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# MSU KV policy 1AC

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### Innovation – 1AC

#### Advantage One: Innovation

#### Specifically, Parker immunity discourages disruptive healthcare innovation

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

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

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

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

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

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

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

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

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

#### Disruptive innovation in healthcare solves pandemics

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

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

Introduction

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

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

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

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

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

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

I. WHY ANTICOMPETITIVE REGULATION SUCCEEDS

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

A. The Generic Story

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

B. Additional Considerations Affecting Product Market Innovation

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

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

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

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

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

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

C. An Illustration from Automobile Distribution

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

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

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

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

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

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

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

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

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

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

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

A. Lochner, anti-Lochner, and Parker

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

B. The Potential for an Increased Level of Judicial Scrutiny

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Considering Governmental Justifications for Restraints on Competition

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

C. Institutional and Procedural Distinctions

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

### Plan

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

### Advantage Two: Federalism

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Introduction

IN just three relatively obscure antitrust cases, 1

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

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

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

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

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

III. DOCTRINAL CRITICISM

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

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

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

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

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

IV. PROPOSED SOLUTIONS

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

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

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

#### The aff preserves state authority to enforce antitrust but absent clarification on the transboundary effects from broad Parker immunity turf wars cause enforcement failures

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

B. Spillover Effects and Antitrust Federalism

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# 2AC

## Case:

### 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

### 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.

### Health Innovation – 2AC

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

### Health Innovation – Disease – Extinction

#### Bypasses all defense

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

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

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

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

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

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

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

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

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

#### Extinction---defense is wrong

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

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

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

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

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

#### Pandemics risk extinction

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

2. Pandemic diseases threaten humanity

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

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

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

#### Extinction

**Casadevall 12** – Arturo Casadevall, M.D., Ph.D. in Biochemistry from New York University, Leo and Julia Forchheimer Professor and Chair of the Department of Microbiology and Immunology at Albert Einstein College of Medicine, former editor of the ASM journal Infection and Immunity, “The Future of Biological Warfare,” Microbial Biotechnology Volume 5, Issue 5, pages 584–587, September 2012, http://onlinelibrary.wiley.com/doi/10.1111/j.1751-7915.2012.00340.x/full

In considering the importance of biological warfare as a subject for concern it is worthwhile to review the known existential threats. At this time this writer can identify at three major existential threats to humanity: (i) large-scale thermonuclear war followed by a nuclear winter, (ii) a planet killing asteroid impact and (iii) infectious disease. To this trio might be added climate change making the planet uninhabitable. Of the three existential threats the first is deduced from the inferred cataclysmic effects of nuclear war. For the second there is geological evidence for the association of asteroid impacts with massive extinction (Alvarez, 1987). As to an existential threat from microbes recent decades have provided unequivocal evidence for the ability of certain pathogens to cause the extinction of entire species. Although infectious disease has traditionally not been associated with extinction this view has changed by the finding that a single chytrid fungus was responsible for the extinction of numerous amphibian species (Daszak et al., 1999; Mendelson et al., 2006). Previously, the view that infectious diseases were not a cause of extinction was predicated on the notion that many pathogens required their hosts and that some proportion of the host population was naturally resistant. However, that calculation does not apply to microbes that are acquired directly from the environment and have no need for a host, such as the majority of fungal pathogens. For those types of host–microbe interactions it is possible for the pathogen to kill off every last member of a species without harm to itself, since it would return to its natural habitat upon killing its last host. Hence, from the viewpoint of existential threats environmental microbes could potentially pose a much greater threat to humanity than the known pathogenic microbes, which number somewhere near 1500 species (Cleaveland et al., 2001; Taylor et al., 2001), especially if some of these species acquired the capacity for pathogenicity as a consequence of natural evolution or bioengineering.

### 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

### 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.

# Cap K

### Short 2AC

#### Framework—debate is about the plan’s desirability—key to fairness because the plan is the locus of aff offense and there are infinite arbitrary neg frameworks

#### Perm: do both

#### Alt’s vague---no actor or mechanism---voting issue: jacks ground and means the alt doesn’t solve

#### No impact---it’s empirically denied, long time-frame, and perm solves

#### No war or root cause

Geras 5 (Norman, Emeritus Professor of Politics at the University of Manchester, "The Reductions of the Left," Dissent, 52:1, Winter, p. 57-58)

THE SECOND PART of the answer- to which I now turn—is a seeming lack of ability, of the imagination, to digest the meaning of the great moral and political evils of the world and to look at them unflinchingly. This is a complementary failure. Elsewhere I have argued that Marxism is as familiar as any other intellectual tradition with the realities of human violence and oppression and the more negative traits and potentialities in the makeup of human beings. At the same time, because of its Utopian aspiration—-which I do not mean in any pejorative sense—because of its progressive and meliorative impulse, there has always been a tendency within this tradi¬tion to minimize, or sometimes just deny, the independent force of such negative character¬istics. They come to be treated, genericallv, as the product of class societies and, today, as the product of capitalism. The affinity between this overall intellectual tendency within Marxist and other left thinking, and the practical reductionism I have just described—in which America is identified as the source of all worldly wrongs—should be transparent. The effect of the tendency, however, is, to denature what one is looking at when one looks at the horrors of the world: a massacre of in- nocents; a woman being beaten in a public place or hanged in a football stadium; a place in which a man can have his ears surgically re¬moved or his tongue cut out, or be broken and destroyed, to be followed by the next such vic-tim, and the next, in a continuous sequence ol atrocity; or a place in which a parent can be forced to watch her child tortured and mur¬dered in front of her; or a place in which a hus¬band can be forced to watch his wife repeat-edly raped; an "ethnic^leansing" or a genocide in progress, in which entire communities are pulled up by the roots-arid people are shot or hacked or starved to death by the thousands or the tens of thousands; mass graves opened to yield up their terrible story. The list, as anyone knows who keeps read¬ing when the overwhelming temptation is to look away, could be much extended. The items on it are moral and political realities in their own right. They need to be registered and fully recognized as such. To collapse them too quickly into their putative original causes, to' refer them immediately, or refer from them, to other things that have preceded them is not to give them their due as the specific phenomena they are, the horrors, tor those destroyed by them or enduring them, for those whose lives are torn and wrecked and filled with grief by them, are in a double sense reduced by this quick and easy reference back to something else, putatively their real cause or origin. Furthermore, not all the contributory causes of such grim events are of the type that the section of the left under discussion here likes to invoke—that is, causes arising else- where, either geographically (in the United States) or societally (in the dynamics of capi- talism). Moral and political evils of this order and I make no apology for calling them that— can and generally do have causes that are more local in a spatial sense; and they are governed or influenced by political, ideological, and moral specificities every bit as real as the capitalist economy. Not everything is systemic, in the sense of being an effect of pressures or ten¬dencies of economic provenance, whether from the global economy or from some more par¬ticular region of it. There are independent patterns of coercion and cruelty, both interper¬sonal and embedded within political structures; forms of authoritarian imposition; types of invasive assault and violence, at the micro-level and at the macro-level, involving large social forces.

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

#### Cap’s sustainable and the alt causes transition wars

Mead, 12 -- Professor of Foreign Affairs and Humanities at Bard College [7/28/2012, Walter Russell, The American Interest, “The Energy Revolution 4: Hot Planet?” <http://blogs.the-american-interest.com/wrm/2012/07/28/the-energy-revolution-4-hot-planet/>]

Capitalism is not, Monbiot is forced to admit, a fragile system that will easily be replaced. Bolstered by huge supplies of oil, it is here to stay. Industrial civilization is, as far as he can now see, unstoppable. Gaia, that treacherous slut, has made so much oil and gas that her faithful acolytes today cannot protect her from the consequences of her own folly. Welcome to the New Green Doom: an overabundance of oil and gas is going to release so much greenhouse gas that the world is going to fry. The exploitation of the oil sands in Alberta, warn leading environmentalists, is a tipping point. William McKibben put it this way in an interview with Wired magazine in the fall of 2011: I think if we go whole-hog in the tar sands, we’re out of luck. Especially since that would doubtless mean we’re going whole-hog at all the other unconventional energy sources we can think of: Deepwater drilling, fracking every rock on the face of the Earth, and so forth. Here’s why the tar sands are important: It’s a decision point about whether, now that we’re running out of the easy stuff, we’re going to go after the hard stuff. The Saudi Arabian liquor store is running out of bottles. Do we sober up, or do we find another liquor store, full of really crappy booze, to break into? A year later, despite the success of environmentalists like McKibben at persuading the Obama administration to block a pipeline intended to ship this oil to refineries in the US, it’s clear (as it was crystal clear all along to anyone with eyes to see) that the world has every intention of making use of the “crappy liquor.” Again, for people who base their claim to world leadership on their superior understanding of the dynamics of complex systems, greens prove over and over again that they are surprisingly naive and crude in their ability to model and to shape the behavior of the political and economic systems they seek to control. If their understanding of the future of the earth’s climate is anything like as wish-driven, fact-averse and intellectually crude as their approach to international affairs, democratic politics and the energy market, the greens are in trouble indeed. And as I’ve written in the past, the contrast between green claims to understand climate and to be able to manage the largest and most complex set of policy changes ever undertaken, and the evident incompetence of greens at managing small (Solyndra) and large (Kyoto, EU cap and trade, global climate treaty) political projects today has more to do with climate skepticism than greens have yet understood. Many people aren’t rejecting science; they are rejecting green claims of policy competence. In doing so, they are entirely justified by the record. Nevertheless, the future of the environment is not nearly as dim as greens think. Despairing environmentalists like McKibben and Monbiot are as wrong about what the new era of abundance means as green energy analysts were about how much oil the planet had. The problem is the original sin of much environmental thought: Malthusianism. If greens weren’t so addicted to Malthusian horror narratives they would be able to see that the new era of abundance is going to make this a cleaner planet faster than if the new gas and oil had never been found. Let’s be honest. It has long been clear to students of history, and has more recently begun to dawn on many environmentalists, that all that happy-clappy carbon treaty stuff was a pipe dream and that nothing like that is going to happen. A humanity that hasn’t been able to ban the bomb despite the clear and present dangers that nuclear weapons pose isn’t going to ban or even seriously restrict the internal combustion engine and the generator. The political efforts of the green movement to limit greenhouse gasses have had very little effect so far, and it is highly unlikely that they will have more success in the future. The green movement has been more of a group hug than a curve bending exercise, and that is unlikely to change. If the climate curve bends, it will bend the way the population curve did: as the result of lots of small human decisions driven by short term interest calculations rather than as the result of a grand global plan. The shale boom hasn’t turned green success into green failure. It’s prevented green failure from turning into something much worse. Monbiot understands this better than McKibben; there was never any real doubt that we’d keep going to the liquor store. If we hadn’t found ways to use all this oil and gas, we wouldn’t have embraced the economics of less. True, as oil and gas prices rose, there would be more room for wind and solar power, but the real winner of an oil and gas shortage is… coal. To use McKibben’s metaphor, there is a much dirtier liquor store just down the road from the shale emporium, and it’s one we’ve been patronizing for centuries. The US and China have oodles of coal, and rather than walk to work from our cold and dark houses all winter, we’d use it. Furthermore, when and if the oil runs out, the technology exists to get liquid fuel out of coal. It isn’t cheap and it isn’t clean, but it works. The newly bright oil and gas future means that we aren’t entering a new Age of Coal. For this, every green on the planet should give thanks. The second reason why greens should give thanks for shale is that environmentalism is a luxury good. People must survive and they will survive by any means necessary. But they would much rather thrive than merely survive, and if they can arrange matters better, they will. A poor society near the edge of survival will dump the industrial waste in the river without a second thought. It will burn coal and choke in the resulting smog if it has nothing else to burn. Politics in an age of survival is ugly and practical. It has to be. The best leader is the one who can cut out all the fluff and the folderol and keep you alive through the winter. During the Battle of Leningrad, people burned priceless antiques to stay alive for just one more night. An age of energy shortages and high prices translates into an age of radical food and economic insecurity for billions of people. Those billions of hungry, frightened, angry people won’t fold their hands and meditate on the ineffable wonders of Gaia and her mystic web of life as they pass peacefully away. Nor will they vote George Monbiot and Bill McKibben into power. They will butcher every panda in the zoo before they see their children starve, they will torch every forest on earth before they freeze to death, and the cheaper and the meaner their lives are, the less energy or thought they will spare to the perishing world around them.But, thanks to shale and other unconventional energy sources, that isn’t where we are headed. We are heading into a world in which energy is abundant and horizons are open even as humanity’s grasp of science and technology grows more secure. A world where more and more basic human needs are met is a world that has time to think about other goals and the money to spend on them. As China gets richer, the Chinese want cleaner air, cleaner water, purer food — and they are ready and able to pay for them. A Brazil whose economic future is secure can afford to treasure and conserve its rain forests. A Central America where the people are doing all right is more willing and able to preserve its biodiversity. And a world in which people know where their next meal is coming from is a world that can and will take thought for things like the sustainability of the fisheries and the protection of the coral reefs. A world that is more relaxed about the security of its energy sources is going to be able to do more about improving the quality of those sources and about managing the impact of its energy consumption on the global commons. A rich, energy secure world is going to spend more money developing solar power and wind power and other sustainable sources than a poor, hardscrabble one. When human beings think their basic problems are solved, they start looking for more elegant solutions. Once Americans had an industrial and modern economy, we started wanting to clean up the rivers and the air. Once people aren’t worried about getting enough calories every day to survive, they start wanting healthier food more elegantly prepared. A world of abundant shale oil and gas is a world that will start imposing more environmental regulations on shale and gas producers. A prosperous world will set money aside for research and development for new technologies that conserve energy or find it in cleaner surroundings. A prosperous world facing climate change will be able to ameliorate the consequences and take thought for the future in ways that a world overwhelmed by energy insecurity and gripped in a permanent economic crisis of scarcity simply can’t and won’t do. Greens should also be glad that the new energy is where it is. For Monbiot and for many others, Gaia’s decision to put so much oil into the United States and Canada seems like her biggest indiscretion of all. Certainly, a United States of America that has, in the Biblical phrase, renewed its youth like an eagle with a large infusion of fresh petro-wealth is going to be even less eager than formerly to sign onto various pie-in-the-sky green carbon treaties. But think how much worse things would be if the new reserves lay in dictatorial kleptocracies. How willing and able would various Central Asia states have been to regulate extraction and limit the damage? How would Nigeria have handled vast new reserves whose extraction required substantially more invasive methods? Instead, the new sources are concentrated in places where environmentalists have more say in policy making and where, for all the shortcomings and limits, governments are less corruptible, more publicly accountable and in fact more competent to develop and enforce effective energy regulations. This won’t satisfy McKibben and Monbiot (nothing that could actually happen would satisfy either of these gentlemen), but it is a lot better than what we could be facing. Additionally, if there are two countries in the world that should worry carbon-focused greens more than any other, they are the United States and China. The two largest, hungriest economies in the world are also home to enormous coal reserves. But based on what we now know, the US and China are among the biggest beneficiaries of the new cornucopia. Gaia put the oil and the gas where, from a carbon point of view, it will do the most good. In a world of energy shortages and insecurity, both the US and China would have gone flat out for coal. Now, that is much less likely. And there’s one more reason why greens should thank Gaia for shale. Wind and solar aren’t ready for prime time now, but by the time the new sources start to run low, humanity will have mastered many more technologies that can used to provide energy and to conserve it. It’s likely that Age of Shale hasn’t just postponed the return of coal: because of this extra time, there likely will never be another age in which coal is the dominant industrial fuel. It’s virtually certain that the total lifetime carbon footprint of the human race is going to be smaller with the new oil and gas sources than it would have been without them. Neither the world’s energy problems nor its climate issues are going away any time soon. Paradise is not beckoning just a few easy steps away. But the new availability of these energy sources is on balance a positive thing for environmentalists as much as for anyone else. Perhaps, and I know this is a heretical thought, but perhaps Gaia is smarter than the greens.

### Alt Fails---2AC

#### Neolib is sustainable and entrenched – any alternative fails

Arvidsson 13 – Adam Arvidsson, Professor of Sociology, University of Milano, ’13

(“Thinking beyond neo-liberalism: A response to Detlev Zwick,” [Ephemera,](http://www.ephemerajournal.org/contribution/thinking-beyond-neo-liberalism-response-detlev-zwick) volume 13(2): 407-412)

Today this realistic alternative no longer exists: actually existing socialism has become insignificant as a geopolitical player. More importantly, thirty years of neoliberal governance, together with the transition to a new global information-intensive regime of capitalist accumulation – ‘communicative capitalism’ perhaps – has effectively dismantled what was left of the structure and subjectivities that supported this alternative vision. Traditional working class politics is dead, and the working class itself has been recomposed beyond recognition; people supposedly ‘bowl alone’ and the counter culture has been more or less entirely absorbed within consumer society. We have seen the completion of what Marx described as the process of ‘real subsumption’. Every alternative to capitalism has been included within capitalism and positioned as a potential source of value. As a consequence, life within capitalism has been depoliticized, deprived of an alternative in the name of which a practically effective critique can be mounted.

This makes it trickier to do critical theory. We can of course still criticize the actual state of things. We can point to the precarious relations that prevail among creative knowledge workers; show how exploitative and unjust conditions are intensified by the very forces that drive the globalization of communicative capitalism, like the outsourcing of design work; or lament the fact that a triumphant neoliberal regime subsumes and appropriates aspects of subjectivity and social life that we think should have been left alone. To produce such critiques remains useful intellectual work – I have done it in other contexts (Arvidsson et al., 2010; Arvidsson, 2007), as has Detlev Zwick (2008), and many others. To the extent that such critiques reach a mass audience, they can become a progressive impulse to action and reflection – as in the case of Naomi Klein’s work inspiring the ‘no global’ movement (to use an inadequate name coined by the mainstream press). But such a critique without an alternative remains unsatisfactory for at least three reasons.

First, and most superficially, since everyone else is doing it, the marginal utility of yet another piece of critical theory rapidly diminishes, as does the intellectual satisfaction that can be derived form producing it.

Second, and more seriously, the absence of a realistic alternative, or even of a historical subject in the name of which such a critique can be pronounced, risks rendering critical theory moralistic and rather toothless. We might agree with Zwick when he suggests that the outsourcing of design work from Toronto to the Philippines is somehow wrong, but it is difficult to understand exactly why this would be the case. (Why shouldn’t Philippine designers be allowed to compete with Canadian designers? Can the ‘creative class’ claim an exemption from the global economy? Perhaps the answer is ‘yes’, but I do not know of any viable alternative vision of society that is able to substantiate that ‘yes’.)

Third, and most importantly, in the absence of an alternative vision, critical theory remains rather unconvincing to the people in the name of whom it proposes to speak. I can assure you – and I’ve tried! – that you won’t become an organic intellectual among social entrepreneurs or precarious creative workers by telling them that they are exploited, that they sell out their subjectivity, or that the system in which they operate is unjust. Pure critique is simply not attractive enough to make the multitude of new productive subjects, fragmented by neoliberalism, cohere into a historical subject. To do that you need at least the myth of an alternative, as agitators from Sorel via Lenin to Subcomandante Marcos could tell you.

Don’t get me wrong. I am not proposing that it is wrong to point to the precarious conditions of knowledge work, or that we should not do this as academics and researchers. This is still an important task. But it is not enough. Critical theory must do this, but it must also do more. It must also engage with the question of what a realistic alternative to neoliberalism could be, and it must elaborate a realistic political vision in the name of which a critique that is productive and progressive, and not simply moralistic, can be articulated.

By realistic, I mean that such an alternative must be sought in the actual relations of production that characterize the contemporary information economy. Zwick’s suggestion that we

imagine a commonism of productive consumption as collaborative sharing in the absence of private property and combined with an inclusive model of political determination, collective sovereignty, belonging and justice

– and so on – is simply unproductive to my mind. We might all agree that an economy of commons that has done away with capitalism might be more desirable, but the reality is that hybrid forms, like the game modders that Zwick cites, where a an economy of commons co-exists with a capitalist value logic, in some form, are indeed becoming the norm. At that point the interesting thing to do is not so much to criticize the enduring capitalist nature of these hybrid forms, but rather to investigate the new forms of politics that they might give rise to. This in no way implies that one does away with conflict and politics. Rather, it implies investigating and understanding the new spaces and discourses through which such a new type of politics can be articulated.

In order to do this we must start with what the actors involved in these processes actually think themselves. It is quite useless to simply deploy existing philosophical perspectives, or to compare the reality of communicative capitalism to utopian projections of the political visions of last century. Instead we must start with the ‘empirical metaphysics’, to use Bruno Latour’s term, that actually prevail among people engaged in such hybrid practices. We might all want to do away with neoliberalism and the forms of life that it has promoted. But at the same time, we all recognize that the neoliberal project has been one of the most successful projects of governmentality since, perhaps, the very project of disciplinary power that Foucault himself described. Rebus sic stantibus we cannot simply wish it away.

We need to recognize that people have changed, that competitive individualism, self-branding and an entrepreneurial mentality are, by now, normal features of life. The same thing goes for the popular political myths that prevail among advanced knowledge workers, what Zwick calls ‘cyber-utopianism’. We need to recognize that notions like peer-to-peer production, high-tech gift economies and the like have the power to mobilize the energies of the subjects that are most likely to become the pioneers of a new political vision – today’s version of the skilled workers that have taken the lead in most modern political movements. Even though the social theory that they produce might be shallow and imperfect, and even though they might not have read Marx and Foucault as well as we have, we cannot simply dismiss this vision as a mere ideology to be replaced by our theoretically more refined ideology.

Like the relations of production that are emerging in communicative capitalism and the subjectivity of knowledge workers, these myths are part of the raw material with which the Gramscian intellectual must engage in order to articulate new understandings of common sense that are both politically progressive and intuitively attractive to the people that they are supposed to mobilize. In other words, in order to articulate an alternative, we cannot simply dismiss the reality of communicative capitalism and fall back on what remains of the political utopias of last century. We need to engage with the reality of neoliberal communicative capitalism and try to push its dialectic beyond its apolitical present state. We must investigate what the real conditions of production and imagination are and ask ourselves where they might lead. Critical theory needs to become an empirical, and not simply a philosophical, enterprise.

### Permutation---2AC

#### Perm: do both---only it solves---non-neolib economics out of nowhere has zero value---reform is best

Barry 7 – John Barry, Director of the Institute of Governance, Public Policy and Social Research and Co-Director of the Centre for Sustainability and Environmental Governance at Queen’s University Belfast [“Towards a Model of Green Political Economy: From Ecological Modernisation to Economic Security,” Int. J. Green Economics, Vol. 1, No. 3/4, p. 446-464, <http://www.inderscienceonline.com/doi/pdf/10.1504/IJGE.2007.013071>]

Economic analysis has been one of the weakest and least developed areas of broadly green/sustainable development thinking. For example, whatever analysis there is within the green political canon is largely utopian – usually based on an argument for the complete transformation of modern society and economy as the only way to deal with ecological catastrophe, an often linked to a critique of the socioeconomic failings of capitalism that echoed a broadly radical Marxist/socialist or anarchist analysis; or underdeveloped – due, in part, to the need to outline and develop other aspects of green political theory. However, this gap within green thinking has recently been filled by a number of scholars, activists, think tanks, and environmental NGOs who have outlined various models of green political economy to underpin sustainable development political aims, principles and objectives. The aim of this article is to offer a draft of a realistic, but critical, version of green political economy to underpin the economic dimensions of radical views about sustainable development. It is written explicitly with a view to encouraging others to think through this aspect of sustainable development in a collaborative manner. Combined realism and radicalism marks this article, which starts with the point that we cannot build or seek to create a sustainable economy ab nihlo, but must begin from where we are, with the structures, institutions, modes of production, laws and regulations that we already have. Of course, this does not mean simply accepting these as immutable or set in stone; after all, some of the current institutions, principles and structures underpinning the dominant economic model are the very causes of unsustainable development. We do need to recognise, however, that we must work with (and ‘through’ – in the terms of the original German Green Party’s slogan of ‘marching through the institutions’) these existing structures, as well as change and reform and in some cases, abandon them as either unnecessary or positively harmful to the creation and maintenance of a sustainable economy and society. Equally, this article also recognises that an alternative economy and society must be based in the reality that most people (in the West) will not democratically vote for a completely different type of society and economy. That reality must also accept that a ‘green economy’ is one that is recognisable to most people and that indeed safeguards and guarantees not just their basic needs but also aspirations (within limits). The realistic character of the thinking behind this article accepts that consumption and materialistic lifestyles are here to stay (so long as they do not transgress any of the critical thresholds of the triple bottom line) and indeed there is little to be gained by proposing alternative economic systems, which start from a complete rejection of consumption and materialism. The appeal to realism is in part an attempt to correct the common misperception (and self-perception) of green politics and economics requiring an excessive degree of self-denial and a puritanical asceticism (Goodin, 1992, p.18; Allison, 1991, p.170–178). While rejecting the claim that green political theory calls for the complete disavowal of materialistic lifestyles, it is true that green politics does require the collective reassessment of such lifestyles, and does require a degree of shared sacrifice. It does not mean, however, that we necessarily require the complete and across-the-board rejection of materialistic lifestyles. There must be room and tolerance in a green economy for people to live ‘ungreen lives’ so long as they do not ‘harm’ others, threaten long-term ecological sustainability or create unjust levels of socioeconomic inequalities. Thus, realism in this context is in part another name for the acceptance of a broadly ‘liberal’ or ‘post-liberal’ (but certainly not anti-liberal) green perspective.1

## T:

## T

### Private Sector – 2AC

#### We meet – the plan text specifies the application to the private sector

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

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

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

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

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

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

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

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

Private Sector

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

#### We meet – Parker immunity shields private entities

#### It’s best---

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

#### Aff flex---“expand the scope” massively constrains the aff---innovation prevents a sitting duck for PICs

#### Overlimits---they box out nuanced immunity debates and force repetitive, stale, giant innovation debates

#### Solves ground---stable direction of increasing prohibitions ensures links

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

No link to effects impact – the direct result of the plan is increased prohibitions on private entities by limiting their immunity

They misread the phrase in context – the rez prohibits “practices” those are being done by the private sector even if they’re sanctioned by the public sector

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

## CP:

### Regulation CP – 2AC

#### Perm – do both – solves the link

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

#### Doesn’t solve innovation or links to the net benefit – the anticompetitive practice is sanctioned by a specific legal doctrine that allows it – the counterplan leaves immunity in place and, if it’s no longer applied, they link to the net benefit – Crane

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

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

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

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

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

### Transition Wars---2AC

#### Alt fails---transition wars and domestic pressure means the alt abandons fidelity to the environment.

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

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

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

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

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

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

# 1AR

### Case

Case outweighs – short term impacts.. keep us alive.. instead of arbitrary hope

### Innovation – 1AC

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

### Innovation – A2: State Innovation Doesn’t Spillover

Extend Cooper and Bona – innovation is blocked… the barrier to applying antitrust laws is the state action immunity doctrine

#### 1. Not our argument – our internal links are about the ability for *private companies* to innovate

### Innovation – Impact – Extinction

#### Extinction---sustaining innovation is key

Naam 13 – Ramez Naam, Fellow of the Institute for Ethics and Emerging Technologies, former Microsoft executive, "How Innovation Could Save the Planet", World Future Society, The Futurist, 2013 Issues of The Futurist, March-April 2013 (Vol. 47, No. 2), www.wfs.org/futurist/2013-issues-futurist/march-april-2013-vol-47-no-2/how-innovation-could-save-planet)

The Best of Times: Unprecedented Prosperity There are many ways in which we are living in the most wonderful age ever. We can imagine we are heading toward a sort of science-fiction utopia, where we are incredibly rich and incredibly prosperous, and the planet is healthy. But there are other reasons to fear that we’re headed toward a dystopia of sorts. Ramez Naam spoke at WorldFuture 2013, the annual conference of the World Future Society in Chicago, in July of 2013. On the positive side, life expectancy has been rising for the last 150 years, and faster since the early part of the twentieth century in the developing world than it has in the rich world. Along with that has come a massive reduction in poverty. The most fundamental empowerer of humans—education—has also soared, not just in the rich world, but throughout the world. Another great empowerer of humanity is connectivity: Access to information and access to communication both have soared. The number of mobile phones on the planet was effectively zero in the early 1990s, and now it’s in excess of 4 billion. More than three-quarters of humanity, in the span of one generation, have gotten access to connectivity that, as my friend Peter Diamandis likes to say, is greater than any president before 1995 had. A reasonably well-off person in India or in Nigeria has better access to information than Ronald Reagan did during most of his career. With increased connectivity has come an increase in democracy. As people have gotten richer, more educated, more able to access information, and more able to communicate, they have demanded more control over the places where they live. The fraction of nations that are functional democracies is at an all-time high in this world—more than double what it was in the 1970s—with the collapse of the Soviet Union.\* Economically, the world is a more equal place than it has been in decades. In the West, and especially in the United States, we hear a lot about growing inequality, but on a global scale, the opposite is true. As billions are rising out of poverty around the world, the global middle classes are catching up with the global rich. In many ways, this is the age of the greatest human prosperity, freedom, and potential that has ever been on the face of this planet. But in other ways, we are facing some of the largest risks ever. The Worst of Times: The Greatest Risks At its peak, the ancient Mayan city of Tikal was a metropolis, a city of 200,000 people inside of a civilization of about 20 million people. Now, if you walk around any Mayan city, you see mounds of dirt. That’s because these structures were all abandoned by about the mid-900s AD. We know now what happened: The Mayan civilization grew too large. It overpopulated. To feed themselves, they had to convert forest into farmland. They chopped down all of the forest. That, in turn, led to soil erosion. It also worsened drought, because trees, among other things, trap moisture and create a precipitation cycle. When that happened, and was met by some normal (not human-caused) climate change, the Mayans found they didn’t have enough food. They exhausted their primary energy supply, which is food. That in turn led to more violence in their society and ultimately to a complete collapse. The greatest energy source for human civilization today is fossil fuels. Among those, none is more important than oil. In 1956, M. King Hubbert looked at production in individual oil fields and predicted that the United States would see the peak of its oil production in 1970 or so, and then drop. His prediction largely came true: Oil production went up but did peak in the 1970s, then plummeted. Oil production has recently gone up in the United States a little bit, but it’s still just barely more than half of what it was in its peak in the 1970s. Hubbert also predicted that the global oil market would peak in about 2000, and for a long time he looked very foolish. But it now has basically plateaued. Since 2004, oil production has increased by about 4%, whereas in the 1950s it rose by about 4% every three months. We haven’t hit a peak; oil production around the world is still rising a little bit. It’s certainly not declining, but we do appear to be near a plateau; supply is definitely rising more slowly than demand. Though there’s plenty of oil in the ground, the oil that remains is in smaller fields, further from shore, under lower pressure, and harder to pump out. Water is another resource that is incredibly precious to us. The predominant way in which we use water is through the food that we eat: 70% of the freshwater that humanity uses goes into agriculture. The Ogallala Aquifer, the giant body of freshwater under the surface of the Earth in the Great Plains of the United States, is fossil water left from the melting and the retreat of glaciers in the end of the last Ice Age, 12,000–14,000 years ago. Its refill time is somewhere between 5,000 and 10,000 years from normal rainfall. Since 1960, we’ve drained between a third and a half of the water in this body, depending on what estimate you look at. In some areas, the water table is dropping about three feet per year. If this was a surface lake in the United States or Canada, and people saw that happening, they’d stop it. But because it’s out of sight, it’s just considered a resource that we can tap. And indeed, in the north Texas area, wells are starting to fail already, and farms are being abandoned in some cases, because they can’t get to the water that they once did. Perhaps the largest risk of all is climate change. We’ve increased the temperature of the planet by about 2°F in the last 130 years, and that rate is accelerating. This is primarily because of the carbon dioxide we’ve put into the atmosphere, along with methane and nitrous oxide. CO2 levels, now at over 390 parts per million, are the highest they’ve been in about 15 million years. Ice cores go back at least a million years, and we know that they’re the highest they’ve been in that time. Historically, when CO2 levels are high, temperature is also high. But also, historically, in the lifetime of our species, we’ve actually never existed as human beings while CO2 levels have been this high. For example, glaciers such as the Bear and Pedersen in Alaska have disappeared just since 1920. As these glaciers melt, they produce water that goes into the seas and helps to raise sea levels. Over the next century, the seas are expected to rise about 3 to 6 feet. Most of that actually will not be melting glaciers; it’s thermal expansion: As the ocean gets warmer, it gets a little bit bigger. But 3 to 6 feet over a century doesn’t sound like that big a deal to us, so we think of that as a distant problem. The reality is that there’s a more severe problem with climate change: its impact on the weather and on agriculture. In 2003, Europe went through its worst heat wave since 1540. Ukraine lost 75% of its wheat crop. In 2009, China had a once-in-a-century level drought; in 2010 they had another once-in-a-century level drought. That’s twice. Wells that had given water continuously since the fifteenth century ran dry. When those rains returned, when the water that was soaked up by the atmosphere came back down, it came down on Pakistan, and half of Pakistan was under water in the floods of 2010. An area larger than Germany was under water. Warmer air carries more water. Every degree Celsius that you increase the temperature value of air, it carries 7% more water. But it doesn’t carry that water uniformly. It can suck water away from one place and then deliver it in a deluge in another place. So both the droughts are up and flooding is up simultaneously, as precipitation becomes more lumpy and more concentrated. In Russia’s 2010 heat wave, 55,000 people died, 11,000 of them in Moscow alone. In 2011, the United States had the driest 10-month period ever in the American South, and Texas saw its worst wildfires ever. And 2012 was the worst drought in the United States since the Dust Bowl—the corn crop shrank by 20%. So that’s the big risk the world faces: that radical weather will change how we grow food, which is still our most important energy source—even more important than fossil fuels. A number of people in the environmentalist movement are saying that we have to just stop growing. For instance, in his book Peak Everything: Waking Up to the Century of Declines, Richard Heinberg of the Post-Carbon Institute says that the Earth is full. Get used to it, and get ready for a world where you live with less wealth, and where your children live with less wealth, than any before. I don’t think this idea of stopping growth is realistic, because there are a top billion people who live pretty well and there are another 6 billion who don’t and are hungry for it. We see demand rising for everything—water, food, energy—and that demand is rising not in the United States or Europe or Canada or Australia. It’s rising in the developing world. This is the area that will create all of the increased demand for physical resources. Even if we could, by some chance, say That’s enough, sorry, we’re not going to let you use these resources, which is doubtful, it wouldn’t be just, because the West got rich by using those natural resources. So we need to find a different way. Ideas as a Resource Expander, Resource Preserver, and Waste Reducer The best-selling environmental book of all time, Limits to Growth, was based on computer modeling. It was a simple model with only about eight variables of what would happen in the world. It showed that economic growth, more wealth, would inevitably lead to more pollution and more consumption of finite resources, which would in turn take us beyond the limits and lead ultimately to collapse. While it’s been widely reported recently that its predictions are coming true, that’s actually not the case. If you look at the vast majority of the numbers that the researchers predict in this model, they’re not coming true. Why did they get these things wrong? The most important thing that the forecasters did was underestimate the power of new ideas to expand resources, or to expand wealth while using fewer resources. Ideas have done tremendous things for us. Let’s start with food. In The Population Bomb (1968), Paul Ehrlich predicted that food supply could not support the population, just as Malthus did. But what’s happened is that we’ve doubled population since 1960, and we’ve nearly tripled the food supply in total. We’ve increased by 30%–40% the food supply per person since the 1960s. Let’s look at this on a very long time scale. How many people can you feed with an acre of land? Before the advent of agriculture, an acre of land could feed less than a thousandth of a person. Today it’s about three people, on average, who can be fed by one acre of land. Pre-agriculture, it took 3,000 acres for one person to stay alive through hunting and gathering. With agriculture, that footprint has shrunk from 3,000 acres to one-third of one acre. That’s not because there’s any more sunlight, which is ultimately what food is; it’s because we’ve changed the productivity of the resource by innovation in farming—and then thousands of innovations on top of that to increase it even more. In fact, the reason we have the forests that we have on the planet is because we were able to handle a doubling of the population since 1960 without increasing farmland by more than about 10%. If we had to have doubled our farmland, we would have chopped down all the remaining forests on the planet. Ideas can reduce resource use. I can give you many other examples. In the United States, the amount of energy used on farms per calorie grown has actually dropped by about half since the 1970s. That’s in part because we now only use about a tenth of the energy to create synthetic nitrogen fertilizer, which is an important input. The amount of food that you can grow per drop of water has roughly doubled since the 1980s. In wheat, it’s actually more than tripled since 1960. The amount of water that we use in the United States per person has dropped by about a third since the 1970s, after rising for decades. As agriculture has gotten more efficient, we’re using less water per person. So, again, ideas can reduce resource use. Ideas can also find substitutes for scarce resources. We’re at risk of running out of many things, right? Well, let’s think about some things that have happened in the past. The sperm whale was almost hunted into extinction. Sperm whales were, in the mid-1800s, the best source of illumination. Sperm whale oil—spermaceti—was the premier source of lighting. It burned without smoke, giving a clear, steady light, and the demand for it led to huge hunting of the sperm whales. In a period of about 30 years, we killed off about a third of the sperm whales on the planet. That led to a phenomenon of “peak sperm-whale oil”: The number of sperm whales that the fleet could bring in dropped over time as the sperm whales became more scarce and more afraid of human hunters. Demand rose as supply dropped, and the prices skyrocketed. So it looked a little bit like the situation with oil now. That was solved not by the discovery of more sperm whales, nor by giving up on this thing of lighting. Rather, Abraham Gesner, a Canadian, discovered this thing called kerosene. He found that, if he took coal, heated it up, captured the fumes, and distilled them, he could create this fluid that burned very clear. And he could create it in quantities thousands of times greater than the sperm whales ever could have given up. We have no information suggesting that Gesner was an environmentalist or that he cared about sperm whales at all. He was motivated by scientific curiosity and by the huge business opportunity of going after this lighting market. What he did was dramatically lower the cost of lighting while saving the sperm whales from extinction. One more thing that ideas can do is transform waste into value. In places like Germany and Japan, people are mining landfills. Japan estimates that its landfills alone contain 10-year supplies of gold and rare-earth minerals for the world market. Alcoa estimates that the world’s landfills contain a 15-year supply of aluminum. So there’s tremendous value. When we throw things away, they’re not destroyed. If we “consume” things like aluminum, we’re not really consuming it, we’re rearranging it. We’re changing where it’s located. And in some cases, the concentration of these resources in our landfills is actually higher than it was in our mines. What it takes is energy and technology to get that resource back out and put it back into circulation. Ideas for Stretching the Limits So ideas can reduce resource use, can find substitutes for scarce resources, and can transform waste into value. In that context, what are the limits to growth? Is there a population limit? Yes, there certainly is, but it doesn’t look like we’re going to hit that. Projections right now are that, by the middle of this century, world population will peak between 9 billion and 10 billion, and then start to decline. In fact, we’ll be talking much more about the graying of civilization, and perhaps underpopulation—too-low birthrates on a current trend. What about physical resources? Are there limits to physical resource use on this planet? Absolutely. It really is a finite planet. But where are those limits? To illustrate, let’s start with energy. This is the most important resource that we use, in many ways. But when we consider all the fossil fuels that humanity uses today—all the oil, coal, natural gas, and so on—it pales in comparison to a much larger resource, all around us, which is the amount of energy coming in from our Sun every day. The amount of energy from sunlight that strikes the top of the atmosphere is about 10,000 times as much as the energy that we use from fossil fuels on a daily basis. Ten seconds of sunlight hitting the Earth is as much energy as humanity uses in an entire day; one hour of sunlight hitting the Earth provides as much energy to the planet as a whole as humanity uses from all sources combined in one year. This is an incredibly abundant resource. It manifests in many ways. It heats the atmosphere differentially, creating winds that we can capture for wind power. It evaporates water, which leads to precipitation elsewhere, which turns into things like rivers and waterfalls, which we can capture as hydropower. But by far the largest fraction of it—more than half—is photons hitting the surface of the Earth. Those are so abundant that, with one-third of 1% of the Earth’s land area, using current technology of about 14%-efficient solar cells, we could capture enough electricity to power all of current human needs. The problem is not the abundance of the energy; the problem is cost. Our technology is primitive. Our technology for building solar cells is similar to our technology for manufacturing computer chips. They’re built on silicon wafers in clean rooms at high temperatures, and so they’re very, very expensive. But innovation has been dropping that cost tremendously. Over the last 30 years, we’ve gone from a watt of solar power costing $20 to about $1. That’s a factor of 20. We roughly drop the cost of solar by one-half every decade, more or less. That means that, in the sunniest parts of the world today, solar is now basically at parity in cost, without subsidies, with coal and natural gas. Over the next 12–15 years, that will spread to most of the planet. That’s incredibly good news for us. Of course, we don’t just use energy while the Sun is shining. We use energy at night to power our cities; we use energy in things like vehicles that have to move and that have high energy densities. Both of these need storage, and today’s storage is actually a bigger challenge than capturing energy. But there’s reason to believe that we can tackle the storage problem, as well. For example, consider lithium ion batteries—the batteries that are in your laptop, your cell phone, and so on. The demand to have longer-lasting devices drove tremendous innovations in these batteries in the 1990s and the early part of the 2000s. Between 1991 and 2005, the cost of storage in lithium ion batteries dropped by about a factor of nine, and the density of storage—how much energy you can store in an ounce of battery—increased by a little over double in that time. If we do that again, we would be at the point where grid-scale storage is affordable and we can store that energy overnight. Our electric vehicles have ranges similar to the range you can get in a gasoline-powered vehicle. This is a tall order. This represents perhaps tens of billions of dollars in R&D, but it is something that is possible and for which there is precedent. Another approach being taken is turning energy into fuel. When you use a fuel such as gasoline, it’s not really an energy source. It’s an energy carrier, an energy storage system, if you will. You can store a lot of energy in a very small amount. Today, two pioneers in genome sequencing—Craig Venter and George Church—both have founded companies to create next-generation biofuels. What they’re both leveraging is that gene-sequencing cost is the fastest quantitative area of progress on the planet. What they’re trying to do is engineer microorganisms that consume CO2, sunlight, and sugar and actually excrete fuel as a byproduct. If we could do this, maybe just 1% of the Earth’s surface—or a thirtieth of what we use for agriculture—could provide all the liquid fuels that we need. We would conveniently grow algae on saltwater and waste water, so biofuel production wouldn’t compete for freshwater. And the possible yields are vast if we can get there. If we can crack energy, we can crack everything else: • Water. Water is life. We live in a water world, but only about a tenth of a percent of the water in the world is freshwater that’s accessible to us in some way. Ninety-seven percent of the world’s water is in the oceans and is salty. It used to be that desalination meant boiling water and then catching the steam and letting it condense. Between the times of the ancient Greeks and 1960, desalination technology didn’t really change. But then, it did. People started to create membranes modeled on what cells do, which is allow some things through but not others. They used plastics to force water through and get only the fresh and not the salty. As a result, the amount of energy it takes to desalinate a liter of water has dropped by about a factor of nine in that time. Now, in the world’s largest desalination plants, the price of desalinated water is about a tenth of a cent per gallon. The technology has gotten to the point where it is starting to become a realistic option as an alternative to using up scarce freshwater resources. • Food. Can we grow enough food? Between now and 2050, we have to increase food yield by about 70%. Is that possible? I think it is. In industrialized nations, food yields are already twice what they are in the world as a whole. That’s because we have irrigation, tractors, better pesticides, and so on. Given such energy and wealth, we already know that we can grow enough food to feed the planet. Another option that’s probably cheaper would be to leverage some things that nature’s already produced. What most people don’t know is that the yield of corn per acre and in calories is about 70% higher than the yield of wheat. Corn is a C 4 photosynthesis crop: It uses a different way of turning sunlight and CO2 into sugars that evolved only 30 million years ago. Now, scientists around the world are working on taking these C 4 genes from crops like corn and transplanting them into wheat and rice, which could right away increase the yield of those staple grains by more than 50%. Physical limits do exist, but they are extremely distant. We cannot grow exponentially in our physical resource use forever, but that point is still at least centuries in the future. It’s something we have to address eventually, but it’s not a problem that’s pressing right now. • Wealth. One thing that people don’t appreciate very much is that wealth has been decoupling from physical resource use on this planet. Energy use per capita is going up, CO2 emissions per capita have been going up a little bit, but they are both widely outstripped by the amount of wealth that we’re creating. That’s because we can be more efficient in everything—using less energy per unit of food grown, and so on. This again might sound extremely counterintuitive, but let me give you one concrete example of how that happens. Compare the ENIAC—which in the 1940s was the first digital computer ever created—to an iPhone. An iPhone is billions of times smaller, uses billions of times less energy, and has billions of times more computing power than ENIAC. If you tried to create an iPhone using ENIAC technology, it would be a cube a mile on the side, and it would use more electricity than the state of California. And it wouldn’t have access to the Internet, because you’d have to invent that, as well. This is what I mean when I say ideas are the ultimate resource. The difference between an ENIAC and an iPhone is that the iPhone is embodied knowledge that allows you to do more with less resources. That phenomenon is not limited to high tech. It’s everywhere around us. So ideas are the ultimate resource. They’re the only resource that accumulates over time. Our store of knowledge is actually larger than in the past, as opposed to all physical resources. Challenges Ahead for Innovation Today we are seeing a race between our rate of consumption and our rate of innovation, and there are multiple challenges. One challenge is the Darwinian process, survival of the fittest. In areas like green tech, there will be hundreds and even thousands of companies founded, and 99% of them will go under. That is how innovation happens. The other problem is scale. Just as an example, one of the world’s largest solar arrays is at Nellis Air Force Base in California, and we would need about 10 million of these in order to meet the world’s electricity needs. We have the land, we have the solar energy coming in, but there’s a lot of industrial production that has to happen before we get to that point. Innovation is incredibly powerful, but the pace of innovation compared to the pace of consumption is very important. One thing we can do to increase the pace of innovation is to address the biggest challenge, which is market failure. In 1967, you could stick your hand into the Cuyahoga River, in Ohio, and come up covered in muck and oil. At that time, the river was lined with businesses and factories, and for them the river was a free resource. It was cheaper to pump their waste into the river than it was to pay for disposal at some other sort of facility. The river was a commons that anybody could use or abuse, and the waste they were producing was an externality. To that business or factory, there was no cost to pumping waste into this river. But to the people who depended upon the river, there was a high cost overall. That’s what I mean by a market externality and a market failure, because this was an important resource to all of us. But no one owned it, no one bought or sold it, and so it was treated badly in a way that things with a price are not. That ultimately culminated when, in June 1969, a railway car passing on a bridge threw a spark; the spark hit a slick of oil a mile long on the river, and the river burst into flames. The story made the cover of Time magazine. In many ways, the environmental movement was born of this event as much as it was of Rachel Carson’s Silent Spring. In the following three years, the United States created the Environmental Protection Agency and passed the Clean Water and Clean Air acts. Almost every environmental problem on the planet is an issue of the commons, whether it’s chopping down forests that no one owns, draining lakes that no one owns, using up fish in the ocean that no one owns, or polluting the atmosphere because no one owns it, or heating up the planet. They’re all issues of the commons. They’re all issues where there is no cost to an individual entity to deplete something and no cost to overconsume something, but there is a greater cost that’s externalized and pushed on everybody else who shares this. Now let’s come back again to what Limits to Growth said, which was that economic growth always led to more pollution and more consumption, put us beyond limits, and ends with collapse. So if that’s the case, all those things we just talked about should be getting worse. But as the condition of the Cuyahoga River today illustrates, that is not the case. GDP in the United States is three times what it was when the Cuyahoga River caught on fire, so shouldn’t it be more polluted? It’s not. Instead, it’s the cleanest it’s been in decades. That’s not because we stopped growth. It’s because we made intelligent choices about managing that commons. Another example: In the 1970s, we discovered that the ozone layer was thinning to such an extent that it literally could drive the extinction of all land species on Earth. But it’s actually getting better. It’s turned a corner, it’s improving ahead of schedule, and it’s on track to being the healthiest it’s been in a century. That’s because we’ve reduced the emissions of CFCs, which destroy ozone; we’ve dropped the amount of them that we emit into the atmosphere basically to zero. And yet industry has not ground to a halt because of this, either. Economic growth has not faltered. And one last example: Acid rain—which is primarily produced by sulfur dioxide emitted by coal-burning power plants—is mostly gone as an issue. Emissions of sulfur dioxide are down by about a factor of two. That’s in part because we created a strategy called cap and trade: It capped the amount of SO2 that you could emit, then allowed you to swap and buy emission credits from others to find the optimal way to do that. The cost, interestingly enough, has always been lower than projected. In each of these cases, industry has said, This will end things. Ronald Reagan’s chief of staff said the economy would grind to a halt, and the EPA would come in with lower cost estimates. But the EPA has always been wrong: The EPA cost estimate has always been too high. Analysis of all of these efforts in the past shows that reducing emissions is always cheaper than you expect, but cleaning up the mess afterwards is always more expensive than you’d guess. Today, the biggest commons issue is that of climate change, with the CO2 and other greenhouse gases that we’re pumping into the atmosphere. A logical thing to do would be to put a price on these. If you pollute, if you’re pumping CO2 into the atmosphere and it’s warming the planet, so you’re causing harm to other people in a very diffuse way. Therefore, you should be paying in proportion to that harm you’re doing to offset it. But if we do that, won’t that have a massive impact on the economy? This all relates to energy, which drives a huge fraction of the economy. Manufacturing depends on it. Transport depends on it. So wouldn’t it be a huge problem if we were to actually put a price on these carbon emissions? Well, there has been innovative thinking about that, as well. One thing that economists have always told us is that, if you’re going to tax, tax the bad, not the good. Whatever it is that you tax, you will get less of it. So tax the bad, not the good. The model that would be the ideal for putting a price on pollution is what we call a revenue-neutral model. Revenue-neutral carbon tax, revenue-neutral cap and trade. Let’s model it as a tax: Today, a country makes a certain amount of revenue for its government in income tax, let’s say. If you want to tax pollution, the way to do this without impacting the economy is to increase your pollution tax in the same manner that you decrease the income tax. The government then is capturing the same amount of money from the economy as a whole, so there’s no economic slowdown as a result of this. This has a positive effect on the environment because it tips the scales of price. Now, if you’re shopping for energy, and you’re looking at solar versus coal or natural gas, the carbon price has increased the price of coal and natural gas to you, but not the cost of solar. It shifts customer behavior from one to the other while having no net impact on the economy, and probably a net benefit on the economy in the long run as more investment in green energy drives the price down. Toward a Wealthier, Cleaner Future The number-one thing I want you to take away is that pollution and overconsumption are not inevitable outcomes of growth. While tripling the wealth of North America, for instance, we’ve gone from an ozone layer that was rapidly deteriorating to one that is bouncing back. The fundamental issue is not one of limits to growth; it’s one of the policy we choose, and it’s one of how we structure our economy to value all the things we depend upon and not just those things that are owned privately. What can we do, each of us? Four things: First is to communicate. These issues are divisive, but we know that beliefs and attitudes on issues like this spread word of mouth. They spread person to person, from person you trust to person you trust. So talk about it. Many of us have friends or colleagues or family on the other side of these issues, but talk about it. You’re better able to persuade them than anyone else is. Second is to participate. By that I mean politically. Local governments, state and province governments, and national governments are responsive when they hear from their constituents about these issues. It changes their attitudes. Because so few constituents actually make a call to the office of their legislator, or write a letter, a few can make a very large impact. Third is to innovate. These problems aren’t solved yet. We don’t have the technologies for these problems today. The trend lines look very good, but the next 10 years of those trend lines demand lots of bright people, lots of bright ideas, and lots of R&D. So if you’re thinking about a career change, or if you know any young people trying to figure out what their career is now, these are careers that (A) will be very important to us in the future and (B) will probably be quite lucrative for them.

### Health Innovation – Disease – Extinction

COVID was not caused by capitalism - disease predates capitalism, they have no evidence that capitalism is the direct cause of covid…

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

### Advantage Two: Federalism

Federalism cannot be solved by the PIC, cross ex binding

Extend McGinnis’11 -

Extend Pamlin’15 cards –

Extend Allensworth 16 –

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 – because of these TERMS… federalism links do NOT apply… states can enforce post-plan – Kobyashi

Extend Adler 20

#### 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

### T

### Private Sector – We Meet – 1AR

#### It’s used to shield private parties

Hittinger 19 [Carl W Hittinger, BakerHostetler’s antitrust and competition practice national team leader, J.D., Temple University Beasley School of Law, September 2019 https://www.bakerlaw.com/webfiles/Litigation/2019/Alerts/GCR-Private-Antitrust-Litigation.pdf]

#### It applies to private entities

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]

### Section 5 CP – Rollback – 1AR

They want to “organize” how long will that take… THOUSANDS will die in the meantime, theory of power is just a theory. it is not reality, people will not be relaying on power theory to survive, its unrealistic.. said during cross x

#### Independent FTC action struck down

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

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

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

#### 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

# K

### Permutation---1AR

We solve a bad impact, perm still viable. Still advocating for anti-capitalism, mitigate their harms.. while alt does nothing to solve our harms... can’t solve it quickly enough. only policy can solve it quick enough – federalism…

Perm does the aff and the alt- resolves some parts of their impact- incorporated reformism and mindset shift, step in the right direction (reject capitalism, do the aff)

#### Sweeping rejection of the perm reifys neolib and destroys the alt---prefer specificity

Duffy 10

Article: Neoliberalizing nature? Elephants as imperfect commodities Author: Duffy, R Journal: Antipode ISSN: 0066-4812 Date: 2010 Volume: 42 Issue: 3 Page: 742

Note: from 1 September 2012 I take up the post of Professor of Conservation Politics at the Durrell Institute of Conservation Ecology (DICE) in the School of Anthropology and Conservation, University of Kent.

I am Professor of International Politics, and I held posts at Edinburgh University and Lancaster University before joining Manchester in 2005. I take a deliberately interdisciplinary approach to understanding conservation; my work is located at the intersection between international relations, geography and sociology. My work examines the debates on global environmental governance, especially the roles of international NGOs, international treaties, international financial institutions and epistemic communities. I am particularly interested in how global environmental management regimes play out on the ground, how they are contested, challenged and resisted by their encounter at the local level. I focus on wildlife conservation, tourism and illicit trading networks to understand the local level complexities of global environmental management. I have undertaken a number of ESRC funded research projects on Peace Parks, gemstone mining and national parks,and on ecotourism (more details are under 'research interests'. My most recent book, Nature Crime: How We're Getting Conservation Wrong (Yale University Press, 2010) examines how global dynamics of wealth and poverty shape conservation outcomes. More information is on my personal wesbite 'Conservation Politics' <http://conservationpolitics.wordpress.com/>

However, it is critically important not to reify neoliberalism and ascribe it a greater level of coherence and dominance than it really deserves (Bakker 2005; Castree 2008a; Brenner and Theodore 2002; Mansfield 2004; McCarthy and Prudham 2004). Instead it is important to interrogate how neoliberalism plays out “on the ground”, to probe its complexities, unevenness and messiness (see Peck and Tickell 2002). In this paper we concentrate on comparing the practices of neoliberalism in order to draw out these messy entanglements; this demonstrates how neoliberalism can be challenged, resisted and changed by its encounter with nature (Bakker 2009; Castree 2008b:161). Therefore, we do not rehearse the well worn debates on definitions of neoliberalism, but rather take up the challenge of comparative research on “actually existing neoliberalisms”, which involves engaging with contextual embeddedness in order to complicate neat theoretical debates. As Brenner and Theodore (2002:356–358) suggest, to understand actually existing neoliberalism we must explore the path-dependent, contextually specific interactions between inherited regulatory landscapes and emergent forms of neoliberalism. As such, the neat lines and models generated via theoretical debates can be traced, refined, critiqued and challenged through engagement with specific case studies (Bakker 2009; Castree 2008b).

### Alt Fails---1AR

Capitalism is unethical.. so is everyone dying… which is what the neg is doing

Capitalism not root cause of disease… they r inevitable... predate econ systems/ capitalism itself

#### Neolib is sustainable and entrenched – any alternative fails- Arvidsson 13, the PIC will fail..

#### The alt creates dangerous vacuums that increase violence and don’t produce change

Barnett ‘10

Clive Barnett – Faculty of Social Sciences and Reader in Human Geography at The Open University.

From Chapter Twelve – “PUBLICS AND MARKETS: What’s wrong with Neoliberalism?” – From the book: The Handbook of Social Geography, edited by Susan Smith, Sallie Marston, Rachel Pain, and John Paul Jones III. London and New York: Sage. Available via http://www.open.ac.uk/socialsciences/emergentpublics/publications/barnett\_publicsandmarkets.pdf

In accepting the same simplistic opposition between individual freedom and social justice presented by Hayek, but simply reversing the evaluation of the two terms, critics of neoliberalism end up presenting highly moralistic forms of analysis of contemporary political processes. In resisting the idealization of the market as the embodiment of public virtue, they end up embracing an equally idealized view of the forum as the alternative figure of collective life (see Elster 1986). For example, while Harvey insists that neoliberalism is a process driven by the aim of restoring class power, he ends his analysis by arguing that it is the anti-democratic character of neoliberalism that should be the focal point of opposition (Harvey 2005, 205-206). But it is far from clear whether the theories of neoliberalism and neoliberalization developed by political economists, sometimes with the help of governmentality studies, can contribute to reconstructing a theory and practice of radical democratic justice. In Harvey’s analysis, the withdrawal of the state is taken for granted, and leads to the destruction of previous solidarities, unleashing pathologies of anomie, anti-social behaviour and criminality (ibid, 81). In turn, the vacuum created by the withdrawal of the state leads to social solidarities being reconstructed around other axes, of religion and morality, associationism, and nationalism. What has been described as the rise of the “movement society”, expressed in the proliferation of contentious politics of rights-based struggles and identity politics, Harvey sees as one aspect of a spread of corrosive social forms triggered by the rolling-back of states. In the wake of this rolling-back “[e]verything from gangs and criminal cartels, narco-trafficking networks, mini-mafias and favela bosses, through community, grassroots and non-governmental organizations, to secular cults and religious sects proliferate” (ibid, 171). These are alternative social forms “that fill the void left behind as state, powers, political parties and other institutional forms are actively dismantled or simply wither away as centres of collective endeavour and of social bonding” (ibid.). What’s really wrong with neoliberalism, for critics who have constructed it as a coherent object of analysis, is the unleashing of destructive pathologies through the combined withdrawal of the state and the unfettered growth of market exchange. ‘Individual freedom’ is presented as a medium of uninhibited hedonism, which if given too much free reign undermines the ascetic virtues of self-denial upon which struggles for ‘social justice’ are supposed to depend. Underwritten by simplistic moral denunciations of ‘the market’, these theories cover over a series of analytic, explanatory, and normative questions. In the case of both the Marxist narrative of neoliberalization, and the Foucauldian analysis of neoliberal governmentality, it remains unclear whether either tradition can provide adequate resources for thinking about the practical problems of democracy, rights and social justice. This is not helped by the systematic denigration in both lines of thought of ‘liberalism’, a catch-all term used with little discrimination. There is a tendency to present neoliberalism as the natural end-point or rolling-out of a longer tradition of liberal thought – an argument only sustainable through the implicit invocation of some notion of a liberal ‘episteme’ covering all varieties and providing a core of meaning. One of the lessons drawn by diverse strands of radical political theory from the experience of twentieth-century history is that struggles for social justice can create new forms of domination and inequality. It is this that leads to a grudging appreciation of liberalism as a potential source for insight into the politics of pluralistic associational life. The cost of the careless disregard for ‘actually existing liberalisms’ is to remain blind to the diverse strands of egalitarian thought about the relationships between democracy, rights and social justice that one finds in, for example: post-Rawslian political philosophy; post-Habermasian theories of democracy, including their feminist variants; various postcolonial liberalisms; the flowering of agonistic liberalisms and theories of radical democracy; and the revival of republican theories of democracy, freedom, and justice. No doubt theorists of neoliberalism would see all this as hopelessly trapped within the ‘neoliberal frame’ of individualism, although if one takes this argument to its logical conclusion, even Marx’s critique of capitalist exploitation, dependent as it is on an ideal of self-ownership, is nothing more than a var