# Aff v Houston GN- Round 1-Texas

# MSU KV policy 1AC

### Innovation – 1AC

#### Advantage One: Innovation

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

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

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

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

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

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

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

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

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

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

#### Disruptive innovation in healthcare solves pandemics

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

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

Introduction

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

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

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

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

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

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

I. WHY ANTICOMPETITIVE REGULATION SUCCEEDS

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

A. The Generic Story

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

B. Additional Considerations Affecting Product Market Innovation

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

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

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

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

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

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

C. An Illustration from Automobile Distribution

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

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

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

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

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

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

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

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

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

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

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

A. Lochner, anti-Lochner, and Parker

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

B. The Potential for an Increased Level of Judicial Scrutiny

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Considering Governmental Justifications for Restraints on Competition

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

C. Institutional and Procedural Distinctions

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

### Plan

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

### Advantage Two: Federalism

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Introduction

IN just three relatively obscure antitrust cases, 1

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

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

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

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

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

III. DOCTRINAL CRITICISM

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

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

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

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

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

IV. PROPOSED SOLUTIONS

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

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

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

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

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

B. Spillover Effects and Antitrust Federalism

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# 2AC

### Case

Fedderalism

they dropped it - didn’t get to it - their problem

### 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 – Innovation K2 Disease

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Federalism

they dropped it - didn’t get to it - their problem

### 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

#### Counter-interpretation --- specify how scope is expanded, use normal means, and get to perm specification counterplans.

#### Inflates process counterplans – steals the aff and hurts topic education

#### CX checks

#### No rez basis---devolves into infinite regress and unpredictable over-specification that kills the Neg

#### Not a voter --- just force us to specify

Plan isn’t the text of legislation --- evidence clarifies implementation details

#### Reasonability is best: good is good enough, they cause a race to the bottom

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#### Fiat solves circumvention – plan uses USFG and creates enforcement – their ev assumes the squo

#### Doesn’t contextualize – federalism advantage is about specific immunity issue that the aff addresses without needing to win future cases – Sack & Kobayashi

### Vagueness – 2AC

#### Counter-interpretation --- specify how scope is expanded, use normal means, and get to perm specification counterplans.

#### CX checks---they could have asked

#### No rez basis---devolves into infinite regress and unpredictable over-specification that kills the Neg

#### Not a voter --- just force us to specify

Plan isn’t the text of legislation --- evidence clarifies implementation details

#### Reasonability is best: good is good enough, they cause a race to the bottom

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#### Fiat solves circumvention – plan uses USFG and creates enforcement – their ev assumes the squo

#### Doesn’t contextualize – federalism advantage is about specific immunity issue that the aff addresses without needing to win future cases – Sack & Kobayashi

### Enforcement CP – 2AC

#### Perm – do both – solves the link

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

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

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

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

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

#### Exec alone fails:

#### Judicial interpretations

**Baer 20** [Bill Baer former visiting fellow in governance studies at The Brookings Institution and assistant attorney general of the Antitrust Division and as the acting associate attorney general of the U.S. Department of Justice, 11-19-2020 https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states/?longform=true]

The meaning of the antitrust laws rests first with Congress, as does their importance, which is reflected in yearly appropriations. Judicial interpretations have **eviscerated** competition enforcement. Courts have failed to appreciatethe benefits of competition and have underestimated the harm of anticompetitive conduct. They have overestimatedthe ability of markets to correct themselves without proper antitrust enforcement. And they have even praised the benefits of monopoly.5 Too often, the resulting legal standards **allow anticompetitive conduct to escape condemnation**. At the same time that the courts have made it harder for antitrust enforcers to win meritorious antitrust cases, Congress has provided the enforcers fewer resources to do their jobs.

#### Congressional opposition

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

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

### Enforcement CP – Federalism – 2AC

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

### 2ac – Cap long

#### 1. Framework – The ballot is a referendum on the desirability of the plan – this is the *only* non-arbitrary interpretation that is mutually accessible and grounded in the resolution – there’s two impacts

#### [A] *engagement* – any other interp creates a *moral hazard* for reading a plan because *every* plan loses to *any* risk of a link – this lowers the burden of proof for the negative to an absurdly low threshold – *procedural fairness* is a prerequisite to the evaluation of substance because it *structures* argument interaction

#### [B] *advocacy* – their framework retracts from questioning policy, which is *net-worse* for building radical subjects – only an affirmative questioning of the state can avoid the expansion of the right

#### 2. Perm do both – double bind – specific instances of the alt overcome the link to the plan – they don’t have a reason the alt can overcome the healthcare system, the state, etc, BUT would fail if the plan was included

#### Perm – do the plan and non-competitive parts of the alt – mixed economies key to alt solvency

Mazzucato 21 (Mariana Mazzucato is Professor in the Economics of Innovation and Public Value at University College London where she is the founding director of the UCL Institute for Innovation and Public Purpose. She is winner of international prizes including the 2020 John von Neumann Award and the 2018 Leontief Prize for Advancing the Frontiers of Economic Thought. January 28th 2021, “Mission Economy: A Moonshot Guide to Changing Capitalism” via kindle, pages 204-210) CULTIV8

This book has applied what I believe is the immensely powerful idea of a mission to solving the ‘wicked’ problems we face today. In it, I have argued that tackling grand challenges will only happen if we reimagine government as a prerequisite for restructuring capitalism in a way that is inclusive, sustainable and driven by innovation.

First and foremost, this means reinventing government for the twenty-first century – equipping it with the tools, organization and culture it needs to drive a mission-oriented approach. It also means bringing purpose to the core of corporate governance and taking a very broad stakeholder position across the economy. It means changing the relationship between public and private sectors, and between them and civil society, so they all work symbiotically for a common goal. The reason for the emphasis on rethinking government is simple: only government has the capacity to bring about transformation on the scale needed. The relationship between economic actors and civil society shows our problems at their most profound, and this is what we must unravel.

We can start by recognizing that capitalist markets are an outcome of how each actor in the system is organized and governed, and how the different actors relate to one another. This holds for the private and public sectors and for other sectors such as non-profits. No particular kind of market behaviour is inevitable. For example, the market pressure often cited as forcing a business to neglect the long term in favour of the short term, as too many companies do today, is the product of a particular organization of the market. Nor is there anything inevitable in government bureaucracies being too slow to react to challenges such as digital platforms and climate change. Rather, both are outcomes of agency, actions and governance structures that are chosen inside organizations, as well as the legal and institutional relationships between them. It is all down to design within and between organizations.

Capitalism is, indeed, in crisis. But the good news is that we can do better. We know from the past that public and private actors can come together to do extraordinary things. I have reflected on how, fifty years ago, going to the moon and back required public and private actors to invest, to innovate and to collaborate night and day for a common purpose. Imagine if that collaborative purpose today was to build a more inclusive and sustainable capitalism: green production and consumption, less inequality, greater personal fulfilment, resilient health care and healthy ageing, sustainable mobility and digital access for all. But small, incremental changes will not get us to those outcomes. We must have the courage and conviction to lift our gaze higher – to lead transformative change that is as imaginative as it is ambitious, aiming for something far more ambitious than sending a man to the moon.

To do this successfully, governments need to invest in their internal capabilities – building the competence and confidence to think boldly, partner with business and civil society, catalyse new forms of collaboration across sectors, and deploy instruments that reward actors willing to engage with the difficulties. The task is neither to pick winners nor to give unconditional handouts, subsidies and guarantees, but to pick the willing. And missions are about making markets, not only fixing them. They’re about imagining new areas of exploration. They’re about taking risks, not only ‘de-risking’. And if this means making mistakes along the way, so be it. Learning through trial and error is critical for any value-creation exercise. Ambitious missions also have the courage to tilt the playing field.

If government is indeed a value creator that is driven by public purpose, its policies should reflect and reinforce that. Too many green policies today are just minor adjustments to a trajectory that still favours the old waste-prone behaviours and the financial casino that worsens inequality. A healthy economy that works for the whole of society must tilt the playing field consistently to reward behaviours that help us achieve agreed and desirable goals. That means achieving coherence in a multiplicity of fields, from taxes to regulation, from business law to the social safety net.

As emphasized throughout the book, it is key to not pretend that social missions are the same as technological ones. With challenges that are more ‘wicked’ it is essential that moonshot thinking is linked with support to underlying government systems. For example, a moonshot around disease testing or health priorities must interact closely with the public-health system, not replace or circumvent it. Similarly, a moonshot around clean growth must interact with transport systems and planning authorities and understand behavioural change. Thus it is critical to perceive missions not as siloed projects but as being intersectoral, bottom-up, and building on existing systems (such as innovation systems, among others).

Governments cannot pursue missions alone. They must work alongside purpose-driven businesses to achieve them. As I’ve argued in this book, this requires addressing one of the biggest dilemmas of modern capitalism: restructuring business so that private profits are reinvested back into the economy rather than being used for short-term financialized purposes. Missions can accelerate this shift by shaping expectations about where business opportunities lie and also getting a better return for public investment. In this sense they can begin to walk the talk of stakeholder value. This means creating a more symbiotic form of partnership and collaboration in different sectors, whether in health, energy or digital platforms. A market-shaping perspective requires governing these interactions so that intellectual property rights, data privacy, pricing of essential medicines and taxation all reflect what needs to happen to reach the common objective. In health that must mean health innovation driven by the mission of better health care for all; in energy it must mean divestment from fossil fuels and the creation of public goods like green infrastructure and green production systems that protect the earthly oasis that Armstrong referred to; and in the digital domain it must mean the use of digitalization to improve the access of all people to the power of the technologies of the twenty-first century – while ensuring both data privacy and that our welfare states are strengthened, not weakened, by digital platforms.

Doing capitalism differently requires reimagining the full potential of a public sector driven by public purpose – democratically defining clear goals that society needs to meet by investing and innovating together. It requires a fundamentally new relationship between all economic actors willing and able to tackle complexity to achieve outcomes that matter.

#### Link is reductionist and can’t explain US-EU divergences

Foster 19 [Chase Michael Foster was a Doctoral Candidate at Harvard University at the time of this dissertation. The author has served as a Election Observer (OSCE, ODIHR) in Moldova, Belarus, Russia, Georgia and as a Teaching Assistant at the Harvard Kennedy School of Government. At the time of this writing, the author held a MPP (Democracy, Politics, and Institutions) from the Harvard Kennedy School of Government. “The Politics of Delegation: Constitutional Structure, Bureaucratic Discretion, and the Development of Competition Policy in the United States and the European Union, 1890-2017” – Doctoral dissertation to The Department of Government, Harvard University, Graduate School of Arts & Sciences. In partial fulfillment of the requirements for the degree of Doctor of Philosophy in the subject of Government - January 2019 - #E&F –https://dash.harvard.edu/bitstream/handle/1/41121359/FOSTER-DISSERTATION-2019.pdf?sequence=1]

Ideational Theories

Any analysis of the change in antitrust enforcement over time must begin with a consideration of ideas. Most of the existing social scientific scholarship on competition policy emphasizes the role of changing economic paradigms in spurring the transformation of European and American competition policy. A number of scholars of American antitrust have explained the dramatic decrease in antitrust enforcement as stemming from the shift in authority from lawyers to economists at the antitrust agencies (Eisner 1991). Others have emphasized the institutionalization of Chicago School-inspired economic ideas within antitrust jurisprudence (Ergen and Kohl 2017; Davies 2010; Pitofsky 2008). Both of these sets of accounts capture an important component of the shift. As theories of economic efficiency changed in the US academy during the 1960's and 1970's, much of the postwar enforcement program was delegitimized. Beginning in the early 1970's, both the prevailing judicial opinion on antitrust and the enforcement program of the antitrust agencies dramatically shift, leading to a precipitous drop in enforcement output, especially in areas such as vertical restraints, monopolies, and exclusionary practices.

The increase in the intensity of European enforcement has also been explained as the result of ideational change. Some EU scholars have argued that the institutionalization of neoliberal economic ideas in European regulatory law has led to the intensification of regulatory enforcement (Thatcher 2013; Buch-Hansen and Wigger 2010; Wigger 2008). Concomitant to the Single European Act, the European competition directorate began to more intensely apply competition rules, and to shift its enforcement focus to state aid, publicly-owned companies, and the promotion of competition in previously protected network industries (Quack and Djelic 2005). During the late 1990's, competition law modernization led to a more neoliberal approach to the evaluation of market competition, while also expanding the breadth and intensity of enforcement (Wigger and Nolke 2007).

While each of these accounts points to some of the real ways that ideational change affected competition policy in each system, there are problems with explaining opposite trends as the result of the same paradigm shift. An ideas-only approach leaves us in the awkward position of explaining both the increase in the intensity of competition enforcement in the EU and the decrease in antitrust enforcement in the US as resulting from the same (or similar) neoliberal policy paradigm. While any analysis of competition policy developments must account for ideational change, we need to understand why the same set of ideas has produced different patterns of enforcement in Europe and the United States.

Additionally, there are empirical gaps in the ideational explanation. Certainly, the influence of the Chicago School cannot account for why US regulators have failed to follow much of the neoliberal prescription for liberalization and industrial policy. Chicago School economists, after all, have long supported the application of antitrust in these areas (Van I lorn 2015; McChesney 1986; Bork 1978). Moreover, there is no shortage of classically-trained economists in the European competition system.

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

#### ~~Try or die – only innovation can solve in time – prefer new IPCC report~~

~~King 21 (David King, Founder and Chair, Centre for Climate Repair at Cambridge, University of Cambridge; and Jane Lichtenstein, Associate, Centre for Climate Repair at Cambridge, University of Cambridge; “Surviving the next 50 years is an existential crisis – 3 things we must do now,” The Print, 8-14-2021, https://theprint.in/opinion/surviving-the-next-50-years-is-an-existential-crisis-3-things-we-must-do-now/715069/)~~

~~The challenge of surviving the next 50 years is now seen as a planet-wide existential crisis; we need to work together urgently, just to secure a short-term future for human civilisation. Global weather patterns are violently disrupted: Greece burns; the south of England floods; Texas has had its coldest weather ever, while California and Australia suffer apocalyptic wild fires. All of these violent, record-breaking events are a direct result of rapid heating in the Arctic – occurring faster than in the rest of the world. A warm Arctic triggers new ocean and air currents that change the weather for everyone. The only way to reverse some of these catastrophic patterns, and to regain a kind of stability in climate and weather systems, is “climate repair” – a strategy we call “reduce, remove, repair” – which demands that we make very rapid progress to net zero global emissions; that there is massive, active removal of greenhouse gases from the atmosphere; and, in the first instance, that we refreeze the Earth’s poles and glaciers to correct the wild weather patterns, slow down ice-melt, stabilise sea level, and break the feedback loops that relentlessly accelerate global warming. There are no either/or options. Reducing emissions About 70% of world economies have net zero emissions commitments over varying timescales, but this has come too late to restore climate stability. The IPCC has asked for accelerated progress on this trajectory, but whatever happens, current emission rates of atmospheric greenhouse gases imply global warming of 1.5℃ by 2030 and well over 2℃ above pre-industrial level by the end of the century – a devastating outcome. In particular, melting ice and thawing permafrost are considered inevitable even if rapid and deep CO2 emissions reductions are achieved, with sea-level rise to continue for centuries as a result. In every area of the world, climate events will become more severe and more frequent, whether flooding, heating, coastal erosion or fires. There are definitely important steps that can still reduce the scale of this devastation, including faster and deeper emissions reductions. However, this is not enough on its own to avert the worst. Together there is real evidence that the massive removal of greenhouse gases from the atmosphere and solutions such as repairing the Earth’s poles and glaciers could help humanity find a survivable way out of this crisis. Removing greenhouse gases Taking CO2 and equivalent greenhouse gases out of the atmosphere, with the aim of getting back to 350ppm (parts per million) by 2100, involves creating new CO2 “sinks” – long-term stores from which CO2 cannot escape. Sinks operate at many scales, with forest planting, mangrove restoration, wetland and peat preservation all crucially important. Very large projects, such as the restoration of the Loess Plateau in China demonstrate scalable CO2 removal, with multiple add-on benefits of food production, bio-diversity enhancement and weather stabilisation. Habitat restoration can also make economic sense. In the Philippines, mangrove is the focus of a cost-benefit analysis. Mangrove captures four times more carbon than the same area of rainforest, provides numerous ecosystem services and protects against flooding, conferring socio-economic benefits and significantly reducing the cost of dealing with extreme weather events. Big new carbon sinks must be created wherever safely possible, including in the oceans. Interventions that mimic natural processes, known to operate safely “in the wild”, are a workable starting point. Promotion of ocean pastures to restore ocean diversity and fish and whale stocks to the levels last seen 300 years ago is one such possibility – offering new sustainable food sources for humans, as well as contributing to climate ecosystem services and carbon sinks. In nature, sprinklings of iron-rich dust blow from deserts or volcanic eruptions, onto the surface of deep oceans, generating – in a matter of months – rich ocean pastures, teeming fish stocks and an array of marine wildlife. Studies of ocean kelp regeneration show the full range of real-life impacts, from increased protein sources for human consumption, to restoration of pre-industrial levels of ocean biodiversity and productivity, and extensive carbon sequestration. Extending the scale and number of ocean pastures could be achieved by systematically scattering iron-rich dust onto target areas in oceans around the world. The approach is intuitively scalable, and could sequester perhaps 30 billion tons per year of CO2 if 3% or so of the world’s deep oceans were to be treated annually. Large-scale carbon-sink creation of this kind is pivotal if the atmosphere is to return to pre-industrial CO2 levels. A billion tons per year of sequestration is the minimum threshold coordinated by the Centre for Climate Repair at Cambridge given the intensity of the climate crisis. While the scale of intervention is sometimes called “geoengineering”, the approach is closer to forest planting or mangrove restoration. The aim is to remove CO2 from the atmosphere using natural means, to return us to pre-industrial levels within a single generation. Repairing the planet The immediate challenge is to stabilise the planet, achieving a manageable equilibrium that gives a last chance to shift to renewable energy and towards a circular global economy, with new norms in urban, rural and ocean management. “Repairing” systematically seeks to draw the Earth back from climate tipping points (which, by definition, cannot happen without direct effort), providing a supporting framework in which “reduce” and “restore” can happen. Political and societal will is needed. The most urgent effort is to refreeze the Arctic, interrupting a bleak spiral of accelerating ice loss, sea-level rise – and the acceleration of climate change and violent global weather changes that they cause. Arctic temperatures have risen much faster (and increasingly so) than global average temperatures, when compared with pre-industrial levels. Figure 1 shows this clearly from 1850 to the present day. Melting Arctic ice embodies a powerful feedback force in climate change. White ice reflects the Sun’s energy away from the Earth before it can heat the surface. This is known as the albedo effect. As ice melts, dark-blue seawater absorbs increasing amounts of the Sun’s energy, warming increases, and ever-larger areas of ice disappear each summer, expanding the acceleration. Arctic temperatures govern winds, ocean currents and weather systems across the globe. A tipping point is passing: sea-ice loss is becoming permanent and accelerating; Greenland ice will follow and will eventually raise global sea-levels by over seven metres. Total loss may take centuries but, decade by decade, there will be relentless incremental impacts. By mid-century the melting will be irreversible, and sea-level rise alone will leave low-lying countries like Vietnam in desperate circumstances, with reductions to global rice production a certainty, many millions of climate refugees and no obvious pathway forward for such nations. Figure 1: comparison between average global temperature change, and change in the Arctic region from 1850 to present day. Provided by Nerilie Abram using IPCC data, ANU, Australia, 2021 The rapid Arctic temperature increase is matched by the rapid and accelerating loss in minimum (summer) sea-ice volume (Figure 2), which further accelerates the temperature rise in a spiral of reinforcing feedback loops. Figure 2: decline in annual minimum Arctic Sea ice volume 1980-2020. Provided by Nerilie Abram using IPCC data, ANU, Australia, 2021 It is vital to pivot the world back from this ice-melt tipping point, and to repair the Arctic as rapidly as possible. Marine cloud brightening in which floating solar-powered pumps spray salt upwards to brighten clouds and create a reflective barrier between the Sun and the ocean, is known to cool ocean surfaces and is a promising way to promote Arctic summer cooling. It mimics nature, and can be scaled up or down in a flexible way. Studies of marine cloud brightening, its climate impacts and interactions with human systems, are underway. As with promotion of ocean pastures, such solutions must be critically analysed, but there is no longer any doubt of their crucial importance. What we do in the next five years determines the viability of humanity’s future. Even if we narrow our aspirations to “survival”, fixing on a timescale of 50 years or so, the challenges are daunting. Humanity deserves better. We know what to do to be able to imagine thousands of years of human civilisation ahead, as well as behind us.~~

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

#### Alt fails---transition is impossible and causes conflict. Even if transition occurs, it doesn’t solve

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.

#### ~~Market shaping avoids your links~~

~~Mazzucato 21 (Mariana Mazzucato is Professor in the Economics of Innovation and Public Value at University College London where she is the founding director of the UCL Institute for Innovation and Public Purpose. She is winner of international prizes including the 2020 John von Neumann Award and the 2018 Leontief Prize for Advancing the Frontiers of Economic Thought. January 28~~~~th~~ ~~2021, “Mission Economy: A Moonshot Guide to Changing Capitalism” via kindle, pages 171-173) CULTIV8~~

~~Markets: shaping not fixing~~

~~The collective creation of value, which should be at the centre of a common-good approach, requires justifying policy in terms of actively creating and shaping markets, not fixing them. Market failure theory (MFT) assumes that markets are efficient and, when they fail, government should fix them. Government steps in to correct the sources of market failures such as positive externalities (where, due to the high spillovers,there is underinvestment by the private sector, requiring government to fund areas such as basic research); negative externalities (such as pollution, which might require government to impose carbon taxes); and asymmetric information (which can mean that banks don’t know enough about new companies, requiring SME lending by governments).~~

~~MFT has major flaws as a theory but it has nevertheless been adopted as a guide to public policy. It uses as a benchmark perfectly competitive markets characterized by perfect information, completeness, an absence of transaction costs and frictions and so on. So, to measure real markets – that is, markets in which firms compete through innovation and which will often be oligopolistic or characterized by monopoly power (e.g. because of the presence of patents) – MFT argues that the distance from a perfectly competitive market must be ascertained. Yet empirically, perfectly competitive markets don’t exist: markets are nearly always incomplete and imperfect.7 Government may therefore always be able to improve upon a decentralized market outcome, regardless of whether the result of government intervention is inefficient in a Pareto-optimal sense. This does not mean that it is incorrect to tackle market failures, such as pollution, through instruments such as carbon taxes. It just means that we need a better theory of competition to serve as the benchmark. And given that innovation is central to how firms compete, the drivers of innovation and issues around its direction should be at the centre of how we think about competition, not relegated to a list of ‘imperfections’. Furthermore, in economies aiming for transformational growth trajectories (e.g. in a green transition), it will be hard to simply ‘fix’ failures to get there.~~

~~And indeed, the examples we looked at in Chapters 4 and 5, from the moon landing to trying to tackle the SDGs, have required government doing much more than just fixing market failures. They require imagining new landscapes, not fixing existing ones, and aligning policies to inspire different actors who can spot opportunities for investment they did not see before. This is not about facilitating investment but catalysing it through the creation of new markets. This happened with the moon landing, which stimulated decades of investments in areas such as software. And it has happened more recently with the green economy: only after government led with high-risk, capital-intensive investments in green technology (e.g. early investments in solar and wind) did the private sector follow, eventually rendering the technologies more competitive.~~

~~This means that a broader view of policy can be based on market shaping, not only market fixing, which begins with the question: what sort of markets do we want? Attention needs to be paid both to the quantity of investment needed and also to its quality – and the underlying governance mechanisms. So in the health area, this would require broadening the notion of health to well-being, and investing not only in new remedies but also in new forms of preventative care and governing the intellectual property regime to deliver the outcomes desired. When patents are seen purely from a regulation angle, this perpetuates the idea that innovation occurs in the private sphere and is simply fixed in the public one. But, given the enormous public investments in creating value, patents should deliver in the public interest. This means they should be weak (easy to license), narrow (not used for purely strategic reasons) and not too far upstream (so the tools for research remain in the open domain).8~~

### Econ – 2AC

#### No link – Parker immunity has narrow applicability – zero evidence it broadly collapses certainty

#### Best literature review proves biz con is irrelevant for prosperity – it reflects political conditions and isn’t predictive – even the best theoretical studies are correlative not causal

**Salmond 9 ----** Rob, Assistant Professor of Political Science (University of Michigan), Faculty Associate at the Center for Political Studies (University of Michigan), PhD (UCLA), M.A. (Iowa), “Political Business Confidence Cycles: The Political Causes and Effects of Business Confidence Surveys,” [http://robsalmond.com/sites/default/files/Salmond%20working%20paper%20(Business%20Confidence).pdf](http://robsalmond.com/sites/default/files/Salmond%20working%20paper%20(Business%20Confidence).pdf#116)

There are two broad questions about business confidence that are important to the social scientific community: where does business confidence come from; and what does it achieve? Questions about the origins of business confidence **have received little scholarly attention**. The most prominent recent research in this area is Buthe (2002). Buthe shows that business confidence is higher in both Germany and the US under conditions of right government, and that this effect remains even when controlling for real economic conditions. Buthe explains his first result as a function of business’ collective ideological and distributive concerns, but admits that his theory **does not provide a ready explanation** for his second result. Additionally, Silverstone and Mitchell (2005) obtained firm-level data from quarterly business confidence surveys in New Zealand. They found that survey respondents tended to respond the same way to the questions about the macroeconomic situation as they respond to microeconomic questions about their own enterprise, and also found that firms’ responses are affected by signals of confidence coming from elsewhere in the economy. That is, confidence can be contagious. They also found, **however,** that differenttypes of firms associate **different things** with their overall confidence, and that those associations **change over time**. These findings lead Silverstone and Mitchell (2005, p. 18) to conclude **pessimistically** that: “it is **not** immediately apparent what a rise or fall in business confidence actually means.” The performance of business confidence can be broken in to two constituent parts: its predictive performance; and its causal impact. The most wide-ranging study on the predictive performance of business confidence was conducted by Santero and Westerlund (1996) under the auspices of the OECD. They examined patterns of business confidence, consumer confidence, and economic output across eleven advanced economies, finding that business confidence is a good predictor of output whereas consumer confidence is not. The best correlations between business confidence and output were found when the output measure (in this case year-on-year GDP growth) is lagged by either two or three financial quarters, which they say provides a clue that the business confidence indicator is indeed prescient of future events, rather than simply reflective of current ones. I will return to this point later in the paper. In terms of the causal impact of business confidence on the economy, Santero and Westerlund’s empirical analysis also found that business confidence measures “Granger caused” changes in economic output. Granger causation is a measure of **correlation rather than causation** – testing whether variable A (in this case business confidence) provides additional information about the future value of variable B (here GDP growth) beyond the information contained in variable B’s own history. While this empirical result is interesting, **it does not provide any theory** under which business confidence has an independent impact on output. Such an independent impact is of critical importance to business leaders because its existence is ultimately what makes politicians and citizens alike wary of actions that would lower business confidence. A causal impact does, however, exist in economic theory. Ng (1992) showed that, in broadly defined conditions of imperfect competition, self-fulfilling drops in business confidence (which Ng defines as the expected value of aggregate demand) are possible. That is, an exogenously caused drop in business confidence can plausibly cause a recession entirely on its own. Business confidence causal impact on political phenomena such as incumbent approval, partisan public opinion, and election results are substantially unexplored in the academic literature, despite the assumption of such effects found in much business and political journalism.

#### Biden FTC makes link inevitable

**Clayton 8-10** [E. Steele Clayton, IV Bass, Berry & Sims PLC University of Tennessee College of Law - J.D. 8-10-2021 https://www.jdsupra.com/legalnews/be-prepared-aggressive-antitrust-8939761/]

This summer has seen **a flurry of bold antitrust announcements** from the Biden administration. By issuing a sweeping**ex**ecutive **o**rder calling for numerous changes to antitrust enforcement and by naming progressive favorites and prominent Big Tech critics to head the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ), President Biden has **signaled** that federal antitrust policy is entering **a new era**.

The FTC has already begun carrying out its mandate to reshape antitrust policy. Under the leadership of new Chairwoman Lina Khan, the FTC has moved quickly to eliminate checks on its antitrust enforcement powers. A majority of the FTC’s commissioners have expressly disavowed the agency’s longstanding approaches to policing antitrust violations and have given the new chair unprecedented authority over investigations and rulemakings.

Collectively, the Biden administration and the FTC have sent a clear message to the business community: aggressive antitrust enforcement is back. Companies should **expect to see an increase in antitrust investigations**, **stiffer penalties for violations**, **more burdensome merger reviews**, and **new rules targeting** a range of **industry practices**. In this environment, effective antitrust counseling and compliance programs are more important than ever.

#### COVID wrecks certainty links

#### Turn – aff reduces harmful state regulation

**Meese 15** [Alan J. Meese, Ball Professor of Law and Cabell Research Professor, William and Mary Law School, 2015 https://ilr.law.uiowa.edu/assets/Uploads/ILR-100-5-Meese.pdf]

Like Professor Hovenkamp, I too am uncomfortable with the Parker, Exxon, and ARC America trio. As others have noted, Parker arose when serious people believed that state-enforced cartelization or monopolization could help stabilize the macro economy—a claim that only politicians make today. All three decisions countenance some regulation by political entities that do not internalize the full costs of their actions. The predictable result will be **too many state-imposed restraints** and too much state antitrust regulation. Such **overregulation**, of course, will distortthe allocation of resources and reduce national wealth. Moreover, to the extent that such regulation reduces price flexibility, Parker and its progeny **interfere with** the process of natural **economic adjustment and** thus **exacerbate recessions**. **Far from destroying** the **ability of states to engage in regulation, reversal** of such decisions **would simply confine states to “reasonable” regulation**, just as the Sherman Act confines private parties to reasonable restraints of trade. Federal preemption of state-imposed cartels, for instance, would leave states **perfectly free** to combat externalities, produce public goods, and redistribute income via taxing and spending.

#### NC Dental litigation causes confusion – only a risk the aff solves

**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]

As for private litigation, multiple cases following **N**orth **C**arolina Dental have identified **open issues** and emerging trends for antitrust actions involving government bodies. One important threshold issue confronted by private litigants is whether claims may be dismissed at the very onset of litigation due to application of state action immunity. Some courts have denied motions to dismiss claims pursuant to Federal Rule of Civil Procedure 12(b)(6), as long as the complaints plausibly allege the immunity is not established. In a case similar to North Carolina Dental, for example, a district court recently ruled it would be ‘premature’ to dismiss an antitrust claim against the Board of Dental Examiners of Alabama where the complaint plausibly alleged that the board was not actively supervised by the state.34 Other courts have implicitly rejected the notion that parties can plead away application of the immunity. In one such recent case, a district court dismissed an antitrust claim against a public utilities body based on South Carolina’s statutes reflecting a clearly articulated policy of displacing competition in and active supervision of the sale of electricity, notwithstanding complaint allegations that the body had exceeded its authority and was inadequately supervised by the state.35

Courts have also diverged on whether rulings on the dismissal of claims under state action immunity are immediately appealable. After North Carolina Dental, the Ninth Circuit held that a lower court order denying a dismissal motion based on state action immunity is not immediately appealable.36 The Ninth Circuit accepted that the Fifth and Eleventh Circuits ‘have reached the opposite conclusion’, but explained that disallowing immediate appeals of the rejection of the immunity defence is ‘the better view’ given, among other reasons, the Supreme Court’s caution against broad assertions of immunity against suits.37 Similarly, the DOJ has submitted an amicus brief arguing that refusing to dismiss under state action immunity is not immediately appealable.38

The most challenging issue since North Carolina Dental may continue to be whether the particular facts of individual cases can satisfy the application of state action immunity to government bodies with private actors. The Supreme Court implicitly acknowledged there would be **uncertainty** when recognising that application of the doctrine requires **a ‘flexible and contextspecific’ analysis**. Justice Samuel Alito’s dissent put a finer point on the uncertainty, identifying the **lack of clarity** on what constitutes ‘active market participants’ or how to define the markets in which they participate.39 One FTC commissioner agreed that these are ‘key questions that need to be addressed’.40 And they have been, somewhat, in recent years.

As Justice Alito forecasted, litigants and courts have **laboured** with determining whether government entities include sufficient privateparticipants to require such entities to prove satisfaction of both the ‘clearly articulated state policy’ and ‘active state supervision’ state action immunity prongs (~~as opposed to only the first).41 A developing approach to this issue among courts focuses on whether the private participants actually exercised control over the governmental entities in question. For instance, following North Carolina Dental, the Third Circuit reasoned that a state university does not need to satisfy the active state supervision prong because the private party with which the university allegedly conspired in real estate dealings had not dominated the university’s real estate decisions.42 More recently, a district court determined that a state agency tasked with overseeing certain healthcare programmes, with a board consisting of five healthcare providers and six members who were not healthcare providers, was excused from satisfying the active state supervision prong because the board was not ‘controlled’ by the private participants who comprised ‘only a minority’ of the agency board.43~~

~~A related issue that has proven to be equally challenging is whether the state itself must provide the required active supervision. To illustrate, the Ninth Circuit recently held that ‘active supervision must be “by the State itself ”’ and, consequently, the court ruled that Seattle’s ordinance regulating ride-hailing services (eg, Uber) was not eligible for state action immunity because the city of Seattle, rather than the state of Washington, supervised and enforced the ordinance.44 At the same time, other courts have found active supervision satisfied where provided by municipalities alone.45 As these and similar cases progress through the courts, further clarity on areas of uncertainty about state action immunity should be realised.~~

~~Conclusion~~

~~The Supreme Court’s decision in~~ **~~N~~**~~orth~~ **~~C~~**~~arolina Dental not only provides valuable guidance for the application of state action immunity, it also sets the stage for continued development of the doctrine. In the nearly five years since the decision, government antitrust enforcers have relied on it for broadening their enforcement of the federal antitrust laws against quasi-government actors.~~ **~~Private litigants have also relied on it~~** ~~in pursuing cases that portend widespread impact on state and local government operations. All who believe they operate with state action immunity should~~ **~~proceed with caution~~** ~~and consider reviewing their conformity with the principles explained by the Supreme Court, in addition to assessing whether they remain eligible for immunity~~

#### ~~Antitrust increases business confidence and growth broadly~~

**~~OECD 14~~**~~, Organization for Economic Cooperation and Development, “Factsheet on how competition policy affects macro-economic outcomes”, OECD, October 2014, https://www.oecd.org/daf/competition/2014-competition-factsheet-iv-en.pdf~~

~~Most importantly, it is clear that industries where there is greater competition experience~~ **~~faster productivity growth.~~** ~~This has been confirmed in a wide~~ **~~variety of empirical studies~~**~~, on an industry-by-industry, or even firm-by-firm, basis. Some studies seek to explain differences in productivity growth between industries using measures of the intensity of competition they face. Others look at the effects of specific pro-competitive interventions, particularly trade liberalisation or the introduction of competition into a previously regulated, monopoly sector (such as electricity).~~

~~This finding is not confined to “Western” economies, but emerges from studies of the Japanese and South Korean experiences, as well as from developing countries.~~

~~The effects of stronger competition can be felt in sectors other than those in which the competition occurs. In particular,~~ **~~vigorous competition~~** ~~in upstream sectors can ‘~~**~~cascade~~**~~’ to improve productivity and employment in downstream sectors and so through the~~ **~~economy more widely.~~**

~~The main reason seems to be that competition leads to an improvement in allocative efficiency by allowing more efficient firms to enter and gain market share, at the expense of less efficient firms (the so called between-firms effect). Regulations, or anti-competitive behaviour preventing entry and expansion, may therefore be particularly~~ **~~damaging for economic growth.~~** ~~Competition also improves the productive efficiency of firms (the so called within-firms effects), as firms facing competition seem to be better managed. This can even apply in sectors with important social as well as economic outcomes: for example, there is increasing evidence that competition in the provision of healthcare can improve quality outcomes.~~

~~There is also evidence that intervening to promote competition will~~ **~~increase innovation.~~** ~~Firms facing competitive rivals innovate more than monopolies (although after such competition a firm may of course end up with a monopoly through a patent). The relationship is not simple: it is possible that moderately competitive markets innovate the most, with both monopoly and highly competitive markets showing weaker innovation. However, as competition policy does not focus on making moderately competitive markets hyper-competitive, but rather on introducing or strengthening competition in markets where it does not work well, this would still imply that most competition policies serve to promote innovation.~~

~~Because more competitive markets result in higher productivity growth, policies that lead to markets operating more competitively, such as~~ **~~enforcement of competition law~~** ~~and removal of regulations that hinder competition, will result in~~ **~~faster economic growth.~~**

~~Is there evidence that pro-competitive policies are effective?~~

~~In addition to this evidence that competition promotes growth, there have been studies directly of the effects of competition law itself, and of product market deregulation. Although it is difficult to distinguish the effects of individual policy changes, there are some studies showing that introducing competition law raises productivity. Conversely, the selective suspension of antitrust laws in the USA during the 1930s seems to have~~ **~~delayed recovery.~~**

~~Many studies of the effect of competition law use international comparisons of different countries’ experiences, to assess whether countries with competition laws (or longer-standing, or more effective competition laws) achieve faster economic growth. The task is a difficult one because of many other factors that affect the overall economic growth rate, including other policies introduced at the same time (e.g. Eastern Europe’s transformation after 1989). Some studies find no effect, but the~~ **~~overwhelming~~** ~~majority of such studies do find a positive effect of competition law on economic growth. Most ascribe this effect to increased productivity, although there may also be an effect on investment, especially in developing countries, perhaps because competition laws~~ **~~boost business confidence~~** ~~and reduce corruption.~~

#### ~~No impact – Biz con’s irrelevant~~

~~Doll 16 – Bob Doll, Chief Equity Strategist at Nuveen Asset Management, “Despite Lackluster Growth, Equities Remain Attractive”, Financial Advisor, 8-9,~~ [~~http://www.fa-mag.com/news/despite-lackluster-growth--equities-remain-attractive-28409.html~~](http://www.fa-mag.com/news/despite-lackluster-growth--equities-remain-attractive-28409.html)

~~July’s jobs report confirmed that U.S. economic growth remains on track. 255,000 new jobs were created last month, the unemployment rate remained at 4.9% and average hourly earnings climbed 0.3%.2 These stronger-than-expected results raise the chances of a Fed rate hike before year end. Long-term U.S. growth has been lackluster and will likely remain so. Since the start of the recovery seven years ago, real gross domestic product growth has averaged just over 2%.3 Tailwinds such as the improving labor market and low mortgage rates have been counteracted by headwinds such as low business confidence. We expect these crosscurrents will persist. Nominal growth has been particularly weak this cycle. Compared to previous expansions, nominal growth (which includes the effects of inflation) has been extremely low.3 Since nominal growth is determined by both unit growth and pricing power, this trend has been a primary culprit behind recent weakness in corporate earnings. Increases in government spending are a mixed bag for the economy. After several years of a sequester-enforced decline in spending, government spending has increased in 2016.4 While this boosts economic growth, additional regulations and increased control of private resources through stringent health insurance rules limit the economy’s ability to promote higher standards of living. China’s economy is slowing, but the rate should be manageable. Fears of a Chinese hard landing have been a persistent worry for investors. Chinese authorities have been slowly shifting the country’s economy away from exports and investment spending and toward domestic consumption. We believe Chinese growth is slowing from the officially reported 10% level of a few years ago toward something closer to a more-sustainable 5% by the end of this decade.5 Despite Risks, the Global Economy Remains Resilient Since the current economic recovery began, investors have contended with a number of economic issues. The most recent risk has been the extent to which the Brexit vote might trigger widespread contagion. So far, it appears that outside of slowing growth in the United Kingdom, effects have been limited. Investor worries are now focused on Italy’s banking and political systems. Italian banks are struggling with a rash of bad loans on their balance sheets and thin capital buffers. This storm has been brewing for some time, and coincides with the upcoming constitutional referendum that could reshape Italy’s political system. Investors are rightfully viewing the turmoil with caution. In addition, many are questioning the overall state of the world economy in light of rising geopolitical instability, consternation over the upcoming U.S. elections, questions about global monetary policy, relatively low business confidence and a renewed slump in oil prices. Yet, we believe the global economy has been, and should continue to be, resilient in the face of all of these risks. We believe global monetary policy remains supportive of growth and the global recovery will continue, especially in the United States.~~

# 1AR

## Case

#### Advantage One: Innovation

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

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

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

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

#### 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

### Advantage Two: Federalism

Completely dropped it in the 1NC- completely goes aff- whatever they did on the flow for fed has to be null and void, they dropped it and we brought it up in our speech in the 2AC- it’s dropped and fed still goes aff- and cross ex binding that they did not get to Advantage 2 meaning that they dropped it cross ex binding

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

### Nano/AI – Combo Impact – 2AC

#### The combination is uniquely threatening

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

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

## Plan Flaw- ASPEC

#### Counter-interpretation --- say USFG, use normal means, and get to perm sub-specification counterplans.

#### It’s best:

#### Inflates Agent cplans – steals the Aff and hurts topic education

#### Aff over-specification destroys the Neg

#### Cross-ex checks

#### No rez basis – they devolve to Senator-spec -- limits-out the Aff

#### Not a voter --- just force us to specify

#### Reasonability is best: good is good enough, they cause a race to the bottom.

### T and Aspec – Counter-Definitions – 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**

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

**JTP 21**

#### 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

#### Counter-interpretation --- specify how scope is expanded, use normal means, and get to perm specification counterplans.

#### Inflates process counterplans – steals the aff and hurts topic education

#### CX checks

#### No rez basis---devolves into infinite regress and unpredictable over-specification that kills the Neg

#### Not a voter --- just force us to specify

Plan isn’t the text of legislation --- evidence clarifies implementation details

#### Reasonability is best: good is good enough, they cause a race to the bottom

---

#### Fiat solves circumvention – plan uses USFG and creates enforcement – their ev assumes the squo

#### Doesn’t contextualize – federalism advantage is about specific immunity issue that the aff addresses without needing to win future cases – Sack & Kobayashi

#### ( ) Their “all three branches” ev is deceptive.

#### It doesn’t prove USFG is a mass noun. It’s *inclusive* evidence that doesn’t prove a team non-topical if they’re solely one branch.

#### ( ) ~~counter-def – USFG includes all three branches – but all three do not have to act in order to be topical.~~

~~Absolute Astronomy ‘9~~

~~(Encyclopedia – http://www.absoluteastronomy.com/topics/Federal\_government\_of\_the\_United\_States)~~

~~The Federal Government of the United States is the central current reigning United States governmental body, established by the United States Constitution. The federal government has three branches: the legislative, executive, and judicial. Through a system of separation of powers and the system of "checks and balances," each of these branches has some authority to act on its own, some authority to regulate the other two branches, and has some of its own authority, in turn, regulated by the other branches.~~

#### Optional:

#### ( ) The T argument is wrong – we are resolved and their interpretation is spun

#### ( ) Plan is not void – government is not stupid and plan is not the legislation, it’s a reasonable outline

#### ( ) No sacred right to pre-round prep – new Affs prove

#### We meet – plan text says USFG

#### “Resolved” means firm

AHD 6 (American Heritage Dictionary,, http://dictionary.reference.com/browse/resolved)

Resolve TRANSITIVE VERB:1. To make a firm decision about. 2. To cause (a person) to reach a decision. See synonyms at decide. 3. To decide or express by formal vote.

#### “The” allows specification

Random House 6 (Unabridged Dictionary, http://dictionary.reference.com/browse/the)

(used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article *a* or *an*): the book you gave me; Come into the house.

#### -- Its good –

#### Ground – agent specific DAs, counterplan, case arguments

#### Education – who acts determines desirability

#### -- Defense

#### 2AC agent clarifications inevitable –plan is key to neg strategy

#### Not a voter – just force us to be the whole USFG

### Vagueness – 2AC

#### Counter-interpretation --- specify how scope is expanded, use normal means, and get to perm specification counterplans.

#### CX checks---they could have asked

#### No rez basis---devolves into infinite regress and unpredictable over-specification that kills the Neg

#### Not a voter --- just force us to specify

Plan isn’t the text of legislation --- evidence clarifies implementation details

#### Reasonability is best: good is good enough, they cause a race to the bottom

---

#### Fiat solves circumvention – plan uses USFG and creates enforcement – their ev assumes the squo

**Doesn’t contextualize – federalism advantage is about specific immunity issue that the aff addresses without needing to win future cases** – Sack & Kobayashi

## Cap K

#### Framework – the ballot’s about the plan’s desirability – their framework is self-serving, structurally favors the neg – voter for fairness

#### Clash that we learn from second-level testing of predictable claims breaks down biases and learn tactics for change – focusing on the contingent question of the resolution is key to unpack neoliberal motivations – their framework is reductionist – that’s Watts

### 1AR FW – AT: Topic Education / Fiat Bad

#### Group the topic education and fiat DAs – they’ve got it backwards:

#### Debating policies is key to effectively counter the technocrats

Pocock 9 (Barbara Pocock, Professor in the Business School, and Director of the Centre for Work + Life, at the University of South Australia, “The Uses and Misuses of Economics: Reflections of a Recovering Economist,” Hawke Research Institute Professorial Lecture Series, 11-3-2009, <https://www.researchgate.net/profile/Barbara-Pocock/publication/242759957_%27The_Uses_and_Misuses_of_Economics_Reflections_of_a_Recovering_Economist/links/004635320f6cded9b1000000/The-Uses-and-Misuses-of-Economics-Reflections-of-a-Recovering-Economist.pdf>) \*added [people]

However, in honours I was allowed - indeed required - to ‘think’ rather than ‘learn’. I was in a group of students who were obsessed with how the world got the way it was and how economic theory illuminated – or obscured - it. Geoff Harcourt taught the history of economic thought in a way which revealed that neoclassical economics was just one paradigm amongst several, and not a very satisfying one at that.

Economics as neutral, value-free science?

Neoclassical economics was just one way of looking at the economic world. And it was very peculiar. It did not include consideration of the distribution of income in its machinations; instead it focussed on the generation of product by the most efficient means – preferably through the invisible hand of markets. It was uncritical of profit. It was ‘above’ normative values: a positive, mathematical and scientifically grounded terrain. Such values are out of contest in this world. Neoclassical economics makes ‘market efficiency the core explanation for distributive outcomes’ and markets are deified as bastions of freedom and choice. (Freedman 2005). ‘Free’ markets are especially valued, for they allow individuals the most freedom in the economic world.

While even in the 1970s text books had chapters on market failure and externalities (those incidental outcomes that are not counted in economic calculus, like pollution) these were minor malfunctions on the otherwise robust body of economic theory.

Geoff Harcourt’s course showed how economics could ask other questions in other ways strange to neoclassical economics: about the meaning of value, inequality and the political purposes of economics – to function as a convenient veil for the system of profit.

This was the terrain of Joan Robinson, who contributed a great deal to the study of developing countries and growth. She once said ‘The purpose of studying economics is not to acquire a set of ready-made answers to economic questions, but to learn how to avoid being deceived by economists.’ And she replied to John Maynard Keynes famous statement that ‘in the long run we are all dead’ by saying ‘Yes, but not all at the same time’.

These economic thinkers were not neoclassical in approach. They were, in the tradition of David Ricardo, asking questions about power, income distribution, and the nature of values that underpin economic analysis. This is sometimes referred to as ‘political economy’ but in fact it is just asking the questions that neoclassical economics by and large foreclose.

It is not that values are not implicit in the valourisation of markets as the means of social and economic organisation; but in promoting markets, neoclassical economists aim to suggest that they stand above the muddy fray of normative talk. In fact they privilege money as a means of measuring value, expose society to powerfully destructive externality effects, and take the distribution of income, with which people approach markets, out of contention. In this way they veil the way in which markets shape inequality and give legitimacy to market outcomes and market institutions while undermining the institutions which constrain markets: regulation, governments and social welfare.

Fairness and gender at work

Through my working life and early engagement with economics, gender issues were a constant companion. I had read Germaine Greer and her shadow was present when I attended my first Agriculture Bureau meeting, the only woman; when I was the only woman in my honours class; when I was irritated by so many football metaphors in my economics lectures (Geoff Harcourt used them all the time: he was entitled to, given that he played Aussie rules until he was over 50). It was a fact that women only ever appeared in my economics lectures as housewives buying things.

Not surprisingly my first act of intellectual contest in this field of economics was around equal pay. When Peter Kenyon in a microeconomics tutorial showed how economic theory suggests that increasing women’s wages above their marginal productivity could well cost them their jobs, I asked rather nervously whether this effect would apply if they were being paid less than their marginal productivity to begin with - perhaps because of discrimination? He agreed that this jobs loss should not occur if this were the case.

I see now that I was trying to pull the social context into the labour market; this was not an original idea, but it is a practice that is underdone in economic theory.

I think I felt from then that wages were worth understanding, and that the tools of economic theory could help, but they needed to be located within their social and political context. Keith Hancock and Richard Blandy encouraged this thought with their lectures about institutions and social capital.

Economic theory can help, but only so much. And sometimes it is just wrong

Economic theory cannot explain gender inequality in wages: human capital theory takes us only so far. A framework that suggests that differences in men’s and women’s wages reflects their relative skills and experience does not stand up to empirical testing.

The ratio of Australian women’s to men’s wages has been steady at about 84% for decades, despite women’s rapid accumulation of human capital in the shape of qualifications and experience. Something else is going on here, and power plays a role: power built on gender inequality, the sexual division of labour which leaves unpaid work and care with women and mothers, and the failure of laws to eliminate discrimination against women, or to ensure fair pay. How else can we explain the continuing inequity in pay that gives more to a car park attendant than a child care worker? There is no microeconomic theory that can explain this, and inquiry after inquiry, and equal pay decision after equal pay decision by Australian wage fixing tribunals, have been unable to deal with the sticky, persistent problem of the underpayment of women. But I would not want you to think that I did not learn useful things through an economics degree.

I found – and still do – many of the foundation concepts of economics powerful and valuable. I wrote my thesis about economies of scale in wheat and sheep farming, and I found the clarity of supply and demand, and many other primary concepts of marginal utility theory, very powerful. However, their weakness lies in the hubris of so many economists who do not admit the limitations of economic theory in the world of real markets, real people, real information systems – that are so far from the perfect assumptions of economic theory as to be laughable. Just take the issue of perfect information. No one has this; indeed the transaction costs of ensuring it mean that few of us can practice it even in relation to relatively simple transactions like buying electricity or a phone plan. Indeed there is now quite interesting research evidence about the psychological burdens of too much choice (Schwartz 2004).

Some of my favourite economics lectures were about the operation of grubby and unruly spheres beyond the improbable assumptions of economic theory: the labour market and its governance – and the ways in which this was bought to life by Tom Sheridan, Ian McLean and Sue Richardson, not to mention Merv Lewis and the mysteries of international finance and macroeconomics.

I found to my advantage that an economics degree is highly over-valued in employment. I benefited from this over-valuation. In the eyes of some who recruited me, an economics degree made me into a kind of a man - someone more valuable that a women, some one ‘safe’, and perhaps properly aligned with the dominant values of central banking or public sector policy, for example. Probably - they hoped - not an unruly woman or a bleeding heart.

Learning from central banking

Five years on from my short career as a rouseabout and with an economics degree in hand, I undertook a short career in central banking, finding myself a long way from the sheltered umbrella of my landed, mallee farming family: a mere wage-earner on the streets of Sydney, working in the Reserve Bank where I discovered what it was like to have just a wage and a suitcase (and, it must be said, a big store of human and social capital).

I was, I suspect, something of a square peg in a round hole in the Reserve Bank where I worked for a bit over two years. I prepared briefing notes for the Governor on various countries that he was visiting. I had a stamp made that said ‘This exploits women’ for use on the early morning copy of the Australian Financial Review which circulated around the International Department, peppered with pictures of scantily clad women draped over photocopying machine advertisements.

I also learned a little about the working lives of the note counters who lived and worked – mostly women – in the bowels of the bank. Through them, I was introduced to unionism and ran for my first union election as shop steward in the Bank’s International Department. I had left Ayn Rand and the petty bourgeois farmer-shearers behind as I made my way down Redfern Street to the Bank in the morning, and saw how a whole set of things shaped my chances, and those I met. Individual effort was not enough when other things were not equal. People were not counting notes in the bowels of the Reserve Bank because they were lazy or lacked motivation. And my wages were not four times theirs because I worked harder: I did not.

I had come to the end of Ayn Rand. Personal efficacy can get you only so far.

Economics is made complicated: which shuts down debate

The failings of neoclassical economics are not only in the foreclosure of discussion about inequality and values-based discussion. They also lie in the ways in which power is ignored in economic life – the kind of power that separated me from the note counters - as well as the means economists employ which make the workings of the economic world obscure and difficult to understand for many citizens.

Nothing is perhaps more dangerous for democracy than the moment when citizens [people] give up engaging with technocrats and their intellectual handmaidens in the academy, in the hope that they – the intellectuals and technocrats - know what they are doing.

We have seen the recent fall out from this in the international financial collapse. The market for derivatives was an emperor without any sensible clothes: huge risks were being marketed in dangerous ways. But citizens [people] – and governments - had their fingers crossed because the workings of the international financial market had become too complex to understand or to govern.

However, as one wit put it, if something is too big to be allowed to fail – like a very large bank – then it is probably too big to be allowed to live – especially if its continued life depends on the welfare support of the tax payer in a non-reciprocal form of corporate welfare when failure looms.

Unfortunately, the paradigm of neoclassical economics does not lack for self-confidence. The global financial crisis has shaken the foundations of economic policy, revealing bankers and financial analysts as - at best - seriously flawed and - at worst - fools. This has not stopped bankers from continuing to defend their hefty bonuses – even as, in the UK case, the government invested 37 billion pounds bailing them out, with similar scenes in many countries.

Financiers and bankers’ intellectual handmaidens are neoclassical economics textbooks. Together they share an attachment to market mechanisms and to small government. Both should be held to account in the current crisis. Many policy-oriented economists have been instant converts from conservative monetarism to profligate Keynesianism and a one-sided market bail out, throwing aside decades of theoretical purity about government deficits in favour of unseemly barracking for government rescue. Not least amongst these was Alan Greenspan, former chairman of the US Federal Reserve - and a devotee of Ayn Rand - who admitted to “shock” that financial markets didn’t worked as he expected (Jackson 2009: 31). While UK bankers have said ‘sorry’ for their role in the crisis, economists have yet to apologise. They cannot predict how long the current international crisis will last or whether the current remedies will work. They can confirm, however, that relying on the past as a guide to the future is not wise.

The discrediting of unbounded, poorly regulated markets which follows from the current global financial crisis draws attention to the frayed garb of conventional economic theory. It invites a more assertive, diligent and evidence-based research effort - linked to policy and planning - in relation to markets and their inappropriate operation in some spheres of social and economic life.

We may be waiting for a long time to hear the apologies of some neoclassical economists who uncritically backed the rapid expansion of risky lending to keep the engine of economic growth on track.

Markets: Good servants, bad masters

We are overdue for a thorough discussion about the limitations of markets. The old observation that markets make good servants but bad masters, was never more salient. Prime Minister Rudd (2009) has argued for a rethink around markets and economic orthodoxy. However, his own Government is facing two very distinctive market crises in relation firstly to carbon and secondly in relation to the sale of that most fragile of human ‘products’: care of infants and children. I am not going to deal with the Carbon Pollution Reduction Scheme (CPRS) here (but there are many problems with it - see for example, various papers at; https://www.tai.org.au including Denniss 2008). However, I would like to address the second – the limitations of markets in relation to the care of children.

#### AND, they also fiat – ie, imagine actions they lack the power to implement – ALT answers prove that’s even less productive than our model

### 1AR FW – AT: Ethics O/W

#### Ethics first is a meaningless tautology – must be a function of careful evaluation of consequences – their impact frame only replicates government and corporate reckless disregard for so-called unintended consequences

Zanotti 17—Associate Professor Department of Political Science, Virginia Tech (Laura, “Reorienting IR: Ontological Entanglement, Agency, and Ethics,” International Studies Review, January 13, 2017, dml)

In this article, I have argued that in order for IR to remain politically relevant and critical, we must rethink and reflect on the ontological, epistemological, and methodological assumptions of the discipline. I then explored how onto-epistemologies, ethics, and political agency are interlinked. Ontologies of entanglement tend to embrace complex conceptualizations of causality and the morphogenetic properties of what exist. In a quantum world, ontological cuts happen in practices. This worldview invites a reconsideration of the way we justify and address political decisions and ethical action beyond the universalism supported by atomistic ontologies and the stifling limits imposed by substantialist-structuralism. As Nick Onuf has argued, “In a straightened world, as in a world in turmoil, talk of universal principles rings hollow… In such a world, positional ethics is the best we can hope for” (Onuf forthcoming, quoted with permission). A quantum reconceptualization of our being in the world and our relation to matter calls for a profound sense of modesty, as well as for the central role of responsibility for taking political decisions. In an entangled world that is not governed by theoretically detectable, linear, and immutable laws of history, but instead by intra-agential processes, the conditions of possibility for political agency are rooted in the morphogenetic properties of practices. Taking responsibility for critically questioning what exists without the hubris of assuming our ability to ordain outcomes displays an affinity with Foucault’s methodological and political project. In this vein, ethical guidelines may not be grounded on abstractions stemming from the solitary ruminations of an individual’s mind. Prudence, responsibility, and practices of cultivation of the self offer pathways to overcome the limitations of the Kantian categorical imperative by which universal prescriptions are the main way of validating ethical choices. As Patomäki has shown, universalism may elicit exclusionary and violent practices. Moreover, as Connolly has argued, the nostalgia for a slowly moving world regulated by linear relations of causality and characterized by certainty and stability may be the root of fundamentalism. Furthermore, if we accept Barad’s position that we are “of the world” and not above the world, theorizing looks more like a practice endowed with performative political effects than a quest for the discovery of the “true nature” of what exists. Therefore, intellectual undertakings are a form of political agency and come with great responsibility. Such responsibility requires the need for exercising prudence in making truth statements about what is universally good or naturally inevitable. Assumptions about linearity of causal relations, universal laws of history, or ontological properties of entities yield two problematic effects. On the one hand, they may stifle political imagination; on the other hand, they could encourage actions based upon abstract prescriptions rather than upon careful diagnosis of the forces that obtain in the situation at hand. In an entangled world, there are no externalities. Arguments that divert responsibility by basing political choices upon abstract principles or aspirations and, as a result, that treat what happens on the ground as “unintended consequences” or “collateral damage,” are ethically thin and politically dangerous. In fact, unintended consequences may well be the result of irresponsible political decision-making that does not include a competent assessment of the practical configurations that constitute the context of action and the means necessary to achieve stated goals. Such attitudes, Amoureux and Steele (2014) have suggested, have led to disastrous initiatives, such as the Bush administration’s invasion of Iraq. Likewise, Kennedy (2006) has shown that the bland rhetoric of jus in bello that provides standardized criteria regarding the number of acceptable civilian casualties (conveniently called collateral damage) produces the effect of diverting responsibility from those who conduct war while assuaging their consciences concerning the injuries and deaths their choices are inflicting. Kennedy (2004) has also shown that as a result of the preference for universal normativity, the human rights profession (which he calls “the invisible college”) is more concerned with protecting abstract norms than with acting politically so as to devise viable solutions to specific problems. Universal norms and bureaucratic routines play a major role in prescribing and justifying UN peacekeeping interventions. As Jean Marie Guehénno argued more than a decade ago, strategies of international intervention based upon assumptions of causal linearity and invariance may amount to hubris. Norms and rules can also offer grounds for appeasement. The massacres that occurred in Rwanda and Srebrenica in the 1990s provide examples of how, by uncritically following institutionalized rules, United Nations peacekeepers permitted atrocities. UN employees are not cold-blooded monsters or extremely callous individuals. They follow norms and rules, key examples of which include the principle of “impartiality,” Security Council mandates, and “rules of engagement.” By doing so, however, they have often fallen short of considering the possible consequences of decisions in specific situations. The United Nations’ failure to take action to prevent the Rwanda and Srebrenica genocide testifies to the fact that following universal norms (i.e., the imperative to preserve impartiality) and bureaucratic reasoning (i.e., the rules of engagement prescribing not to intervene to disarm any party of the conflict) set the stage for avoiding a careful assessment of what was at stake on the eve of the massacres. These ways of reasoning also appeased consciences for not making decisions accountable to the people in danger (Zanotti 2014). Significantly, the lack of prudence that derives from broad overgeneralizations and reliance on abstractions, rather than careful consideration of what the case demands, threatens more self-defeating outcomes in peacekeeping and international politics. This is why a careful reflection of the ways our political choices are validated ontologically and epistemologically is of paramount practical importance. Seven decades ago, Carr (1946) advocated the need for conceptualizing political agency and ethics in a way that addresses both the limits of the idealist illusion regarding the possibility to transform reality through acts of will as well as the realist persuasion about the inescapable subordination of actors to external conditions. Both of these positions, Carr pointed out, lead to self-defeating outcomes and stifle political imagination because they focus on general abstractions, failing to take into consideration what conditions and political opportunity actually obtain in specific historical configurations. Here I have proposed that an ontology of entanglement fosters an ethic of engagement and activism along the lines suggested by Foucault and opens up possibilities for political action. In this ontological horizon, what qualifies as meaningful agency is not stifled by the structuralist commitment to the stabilizing effects of structures (like in Waltz’s) or by the inescapable features of an oppressive and alienating social order that dispossess subjects of their humanity and reduces them to “bare life” (as in Agamben). Instead, micropolitical interventions, parrēsia, and the cultivation of a particular kind of character, while not revolutionizing the status quo, may be relevant to triggering social change. Importantly, ontologies of entanglement also raise the bar for adjudicating the ethical validity of political choices. Radical assumption of responsibility drastically limits what is acceptable as “unintended consequences.” This is important for the way international organizations make decisions regarding international peacekeeping interventions and for the way politicians decide to wage war. Ethically and politically sound decision-making cannot be based mainly upon the apodictic recognition of universal rules of behavior, abstract aspirations, or overarching theories of the functioning of society. They must also include careful analysis of how clusters of causes may generate effects in the specific contexts at hand and take responsibility for the ontological cuts our initiatives operate and for the morphogenetic processes they may set off.

### Link

#### No link – we agree competition theory is flawed now – regulated innovation is how we reign in capitalism – they have no link ev the plan causes what their impacts talk about – that’s Mazzucato

#### If the alt avoids the link, it can’t solve pandemics OR tech – only innovation systems can solve in time – abandonment fails – that’s Stiglitz – prefer Nobel prize winner analysis

#### ~~Links turn themselves~~

~~Cleary 21 (Joe Cleary, Professor of English, Yale University, Ph.D. Columbia University, 1997, November 15~~~~th~~ ~~2021, “Policy, citizen engagement and corporate strategy to transition to a sustainable world in the decisive decade” Energy Hub,~~ [~~https://energyhubplus.org/wp-content/uploads/2021/06/20211115-Joe-Cleary-COP26-Paper.pdf~~](https://energyhubplus.org/wp-content/uploads/2021/06/20211115-Joe-Cleary-COP26-Paper.pdf)~~) CULTIV8~~

~~Neoliberal doctrine that views government as an institution existing only to correct market failure ‘creates a self-fulfilling prophecy whereby government does too little, too late’. To challenge this, Mazzucato advocates not for ‘big’ or ‘small’ government, but a different ‘type of government’. Government itself must become an innovative organization capable of continual development, from being ‘merely an “enabler” or even a “stifler” of innovation to becoming the engine of innovation’.~~

### PNCP

#### Extend the Perm – do the plan and non-competitive parts of the alt – mixed economies solve market failures but we’re winning offense in the area of the plan – radical reform combined with antitrust is best and mobilizes coalitions – that’s Mazzucato and Berk

#### ~~The perm’s iteration checks the market~~

~~Mazzucato 21 (Mariana Mazzucato is Professor in the Economics of Innovation and Public Value at University College London where she is the founding director of the UCL Institute for Innovation and Public Purpose. She is winner of international prizes including the 2020 John von Neumann Award and the 2018 Leontief Prize for Advancing the Frontiers of Economic Thought. January 28~~~~th~~ ~~2021, “Mission Economy: A Moonshot Guide to Changing Capitalism” via kindle, pages 174-175) CULTIV8~~

~~To co-create value and shape markets, public and private organizations need dynamic capabilities of experimentation and learning. While the need to be a learning organization is often emphasized in the private sector, it is not so true in the public sector which has, as discussed in Chapter 3, been relegated to the role of a simple market fixer and enabler of value created by business. A more proactive, market-shaping approach requires rethinking the ways in which public organizations create and implement strategic actions (from leadership capabilities to how they engage with groups, other organizations and even individuals in society), rethinking how the civil service is developed (from training to performance assessment and promotion), and rethinking how work in public organizations is managed (from cross-sectoral teams to iterative experimentation, a process which goes through several stages, developing the concept and testing it to produce a workable innovation).9~~

### Sustainability

#### Sustainability is not offense and doesn’t flip calculus – they don’t have link evidence that the aff prevents solutions to these problems – and, there’s no evidence the alt can solve those problems – proves the perm is key

### Alt

#### Alt fails – extend Smith

#### can’t solve case – policy intervention into markets is key to both advantages – [what they do] can’t resolve our internal links

#### 2. Transition war ~~– quick recession causes lash-out, probing, and interventions during restructuring – magnified by corporate capture~~

~~Slobodian 21 (Quinn, Associate professor at Wellesley College, previously was a Residential Fellow at the Weatherhead Center for International Affairs, Harvard University, “The Backlash Against Neoliberal Globalization from Above: Elite Origins of the Crisis of the New Constitutionalism,” April 7~~~~th~~~~, 2021, https://doi.org/10.1177/0263276421999440)//NRG~~

~~Journalists later revealed that funding for the film came from the country’s second-largest steel company, Nucor, funneled through a non-profit organization (Timiraos and Ballhaus, 2018). Both film and book followed closely the talking points of Nucor’s CEO at the time, Dan DiMicco. Singled out as an exemplary CEO in Death by China, DiMicco is also quoted as saying: ‘We’ve been in a trade war with China for more than a decade. But they are the only ones firing the shots!’ (Navarro and Autry, 2011: 66, 242). DiMicco spoke on behalf of one of the perceived losers of free trade globalization as employment in steel had been hit by the so-called ‘China Shock’ of import competition alongside the much more consequential increase in productivity (Griswold, 2019). He pioneered many of the points later taken up by Trump, including the attack on China’s ‘mercantilist and predatory trading practices’, including currency manipulation and illegal subsidies, and the call for domestic energy independence and protection of domestic manufacturing (DiMicco, 2009). In an op-ed co-authored with Navarro, DiMicco described China as a global threat that needed to reform or ‘be engulfed in a trade war largely of its own making’ (Navarro and DiMicco, 2010).~~

~~The echoes of DiMicco in Trump’s rhetoric are not coincidental. DiMicco was one of Trump’s campaign advisors, alongside Navarro and a range of hedge fund managers and real estate CEOs, along with veterans of the neoliberal think tank archipelago like Stephen Moore of ALEC and Club for Growth and the inspiration to Reagan’s top marginal tax cuts, Arthur Laffer (Matthews, 2016; Moore and Laffer, 2018). DiMicco took the lead on trade policy for Trump, steering the transition team on the USTR and interviewed for the job himself before the selection of Lighthizer (Fares and Lawder, 2016). True to DiMicco and Navarro’s threats, among the first acts of the new government was the commencement of a trade war through steel and aluminum tariffs with China as a primary target. This was done first through a ‘national security clause’ (Section 232) followed by further tariffs authorized by a Section 301 investigation led by Lighthizer (Park and Stangarone, 2019; Slobodian, 2018a). A 25 percent tariff was placed on steel in 2018, lifted for Canada and Mexico in 2019. Trump tweeted regularly about steel, perhaps most memorably on 2 March 2018, when he wrote: ‘We must protect our country and our workers. Our steel industry is in bad shape. IF YOU DON’T HAVE STEEL YOU DON’T HAVE A COUNTRY.’~~

~~How to make sense of the steel industry’s apparent capture of US trade policy? In sponsored vehicles for their message like Death by China, steel lobbyists crafted a persuasive narrative about the immiseration of the heartland and those left behind by globalization, reproduced by many journalists and politicians despite the sparse evidence that tariffs have the capacity to reverse the symptoms identified. Protection did pay off in the short run for Nucor’s shareholders as the stock price doubled from January 2016 to January 2018, though it has fallen since. Was Trump’s steel-friendly trade policy the opposite of New Constitutionalism? A ‘post-neoliberal’ return to ‘power’ after the 1990s dogma of ‘rules’?~~

~~One must draw distinctions between the economic imaginaries of Trump’s advisors. Lighthizer continues to adhere to ‘competitive liberalization’, according to which unilateral action can be market-opening, producing a more ‘level playing field’ (to use the common metaphor) and perhaps even a future multilateral settlement (Wraight, 2019). Arriving at this destination requires many of the tools of the New Constitutionalism. Lighthizer is keen on extending the purview of economic juridicization well beyond the Chinese border into its court system to ensure compliance with intellectual property laws. In this sense, we see an intensification of some aspects of the legalized political economy of the 1990s and certainly the market-opening protectionism of the 1980s (Miller, 2018).~~

### ~~Sustainability~~

#### ~~Innovation key to sustainability – next 5 years is key to unlock active removal, refreezing, and shift to circular economies that break feedback loops – they dropped that mitigation alone even for centuries can’t solve in time – err aff we cite the IPCC – gold standard for climate data – that’s King~~

#### ~~Speed flips try or die~~

~~\*fyi, the policies mentioned here are widely advocates by dedev authors and can be applies to more than Hickel (Alexander, Trainer, etc)~~

~~Piper 21 (Kelsey, writing with Vox, citing Zeke Hausfather, climate scientist at the Breakthrough Institute, and Michael Mann, climatologist at Penn State, “Can we save the planet by shrinking the economy?,” 8/3/21,~~ [~~https://www.vox.com/future-perfect/22408556/save-planet-shrink-economy-degrowth)//NRG~~](https://www.vox.com/future-perfect/22408556/save-planet-shrink-economy-degrowth)//NRG)

~~As a policy program, degrowth suffers from being both too radical and not radical enough. There’s a lot of broad-brush policy prescriptions in the degrowth lit, but those details never really add up. While it’s not a short book, Less Is More feels surprisingly sparse when it comes to envisioning how the changes it recommends could be brought about. The chapter on solutions recommends cutting the workweek and changing tax policy — two solid proposals — but then rounds that out by recommending ending technological obsolescence, advertising, food waste, and student debt. I’m not particularly opposed to those policies. But they seem laughably inadequate for the magnitude of the task at hand: confronting the climate crisis. Degrowth successfully persuades that guiding humanity and our planet through the 21st century will be really, really hard — but not in a way degrowth particularly solves. Where degrowth literature is relentlessly pessimistic about the prospect of our problems being solved under our current economic system, it turns oddly optimistic about the prospect that they’ll be solved once we embrace a different way of viewing wealth and progress. If cutting carbon emissions fast enough to matter requires shrinking the global economy by 0.5 percent a year indefinitely, starting right now, as the Nature paper estimates, that’ll take policy measures much larger and more ambitious than any proposed in Less Is More. “If we are to avert catastrophic warming, we have to lower carbon emissions by a factor of two within the next 10 years. I find it highly implausible that capitalism/market economics will be abandoned by the world on that time frame,” Pennsylvania State University climatologist Michael Mann told me. “That means we have to act on the climate crisis within the framework of the current system.” In that sense, there’s actually something anti-radical about any climate plan so radical that it can’t be concretely brought about in the next decade.~~

#### ~~No “bubble” either~~

~~Gelzinis~~ **~~‘~~**~~21 [Gregg; 5/11/21; associate director for Economic Policy at American Progress; "Addressing Climate-Related Financial Risk Through Bank Capital Requirements," https://www.americanprogress.org/issues/economy/reports/2021/05/11/498976/addressing-climate-related-financial-risk-bank-capital-requirements/]~~

~~In either an orderly or a disorderly scenario, banks with overly risky balance sheets that are not aligned with a low-carbon economy could face severe losses, increasing risks to the economy, communities, the Deposit Insurance Fund, and other public funds. Research suggests that the direct and indirect exposures to carbon-intensive sectors could propagate stress throughout the financial system and trigger broader instability in the banking system.41 Banking regulators should ensure that banks are resilient to the heightened credit, market, operational, reputational, and liquidity risks created by the clean energy transition and are well-positioned to meet the needs of a low-carbon economy.42 Immediate financial regulatory action can help prevent the carbon bubble from bursting suddenly, an event that former Governor of the Bank of England Mark Carney has referred to as a “climate ‘Minsky moment.’”43 As an early and important step toward that end, banking regulators should increase the risk-weighted capital requirements for the bank exposures facing the most acute transition-related risks. Accounting for severe transition risks in the capital framework quickly would improve the resiliency of banks and prevent the inevitable clean energy transition from causing instability in the banking system.~~

## FTC CP

#### Perm – do both – solves the link- independent FTC fails

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

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

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

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

**Doesn’t solve federalism**

#### – arg is about Court interpretive precedent allowing states to experiment – Sack and Kobayashi

### ~~Section 5 CP – Rollback – 1AR~~

#### ~~Independent FTC action struck down- cross ex binding~~

~~Crane 10 that’s against their own author [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.”~~

#### ~~Judicial nullification wrecks solvency – uniformly read down liability to protect big business~~

~~Crane 20 [Daniel A. Crane, Frederick Paul Furth, Sr. Professor of Law, University of Michigan, 3-1-2020 https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3561870]~~

~~Judges and scholars frequently describe antitrust as a common law system predicated on open-textured statutes, but that description fails to capture a~~ *~~historically persistent~~* ~~phenomenon; judicial~~ *~~disregard~~* ~~of the plain meaning of the statutory texts and manifest purposes of Congress. This pattern of~~ *~~judicial nullification~~* ~~is not evenly distributed: When the courts have deviated from the plain meaning or Congressional purpose, they have~~ *~~uniformly~~* ~~done so to~~ *~~limit the reach of antitrust liability~~* ~~or~~ *~~curtail the labor exemption~~**~~to the benefit of industrial interests~~*~~. This phenomenon cannot be explained solely or even primarily as a tug-of-war between a progressive Congress and conservative courts. The judges responsible for these decisions were far from uniformly conservative, Congress has not mobilized to overturn the judicial precedents, nor, despite opportunities to do so, have the courts constitutionalized their holdings to prevent Congressional overriding. Antitrust antitextualism is best understood as an implicit political arrangement in which Congress writes broad statutes expressing anti-bigness republican idealism, and then the courts~~ *~~read down the statutes~~* ~~pragmatically to accommodate competing demands for efficiency and industrial progress.~~

## ~~Biz Con~~

#### ~~Extend No link – Parker immunity has narrow applicability – zero evidence it broadly collapses certainty~~

#### ~~Extend no link Best literature review proves biz con is irrelevant for prosperity – it reflects political conditions and isn’t predictive – even the best theoretical studies are correlative not causal~~

**~~Salmond 9 –~~** ~~meaning no impact because best literature proves biz con is irrevleant~~

#### ~~No impact – Biz con’s irrelevant~~

~~Doll 16 – Bob Doll, Chief Equity Strategist at Nuveen Asset Management, “Despite Lackluster Growth, Equities Remain Attractive”, Financial Advisor, 8-9,~~ [~~http://www.fa-mag.com/news/despite-lackluster-growth--equities-remain-attractive-28409.html~~](http://www.fa-mag.com/news/despite-lackluster-growth--equities-remain-attractive-28409.html)

~~July’s jobs report confirmed that U.S. economic growth remains on track. 255,000 new jobs were created last month, the unemployment rate remained at 4.9% and average hourly earnings climbed 0.3%.2 These stronger-than-expected results raise the chances of a Fed rate hike before year end. Long-term U.S. growth has been lackluster and will likely remain so. Since the start of the recovery seven years ago, real gross domestic product growth has averaged just over 2%.3 Tailwinds such as the improving labor market and low mortgage rates have been counteracted by headwinds such as low business confidence. We expect these crosscurrents will persist. Nominal growth has been particularly weak this cycle. Compared to previous expansions, nominal growth (which includes the effects of inflation) has been extremely low.3 Since nominal growth is determined by both unit growth and pricing power, this trend has been a primary culprit behind recent weakness in corporate earnings. Increases in government spending are a mixed bag for the economy. After several years of a sequester-enforced decline in spending, government spending has increased in 2016.4 While this boosts economic growth, additional regulations and increased control of private resources through stringent health insurance rules limit the economy’s ability to promote higher standards of living. China’s economy is slowing, but the rate should be manageable. Fears of a Chinese hard landing have been a persistent worry for investors. Chinese authorities have been slowly shifting the country’s economy away from exports and investment spending and toward domestic consumption. We believe Chinese growth is slowing from the officially reported 10% level of a few years ago toward something closer to a more-sustainable 5% by the end of this decade.5 Despite Risks, the Global Economy Remains Resilient Since the current economic recovery began, investors have contended with a number of economic issues. The most recent risk has been the extent to which the Brexit vote might trigger widespread contagion. So far, it appears that outside of slowing growth in the United Kingdom, effects have been limited. Investor worries are now focused on Italy’s banking and political systems. Italian banks are struggling with a rash of bad loans on their balance sheets and thin capital buffers. This storm has been brewing for some time, and coincides with the upcoming constitutional referendum that could reshape Italy’s political system. Investors are rightfully viewing the turmoil with caution. In addition, many are questioning the overall state of the world economy in light of rising geopolitical instability, consternation over the upcoming U.S. elections, questions about global monetary policy, relatively low business confidence and a renewed slump in oil prices. Yet, we believe the global economy has been, and should continue to be, resilient in the face of all of these risks. We believe global monetary policy remains supportive of growth and the global recovery will continue, especially in the United States.~~