlash link in the context of antitrust

#### 1 – Courts will rule on uncontroversial grounds to avoid it

#### 2 – even if unpopular, insufficiently so – all their ev’s examples are from decades ago

#### 3 – even if they’re right, not until after their bill passed

Baker 10 (Jonathan Baker, Professor of Law, Washington College of Law, American University, “Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement,” Antitrust Law Journal, vol.76, 2010, pp.648-650, 76 ANTITRUST L.J. 605 (2010), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2140&context=facsch\_lawrev)

If the hypothetical pro-Intel decision did come to fruition and created such a debate, other governmental institutions might respond by undoing its result 181 -with legislation overturning it, through aggressive enforcement of state competition laws governing the conduct of dominant firms, or, after the composition of the Court changes, with a new decision limiting or overruling the Court's modification of monopolization law. Recognizing this possibility, 182 it would take an unusually self-confident and determined Court to provoke such a controversy on its own, 183 without a strong political wind at its back.184

**[FOOTNOTE 182]**

182 Even if the Court is sympathetic to the non-interventionist approach to monopolization doctrine, it may fear a political backlash from an expansive decision and so find for Intel in an uncontroversial way (e.g., holding for Intel on narrow grounds, or deciding the case in Intel's favor on procedural or factual grounds that do not require modification to the substantive standards governing monopolization). On the other hand, the Court may discount the possibility of a political reaction on the ground that any such response would take time and the political environment could change before opposing political forces successfully mobilize to overcome legislative inertia.

**[FOOTNOTE 182]**

If the courts endorse the non-interventionist arguments on monopolization standards, it is more realistic to suppose that such decisions would be framed as fine-tuning antitrust rules to better advance the goals of competition policy, not as questioning whether the benefits of antitrust enforcement exceed the costs. They would be presented as similar in spirit to the modifications to other antitrust rules associated with the success of the Chicago School, not as subverting the competition policy bargain. That is, judicial opinions accepting non-interventionist proposals to modify monopolization doctrine would likely present the change in standards as a reform that advances competition policy goals as those goals have been understood since the 1980s.

Even in this more limited form, the non-interventionist effort to raise the burden for plaintiffs seeking to demonstrate monopolization by exclusionary conduct faces hurdles. The prospects for success of a renewed non-interventionist bid for reform of antitrust rules are less today than they were three decades ago, when Chicago critiques led to thoroughgoing modifications of antitrust doctrines without overthrowing the political bargain, for three reasons.

First, during the 1980s, a bipartisan consensus, reflected in all three branches of the federal government, favored some sort of economic deregulation and antitrust reform. By contrast, there is no bipartisan consensus today that antitrust rules generally, or monopolization rules in particular, are overly restrictive or that they undermine economic goals in the pursuit of social and political goals. Second, the economic arguments in favor of reform of monopolization rules have been strongly (and, in my view, persuasively) countered by economic arguments in favor of preserving current rules governing non-price exclusionary conduct by dominant firms. 8 5 Finally, among the three branches of the federal government, only the judiciary now seems inclined toward the noninterventionist position on monopolization,'8 6 and its makeup may begin to change as the Obama administration moves forward with judicial appointments. Hence, even a proposal to revise monopolization standards conceived as extending the Chicago School reforms of antitrust doctrine to a previously untouched area may be too partisan to succeed today. 187

For the above reasons, I am skeptical about the current prospects for success of the non-interventionist effort to change monopolization standards. Courts are likely to leave the legal standard governing predatory conduct by a dominant firm largely unchanged, issuing to the extent possible narrow decisions that resolve monopolization cases based on their particular facts and procedural posture without reaching the substantive legal standard.188

#### Does NOT affect Biden’s PC NOR Dem unity regardless

Whittington 5 (Keith E. Whittington, Professor, Department of Politics, Princeton University, ““Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court”, American Political Science Review, 99(4), November 2005, pp.591-592) \*added [gridlocked]

OVERCOMING CROSS-PRESSURED POLITICAL COALITIONS

There are some issues that politicians cannot easily handle. For individual legislators, their constituents may be sharply divided on a given issue or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including presidents and legislative leaders, must similarly sometimes manage deeply divided or cross-pressured coalitions. When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to circumvent a paralyzed [gridlocked] legislature and avoid the political fallout that would come with taking direct action themselves. As Mark Graber (1993) has detailed in cases such as slavery and abortion, elected officials may prefer judicial resolution of disruptive political issues to direct legislative action, especially when the courts are believed to be sympathetic to the politician’s own substantive preferences but even when the attitude of the courts is uncertain or unfavorable (see also, Lovell 2003). Even when politicians do not invite judicial intervention, strategically minded courts will take into account not only the policy preferences of well-positioned policymakers but also the willingness of those potential policymakers to act if doing so means that they must assume responsibility for policy outcomes. For cross-pressured politicians and coalition leaders, shifting blame for controversial decisions to the Court and obscuring their own relationship to those decisions may preserve electoral support and coalition unity without threatening active judicial review (Arnold 1990; Fiorina 1986; Weaver 1986). The conditions for the exercise of judicial review may be relatively favorable when judicial invalidations of legislative policy can be managed to the electoral benefit of most legislators. In the cases considered previously, fractious coalitions produced legislation that presidents and party leaders deplored but were unwilling to block. Divisions within the governing coalition can also prevent legislative action that political leaders want taken, as illustrated in the following case.

### Debt Ceiling – Passage Inevitable – 1AR

#### Debt ceiling is a game of chicken but ultimately will raise it – it’s not about PC but fear of markets

Jasinski 9-29-21 (Nicholas Jasinski, reporter at Barron's focusing on stock coverage, writes the Sizing Up Small Caps column and the Barron's Review & Preview newsletter; **internally citing Chris Harvey, head of equity strategy at Wells Fargo Securities**; “The Nasdaq's Terrible Day,” Medicare Agent News, 9-29-2021, https://medicareagentnews.blogspot.com/2021/09/the-nasdaqs-terrible-day.html)

Taking a purely investor lens on the showdown, there appears to be a bit of a game of chicken afoot. The stock market isn't pricing in a U.S. debt default because it expects Congress to act. But lawmakers could be letting things get awfully close to the deadline because they don't feel the political pressure of a tumbling stock market. The higher bond yields of late could be pricing in some greater odds of a default, but not clearly nothing major either.

Here's Chris Harvey, head of equity strategy at Wells Fargo Securities, writing to clients today:

Is the market's benign reaction to a potential shutdown causing Congress to be too complacent? In other words, does the market need to sell off to shock politicians into action? Republicans appear to have no motivation to budge, and the Democrats are slowly realizing that (as the party with governing control) they likely will be blamed for any shutdown.

If substantial progress is not made by mid-October, we think the markets will get into the act. Until then, we need to see how much the Democrats are willing to risk 'political capital' on this issue. With President Biden's polls reaching a new low (Rasmussen, 9/27: 40% approval / 58% disapprove), we think the answer is not much.

Our best guess is the Democrats will reach an intraparty agreement by mid/late-October. This is when our Econ Group and others (including Secretary Yellen) believes the projected 'X date' window opens – i.e., the day the government actually can no longer fund its obligations.

#### Passage inevitable and PC not key

Weisman 9-15 [Jonathan Weisman is a congressional correspondent for NYT, 9-15-2021 https://www.nytimes.com/2021/09/15/us/politics/debt-ceiling-mcconnell.html]

Mr. McConnell is not the Democrats’ only target; they say other Senate Republicans, such as Mitt Romney of Utah, Susan Collins of Maine and Lisa Murkowski of Alaska, understand what is at stake. Democratic leaders are likely to attach a debt ceiling increase to an emergency spending bill that includes funding for Hurricane Ida reconstruction, wildfire management and Afghan refugee resettlement; they will then dare Republican senators from Louisiana, Idaho and Montana and other interested lawmakers to vote no later than this month.

Biden’s 2022 Budget

The 2022 fiscal year for the federal government begins on October 1, and President Biden has revealed what he’d like to spend, starting then. But any spending requires approval from both chambers of Congress. Here’s what the plan includes:

Ambitious total spending: President Biden would like the federal government to spend $6 trillion in the 2022 fiscal year, and for total spending to rise to $8.2 trillion by 2031. That would take the United States to its highest sustained levels of federal spending since World War II, while running deficits above $1.3 trillion through the next decade.

Infrastructure plan: The budget outlines the president’s desired first year of investment in his American Jobs Plan, which seeks to fund improvements to roads, bridges, public transit and more with a total of $2.3 trillion over eight years.

Families plan: The budget also addresses the other major spending proposal Biden has already rolled out, his American Families Plan, aimed at bolstering the United States’ social safety net by expanding access to education, reducing the cost of child care and supporting women in the work force.

Mandatory programs: As usual, mandatory spending on programs like Social Security, Medicaid and Medicare make up a significant portion of the proposed budget. They are growing as America’s population ages.

Discretionary spending: Funding for the individual budgets of the agencies and programs under the executive branch would reach around $1.5 trillion in 2022, a 16 percent increase from the previous budget.

How Biden would pay for it: The president would largely fund his agenda by raising taxes on corporations and high earners, which would begin to shrink budget deficits in the 2030s. Administration officials have said tax increases would fully offset the jobs and families plans over the course of 15 years, which the budget request backs up. In the meantime, the budget deficit would remain above $1.3 trillion each year.

Reputation aside, Mr. McConnell has lost before. In 2015, the Senate voted over his adamant opposition to curtail the federal government’s post-Sept. 11 surveillance of U.S. phone records. He vowed this year to oppose a Senate organizing resolution to give Democrats control of the chamber unless the new majority promised to protect the legislative filibuster. Then he blinked.

“I don’t think anyone believes he will say, ‘They nailed me for being hypocritical — I give up,’” Senator Brian Schatz, Democrat of Hawaii, said of Mr. McConnell. “But it is possible, in fact it’s imperative, that we demonstrate that the modern Republican Party is just too dangerous for the American economy and for American democracy.”

The attack on the Capitol on Jan. 6 was “exhibit A,” Mr. Schatz added. “This is exhibit B.”

Some Republicans clearly are queasy with the brinkmanship. While they are angry that Democrats passed a $1.9 trillion pandemic rescue bill over united Republican opposition — and are now doing the same with their social policy bill — they know the stakes of a government default.

“The Democrats have added enormous amounts of debt, including the $1.9 trillion package, now $3.5 trillion on top of that, so they bear the responsibility for increasing the debt limit,” Ms. Collins said. “I don’t, however, want to see our country default, so we’ll have to see what happens.”

Senator Richard C. Shelby of Alabama, the top Republican on the Appropriations Committee, told reporters this week: “After stops and starts, we will pass a debt limit of some kind. Because otherwise the alternative is not good, not good either way.”

#### The DA is political theater – they WILL 100% cave and raise it

Cillizza 9-16 [Chris Cillizza, CNN Politics Reporter and Editor-at-Large, 9-16-2021 https://www.cnn.com/2021/09/16/politics/debt-ceiling-mcconnell-schumer-biden/index.html]

Every few years, the most Washington possible debate engulfs the nation's capitol: Whether or not to raise the debt ceiling.

The issue is whether or not to increase the amount that the US government can borrow against itself before a certain date when it runs out of money. It's all massive numbers and misunderstandings: Increasing the debt ceiling isn't really about allowing the government to spend more money going forward. It's about paying for the more money the government has already spent.

Think of the debt limit like a credit card. What raising the debt ceiling does is pay off the things you've already bought. It doesn't allow you to go on a spending spree going forward.

And yet, Congress fights over it almost every single time it comes up.

The latest fight features Senate Minority Leader Mitch McConnell insisting that no Republican senator will vote to increase the debt limit, a move that would force Democrats to keep all 50 of their own senators in line to pass the increase on a purely partisan vote. McConnell wants to do this so that, when Democrats seek to push through their $3.5 trillion budget bill sometime soon, Republicans on the campaign trail can say they voted unanimously to stop that sort of out-of-control spending. (Again, worth noting here: Increasing the debt limit is about paying bills we've already incurred, not bills that we may incur going forward.)

"They are just going to have to reconcile themselves and recognize they are going to have to own it," said Texas Sen. John Cornyn, a close ally of McConnell.

Democrats -- led by Senate Majority Leader Chuck Schumer -- are doing the damndest to force Republicans into breaking with McConnell by, among other things, considering packaging the debt ceiling increase with legislation that would keep the government financed -- and open -- beyond the end of the month. The thinking there is that Republicans wouldn't be willing to be part of a government shutdown solely to avoid raising the debt limit.

Democrats also make the case that the current debt limit -- around $28.5 trillion as of August -- is the result of former President Donald Trump's massive tax cuts. "This is for Trump debt," Sen. Dick Durbin told CNN. "You would think they would at least stand up and pay for the administration of that last Republican President."

And here's the little secret about raising the debt ceiling: Congress has never not done it. Why? Because the consequences of not doing it are far too dire for the country: The Treasury Department would default on its debts, badly damaging the country's economic credibility around the world. In 2011, even the prospect that Congress would not raise the debt ceiling -- spolier alert: They did! -- led Standard & Poor's to downgrade its ratings on US debt for the first time in 7 decades.

This then is a decidedly [silly] ~~dumb~~ debate. Members of Congress are engaging in its usual brinksmanship over a) whether to pay bills they've already rung up and b) knowing they will, eventually, find a way to raise the debt ceiling. Because they always do.

#### GOP will fold – pressure from businesses

Treene 9-15 [Alayna Treene is a congressional reporter at Axios 9-15-2021 https://www.axios.com/the-debt-ceiling-stare-down-b7efb4c2-f1f2-404f-a0e2-a67cf074c4d9.html]

Congress is fast approaching its deadline to raise the debt ceiling or risk defaulting on the nation's debt, and, as of now, there's no serious plan to stave off what many members are calling the worst-case scenario.

Why it matters: The U.S. has never defaulted on its debt. If Congress doesn't take "extraordinary measures" to finance the government, it would "likely cause irreparable damage to the U.S. economy and global financial markets," Treasury Secretary Janet Yellen warned last week.

Driving the news: Democrats are banking on at least 10 Republicans to eventually give in and vote for a debt increase.

But Republicans insist they're not bluffing and have remained united in their insistence that if the U.S. defaults on its debt, the blood will be on Democrats' hands.

“It's their obligation. They should step up. It's hard being in the majority. They are the ones who will raise the debt limit,” Senate Minority Leader Mitch McConnell (R-Ky.) told Punchbowl News.

What we're hearing: Axios spoke with more than a dozen senators this week about how they think Congress should handle the stalemate.

Democrats largely told us they think Republicans are willing to get as close to the deadline as possible but then will fold after banks, lobbyists and donors call them.

"Oh come on, they're not gonna let us default," said Sen. Chris Coons (D-Del.). He said he and his Democratic colleagues think the most likely scenario is Republicans "fuss, fuss, fuss, then do it" in a continuing resolution.

Some Republicans, though, said they're willing to let a default happen and blame it on Democrats.

"It's going to be entirely determined by the Democrats," said Sen. Susan Collins (R-Maine), one of the few moderate Republicans usually willing to break with her party. "They are the ones whose actions are making the increase in the debt limit necessary."

What they're saying:

Coons: "We came right up against [default] once," referring to a 2013 clash. "And the amount of input senior Republicans got from the financial community, I mean, this would be catastrophically foolish."

#### Republican business interests make passage inevitable – PC’s NOT key

Barrón-López et al 9-9-21 (Laura Barrón-López, White House Correspondent for POLITICO, formerly covered Democrats for the Washington Examiner, Congress for HuffPost, and energy and environment policy for The Hill, BA political science, California State University, Fullerton; and Christopher Cadelago, White House Correspondent at POLITICO; “Biden wants to force Republicans to vote on the debt ceiling, sensing they’ll cave,” POLITICO, 9-9-2021, <https://www.politico.com/news/2021/09/09/biden-mcconnell-debt-limit-threats-510922>)

President Joe Biden is treating the latest Republican threats over the debt limit like a bluff. And the entire party, from congressional Democratic leadership to the top brass at the Treasury Department, is calling them on it.

Multiple Democratic sources on the Hill and with knowledge of the White House’s thinking said the administration wants to include a suspension of the debt limit — a legal cap on how much the U.S. can borrow — in a continuing resolution to fund the government. Such a bill, which Congress is expected to consider as early as this month, would require 60 votes to pass in the Senate, meaning at least 10 Republicans would need to vote to advance the measure.

To challenge those Republicans, Biden is also calling on Congress to include funding for hurricane relief in the bill, and Democratic leadership has continued to shoot down questions about possible alternative legislative vehicles in recent conversations with members and close allies. Including a debt limit increase in Democrats’ pending party-line reconciliation package, for example, is one option. But the White House and Democratic leaders are not entertaining it at present.

“They're right at the moment to say, 'We're working on Plan A,'” said a lobbyist with knowledge of the party’s strategy. “The minute you start to signal that that doesn't work then you're signaling weakness.”

The posture from the president on down is setting up a game of chicken with incredibly high stakes — if a vote to suspend or increase the debt limit fails, the U.S. economy will likely crater. Treasury officials have said lawmakers will have until an unspecified date next month before the department runs out of ways to prevent a default.

The debt limit is the foundation of the “full faith and credit” of the country’s currency and bonds. If it isn’t raised or suspended, the U.S. defaults on its bond investors, its credit rating could tank and, in turn, the government could be forced to scale back on Medicare benefits, Social Security checks and other programs. The belief in the White House is that a mix of pressure — from business leaders expressing urgency to fears of a full blown financial crisis — will be most acute on Republicans as the deadline nears. After voting for years to suspend or increase the debt limit with Democrats — a routine step required by law — GOP lawmakers in recent history have used the threat of default to score political points when a Democratic president is in charge.

Learning from his former boss, President Barack Obama — who vowed not to negotiate over the debt ceiling after doing it once — Biden is essentially daring Republicans to vote down a debt limit suspension or increase. Since Republicans led by Senate Minority Leader Mitch McConnell announced publicly that his party members wouldn’t support an increase in the debt limit, the Biden administration has not had any additional talks with him on the issue. McConnell’s office pointed to the senator’s past comments on the debt ceiling but did not address whether the two sides had talked.

A White House official said the administration is largely deferring to congressional leaders on the procedural aspects of how to pursue a debt limit increase or suspension. Whether Democrats are pursuing a long- or short-term increase remains unclear. In public and private conversations and briefings with Hill aides, the White House has two main positions: Don’t negotiate with Republicans over what should be a routine vote and clearly message that the debt limit addresses past, not future, spending, seeking to avoid confusion and rebuff GOP attacks over a complex topic.

“The debt limit is a function of bills that Congress has already passed, already wrapped up,” said Brian Deese, director of the White House National Economic Council. “Even if Congress took no future action ever, did nothing else in the future, Congress would have to raise or suspend the debt limit because it’s a reflection of actions already taken.”

The showdown comes as Biden faces a grueling month that will determine the fate of his signature economic items: the bipartisan infrastructure bill and social spending package. On top of that, government funding runs out Sept. 30, the coronavirus pandemic continues to rage and parts of the country are struggling to rebuild after devastating hurricanes and wildfires.

“With everything from Covid to Afghanistan to the weather incidents, the idea that we would self inflict another blow to our country right now and even putting in potential jeopardy the full faith and credit of the United States would be crazy,” said Sen. Mark Warner (D-Va.).

Warner said it’s imperative that Democrats clearly articulate why a default is so cataclysmic and that Republicans are also responsible for the debt limit.

“Do you really want to vote for shutting down the government, not giving aid to people who are the third of Americans who've had weather affect [them] and mess with the full faith and credit of the United States all in one vote?” Warner said of Republicans. “I hope not.”

Warner added that a decade ago, there was near unanimity about the dangerous consequences of not raising the debt limit. “But that was before there was an age of the level of misinformation and disinformation,” he said. “This was not a tool that was used against President Trump so on a fairness argument, we’re making the case. Whether that wins the day at a time when things are so unusual, time will tell.”

To stave off a crisis, the administration is also having conversations with business leaders and community bankers and expects them to apply pressure to Republicans with warnings that a default would be catastrophic for the economy, the White House official said.

Others who have spent years working on the issue said the fiscal cliff standoff between Obama and Republicans in 2011 — and the resulting lessons both parties have taken since — is informing Biden’s strategy as president. Seth Hanlon, a former special assistant to Obama at the National Economic Council, said the lesson from that episode is that the debt limit is plainly non-negotiable.

Republicans took away a different lesson altogether. At the time, they refused to vote to raise the debt limit unless they got corresponding budget cuts. Obama negotiated with congressional GOP leaders on a deal and, after talks scuttled, Biden himself picked up the baton and hammered out an agreement with McConnell. McConnell later said he came away believing that the debt limit, which underlies the financial well-being of the country, was “a hostage that's worth ransoming."

That standoff between Democrats and Republicans resulted in the nation’s credit rating being downgraded for the first time in history, something Treasury officials have pointed to in recent days as evidence that even negotiations over the debt limit have damaging consequences.That standoff between Democrats and Republicans resulted in the nation’s credit rating being downgraded for the first time in history, something Treasury officials have pointed to in recent days as evidence that even negotiations over the debt limit have damaging consequences.

“There were a number of times after 2011 where there was a lot of Republican hue and cry over the debt limit when Obama was president, but ultimately, Mitch McConnell found the cover for himself and his members and joined in raising it,” said Hanlon, now a senior fellow at the Center for American Progress.

So far, McConnell has put the onus squarely on Biden and Democrats to raise the debt limit, saying last month that “they have the House, the Senate and the presidency. It’s their obligation to govern … and the essence of governing is to raise the debt ceiling to cover the debt.”

In recent remarks on the subject, McConnell stressed that “the debt ceiling needs to be raised,” but said the emphasis is “who should do it. And under these uniquely unprecedented circumstances,” he added, “it’s their obligation to do it.”

But Hanlon said he’s confident that pressure from Republican allies in the conservative ranks of big business will ultimately force them to capitulate.

“They’re attuned to financial markets and they know the disastrous consequences that will result,” he said of the GOP brinkmanship on Capitol Hill. “As extreme as the Republican Party has become, I don't think McConnell is ultimately willing to push the U.S. over the cliff.”