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#### Despite legal victories narrowing the scope of Paker, the current legal regime protects incumbent interests in the digital economy and stifles the development of disruptive technology

Ohlhausen 20 [Maureen K. Ohlhausen chairs the antitrust group at Baker Botts LLP, J.D. with distinction from the George Mason University School of Law, 10-4-2020 https://gaidigitalreport.com/2020/10/04/occupational-licensure-in-digital-markets/#\_ftn2]

Introduction

Innovative technologies and business models are propelling the digital economy to its current heights, as well as serving consumer needs in response to unforeseen challenges caused by the COVID-19 pandemic. These technologies and business models are frequently disruptive and often bump up against restrictions that require the innovator to obtain some kind of government permission, such as a government license, to enter a market, which is a ‘Mother, May I?’ approach to competition.[1]

Relatedly, some new offerings in the digital economy are subject to the ‘Brother, May I?’ problem, which is the challenge of competitor control over market entry.[2] This problem arises when innovative technologies or business models are required to obtain permission from incumbent competitors to enter or expand within a certain market. This might be due to a financially-interested state board or conduct by a monopolist looking to maintain its market power.[3] A recurring version of the ‘Brother, May I?’ problem stems from occupational licensure.

Although occupational licensure can offer important benefits—such as protecting consumers from health and safety risks that are difficult for them to assess on their own—not all licensing is warranted. Indeed, licensing restrictions may impede competition and hamper entry into professional and services markets while offering few consumer benefits. These regulations may result in higher prices, lower quality, and reduced consumer access to services and goods, including healthcare. This is especially true with innovative entrants in the digital economy who are often denied the ability to compete in a traditionally regulated market. In the long run these unnecessary restrictions can cause lasting damage to competition, rendering markets less responsive to consumer demand and dampening incentives for innovation.

Incumbent competitors have strong incentives to raise barriers to competition that the state will enforce for them. When licensing establishes entry conditions for an occupation, only individuals who satisfy those conditions are legally authorized to provide the services associated with that occupation, which tends to reduce the number of market participants and benefit those who meet the qualifications by allowing them to charge higher prices.[4] Although antitrust law is normally a check on collective action by competitors to reduce competition, activities to seek government action, even anticompetitive action, are immune from liability under First Amendment protections.[5] And public choice scholars have explained the incentives legislators and regulators might have to adopt economically harmful limits such as unnecessary occupational licenses.[6]

To provide context for this chapter on the interplay between occupational licensing and digital markets, it is important to understand the underlying concepts that guide the antitrust analysis for control of market entry under the color of state law. Several Federal Trade Commission victories in court—North Carolina Dental[7] and Phoebe Putney[8]—established clearer boundaries between true state action, which is immune from antitrust law, and private action, which is not, a key distinction in combatting anticompetitive occupational licensure that requires competitor permission to enter a market. Anticompetitive occupational licensure has been extended to the digital economy when online companies have been forced out of markets where traditional brick and mortar competitors blocked entry—Teladoc,[9] Tennessee Wine and Spirits,[10] Hines,[11] and Vizaline.[12] With innovation flooding the digital economy, traditional brick and mortar competitors have sometimes used occupational licensure to prevent entry into the market. Although this chapter is focused primarily on antitrust challenges to occupational licensure, the array of cases affecting licensing of digital commerce discussed involves challenges on a variety of Constitutional grounds, including the Commerce Clause and the First and Fourteenth Amendments. Each case implicates the same underlying issue, however: state regulation to protect entrenched bricks and mortar entities from digital commerce.

This chapter proceeds as follows. Section I begins with the background and recent history of the state action doctrine and its relation to occupational licensure, addressing the recent cases listed above. Section II discusses recent and current litigation involving competitors using the ‘Brother, May I?’ approach to prevent new technology in the digital economy from entering the market. Section III argues that the FTC’s targeted efforts in North Carolina Dental and Teladoc should extend to current issues in the digital economy by narrowing the use of occupational licensure for health services to regulations that actually protect health and safety. Section IV discusses the Commerce Clause implications caused by occupational licensure on new technology in the digital economy. Section V concludes this chapter.

I. The State Action Doctrine and State Licensing Boards

The state action doctrine—first announced in the 1943 U.S. Supreme Court opinion, Parker v. Brown,[13]—gives certain state decisions protection from the reach of the Sherman Act. The Court reasoned that “in light of states’ sovereign status and principles of federalism, Congress would not have intruded on state prerogatives through the Sherman Act without expressly saying so.”[14] The Parker Court set a threshold inquiry for invoking state action immunity, which is whether the anticompetitive action was by the sovereign or by a private party.

State action immunity has been modified doctrinally through the years. Four decades after creation of the state action doctrine, the Supreme Court limited its scope by creating a two-part test in California Retail Liquor Dealers Assn v. Midcal Aluminum, Inc.[15] First, the defendant claiming the immunity must demonstrate that the conduct in question was in conformity with a “clearly articulated” state policy. Second, the defendant must demonstrate that the state engaged in “active supervision” of the conduct.

The Midcal test limited the use of the state action doctrine by creating political accountability for state legislators that choose to displace competition through regulation. However, even with these limitations, the problem of private competitors claiming the protection of state authority to shield their private efforts to exclude competitors remains, and the FTC therefore undertook an organized effort to bring further clarity to the state action doctrine through scholarly research and targeted case selection.[16] The Phoebe Putney and North Carolina Dental decisions represent not only a narrowed interpretation of antitrust immunity under the state action doctrine but highlight the issues with state regulation and occupational licensure.

A. Phoebe Putney and Certificate of Need Laws

In April 2011 the FTC filed a complaint challenging a merger involving a local hospital authority in Albany, Georgia.[17] The parties arranged to have the local hospital authority acquire Palmyra Park Hospital from HCA Inc. and then transfer all management control of the hospital to Phoebe Putney Health System, Inc. Although the transaction represented a virtual merger-to-monopoly, both the district court and Eleventh Circuit Court of Appeals granted and affirmed the defendants’ motion to dismiss on state action grounds.[18]

The FTC then turned to the Supreme Court, which in a unanimous 2013 decision sided with the agency.[19] For their actions to be immune from antitrust laws under the state action doctrine, private entities must demonstrate the state “clearly articulated and affirmatively expressed” a policy displacing competition and thus allowing the otherwise anticompetitive conduct at issue.[20] The Court held that a general grant of corporate powers to a private entity is insufficient by itself to satisfy the clear articulation prong of Midcal.[21] Therefore, the challenged transaction was not immune from antitrust scrutiny, and the case was remanded for further proceedings.

The FTC complaint counsel resumed the administrative litigation that had been stayed. It did not take very long, however, before the agency recognized a potentially insurmountable hurdle to a successful resolution of this case: the Georgia certificate of need (“CON”) laws.

CON laws establish requirements for state approval before a new health care provider can enter a market or an existing provider can make certain capital improvements, a classic “Brother May I?” situation.[22] Normally, states are not directly involved in the entry or improvement decisions of private firms except for requiring firms to comply with zoning laws and other general commercial regulations. However, CON laws were created so that the state could step in and prevent competing hospitals from purchasing equipment that would sit idle to keep up with other competing hospitals, which was claimed to prevent waste and lower health care costs. Although a small number of studies identify some very modest benefits from CON laws, the majority of studies fail to establish any definitive link between CON laws and lower unit costs.[23] Even with the lack of conclusive data showing an increase in consumer welfare through CON laws and the presence of other laws that ensure patient safety about two-thirds of states continue to use the antiquated regulation.[24]

Georgia is one of those states, and even if the Commission could have established antitrust liability, which was likely for a merger to monopoly, the state CON laws would have prevented a divestiture of any hospital assets.[25] Because the Albany region was deemed ‘over-bedded’ it was unlikely that a divestiture buyer could obtain CON approval, which forced the FTC to finalize a consent agreement with Phoebe Putney without divestiture.[26]

There are several takeaways from the Phoebe Putney matter. Importantly, the Supreme Court decision narrowing the state action doctrine is a significant victory for competition principles. It is also a reminder of the anticompetitive nature of laws that effectively give competitors veto power over new market entry.

B. North Carolina Dental, State Licensing Boards Run by Market Participants

In 2010, the FTC filed an administrative complaint in North Carolina Dental, alleging that the State Board—through its dentist-members—was “colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services.”[27] The Board, after deciding that whitening teeth constitutes the practice of dentistry, issued letters to non-dentist providers and their landlords, stating they were illegally practicing dentistry without a license and ordering them to cease and desist.

Prior to the administrative trial over the alleged violation of § 1 of the Sherman Act, the Board filed a motion to dismiss—arguing immunity under the state action doctrine.[28] The FTC, in a unanimous opinion, held that “a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy both prongs of Midcal to be exempted from antitrust scrutiny under the state action doctrine.”[29] The Commission further found that the decision to classify teeth whitening as the practice of dentistry and to enforce cease and desist orders based on that decision failed to demonstrate ‘active supervision’ by the state under the Midcal test.[30]

On appeal, the Fourth Circuit Court of Appeals denied the Board’s petition for review of the FTC’s order and affirmed the decision.[31] In 2015, the Supreme Court ruled in the Commission’s favor, holding that “a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy Midcal’s active supervision requirement in order to invoke state-action antitrust immunity.”[32] A few aspects of the Court’s opinion stand out.

First, the Court explained while citing Phoebe Putney that, “given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, ‘state action immunity is disfavored, much as are repeals by implication.”’[33] Next, the Court focused on political accountability. After rejecting the idea that state agencies are sovereign actors, the Court contrasted state agencies to municipalities.[34] Most significantly, the Court noted that “municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market.”[35] Finally, the Court briefly addressed the issue of active supervision as it relates to a state agency controlled by market participants. Although the Court made clear that day-to-day involvement in agency operations is not required, it identified a few constant requirements of active supervision:

(1) Review [of] the substance of the anticompetitive decision, not merely the procedures followed to produce it; (2) supervisory ‘power to veto or modify particular decisions to ensure they accord with state policy;’ (3) the ‘mere potential for state supervision’ is insufficient; and (4) ‘the state supervisor may not itself be an active market participant.’[36]

Unlike Phoebe Putney, this decision was not unanimous, and the dissent took issue with immunity not applying to state-created agencies. The dissenting Justices further identified several questions left unanswered by the majority:

(1) What is a “controlling number” of decision makers?; (2) Who is an “active market participant?”; and (3) What is the scope of the market in which a member may not participate while serving on the board?[37]

North Carolina Dental was an essential victory for competition and consumers as it forced states to be held politically accountable for how they choose to meddle in the competitive system.[38] Where there is a benefit concentrated in the hands of a small number of incumbent providers and the competitive harm is dispersed across all consumers of health care services, public choice theory predicts such incumbent exploitation of state licensing laws and regulations.[39] The adverse competitive results of this are manifest and is the regulated replacing and acting as the regulators.[40]

Both Phoebe Putney and North Carolina Dental exemplify the anticompetitive nature of the ‘Brother, May I?’ approach to regulation. Moreover, they illustrate how state licensure requirements can be a tool to fence out competition, a problem that becomes even more acute for the multi-state digital economy.

II. Occupational Licensure in the Digital Economy

The digital economy is, simply put, the economic activity and connection of businesses online including sales, data collection, communication, and devices. As internet use increases and technology improves, the ability for traditionally in person sectors of the economy to transition to the online marketplace follows suit. In the age of COVID-19 it is apparent that the digital economy is an essential and permanent fixture in the economy at large.

As early as 2004, the FTC engaged in studies regarding the use of occupational licensure in the digital economy as seen in its 2004 E-Commerce contact lenses report.[41] The FTC, after decades of enforcement in the eye care industry—including the enforcement of the Eyeglass Rule, which requires an eyecare provider to give a patient, at no extra cost, a copy their eyeglass prescription after completion of an eye exam[42]—found that the benefits associated with requiring third party online sellers of replacement contact lenses to obtain a license increased the cost of replacement lenses.[43] These increased costs would actually harm public health by inducing consumers to replace the lenses less frequently than doctors recommend or to substitute other forms of contact lenses that pose greater health risks. In sum, the added barrier to online sellers of contact lenses reduced competition and consumer choice in the entire market.[44]

Issues such as those presented in the FTC Contact Lenses Report appear in numerous other industries and board decisions to increase licensure requirements when incumbents feel pressure from new competitors in the digital economy. This section will address examples of recent matters involving occupational licensure in the digital economy for online practice by doctors and veterinarians, online sales of liquor and wine, and online map making. Each example shows how occupational licensing regimes are prone to misuse in innovative markets controlled by strong incumbents.

A. Teladoc, Inc. v. Texas Medical Board: Occupational Licensure of Online Medical Practice

When innovative new entrants threaten to disrupt a market with strong incumbents, these incumbents may erect rules and regulations through occupational licensure to preserve the status quo. The case of Teladoc, Inc v. Texas Medical Board[45]is a timely example of rules that not only thwart entry but also threaten consumers’ health. The Texas Medical Board (“TMB”), filled primarily with active physicians, enacted a rule that would greatly reduce a patient’s ability to obtain medical care from online Teladoc physicians.

Teladoc employed “board certified physicians who are provided specialized training in treatment and diagnosis via telephone.”[46] After a patient requested a consultation with Teladoc, the physician would typically review the patient’s information and medical records prior to calling the patient for more information. On the phone call, the Teladoc physician would use the background information combined with any additional information offered by the patient or solicited by the physician to offer medical advice.[47] The medical advice could range from referring the patient to an in person doctor’s appointment, suggesting emergency room visits, or prescribing certain medications—Teladoc did not prescribe “DEA-controlled substances (including narcotics).”[48]

However, the TMB, in 2015, changed its rules to require a “face-to-face visit or in-person evaluation” before a physician could issue any prescription.[49] Teladoc challenged the revision claiming it violated federal antitrust laws and would increase prices while reducing choice, access, innovation, and overall supply.[50] The prominent issue in the litigation was state action immunity and more specifically whether the TMB met the active supervision requirement as set forth in North Carolina Dental.[51] Although TMB argued that it was subject to supervision through judicial review by the courts of Texas, the State Office of Administrative Hearings, and the Texas Legislature, the court found these types of review were “limited and fail[ed] to confer on the reviewing court a method for looking to whether the decision of the TMB is ‘in accord with state policy.’”[52] In sum the TMB was the type of board the North Carolina Dental Court predicted could create anticompetitive rules if not held politically accountable by active supervision.

The FTC recognized the anticompetitive effects that could flow from such regulations “especially. . . in medically underserved areas or with medically underserved populations” much like the conditions that exist in Texas.[53] Moreover, TMB’s rule would have imposed costs upon patients in Texas because the occupational licensing regime excluded board-certified entrants, and reduced patient access to those new entrants, which in turn raised prices and reduced output. Following the outcome in this case, Texas chose to remove the restriction on online medical practice, thereby allowing greater access to medical treatment in rural areas.

This case demonstrates how antitrust laws can intervene to protect consumers from these abuses. In the current COVID-19 crisis the benefits of online medicine are clear. Yet, the ‘Brother, May I?’ approach by the TMB highlights the potentially catastrophic effects that occupational licensure can have on innovation and consumer welfare.

B. Hines v. Quillivan: Occupational Licensure of Online Veterinary Practice

A few years after Texas lessened restrictions on medical practice online, a veterinarian filed an equal protection claim for his online veterinary practice. The Texas State Board of Veterinary Examiners shut down and fined Dr. Ronald Hines’ online practice because it violated the Texas statute establishing veterinarian-client-relationship.[54] Dr. Hines’ case has a similar feel to Teladoc, but differs slightly because the Board of Veterinary Examiners enforced a new statute passed by the state legislature rather than creating its own rule. Yet, even with a statute, this case shows the effects that a board of market participants can have to influence a legislature to pass a law that would prevent innovative entrants from coming to market. Moreover, this case presents constitutional law issues that complicate the ability of online platforms to compete with in-state incumbents.

This section will give a brief background of the Hines I[55] case brought by Mr. Hines prior to the decision in Teladoc. Next, this section will outline the arguments made in Hines II[56], currently before the Fifth Circuit. Finally, this section will compare the effects of the licensure requirements on consumers in online medical practice and online veterinary practice.

1. Hines I: ‘Brother May, I?’ and the Constitution

From 2002 to 2012, Dr. Hines gave veterinary advice both generally via his website and directly to patients who solicited his expertise.[57] Hines provided advice to various groups of people such as pet owners who had no access to conventional veterinary care—either because of geography and/or inability to pay—and other pet owners who might have received conflicting diagnoses.[58] However, Hines never attempted to serve as any patient’s primary veterinarian by providing medication, performing procedures, or physically examining the animal.[59] In fact, on his website, Hines advised any visitors that his advice was inherently limited and he “[did] not provide any advice or accept payment if in his professional judgment doing so would [have been] inappropriate.”[60]

In 2012, the Texas State Board of Veterinary Examiners (“TBVE”) informed Hines that he was in violation of Tex. Occ. Code § 801.351,[61] which prohibited veterinarians from providing veterinary advice without first establishing a veterinarian-client-patient relationship. In 2005, the state legislature amended the statutory provision to require a veterinarian-client-patient relationship before practicing and expressly excluded forming a relationship “solely by telephone or electronic means.”[62] In passing the amendment, the legislature recognized the TBVE’s claim that the veterinarian-client-patient relationship was a cornerstone of a veterinarian’s care of animals and veterinarians could circumvent that relationship via new technology.[63]

Dr. Hines’ violation of the statute was based on his failure to physically examine the animals about which he provided advice.[64] The TBVE ordered a one-year suspension of his veterinary license, required him to retake portions of the veterinary licensing exam, and imposed a $500 fine.[65] Hines filed a complaint for injunctive relief claiming violations of his rights under the First Amendment, Fourteenth Amendment substantive due process, and Fourteenth Amendment equal protection.[66]

The district court dismissed the equal protection and due process claims concluding that “because the law did not discriminate on the basis of any suspect classification, the count was evaluated pursuant to rational basis review—and held that the physical examination requirement passed that deferential standard.”[67] However, the district court denied the defendants’ motion to dismiss the First Amendment claims. On appeal the Fifth Circuit affirmed the district court’s Fourteenth amendment holding but reversed and remanded the First Amendment claim in favor of the defendant.[68] The Fifth Circuit explained that this restriction on the veterinary practice is within the scope of state regulation, and any effects on Dr. Hines’ First Amendment rights were incidental to the constraint and therefore did not violate the constitution.[69]

In 2017, Texas Governor Greg Abbot signed SB 1107, which allowed medical doctors to practice telemedicine in Texas without an in-person examination. And shortly after in June 2018, the U.S. Supreme Court explained there is no professional-speech exception to the First Amendment in NIFLA v. Becerra.[70] The Court explained that “professional speech” is difficult to define as all it embodies is a profession that requires a license from the state.[71] But if that is the case it “gives the States unfettered power to reduce a group’s First Amendment rights by simply imposing a licensing requirement.”[72] In conclusion the Court found that there was not a “persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles.”[73] With this new ruling by the Supreme Court changing controlling constitutional law, Dr. Hines was able to bring his First Amendment suit again under the res judicata exception.

2. Hines II: Operating a Tele-practice

On June 11, 2019, the United States District Court for the Southern District of Texas decided Hines’ second case in the court.[74] Dr. Hines argued that the NIFLA holding and Tex. Occ. Code § 111.005,[75] the new telemedicine rule, breathed life into his First Amendment and Fourteenth Amendment due process claims respectively.[76] Again, defendants sought a motion to dismiss all of Hines’ claims.

The district court disagreed with Hines’ claim that NIFLA abrogated the Fifth Circuit’s decision in Hines I.[77] The court held that NIFLA did not reference Hines I nor did it make a statement that directly contradicts the Fifth Circuits opinion.[78] In sum, the court concluded that Hines’ argument was that the Fifth Circuit reached an erroneous conclusion and under the rule of orderliness, the district court cannot reconsider that decision.[79]

Next, the court addressed the Equal Protection Clause claim, noting that Hines I does not foreclose the current claim.[80] Hines I turned on the difference between veterinarians who saw animals in person and those who had not. Hines II focuses on the different treatment between doctors who can perform telemedicine on human patients and veterinarians who cannot perform telemedicine on animals.[81] Dr. Hines argued that the new law for doctors required the court to determine whether the Board has a rational basis to maintain the in-person requirement for veterinarians when Texas law removed the same requirement for doctors treating humans.[82] The district court found that the Board presented two reasons that form a rational basis. First, because animals cannot speak as humans can speak, a physical examination is important because without one the veterinarian would have to rely on the animal’s owner to convey information about symptoms.[83] Second, because owners lack knowledge about animal physiology, the information conveyed would likely lack accuracy.[84]

For these reasons the district court granted defendants motion to dismiss all claims. Hines has appealed the decision and oral arguments have been made to the Fifth Circuit. As of now the Fifth Circuit has not released its decision. The similarities between Hines I-II and Teladoc are clear. The incumbent veterinarians who sit on the TBVE have prevented the market entry of an innovative supplement to traditional veterinary practice. However, the difference is that a Texas Statute has given them the ability to restrict the market. Although Hines is not argued as a state action doctrine case, the effects of occupational licensure remain the same.

C. Vizaline, L.L.C. v. Tracy: Occupational Licensure in Non-Medical Fields

The Fifth Circuit recently applied the NIFLA Court’s professional speech analysis to an innovative map making online competitor in Mississippi. In Vizaline,[85] the Mississippi Board of Licensure for Professional Engineers and Surveyors (“Mississippi Board”) claims Vizaline is partaking in the unlicensed practice of surveying. Like both Teladoc and Hines, the State Board is looking to squelch an innovative online entrant to the market through occupational licensure.

Vizaline is an important test for the state action doctrine and occupational licensure. First, the case revolves around a state licensing board’s determination that a novel process for map making constitutes the practice of surveying and therefore is under the board’s jurisdiction. Next, it expands the NIFLA professional speech analysis to the Fifth Circuit. Finally, this again exemplifies the issue that occurs when incumbents can stifle the entry of competing business models through the use of occupational licensure.

1. The Background of Vizaline

Vizaline, a Mississippi technology startup, “converts existing metes-and-bounds descriptions of real property into ‘simple map[s]’ . . . through a computer program that overlays lines onto satellite images.”[86] The company sells these maps exclusively to community banks for small, less expensive properties that serve as loan collateral. These banks would normally have to use a costly in-person survey for these properties. Vizaline has never held itself out to be a surveyor. In fact, Vizaline stated it does not “establish or purport to establish metes and bounds descriptions of property . . . [n]or does it locate, relocate, establish, reestablish, lay out, or retrace any property boundary or easement.”[87] Moreover, Vizaline does not market its product as a replacement for a legal survey and alerts its customers that it is not a legal survey. If Vizaline encounters discrepancies in its drawings, it recommends its customers hire a licensed surveyor to correct the issue. Currently, the company has six employees and operates in five states.[88]

In Mississippi, the practice of surveying is regulated by the Mississippi Board in accordance with Miss. Code § 73-13-95 which states, “Any person who shall practice, or offer to practice, surveying in this state without being licensed. . . shall be guilty of a misdemeanor.”[89] In particular, the Mississippi Board alleged that Vizaline violated Mississippi Code § 73-13-95(c), which prohibits “‘receiv[ing] any fee’ for performing ‘any service, work, act or thing which is any part of the practice of surveying’ without a surveying license.”[90] The Mississippi Board, prior to bringing a lawsuit against Vizaline, asked the company to revise its website to not market to the general public and clarify it is not to be used as a survey—Vizaline complied.[91] Two years after its requests, the Mississippi Board sought an injunction against Vizaline’s business and disgorgement of all compensation. In response to the requested injunction Vizaline filed a lawsuit claiming the Mississippi rule violated the First Amendment.

2. The Fifth Circuit Ends Professional Speech Protection for States

The district court took a similar view to that in Hines and promptly dismissed Vizaline’s First Amendment claim.[92] The district court found that the state, using its broad power to establish licensing standards and oversee professions, regulated “professional conduct which incidentally involves speech.”[93] In sum, the district court held that occupational licensing restrictions were categorically exempt from First Amendment scrutiny.

On appeal, the Fifth Circuit disagreed, citing NIFLA for the proposition that “occupational-licensing provisions are entitled to no special exception from otherwise-applicable First Amendment protections.”[94] The Fifth Circuit went on to explain that it and other circuit courts had invoked the “professional speech” doctrine, which addressed any speech by individuals that is based on their expert knowledge and judgment or which occurred within a professional relationship.[95] These courts had held that a statute that creates occupational licensure standards was not unconstitutional for violating First Amendment rights because it was an incidental effect of a legitimate regulation.[96]

The Fifth Circuit recognized that NIFLA replaced the Fifth Circuit’s previous analysis of occupational licensure requirements with a conduct-versus-speech dichotomy.[97] What this means is that First Amendment challenges do not turn on whether the regulation is occupational licensure, but whether the regulation is directed at conduct, rather than speech, and does not run afoul First Amendment protections.[98] The court reversed and remanded the lower court’s decision because there was no First Amendment scrutiny for the Mississippi Board’s licensing requirements.[99] The Fifth Circuit did not address whether the restrictions violated the First Amendment or what role Mississippi should have in regulating Vizaline’s practice but emphatically put an end to the “professional speech” exception.[100]

These cases illustrate that a growing concern of over-regulation by states has led to constitutional challenges of several occupational licensure requirements affecting digital commerce. Whether these challenges will have a lasting effect on occupation licensing overall is yet to be seen. But, with each challenge the same underlying principle issues remain—state regulation to protect entrenched bricks and mortar entities from digital commerce ends with less innovation, reduced access for consumers, higher prices, and the reduction of competition in the regulated industry.

D. Tenn. Wine & Spirits Retailers Ass’n v. Thomas: Occupational Licensure’s Effect on Interstate Commerce

Licensure requirements might also unreasonably burden out of state companies and create conflicts with interstate commerce. Moreover, in the digital economy, a company might sell its products to a number of different states through an online platform, which means a state regulation that favors in-state firms would directly affect online sales. This issue brings to light yet another constitutional question relating to state regulation through occupational licensure.

The Twenty-first Amendment gives each state leeway in choosing alcohol-related public health and safety measures and most states have done so through state regulatory boards. In Tennessee, alcohol is regulated through the Tennessee Alcoholic Beverage Commission (“TABC”). In 2012, the Supreme Court of the United States granted certiorari to decide if a TABC regulation on alcohol retail violated the Commerce Clause. Much like the First Amendment arguments made in the above cases, state regulation that violates the Commerce Clause causes reductions in competition. The Supreme Court, in Tenn. Wine & Spirits Retailers Ass’n v. Thomas,[101] held that a TABC two-year residency requirement violated the Commerce Clause because its predominant effect was to protect in-state vendors from out-of-state competition.

1. Tennessee Wine and Spirits Background

Tennessee requires alcohol distribution to flow through a three-tier system.[102] Producers may only sell to licensed wholesalers who may only sell to licensed retailers who are the only group allowed to sell to consumers.[103] This means that no entity may sell alcohol without a license.[104] The tiered system also contained residency requirement to obtain a license. For any retailer to obtain a license to sell alcohol for home consumption, the retailer must demonstrate that it has been a “bona fide resident” of the state for two years.[105] Moreover, a corporation could not get a retail license unless all of its “officers, directors and owners of capital stock satisfy the durational requirements applicable to individuals.”[106]

In 2016, two national chain liquor stores, Total Wine and Affluere, applied for a license to retail alcohol in Tennessee.[107] The TABC recommended approval of the application until the Tennessee Wine and Spirits Retailers Association (“Spirits Association”)—an in-state liquor trade association—threatened to sue the TABC if it granted the license.[108] The TABC decided to file a declaratory judgment regarding the constitutionality of the residency requirements.[109] The district court held that the requirements were unconstitutional.[110]

The Spirits Association appealed to the Sixth Circuit, which affirmed the district court decision. The court split on the 2-year residency requirement. The majority affirmed the lower court’s decision using a dormant Commerce Clause argument—the requirement facially discriminated against interstate commerce and the interests the requirement was meant to further could adequately be served by nondiscriminatory alternatives.[111] The dissent, however, claimed that the Twenty-first Amendment granted states limitless authority to regulate in state alcohol distribution unless it served no purpose besides “economic protectionism.”[112] The Spirit Association filed a petition for certiorari regarding the two-year residency requirement, which was granted by the Supreme Court.[113]

2. The Supreme Court Strikes Down the Two-Year Residency Requirement

The Supreme Court in a 7-2 opinion held that the two-year restriction was unconstitutional. The majority framed the opinion as a dormant Commerce Clause issue. Under the dormant Commerce Clause, a state law that discriminates against out-of-state goods or economic actors is unconstitutional unless it is “narrowly tailored to advance[e] a legitimate local purpose.”[114] The Court found that the two-year residency requirement plainly favored in-state residents and that the Spirit Association did not make a Commerce Clause argument but instead chose to argue under the Twenty-first Amendment.[115]

The majority held that if the Twenty-first Amendment were read to take precedence over the Commerce Clause it would lead to an absurd result.[116] For example, if the Twenty-first Amendment trumped any previous section of the constitution, a state could enact laws prohibiting the sale of alcohol to a particular race or religion despite the Equal Protection Clause, or prohibit the sale of alcohol to people who express an unpopular point of view despite the First Amendment.[117] Instead, the Twenty-first Amendment should be viewed as “one part of a unified constitutional scheme.”[118] Moreover, the Court cited Midcal as an example of the Twenty-first Amendment’s limits, noting that when state alcohol laws conflict with federal regulation of the export of alcohol, that is deemed unconstitutional.[119]

Because the residency law directly conflicted with the dormant Commerce Clause, the Court looked to the purpose of the law and whether it had a legitimate interest in furthering the health and safety of citizens consuming alcohol and found that it did not.[120] When a purpose is “mere speculation” or an “unsupported assertion,” it is not immune from violating the Commerce Clause.[121] The Spirit Association presented no evidence that tied the residency requirement to the protection of public health and safety subjecting the law to Commerce Clause scrutiny.[122] Because the predominant effect of the residency requirement was to protect the Spirit Association’s members from out-of-state competition and it lacked a nexus to protecting public health and safety, the Court struck down the requirement.[123]

Although the Court only made passing reference to antitrust issues this case, it still exemplifies the issues that out-of-state online firms face when trying to enter a market that is regulated by state occupational licensure. Both national liquor retailers at issue in Tennessee Wine & Spirits had an online presence that was stifled by the unconstitutional barrier to market entry. And while states have the right to regulate to protect public health and safety, occupational licensing requirements that lack a nexus to that purpose tend to harm consumers and competition.

III. Narrowing Occupational Licensure to Protect Public Health and Safety

Occupational licensure, in its most appropriate form, allows a state to protect the health and safety of its citizens through requirements created by a politically accountable state board. However, a state board run by market participants without state supervision loses political accountability, which often leads to overreaching requirements that in the end harm consumers. As illustrated in the above cases, when state regulations stray from protecting public health and safety it can lead to a flurry of constitutional questions.

In the increasingly digital economy, occupational licensure prevents innovative firms from entering markets under the guise of protecting consumers. Teladoc, Hines, and Vizaline illustrate this principal. Like Phoebe Putney and North Carolina Dental, these three cases show the expansion of occupational licensure arising from an overly broad delegation of authority to protect public health and safety, which allows incumbents to choose whether new competitors and new technologies can enter a market, unmoored from legitimate health and safety concerns. While new technologies may offer new market options to consumers, they may also have adverse effects on health and safety, and, in these instances, occupational licensure may be justified.

#### ‘Sustaining innovation’ and digitization are inevitable but disruptive digital technology convergence is distinct and solves extinction from complex system threats

Tyfield 18 [David Tyfield, Lancaster Environment Centre, Lancaster University, UK & Joint Institute for the Environment (JIE), March 2018 https://www.sciencedirect.com/science/article/pii/S2214629617303523]

1. Disruptive low-carbon innovation revisited

Wholesale low-carbon transition is urgently needed to stay within 1.5 °C limits, but remains elusive [1]. Could disruptive low-carbon innovation (DLCI) help regarding this imperative?

The idea of DLCI was first raised 10 years ago [2], and subsequently taken up with special focus on developing countries [3], especially China [4], [5]. What is DLCI and why is it important? Against the stream of current discussion [6], our starting point here is the seminal work of Christensen [7]. While addressing a business strategy readership and not specifically concerned with low-carbon transition, Christensen’s work nonetheless furnishes a broad but rigorous definition of ‘disruptive innovation’ (DI). This concerns “cheaper, easier-to-use alternatives to existing products or services often produced by non-traditional players that target previously ignored customers” [2] and/or their use in novel contexts and combinations. This contrasts disruptive innovation with ‘sustaining innovation’ along existing, stabilized techno-economic trajectories. The former thus effects a social redefinition of existing technologies through recombination, thereby offering possibly lower functionality against existing metrics initially. Over time, though, such innovation may ‘disrupt’ at varying levels, as new low-cost offerings attract not only users previously unable to afford these technological affordances, but also increasingly the incumbent ‘mainstream’ market.

The particular promise of low-carbon DI rests in precisely these characteristics: low-cost, rapid (driven by its own spontaneous demand) global deployment of existing technologies in novel combinations (and incremental improvements thereof) can be favourably compared with the default (and stalling) model of low-carbon transition. The latter focuses on supply or production of high-cost new-to-the-world technologies from high-risk, slow and uncertain RDD&D processes. Aligning with and corroborating criticisms of this dominant techno-fetishistic narrative, a focus on such DLCI, and its social redefinition of (probably existing) technologies, also directly opens up the importance of socio-technological and systems issues [8].

These arguments are still pertinent today, and I welcome that DLCI is getting a new and arguably more high-profile hearing, amplified through Future Earth and this SI. But in this paper I also want to go beyond restatement of this original case to update and extend that argument in light of both more recent, clearer evidence of challenges and positive trends, and developments in theoretical understanding. In brief, this involves three key steps, set out in much greater detail in [9]:

* Reframing understanding of low-carbon transition and innovation, including DI, as not just a socio-technical system process but one of power/knowledge.
* From this perspective, appraising the nature and importance of digital innovation to both low-carbon innovation and disruptive innovation (and their conjunction).
* Illustrating and developing these arguments with the contemporary geographical exemplar of such disruptive (digital and/or low-carbon) innovation, namely China.

Along the way I also not only reaffirm the Christensen point that there is a specific form of innovation that merits its own label – ‘disruptive innovation’ – and that conflating this with innovation per se is to evacuate the term of any useful rigorous analytical meaning. But also, and stronger, I argue that the predominant contemporary manifestation of that conceptual laxity – in which Silicon Valley ‘Tech’ is widely imagined as the archetype of ‘disruptive innovation’ – is not merely obfuscating but actively complicit in reproducing the problem low-carbon transition is trying to tackle. In short, if we accept this commonplace (mis)interpretation, then ‘disruptive innovation’ is part of the problem, not the ‘solution’.

Given that the public sphere is (rightly!) more powerful in determining the meanings of terms than academic argument (which may of course participate in the former), it is tempting to drop ‘disruptive’ innovation altogether and replace it with another term (e.g. ‘game-changing’, or, in Chinese, ‘poju’ (see [4]1). But given that this special issue – and broader initiative – is aiming to illuminate the crucial role that DLCI could play in the greatest challenge of our time – let alone that it was Christensen’s coining initially – it seems legitimate still to fight for the meaning of ‘disruptive innovation’, as I do here.

2. Complex power/knowledge systems, their government and their transition

Our first contention is that to understand DLCI and its importance, and indeed low-carbon transition itself, we need to adopt a complex power/knowledge systems (CPKS) perspective. This conceptualizes the problem field of low-carbon transition, and innovation more generally, not just as multi-agent, multi-factorial (and hence socio-technical) and multi-levelled (e.g. [10], hence ‘MLP’) systems, as is increasingly the orthodoxy in innovation studies. They are also, and essentially, composed of complex, dynamic assemblages of relatively sedimented relations and technologies of power/knowledge [11], [12], [13].

I use the combined term ‘power/knowledge’ to indicate the specific conceptualisation of power drawn on in this perspective, inspired by the later work of Michel Foucault. In brief, this presentation aims to shorthand how power and knowledge are different but inseparable aspects of the same (strategic, relational and practiced) phenomenon, not completely different issues. Hence even academic knowledge must be primarily assessed in terms of what it does and enables (or disables) in the world and how, not just in terms of the representative truth of what it says; while conversely, even the heights of ‘power politics’ must be analysed in terms of how they manipulate and successfully dominate others, not least through their deployment and development of particular knowledge claims and practices, as ‘power/knowledge technologies’. For example, Google’s or Facebook’s proprietary algorithms and software are essential to their domination of their respective aspects of the digital political economy. International IP laws, technoeconomic paradigms, sociotechnical imaginaries of development or norms of high-status consumption are also all power/knowledge technologies.

These complex assemblages (or dynamic ‘structures’) of power/knowledge relations and technologies are then co-produced, in interactive parallel, with strategic agency, including (everyday) practices and even the very subjectivities of agents themselves (Fig. 1). The systems are thus not just transformed or ‘transitioned’, but constituted and conducted through the constant cycling of this co-production of ‘structure’ and ‘agency’, where both are conceptualized as constitutively relational, dynamic and strategic.

As such, it is not that ‘power’ enters the picture only to ‘change’ a system already there and conceptualized as stable, nor that it is just a nefarious force responsible for lock-in to dysfunctional systems. Rather, the prior stabilization and emergence of that system in the first place is itself a matter of never-ending, ongoing, dynamic strategic jockeying. Moreover, in this perspective innovation emerges as a key process of this perpetual reconstitution and governing of these systems, as itself a power/knowledge process that we may call innovation-as-politics.

This is not the place to argue the advantages of this change in perspective in detail [14], [11], [15], [9]. In brief, though, reframed as systems of power/knowledge, analytical purchase is afforded on persistently problematic issues for MLP (and cognate) perspectives [16]. For instance, how can analysis illuminate system transition and potential trajectories for upscaling of existing ‘niches’ to the level of ‘regime’ discontinuity, and not just post hoc but prospectively and in real-time? Of course, this approach also places issues of power, politics and culture – likewise issues repeatedly noted as crucial gaps in the MLP (e.g. [17], [18], [19], [20], [21]) – at the very heart of theoretical understanding, not seeking to patch them in at a later stage.

More importantly for our purposes, this shift in perspective underpins each of the sets of insights that follow here. We start with the crucial one of reappraising what exactly (the challenge of) low-carbon transition is, and likewise for its corollary, low-carbon innovation. Conceptualized this way, it becomes clear that the challenge of low-carbon transition consists of transforming the power/knowledge relational ‘structure’, and the strategic agency/ies mediating and mediated by it, such that both are increasingly ‘sustainability-oriented’ (Cf [22]). Likewise, low-carbon innovation is primarily a power/knowledge process through which diverse power/knowledge technologies of system government are progressively made ecologically-attentive. In short, system transition is a process by and through which innovation-as-politics transforms not just the socio-technical furniture but the dynamic and mutually mediating phenomena – power/knowledge relations and technologies alongside subjectivities, identities and communities – that constitute given ‘societies’, including the dominant model of innovation itself.

Low-carbon innovation is thus primarily challenged with conjuring, cajoling and amassing the ‘power momentum’ [11] through which a new dynamic regime of (power/knowledge) system government may finally emerge: transition is a power/knowledge transition. And it is thus by exploring empirical evidence of specific low-carbon innovations displaying embryonic emergence of such power momentum, which may then be qualitatively but uncertainly extrapolated into ‘plausible’ [23] scenarios, that this approach affords insightful strategic foresight of real-time transitions (see [9]).

These abstract insights thus profoundly reframe transition studies in productive ways. But they are also illuminating regarding an analysis of the substantive characteristics of the contemporary predicament facing low-carbon transition in at least two key respects, regarding the abstract challenge (or ‘where we need to get to’) and the concrete predicament (or ‘from where’).

Regarding the former, low-carbon innovation is still too readily discussed in terms that presume the one-for-one and one-off replacement of existing ‘high-carbon’ technologies with better ‘green’ ones. It is clear, though, that low-carbon transition will not be (and cannot be) such a superficial technological substitution, leaving the substance of contemporary high-carbon ways of life as they are. Rather it must be an iterative and medium/long-term process of profound socio-technical change. Moreover, this process must itself prominently feature – and will be most effective and expeditious to the extent it consists of – profitable, competitive innovations, capable of both rapid adoption and cumulative growth of (power) momentum; all considerations strongly favouring DLCI[disruptive low-carbon innovation ], as already noted.

But a CPKS perspective illuminates this problematic further, allowing us to see that low-carbon transition is not a single ‘problem’ at all, not even a ‘system’ one. Rather it is merely one lens on a whole set of existential contemporary challenges – including for innovation itself – that simply cannot be analytically separated, let alone meaningfully addressed, in isolation, notwithstanding the ubiquitous attempts to do so.

For alongside climate change, there are not only the whole wider set of planetary boundaries [24], [25] and the socio-environmental challenges of the Anthropocene (e.g. [26]). But these are interwoven also with the emergence of cosmopolitized globalism (e.g. [27], [28]) and of new horizons of post- or trans-human innovation from massive networks of cheap interconnected learning machines (e.g. [29], [30]). As such, ‘low-carbon transition’ is simply the name for a much wider challenge for contemporary innovation-as-politics insofar as it is seen specifically through environmental glasses (and of anthropogenic climate change).

This wider challenge concerns a new global predicament of learning how to do the ‘complex government of complex systems’ well [9]. For each of these sub-challenges are different (and overlapping) manifestations of the inadequacy of current systems for the government of proliferating global complexity and inter-dependence. Such adept government of complexity, however, is mediated precisely by the prevailing relations and technologies of power/knowledge systems, demanding their iterative, incremental transformation and upgrading in real-time. And this reflexive transformation of power/knowledge relations is exactly what is meant by ‘innovation’(-as-politics). Contemporary innovation, including low-carbon, is thus primarily charged with transforming the processes and capacities for system governance that are capable of harnessing, rather than being overwhelmed by, proliferating complexity, ultimately towards the emergence of qualitatively new and productive dynamics at (global) system level.

As such, on the one hand, we can now specify that the goal of low-carbon transition is the emergence of such productive dynamics at system level for the ongoing and unending improvement and maintenance of resilient government of complexity, NOT a new and restabilized “post-transition” green socio-technical system. But, on the other, this also means that we must accept and embrace that there is no ‘there’ to which low-carbon transition is seeking to move, no specifiable or imaginable future (utopian?) end-state – and that (acknowledging) this irreducible future uncertainty is an essential element of constructing better futures, not an unfortunate or defeatist concession to reduced rational mastery. We thus need new dominant models of innovation that, like DI, are likewise adept at surfing rising waves of complexity and uncertainty – as crucial tools and resources of just such complex system government.

But this perspective also usefully illuminates the converse: the concrete, actual (meso-level) ‘here’ of these overlapping system failures and crises, the aspiration of escape from which is given the name ‘low-carbon transition’. This concerns the overarching crisis of the specific regime that is currently dominant at global scale, at the heart of which – being a power/knowledge system – is its particular model of power/knowledge government: the hegemonic model of neoliberal innovation(-as-politics). Neoliberalism is a regime of system government that has dominated global capitalism for some four decades. It is fundamentally oriented to expansion without limit of the rule of the market, which is conceptualized as the supreme decision-maker [31]. At its heart, in turn, is a specific model of innovation, focusing on highly proprietary, consumer and labour-substituting hi-tech with a view to maximized concentrated corporate control of all spheres of socio-economic life [32], [33], [34].

In recent years, as the ‘digital revolution’ has taken hold, this has mutated into a ‘late’ phase, in which internet giants have claimed the dominant models of innovation and corporate power [35]. This mutation of neoliberalism poses as its antithesis, emphasising its ‘open’ innovation credentials and free access to its services while carefully concealing the ways in which it depends upon a radical intensification of key neoliberal elements [36], [37], [38], [39], in a ‘Googliberalism’ [40].

In particular, these platforms enact a model of innovation that depends, more so even than archetypal neoliberal biotech, on growing speculative investment in its financialized assets [41], betting on the exponential growth of super-proprietary rents from monopoly control of markets for the exploitation of existing resources. Googliberal innovation is thus essentially parasitic and un-creative, intrinsically built upon the zero-sum Ponzi-like exploitation of current assets and resources, including the incumbent oil-based socio-technical system. It also thus divides societies ever more clearly into few spectacular winners – the asset-owning rentier, global, tax-dodging and increasingly politically-enabled elite – and a growing majority of system losers – a debt-laden, wage-stagnant, insecure and increasingly system-rejecting precariat – in mutual co-production to the former’s deepening personal advantage. Completing the cycle, then, winners pursue innovation that will further secure their advantage, not least through more Googliberal innovation, substituting productive, living-waged labour with cheap information technology. Googliberalism thus fundamentally underpins power/knowledge lock-in against system transition.

This characterization is necessarily far too brief. But it is sufficient to suggest how this dominant model of innovation-as-politics is a key dynamic in the power/knowledge government of the incumbent system, including its multiple overlapping and existentially-threatening crises [9]: Chs. 2&3. Yet it follows immediately that such innovation is not merely a different issue, comparatively irrelevant, to low-carbon transition – though it is hard to miss the terrible waste of ingenuity and finance currently invested in creating the next Killer App for some existing (if not environmentally problematic) consumption practice, rather than in tackling our planetary emergency. Rather, such innovation is in fact a key pillar of the problem. For it both actively discourages and obstructs significant low-carbon innovation while itself continually re-constructing and reproducing the high-carbon power/knowledge system and its extreme and worsening power asymmetries that we need to transcend. Furthermore, it follows that to the extent that we assent to the self-satisfied appropriation of the high-cachet label of ‘disruptive innovation’ (“the new rock and roll”, as the T-shirt declaims) by Silicon Valley Big Tech, we are also confusing the problem for the solution.

In short, then, a complex power/knowledge systems perspective alerts us to the siren song of Silicon Valley ‘disruptive innovation’, and spells out much more clearly even than socio-technical systems literature the nature and scale of the challenge for low-carbon innovation. To be of any relevance to low-carbon transition, in other words, what ‘disruptive innovation’ has to disrupt is innovation (-as-politics) itself.

3. The convergence of digital and disruptive innovation towards complexity capitalism

None of the foregoing should be mistaken, though, for arguing that digital innovation is irrelevant to disruptive low-carbon innovation, even as the issues are orthogonal and analytically distinguishable. To the contrary – and a development that is now categorically clearer than when discussions of DLCI began roughly a decade ago – digital innovation is key to the prospects of disruptive low-carbon innovation making a significant impact, in at least two ways. These go beyond reversing how digital innovation in its current dominant form is a key element of the problem, as just described. Rather, they concern the potentially seismic productive impacts as digital innovation comes to converge, first, with low-carbon transition per se; and then with disruptive low-carbon innovation specifically.

It must first be noted, though, that the advent of digital innovation is – per se not just in Googliberal form – a key element of the challenge, in terms of constructing complex government of complex systems. For, itself conceived as a power/knowledge process, digital innovation sits at a key node in the cycles of the contemporary capitalist system and its (currently overflowing, uncontrolled) proliferation of complexity (see Fig. 2, especially c). Digitization, and/or its flipside of informationalization, fundamentally consists of introducing a novel (i.e. ICT-based) mediation to processes of power/knowledge. For instance, manufacturing becomes mediated by software that, in turn, collects constant real-time data for further optimization; so too for information search, listening to music, ride-hailed journeys, even friendship. This novel mediation affords the reflexive and recursive measurement, transformation, interconnection and expansion of these power/knowledge processes at hitherto unprecedented rates and scales, while these digital innovations also thereby constantly and reflexively upgrade themselves – the very acme of the positive feedback loops constitutive of complex systems. In short, digital innovation is singularly productive of the problem-field of complex system government, even as it is generally evangelized as its panacea.

But there is no going back, no putting the digital genie back in the bottle or closing Pandora’s Box. The only way forward, thus, is to develop new models of digital innovation that can work with its capacity for proliferation of complexity but to more system-productive outcomes. In this respect alone, we can immediately see how a different (non-Googliberal) digital innovation necessarily must form a key element of any low-carbon transition. But conceived as a power/knowledge process, digital innovation also emerges as a clear, if as yet underexplored and seemingly tangential, aspect of low-carbon innovation itself.

This hinges precisely on how the digital is the would-be meta-mediator of all power/knowledge processes. For it follows not only that socio-environmental relations, technologies and practices (likewise conceptualized in power/knowledge terms) can be thus mediated, and thereby progressively transformed. But also that viewing any and every ecological problem-field in this way also immediately makes it (much more, if never perfectly or ‘correctly’, and indeed, likely problematically) amenable to capitalist ingenuity: pragmatically but avariciously exploring ways in which collation, mastery, ownership and possible construction of the relevant socio-environmental data – the ‘new oil’ [42] – can be of service to paying customers (and/or hopefully publics and state institutions) and hence profitable.2

In this way, then, the field of low-carbon innovation can be transformed from that of committed green pioneers worthily and laboriously constructing low(er)-carbon technologies, to a more generalized ‘greenrush’… with all that implies, both positive and negative. In other words, digital intermediation enables a process that harnesses the exceptional productivity (for good and/or ill − see conclusion) of capitalist innovation into a growing power momentum of low-carbon transition, and from here, in this late-neoliberal, unequivocally capitalist present.

Here the qualitatively tighter feedback loop of digital innovation (see Fig. 2c Cf b), as power/knowledge technologies reflexively upgrading themselves, also flips from problem to opportunity. While this dynamic is currently causing proliferating, untamed and destructive complexity, a digital greenrush would instead harness it into acceleration of productive innovation; and, indeed, a growing power momentum of sufficient heft that it can even break out of the profound current socio-technical system ‘carbon lock-in’ [43] (see Fig. 2d).

But what has any of this to do with disruptive low-carbon innovation? The answer is, everything, in that this (system-) productive, low-carbon, complexity-adept capitalism, this new harnessing of digital innovation to such productive effect, is entirely dependent upon the latter’s convergence with disruptive innovation. Regarding the productivity and results of innovation, the convergence of disruptive and digital innovation – now just beginning, as both ‘disruptive digital innovation’ and ‘digitized disruptive innovation’ – promises to effect an exponential boost in the significance of both, including for low-carbon transition.

On the one hand, digital innovation adds a quantum boost to disruptive innovation. DLCI is already per se enabled – by its targeting of massive ready demand for low-cost but novel functionalities – to provide fast-growing goods and services disruptive of existing modes of practice. But combining this with digital innovation compounds this dynamism. This is not just because it furnishes disruptive innovation with a whole new momentum, drawing on both the digitized opening up of innovation (if not quite or necessarily its ‘democratisation’) and the dynamic of ‘exponential technology’ described (and mistakenly conflated as ‘disruptive innovation’) by Silicon Valley futurist gurus [44] – though these factors undoubtedly matter, and show how (a future) Silicon Valley could yet be a significant part of the transition, not just the problem. But also because, where environmental innovation is increasingly mediated by digitization and datafication, these processes and projects of innovation are opened up to productive capitalist exploration and exploitation, as described above, thoroughly transforming the prospects and momentum of such innovation. Low-carbon innovation, in short, is productively reframed as primarily a challenge not of emissions and energy but of data and complexity and its harnessing for productive system government. This thereby transforms low-carbon transition from expensive problem dependent on ethical vision and political will to a strategic opportunity for business.

Moreover, in classic complex system positive feedback loops, this does not just apply to individual low-carbon ventures, but promises to transform the broader taskscape and possibility space of low-carbon innovation per se. For both the greater hubbub of innovation activity generated by the combination of digital and disruptive (low-carbon) innovation, across a wide range of issues, and the nature of the disruptive innovation model itself – adept precisely at working rapidly, flexibly and resiliently with and within complex, uncertain and shifting milieux – combine to create a situation in which combinations of disruptive innovations (or recombinations of recombinations) are not just likely, but actively and relentlessly sought out.

In this context, then, it is also likely that the investment climate and innovation zeitgeist would change. Finance would no longer focus on unicorns, pursuing the ‘next Uber’ (of cooked meals, DIY tools or whatever…) that promises sure-fire returns for maximally monopolized exploitation of existing assets. Instead, the game would become one of risky competitive investing in the disruptive innovation that best promises to be a pivotal (but maybe not ‘central’) node in an as-yet-nonexistent and irreducibly uncertain but credible future networked assemblage of firms and customers – where disruption of existing systems of provision in some form is the base common-sense.

Interlocking with other still-to-be-developed innovations, then, these disruptive digital innovations will altogether mediate, and so govern anew, crucial complex processes of global socio-environmental metabolism. And with disruptive low-carbon innovation now ‘speaking the same language’ (i.e. of data and its ICT intermediation) as digital innovation, there is a new bridge and lubricant for cross-fertilization. In this way, too, innovation can be imagined (if, of course, not guaranteed) that is progressively more capable of dealing with socio-environmental challenges in all their geographical specificity, complication and complexity, not just proffering an (entirely unrealistic and strategically self-defeating) one-size-fits-all ‘green technology’ future. And this is especially the case since this is disruptive innovation-as-politics, meaning that these disruptive digital low-carbon innovations will very likely be profoundly contested and thereby made into effective power/knowledge technologies of system government (e.g. see Table 1, below).

In short, then, digital disruptive innovation allows at least the conceptualization of a transformed capitalism, in the medium-term, in which crystallizing clusters of actual system transition are increasingly observable and so themselves become the focus of competitive innovation and investment. In other words, if DI (and DLCI) to date has already shown promise working on ‘real world’ socio-technologies, as it comes to be combined with and mediated through digitization it could well become revolutionary – or, rather, ‘transformational’ (Cf [46]).

On the other hand, disruptive innovation reciprocally transforms digital innovation. In particular, disruptive innovation offers a model of low-cost, hence capital-substituting, and labour-creating innovation capable of harnessing digital innovation to productive ends (regarding new commodities/services, sectors and even systems), not merely parasitic, exploitative and labour-destroying ones. Consider, for instance, disruptive innovation regarding low-cost heart surgery in India [47] or solar water heaters in China [48], [49]. A DI model thus enables digital innovation to reap parallel transformation of the ‘structure’ of power/knowledge relations such that it can begin to match, keep up with and newly regulate the transformations it is already driving in agency, practices and power/knowledge technologies (Fig. 2d).

As such, disruptive (and disrupted, post-Googliberal) digital innovation(as-politics) can indeed become the key element of low-carbon transition mentioned above; constantly, dynamically and cumulatively transforming both power/knowledge relations and technologies towards marshalling the necessary power momentum for a new complexity-adept capitalism (in the first instance) that can avert climate catastrophe in the next few decades.

#### Specifically, immunized incumbents block revolutionary potential in spaces like the sharing economy

Allen 14 [Darcy Allen & Chris Berg, Allen is Research Fellow and Berg is Senior Fellow at the Institute of Public Affairs, “The Sharing Economy: How Over-Regulation Could Destroy an Economic Revolution,” Institute of Public Affairs, December 2014, https://www.parliament.vic.gov.au/images/stories/committees/SCEI/Ride\_Sourcing/Submissions/Submission\_145\_-\_Institute\_of\_Public\_Affairs\_Attachment\_1.pdf]

The sharing economy has been enabled by technological change including constantly accessible internet access, consumer satellite technology, and computing power. But it uses relatively traditional technologies – cars, houses, tools. The possibilities of combining sharing economy principles with other disruptive new technologies are very significant. For instance, how would a sharing economy business model utilise nascent technologies such as consumer-level drones and 3D printers? We don’t propose to have the answers here, of course, but we expect there will be entrepreneurs who face those questions in the near future.

The sharing economy has similar significance for industrial organisation. Ronald Coase’s theory of the firm posits that firms are built in order to reduce transactions costs. The twentieth century was in many ways the century of the firm – where large corporate entities were able to harness economies of scale to push down less efficient service provision outside the firm. If the sharing economy pushes transactions costs down, how will efficient firms restructure?

The sharing economy is it is likely to become more efficient the larger it gets. There are economies of scale in other industries, but these traditional economies of scale continually increase the excess capacity by increasing the resource set of an economy. More goods are produced, at a lower cost, but the excess capacity continues to rise. The economies of scale within the sharing economy, in contrast, decrease the excess capacity in the economy.

The long term significance of the sharing economy model is necessarily speculative. What is certain is that the changes it will bring will disrupt the existing economic order. The next section tackles the threats to this sort of revolutionary change – the regulatory framework which we have built around that existing economic order.

4. Excessive regulation holds back the sharing economy

This report has explored the emergence of the sharing economy as a market, and the widespread benefits these platforms potentially yield over traditional markets. Unfortunately, the sharing economy faces numerous regulatory burdens, particularly in the areas of consumer protection, taxation, safety, employment practices, contracting legitimacy, liability, insurance, not to mention the already existing industry specific law and regulation.

The Australian economy is heavily burdened by regulatory controls. Regulation places constraints on what exchanges can occur and the circumstances under which they can occur. The Australian government has a long and poor history of stifling innovation through regulation. For instance, while FM radio was developed throughout the 1930s in the US, the technology remained effectively banned in Australia until 1974. Further, the introduction of pay television took over a decade from the recommendation of its introduction by the Australian Broadcasting Tribunal in 1982.73

Adding to a large variety of documented case studies, another indicator of regulatory burden is the number of pages of legislation passed every year by Australian legislatures. While not a perfect reflection of the growing regulatory burden – some bills amend other bills, others do not impose regulatory requirements on the economy, and the count is highly sensitive to changes in drafting and formatting – the pages of legislation measure provides an indicative measure of growing regulatory burden.74 Figure 5 depicts the growth in new pages of legislation introduced to federal parliament since federation.

[FIGURE 5 OMITTED]

The argument for regulation is well known. Using regulatory tools, governments seek to impose regulations to maximise social welfare where it is assumed that leaving transactions up to the market would fail to do so. This is the idea that the market left to its own devices would produce some sort of suboptimal outcome.

However, regulation does not always act to maximise social welfare. The public choice school of economics has taught us that regulation is highly susceptible to being introduced and implemented in a manner that furthers the private interest rather than the public interest. The economist George Stigler has described regulation as being ‘acquired’ by firms for their own benefit.75 For instance, incumbent firms in a market often welcome new regulations – even costly new regulations – because they present barriers to entry for new competitors.

Another common regulation, price controls, are often presented to voters as if the controls are designed to help consumers but instead tend to protect inefficient business models. Private firms leverage their political power to lobby and influence regulations for their own private interest. It has been suggested that the influence of these private actors is directly related to the size and scope of government.76

The expansion of the ‘regulatory state’ has great impact on the sharing economy. By definition, sharing economy models are disruptive – emerging, innovative industries and platforms. By disruptive, it is meant that they are likely to force some more inefficient, incumbent industries out of business. This is Joseph Schumpeter’s gale of creative destruction – the economy is under a continual ‘process of industrial mutation that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one.’77 Creative destruction is the basis of a capitalist, free market economy, yet it presents some regulatory challenges.

With this continual disruption of existing powerful industries, there is a significant threat that regulations will be used to protect private, rather than the public, interest. On one hand, there may be calls for some light level of regulation in the genuine public interest. On the other, there are calls for government entry barriers from incumbent industries. The following section provides a series of recommendations that focus direct our regulations towards the public, rather than the private, interest.

5. Recommendations

When facing these regulatory battles it must be remembered that top-down, government-imposed regulations are only one choice in a suite of alternatives. By approaching the problems that are often cited (namely safety and privacy) in the same way we approach many of our other problems (topdown government direction), we will destroy a huge number of potentially mutually beneficial exchanges.

New technologies and software platforms have made previously unrealisable exchange possible. The main threat to the further emergence of these new technologies is crowding out of beneficial exchanges with costly government regulation. Every government regulation placed onto these new technologies and platforms threatens a backwards step – directly reducing the gains we have made.

This section provides several recommendations:

 Encourage bottom up self-regulation rather than top-down government control;

 Reduce occupational licensing;

 Reduce industry specific controls that entrench business structure;

 Provide an environment for platforms to develop private solutions; and

 Reduce regulations to encourage entrepreneurship and flexible work practices.

Bottom up self-regulation rather than top-down government control

The default position for regulators should be to enable bottom-up, organic, self-regulating institutions before top-down, rigid, government control.

Having a general framework for the future of regulating disruptive technologies is important. The current worldwide battles over disruptive technologies are not a single wave of passing concerns. The relationship between innovation and regulation is an expensive and continuing one. If Australia once again approaches these issues without their context, the regulatory process will be more painful than needed.

In his book Permissionless Innovation, Adam Thierer focuses on the continuing battles of emerging technologies and industries with governments and incumbents. This idea of permissionless innovation is important – not only for the sharing economy, but for the future challenges we face through the gale of creative destruction.

Permissionless innovation is the notion that ‘experimentation with new technologies and business models should generally be permitted by default’. Societies tend to follow a precautionary principle when regulating new technology ‘because a new idea or technology could pose some theoretical danger or risk in the future’. The reaction is then to control or limit the innovations to protect from some hypothetical harm. Thierer argues that the position of public policy should be to permit technologies by default, rather than to constrain, regulate and control by default.

Solutions to the problems we face should be crafted as close as possible to the individuals facing the problem at hand. Individuals within a particular scenario have the unique local knowledge to develop a solution. Although this should be a general goal for all public policy, it is most crucial in innovative, emergent industries. Local knowledge when developing innovative solutions is crucial. Thierer noted this:

The best solutions to complex social problems are almost always organic and ‘bottom-up’ in nature. Education and empowerment, social pressure, societal norms, voluntary self-regulation, and targeting enforcement of existing legal norms (especially through the common law) are almost always superior to ‘top-down,’ command-and-control regulatory edits and bureaucratic schemes of ‘Mother, May I’ (ie. Permissioned) nature.

Bottom-up governance tends to be a dynamic, nimble, flexible and cost-effective solution. Only once these fail (if they do) then we should look to imposition of costly, slow and rigid top-down government solutions. That is, we should first look to self-governance, before we look to government. The sharing economy platforms are doing this; the government is only slowing their progress.

The sharing economy has already begun to implement a number of bottom-up governance mechanisms. Particularly, the use of rating and reputation systems is ubiquitous. These are not forced inclusions by top-down regulators. These mechanisms are the result of market competition aiding the development and supply of reliable products and services. It is in the best interests of the platforms to produce a reliable and safe service; this is their brand. To do this, they develop and implement bottom-up governance, utilising and making information available that only the consumers can provide.

Government-imposed ‘permissioned’ regulations may disintegrate the complex civil society institutions of governance. Nobel Prize winning economist Elinor Ostrom showed that implementing top-down government solutions onto existing civil-society institutions may have negative effects.78 This is because top-down control lacks the local information used to develop the existing institutions, and top-down rules often ignore the unwritten social norms and values. That is, government intervention may crowd out and hinder, rather than protect, individuals.

Markets should be left to experiment, to fail, and to undertake evolutionary trial-and-error. They will develop, test and implement effective institutional governance mechanisms. We must leave these mechanisms to test in the market so that they may iterate, improve and focus on the safety and certainty levels required by markets.

Reduce occupational licensing

When issues of occupational licensing emerge in sharing economy debates, the initial reaction should be to decrease existing licensing, rather than to increase the sharing economy models up to current levels.

Government imposed occupational licensing can prevent the emergence of new technologies and services by creating barriers to entry. It can crowd-out alternative self-regulatory models and entrench inefficient business practices. Reducing economy-wide occupational licensing will promote efficiency and experimentation, and is a precondition for sharing economy models to deliver their potential benefits.

Occupational licensing is common in Australia. The Victorian Competition and Efficiency Commission reports that the Victorian government offers 390 separate licences, permits, approvals, certification and registration schemes, 2.1 million of which were issued in 2011-12.79 As the Harper Competition Policy review points out,

licensing can also restrict who can provide services in the marketplace. Such restrictions can prevent new and innovative businesses from entering the market and limit the scope of existing businesses to evolve and innovate. As a result, service providers can become less responsive to consumer demand.80

In 1962, Milton Friedman expressed his dismay over occupational licensure:

The most obvious social cost is that any one of these measures, whether it be registration, certification, or licensure, almost inevitably becomes a tool in the hands of a special producer group to obtain a monopoly position at the expense of the rest of the public.81

Centuries and decades on we remain in a highly regulated labour market landscape. Much of the problem still comes from the issue of occupational licensure. Occupational licensing is a form of government regulation requiring individuals to obtain a license before pursuing a particular profession or vocation. It is ‘a process where entry into an occupation requires the permission of the government, and the state requires some demonstration of a minimum degree of competency.’82

Proponents of occupational licensing generally justify the barriers to entry in terms of public safety, quality of services, and the general protection of the public from practitioners with bad intentions. To obtain a license involves a series of educational hurdles to demonstrate to the government that the license holder will do the job safer and with a higher level of quality than their unlicensed counterparts.

If occupational licensing was a relatively costless process, where government officials quickly and cheaply determined viable license holders, then the problems would be much less severe. In practice, the hurdles to receive a license tend to grow more stringent and expensive as time goes on. These hurdles become a significant barrier for new entrants into the market. 83 Following this limitation of supply, wages and costs are increased, irrespective of the increases in quality. 84

Because of these impacts on wages, licensing has been shown to increase wage inequality – occupational licensing ‘may increase wage inequality by first keeping out persons from entering higher wage occupations, and then by raising wages for persons in these already high income occupations.’85 In industries with high occupational licensing regulations, the benefits appear to flow to higher wage workers because of their artificial government imposed barriers to entry.

Concentrated industries will often seek out legislators for protection from competition, through artificial barriers to entry. It is no surprise that in many – if not most – circumstances, those seeking licensing standards are already practicing professionals attempting to limit the entry of new businesses and employees:

The people who are most concerned with any such arrangement, who will press most for its enforcement and be most concerned with its administration, will be the people in the particular occupation or trade involved … The result is invariably control over entry by members of the occupation itself and hence the establishment of a monopoly position.86

#### That solves extinction

Schor 21 [Juliet B. Schor, Department of Sociology, Boston College, Steven P. Vallas, 2Department of Sociology and Anthropology, Northeastern University, 3-26-2021 https://www.annualreviews.org/doi/pdf/10.1146/annurev-soc-082620-031411?casa\_token=REONhdbq4D0AAAAA:4hPWqJa1WOFkQAVUQQJVpItsnyV-X58UZNu\_JRnZZAIVEpWr6idR0g90tp-6jiVFT-Ui2modzQ]

SHARING AND CAPITALISM

A persistent theme in the literature has been the relationship between the sharing economy and the capitalist economy. At the end of its first decade, the sharing economy has failed in most of its aspirations, and in some cases badly so. For critics, this is vindication that it represents an intensification of neoliberalism, or a kind of hypercapitalism. In contrast, those who envisioned a utopian alternative to global capitalism have been arguing that a kind of reboot via structural changes in regulation, ownership, and governance could create a truly solidaristic sharing sector.

Deeper into Neoliberalism?

A recurrent theme in discussions of the sharing economy is that it has accelerated the incursion of market relations into previously nonmonetized domains of social life (Scholz 2016; Ravenelle 2017, 2019). Use values (driving one’s personal vehicle, maintaining a home) are transformed into exchange values, or mechanisms for the generation of revenue. Building on earlier arguments by Hochschild (2012), this line of criticism argues that for-profit sharing platforms implicitly inscribe a commercial logic ever more deeply within everyday life (Richardson 2015, Laurell & Sandström 2017). In this telling, sharing platforms compel providers to engage in competitive marketing practices, to invoke brand management techniques previously used mainly by corporations, and to embrace ratings technologies that blur the line between private or nonmarket life and the public world of commercial activity. Taken to its extreme, sharing platforms encourage even adherents of nonprofit platforms to view themselves as microentrepreneurs, gradually adjusting their subjectivities to align with the marketization trend. A case in point is the subtle transformation of hackathons, an important ritual among programmers that has lost its communal attributes and now furnishes corporations with sponsoring opportunities that invite users to compete for attention and monetary rewards (Zukin & Papadantonakis 2017). de Peuter et al. (2017) find that a similar trajectory has gripped coworking. Martin et al. (2015) find that even with grassroots community sites there is pressure for commercialization.

This critical view is contradicted by research focusing on the views of participants themselves. Fitzmaurice et al.’s (2020) respondents viewed their activities as an alternative to the corporate marketplace, not an extension of it. They harbor a domestic imaginary, rather than commercializing aspirations. A small study of Airbnb and CouchSurfing hosts finds that, even when initially motivated by the pursuit of income, they come to strongly value sociability (Lampinen & Cheshire 2016). Similarly, Cansoy et al. (2021) find a substantial group of earners with strong social rather than commercial orientations. However, these studies of sharing platforms that emphasize sociability might be tapping misrecognition, or what Bourdieu (1977, p. 171) has called the “sincere fiction of disinterested exchange.” Furthermore, it is unclear whether these alternative orientations can persist in the face of the growing power and prominence of the leading platforms.

Another theme focuses on the consequences of the sharing economy for the organization of work and employment. Here, the argument is that sharing platforms are part of a broader trend that invites the casualization, precarization, and degradation of work by classifying workers as independent contractors and transferring risk from firms and governments to individuals (Kalleberg 2013, Dubal 2017). Some scholars believe that platforms are triggering a race to the bottom as they erode worker protections and drive down wages. Scholz’s (2016) dystopian vision of workers as “uberworked and underpaid,” which included not only in-person sharing services but digital labor more broadly, sounded an early warning on “click factories” and increasing subservience of labor to rapacious corporate interests. These accounts emphasize the power of platforms over workers, perhaps best exemplified by Kenney & Zysman’s (2016, p. 62) frequently quoted assertion that “we are in the midst of a reorganization of our economy in which platform owners are seemingly developing power that may be even more formidable than was that of the factory owners in the early industrial revolution.” While this perspective may have seemed alarmist in the early days of the sector, when wages were high relative to conventional alternatives, in recent years there has been a clear downward trajectory, most pronounced in ride hailing and delivery. Drivers’ earnings have been squeezed via lower payments and increased competition for customers (Farrell et al. 2018, Wells et al. 2019). Declining conditions for delivery workers (Shapiro 2018) and shoppers (Griesbach et al. 2019) have also been reported. Our research in process with these groups in the post-COVID period finds a sharp reduction in earners’ ability to secure work, as platforms overhired to meet rising demand. Union and regulatory activism has increased since 2018, particularly in California, where a fight over classification has been waged. And since the pandemic began, there have been numerous flash strikes.While the deterioration of conditions for workers is partly due to labor market conditions that are adverse to workers, it also reflects the enormous power of platforms, both in the sharing sector and in the wider platform economy. At the same time, and perhaps ironically, the economic viability of powerhouses Uber and Lyft is in question, as both have gone public without profitability. They are now being propped up by shareholders, whose willingness to conform to the role of “patient capital” may carry an expiration date (Kenney & Zysman 2019, Vallas 2019). A major uncertainty is whether the momentum to regulate platforms that began in 2018 will survive the challenges of 2020 and beyond.

The rhetoric of sharing thus serves to mask the nature of pivotal institutional shifts under way that reconfigure the social and economic landscape along more neoliberal lines—a trend overseen by firms that use platforms to concentrate economic power over growing sectors of contemporary capitalist society. Viewed in this light, continued reference to the sharing economy may obscure as much as it reveals about the structure of economic institutions, which allows firms like Google, Uber, Facebook, and Amazon to dominate not only internet-based markets but also much of the conventional economy.

Platform Cooperativism

While there is ample evidence to support the foregoing pessimistic view on the sharing economy, recent developments may be creating new openings for change. As the world faces pandemic and economic catastrophe, postcapitalist discourses are increasingly compelling. In the USA, the epicenter of the tech sector, a rising tide of activism and protest on racial, climate, and economic justice is shifting the policy conversation to the left. These movements align in important ways with the aspirations of early sharing-economy advocates, who aimed to transcend conventional market principles and create an egalitarian, communal, and sustainable alternative to capitalism (Scholz & Schneider 2016, Schneider 2018). The increasingly predatory and antisocial actions of the large platforms have led to renewed efforts to chart a new direction in which sharing technologies are retained but the social and economic models of the corporate apps are transformed. These alternate structures include worker-owned platforms, cashless for-profits, and the many types of community sharing entities that have developed in the last 10 years.

The idea that has attracted the most attention is probably the platform cooperative, which retains the digital features of sharing platforms but is owned by earners. Early advocates such as Trebor Scholz, Nathan Schneider, and Janelle Orsi have been developing infrastructure and networks to support the formation of these entities (Scholz & Schneider 2016, Schneider 2018). One of the earliest, Stocksy United, a stock photography co-op, achieved financial success early and has developed an admirable record of high remuneration and satisfaction for its artists (Sulakshana et al. 2018). SMart, a European freelancers’ cooperative, has more than 35,000 members and continues to expand (Charles et al. 2020). An alternative to Airbnb called Fairbnb plans to donate revenue to the communities it operates in, but the pandemic has hampered its expansion (Foramitti et al. 2020). Smaller co-ops offering local services include a ride-hail co-op in Colorado as well as Up & Go, a New York City cleaning co-op for immigrant women. Platform cooperatives have unique challenges, such as the fact that work performed is typically individualized, which leads to unequal earnings distributions (Schor et al. 2020) or, in some cases, a globally dispersed workforce. Furthermore, successful offline cooperatives are often buoyed by preexisting forms of occupational community, such as those formed among bicycle couriers, artists, photographers, programmers, and other creative class workers, or in some cases by solidary ties among immigrant groups. It remains unclear whether cooperatives can be sustainable in the absence of such bonds. The Fairbnb study reveals that managing the loci of governance and control is complex, and the ecological impacts of its model are also a challenge. A study of Freegle, a UK breakaway from the donation platform Freecycle, which has instituted democratic governance, found that it has been successful despite tensions between funders and participants (Martin et al. 2017). However, the authors of this study note the relevance of their case for smaller groups of breakaways from large platforms. Van Doorn (2017) cautions that this movement can lapse into “technological solutionism,” with insufficient attention paid to issues of racism and sexism, as well as to the state, which is a necessary actor to achieve the aims of a true sharing economy. While cooperatives are a promising alternative to predatory platforms, they have also failed to scale in comparison to well-funded corporate entities.

CONCLUSION

When it launched, many believed that the sharing economy prefigured an alternative form of economic practice to neoliberal capitalism. But the power of that system has all but overwhelmed it. The growth of giant “sharing” firms has cast doubt on the status of its utopian rhetoric. Its claims of generating greater inclusivity and an ethos steeped in mutuality have been contradicted by evidence demonstrating its tendency to reinscribe social inequalities through digital means. Its ability to generate trust among strangers has been revealed to be complex. And expectations of environmental sustainability have been undermined by increasing evidence of its contributions to carbon emissions and other pollutants. These considerations challenge the aspirations that have driven the sharing economy from its very beginning. Yet arguably, the most pronounced challenge to a genuine sharing economy may be an exogenous one: the COVID-19 pandemic that has swept across the globe. This is not to say that the large, for-profit firms cannot adjust. They are nothing if not flexible, consisting of technology rather than physical capital. They can shift their focus nimbly, as Uber has redirected its efforts from ride hailing to food delivery, and will likely survive the pandemic. But the threats to smaller sites specializing in face-to-face community are different. These progenitors of the sharing economy envisioned a form of consumption that transcends capitalism’s long-standing emphasis on property ownership and individual ownership of goods. That vision has been seriously challenged by the advent of a pandemic that has transformed the sharing of goods and services into a source of fear and dread rather than mutuality and reciprocity. As social contact has become perilous, and strangers have become sources of potential infection, people may well shun the kinds of physical connections that are the foundation of the sharing economy. But if societies are to survive the existential threats posed not only by the pandemic but also by the climate and financial crises, they will need to reclaim the fundamental values of true sharing economies—ensuring the safety and security of all in a spirit of reciprocity and generosity. For surely the other way lies barbarism.

#### And, economic crises and conflict are inevitable absent a reimagined approach to the sharing economy

Mason 15 [Paul Mason, writer and broadcaster on economics and social justice, visiting professor at the University of Wolverhampton, “Introduction,” PostCapitalism: A Guide to Our Future, Allen Lane, an imprint of Penguin Books, 2015, pp. 6–17]

What started in 2008 as an economic crisis morphed into a social crisis, leading to mass unrest; and now, as revolutions turn into civil wars, creating military tension between nuclear superpowers, it has become a crisis of the global order.

There are, on the face of it, only two ways it can end. In the first scenario, the global elite clings on, imposing the cost of crisis on to workers, pensioners and the poor over the next ten or twenty years. The global order – as enforced by the IMF, World Bank and World Trade Organisation – survives, but in a weakened form. The cost of saving globalization is borne by the ordinary people of the developed world. But growth stagnates.

In the second scenario, the consensus breaks. Parties of the hard right and left come to power as ordinary people refuse to pay the price of austerity. Instead, states then try to impose the costs of the crisis on each other. Globalization falls apart, the global institutions become powerless and in the process the conflicts that have burned these past twenty years – drug wars, post-Soviet nationalism, jihadism, uncontrolled migration and resistance to it – light a fire at the centre of the system. In this scenario, lip-service to international law evaporates; torture, censorship, arbitrary detention and mass surveillance become the regular tools of statecraft. This is a variant of what happened in the 1930s and there is no guarantee it cannot happen again.

In both scenarios, the serious impacts of climate change, demographic ageing and population growth kick in around the year 2050. If we can’t create a sustainable global order and restore economic dynamism, the decades after 2050 will be chaos.

So I want to propose an alternative: first, we save globalization by ditching neoliberalism; then we save the planet – and rescue ourselves from turmoil and inequality – by moving beyond capitalism itself.

Ditching neoliberalism is the easy part. There’s a growing consensus among protest movements, radical economists and radical political parties in Europe as protest movements, radical economists and radical political parties in Europe as to how you do it: suppress high finance, reverse austerity, invest in green energy and promote high-waged work.

But then what?

As the Greek experience demonstrates, any government that defies austerity will instantly clash with the global institutions that protect the 1 per cent. After the radical left party Syriza won the election in January 2015, the European Central Bank, whose job was to promote the stability of Greek banks, pulled the plug on those banks, triggering a €20 billion run on deposits. That forced the left-wing government to choose between bankruptcy and submission. You will find no minutes, no voting records, no explanation for what the ECB did. It was left to the right-wing German newspaper Stern to explain: they had ‘smashed’ Greece.3 It was done, symbolically, to reinforce the central message of neoliberalism that there is no alternative; that all routes away from capitalism end in the kind of disaster that befell the Soviet Union; and that a revolt against capitalism is a revolt against a natural and timeless order.

The current crisis not only spells the end of the neoliberal model, it is a symptom of the longer-term mismatch between market systems and an economy based on information. The aim of this book is to explain why replacing capitalism is no longer a utopian dream, how the basic forms of a postcapitalist economy can be found within the current system, and how they could be expanded rapidly.

Neoliberalism is the doctrine of uncontrolled markets: it says that the best route to prosperity is individuals pursuing their own self-interest, and the market is the only way to express that self-interest. It says the state should be small (except for its riot squad and secret police); that financial speculation is good; that inequality is good; that the natural state of humankind is to be a bunch of ruthless individuals, competing with each other.

Its prestige rests on tangible achievements: in the past twenty-five years, neoliberalism has triggered the biggest surge in development the world has ever seen, and it unleashed an exponential improvement in core information technologies. But in the process, it has revived inequality to a state close to that of 100 years ago and has now triggered a survival-level event.

The civil war in Ukraine, which brought Russian special forces to the banks of the Dniestr; the triumph of ISIS in Syria and Iraq; the rise of fascist parties in the Dniestr; the triumph of ISIS in Syria and Iraq; the rise of fascist parties in Europe; the paralysis of NATO as its populations withhold consent for military intervention – these are not problems separate from the economic crisis. They are signs that the neoliberal order has failed.

Over the past two decades, millions of people have resisted neoliberalism but in general the resistance failed. Beyond all the tactical mistakes, and the repression, the reason is simple: free-market capitalism is a clear and powerful idea, while the forces opposing it looked like they were defending something old, worse and incoherent.

Among the 1 per cent, neoliberalism has the power of a religion: the more you practise it, the better you feel – and the richer you become. Even among the poor, once the system was in full swing, to act in any other way but according to neoliberal strictures became irrational: you borrow, you duck and dive around the edges of the tax system, you stick to the pointless rules imposed at work.

And for decades the opponents of capitalism have revelled in their own incoherence. From the anti-globalization movement of the 1990s through to Occupy and beyond, the movement for social justice has rejected the idea of a coherent programme in favour of ‘One No, Many Yes-es’. The incoherence is logical, if you think the only alternative is what the twentieth century left called ‘socialism’. Why fight for a big change if it’s only a regression – towards state control and economic nationalism, to economies that work only if everyone behaves the same way or submits to a brutal hierarchy? In turn, the absence of a clear alternative explains why most protest movements never win: in their hearts they don’t want to. There’s even a term for it in the protest movement: ‘refusal to win’.4

To replace neoliberalism we need something just as powerful and effective; not just a bright idea about how the world could work but a new, holistic model that can run itself and tangibly deliver a better outcome. It has to be based on micro-mechanisms, not diktats or policies; it has to work spontaneously. In this book, I make the case that there is a clear alternative, that it can be global, and that it can deliver a future substantially better than the one capitalism will be offering by the mid-twenty-first century.

It’s called postcapitalism.

Capitalism is more than just an economic structure or a set of laws and institutions. It is the whole system – social, economic, demographic, cultural, ideological – needed to make a developed society function through markets and private ownership. That includes companies, markets and states. But it also includes criminal gangs, secret power networks, miracle preachers in a Lagos slum, rogue analysts on Wall Street. Capitalism is the Primark factory that collapsed in Bangladesh and it is the rioting teenage girls at the opening of the Primark store in London, overexcited at the prospect of bargain clothes.

By studying capitalism as a whole system, we can identify a number of its fundamental features. Capitalism is an organism: it has a lifecycle – a beginning, a middle and an end. It is a complex system, operating beyond the control of individuals, governments and even superpowers. It creates outcomes that are often contrary to people’s intentions, even when they are acting rationally. Capitalism is also a learning organism: it adapts constantly, and not just in small increments. At major turning points, it morphs and mutates in response to danger, creating patterns and structures barely recognizable to the generation that came before. And its most basic survival instinct is to drive technological change. If we consider not just info-tech but food production, birth control or global health, the past twenty-five years have probably seen the greatest upsurge in human capability ever. But the technologies we’ve created are not compatible with capitalism – not in its present form and maybe not in any form. Once capitalism can no longer adapt to technological change, postcapitalism becomes necessary. When behaviours and organizations adapted to exploiting technological change appear spontaneously, postcapitalism becomes possible.

That, in short, is the argument of this book: that capitalism is a complex, adaptive system which has reached the limits of its capacity to adapt.

This, of course, stands miles apart from mainstream economics. In the boom years, economists started to believe the system that had emerged after 1989 was permanent – the perfect expression of human rationality, with all its problems solvable by politicians and central bankers tweaking control dials marked ‘fiscal and monetary policy’.

When they considered the possibility that the new technology and the old forms of society were mismatched, economists assumed society would simply remould itself around technology. Their optimism was justified because such adaptations have happened in the past. But today the adaptation process is adaptations have happened in the past. But today the adaptation process is stalled.

Information is different from every previous technology. As I will show, its spontaneous tendency is to dissolve markets, destroy ownership and break down the relationship between work and wages. And that is the deep background to the crisis we are living through.

If I am right we have to admit that for most of the past century the left has misunderstood what the end of capitalism would look like. The old left’s aim was the forced destruction of market mechanisms. The force would be applied by the working class, either at the ballot box or on the barricades. The lever would be the state. The opportunity would come through frequent episodes of economic collapse. Instead, over the past twenty-five years, it is the left’s project that has collapsed. The market destroyed the plan; individualism replaced collectivism and solidarity; the massively expanded workforce of the world looks like a ‘proletariat’, but no longer thinks or behaves purely as one.

If you lived through all this, and hated capitalism, it was traumatic. But in the process, technology has created a new route out, which the remnants of the old left – and all other forces influenced by it – have either to embrace or die.

Capitalism, it turns out, will not be abolished by forced-march techniques. It will be abolished by creating something more dynamic that exists, at first, almost unseen within the old system, but which breaks through, reshaping the economy around new values, behaviours and norms. As with feudalism 500 years ago, capitalism’s demise will be accelerated by external shocks and shaped by the emergence of a new kind of human being. And it has started.

Postcapitalism is possible because of three impacts of the new technology in the past twenty-five years.

First, information technology has reduced the need for work, blurred the edges between work and free time and loosened the relationship between work and wages.

Second, information goods are corroding the market’s ability to form prices correctly. That is because markets are based on scarcity while information is abundant. The system’s defence mechanism is to form monopolies on a scale not seen in the past 200 years – yet these cannot last.

Third, we’re seeing the spontaneous rise of collaborative production: goods, services and organizations are appearing that no longer respond to the dictates of services and organizations are appearing that no longer respond to the dictates of the market and the managerial hierarchy. The biggest information product in the world – Wikipedia – is made by 27,000 volunteers, for free, abolishing the encyclopaedia business and depriving the advertising industry of an estimated $3 billion a year in revenue.

Almost unnoticed, in the niches and hollows of the market system, whole swathes of economic life are beginning to move to a different rhythm. Parallel currencies, time banks, cooperatives and self-managed spaces have proliferated, barely noticed by the economics profession, and often as a direct result of the shattering of old structures after the 2008 crisis.

New forms of ownership, new forms of lending, new legal contracts: a whole business subculture has emerged over the past ten years, which the media has dubbed the ‘sharing economy’. Buzzterms such as the ‘commons’ and ‘peer- production’ are thrown around, but few have bothered to ask what this means for capitalism itself.

I believe it offers an escape route – but only if these micro-level projects are nurtured, promoted and protected by a massive change in what governments do. This must in turn be driven by a change in our thinking about technology, ownership and work itself. When we create the elements of the new system we should be able to say to ourselves and others: this is no longer my survival mechanism, my bolt-hole from the neoliberal world, this is a new way of living in the process of formation.

In the old socialist project, the state takes over the market, runs it in favour of the poor instead of the rich, then moves key areas of production out of the market and into a planned economy. The one time it was tried, in Russia after 1917, it didn’t work. Whether it could have worked is a good question, but a dead one.

Today the terrain of capitalism has changed: it is global, fragmentary, geared to small-scale choices, temporary work and multiple skill-sets. Consumption has become a form of self-expression – and millions of people have a stake in the finance system that they did not have before.

With the new terrain, the old path is lost. But a different path has opened up. Collaborative production, using network technology to produce goods and services that work only when they are free, or shared, defines the route beyond the market system. It will need the state to create the framework, and the postcapitalist sector might coexist with the market sector for decades. But it is postcapitalist sector might coexist with the market sector for decades. But it is happening.

Networks restore ‘granularity’ to the postcapitalist project; that is, they can be the basis of a non-market system that replicates itself, which does not need to be created afresh every morning on the computer screen of a commissar.

#### The aff restructures the sharing economy to fulfill solidaristic principles

Schor 21 [Juliet B. Schor, Department of Sociology, Boston College, Steven P. Vallas, 2Department of Sociology and Anthropology, Northeastern University, 3-26-2021 https://www.annualreviews.org/doi/pdf/10.1146/annurev-soc-082620-031411?casa\_token=REONhdbq4D0AAAAA:4hPWqJa1WOFkQAVUQQJVpItsnyV-X58UZNu\_JRnZZAIVEpWr6idR0g90tp-6jiVFT-Ui2modzQ]

Few recent developments have created as much public buzz and scholarly interest as the sharing economy. It became an object of fascination in part because of its novel technology and economic arrangements, but also because it has been controversial from its early days. Is it “neoliberalism on steroids” (Morozov 2013)—the latest stage of capitalism, in which predatory platforms act with impunity to grow, dominate markets, and exploit users? Or does the combination of digital technology and common good aims represent a genuinely horizontal economic structure and the “end of employment” (Sundararajan 2016)?

Answers to these questions depend in part on how the sharing sector is defined. While the large commercial platforms have gotten most of the attention, the sharing economy has been capacious from the beginning, and includes not only platforms for accessing accommodations and rides but also food swap and donation apps; rental, gift, and loan sites for household items; clothing exchanges; repair cafes; and labor services such as time banks and errand sites (Botsman & Rogers 2010, Gansky 2010). This combination of Silicon Valley corporations and community-based entities helped legitimate a utopian discourse promising economic, social, and environmental benefits (Cockayne 2016, Martin 2016, Schor et al. 2020). For-profit companies justified their existence by their contributions to the struggling middle class (Airbnb), immigrant women ( Josephine, a meal preparation site), or the climate (Zipcar), while nonprofits emphasized community building. Rhetorics of common good attracted participation. There is debate about whether the sharing economy should be considered a field, but if it is, it has been characterized by diversity among its actors, particularly in Europe. Whether its configuration is sustainable is an open question.

Assessing the size of the sector is difficult, as it lacks a presence in official statistics. It includes a number of unicorn firms, including Uber, Lyft, and Airbnb, and is expected to become a US$335 billion market by 2025 (PriceWaterhouseCoopers 2015). A 2014 national survey found that between 10% and 14% of Americans had participated in tool-lending libraries, peer-to-peer (P2P) lodging, car sharing, bicycle sharing, and ride hailing (Cent. New Am. Dream & PolicyInteractive 2014). More recent figures are difficult to find, perhaps because of increased skepticism about the terminology and the concept itself.

The sharing economy has generated a host of important sociological questions about trust, inequality, and its relationship to the conventional capitalist economy. To answer them, we have organized our review into three main sections. [Because our earlier Annual Review of Sociology article, “What Do Platforms Do?” (Vallas & Schor 2020), addresses labor issues, we cover those only briefly.] In the next section we present a discussion of the factors which led to the emergence of the sharing economy, including its intellectual origins, and proceed to debates about terminology and discourse. In the following section we discuss three empirical literatures on the impacts of the sharing economy—trust and social ties, social inequalities, and environmental effects. Finally, we address the question of how to understand the sector—is it part of an intensified neoliberalism, or can it help construct an alternative future? To preview: We do believe that a P2P structure operating with digital tools can organize significant swathes of the economy on solidaristic principles, potentially delivering on some of the original economic, social, and environmental goals. But that will require restructuring the ownership and governance of platforms, including those companies that have shown a willingness to evade, challenge, and openly defy socially minded forms of intervention.

#### A sharing economy aligned with anti-capitalist goals is possible

Rinne 20 [April Rinne, J.D. Harvard, MA. International Business and Finance from Tufts, B.A. Emory, 4-5-2020 https://medium.com/swlh/coronavirus-the-end-of-the-sharing-economy-or-a-new-beginning-a142acbb7130]

The founders’ ethos and goals back then were simple: share rather than own resources in ways that help build community, improve the environment, and forge relationships and trust. They had the added benefit of helping people save money, but the financial rewards were seen as one of a bundle of benefits… and seldom the primary one.

In the ensuing years, the economic benefits of sharing-based platforms ran amok to the point that they began to overshadow the environmental, community and social benefits — sometimes suffocating them altogether. Making money became the holy grail: if we could frame the good, service or activity as “sharing,” even better.

This is when what I call sharewashing took root: companies slapping the term “sharing economy” onto almost anything, whether or not it involved actual sharing of resources or the original ethos. For better or worse, there is no entity to permit (or deny) any person, platform or country from using this term wherever and however they wish.

In fact, I have been on panels globally where I’ve heard claims that education is the sharing economy (we’re “sharing” information), trade is the sharing economy (we’re “sharing” imports and exports), and communication is the sharing economy (we’re “sharing” news). In China, the government has embraced the sharing economy so wholly that it’s become an essential component of its 21st century transformation narrative.

But the problem is, the term has become over-broad to the point of futility; apparently nothing is out of scope. Different places can define the sharing economy differently, leading to confusion without recourse. Moreover, many people lump together the sharing economy, gig economy, on-demand economy, freelance economy and more… yet these are distinct from one another (as I highlighted several years ago). Gig workers are not automatically somehow “sharing”; they are simply working in new ways enabled by mobile and digital technologies.

Taken together, if this transaction-driven, profit-driven, community-optional free-for-all model is the sharing economy that has evolved, then of course it was due for a reckoning. We were destined to have to come to grips with what it is, what it is not, and whether it’s good for society.

Ironically, even amidst the coronavirus pandemic, we continue to see the many flavors of today’s sharing economy play out. On the one hand, we see widespread generosity and sharing of goods and services, often volunteered. We see Airbnb’s community-minded hosts are opening up their homes to host healthcare workers for free. On the other hand, Airbnb’s corporate short-term rentals are in dire straits. But let’s be clear: the former is the sharing economy and pro-social. The latter is not.

Sharing forward: Where does the sharing economy go from here?

Having spent the past decade-plus trying to harness the original values and ethos of the sharing economy — community, sustainability, resourcefulness and trust, all of which we’ve never needed more than today — I believe there are three key trends underway that ultimately pave the way for a new, uplifting era for the sharing economy.

(1) Community-led sharing economies: The sharing economy will thrive when it is aligned with its original values. We will continue to see locally-based sharing networks for space, goods, food, services and so on. Think local co-working spaces, local carshare services, local time banks, local tool (or kitchen, sporting goods, etc.) libraries as well as mutual aid networks. Think bona fide homesharing — the sharing of excess space in one’s home — and social exchange. We will hopefully also see more cooperative ownership of firms and broader awareness of platform cooperatives.

Local sharing economies don’t shy away from money; we’re not talking barter, gifting and volunteerism only (though these activities are included). Rather, this is about focusing on actual sharing and the enhanced resourcefulness, resilience and relationships that naturally come along with such initiatives and business models. Think of it as a rebalancing of benefits: economic benefits are still there, but — finally! — they can only co-exist alongside social and environmental benefits. Think of this sharing economy not as transactional, but transformational: rather than global mega-platforms, a global network of local hubs, each its own sharing economy.

(2) Integrity: Finally, we will realize the slippery slope of terminology. We will learn to be careful with sharing economy language. We will hold ourselves and others accountable for their words, and we will call out instances of sharewashing enthusiastically. Does a BlaBlaCar shared ride among several people qualify? Yes. Does an Uber trip in a leased vehicle that wouldn’t be on the road otherwise? Absolutely not.

I find this reset to be especially exciting, because we’ve desperately needed it for a while. In many ways, the sharing economy has been a victim of its own success: “sharing” sounds so welcoming, who wouldn’t want to be part of it? And yet, by lumping so many clearly non-sharing activities under this umbrella, we’ve diluted its true meaning and power. It’s time to get that meaning and power back.

### Plan

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

### 1AC---Federalism Adv

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

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

Introduction

IN just three relatively obscure antitrust cases, 1

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

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

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

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

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

III. DOCTRINAL CRITICISM

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

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

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

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

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

IV. PROPOSED SOLUTIONS

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

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

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

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

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

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

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

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

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

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

#### Effective regulations solve extinction

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

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

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

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

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

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

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

1. Compacts meet “Federalism 3.0”

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

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

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

2. Horizontal harms in practice

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

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

#### Makes conflict inevitable

Beauchamp 22 [Zack Beauchamp is a senior correspondent at Vox, MSc from the London School of Economics in International Relations 1-3-2022 https://www.vox.com/policy-and-politics/22814025/democracy-trump-january-6-capitol-riot-election-violence]

But worried about what, exactly? This is the biggest question in American politics: Where does our deeply fractured country go from here?

A deep dive into the academic research on democracy, polarization, and civil conflict is sobering. Virtually all of the experts I spoke with agreed that, in the near term, we are in for a period of heightened struggle. Among the dire forecasts: hotly contested elections whose legitimacy is doubted by the losing side, massive street demonstrations, a ~~paralyzed~~ [incapacitated] Congress, and even lethal violence among partisans.

Lilliana Mason, a Johns Hopkins University political scientist who studies polarization and political violence in America, warned of a coming conflagration “like the summer of 2020, but 10 times bigger.”

In the longer term, some foresaw one-party Republican rule — the transformation of America into something like contemporary Hungary, an authoritarian system in all but name. Some looked to countries in Latin America, where some political systems partly modeled on the United States have seen their presidencies become elected dictatorships.

“The night that Trump got elected, one of my Peruvian students writing about populism in the Andes [called me] and said, ‘Jesus Christ, what’s happening now is what we’ve been talking about for years,’” says Edward Gibson, a scholar of democracy in Latin America at Northwestern University. “These are patterns that repeat themselves in different ways. And the US is not an exception.”

Others warned of a retreat to America’s Cold War past, where Democrats stoke conflict with a great power — this time, China — and abandon their commitment to multiracial democracy to appeal to racially resentful whites.

“The losers in the resolution of past democratic crises in the United States have, more often than not, been Black Americans,” says Rob Lieberman, an expert on American political history at Johns Hopkins.

America’s dysfunction stems, in large part, from an outdated political system that creates incentives for intense partisan conflict and legislative gridlock. That system may well be near the point of collapse.

Reform is certainly a possibility. But the most meaningful changes to our system have been won only after bloodshed and struggle, on the fields of Gettysburg and in the streets of Birmingham. It is possible, maybe even likely, that America will not be able to veer from its dangerous path absent more eruptions and upheavals — that things will get worse before they get better.

Part I: Conflict

Barbara Walter is one of the world’s leading experts on civil wars. A professor at the University of California San Diego, she has done field research in places ranging from Zimbabwe to the Golan Heights, and has analyzed which countries are most likely to break down into violent conflict.

Her forthcoming book, How Civil Wars Start, summarizes the voluminous research on the question and applies it to the contemporary United States. Its conclusions are alarming.

“The warning signs of instability that we have identified in other places are the same signs that, over the past decade, I’ve begun to see on our own soil,” Walter writes. “I’ve seen how civil wars start, and I know the signs that people miss. And I can see those signs emerging here at a surprisingly fast rate.”

Walter uses the term “civil war” broadly, encompassing everything from the American Civil War to lower-intensity insurgencies like the Troubles in Northern Ireland. Something like the latter, in her view, is more likely in the United States: One of the book’s chapters envisions a scenario in which a wave of bombings in state capitols, perpetrated by white nationalists, escalates to tit-for-tat violence committed by armed factions on both the right and the left.

Countries are most likely to collapse into civil war, Walter explains, under a few circumstances: when they are neither fully democratic nor fully autocratic; when the leading political parties are sharply divided along multiple identity lines; when a once-dominant social group is losing its privileged status; and when citizens lose faith in the political system’s capacity to change.

Under these conditions, large swaths of the population come to see members of opposing groups as existential threats and believe that the government neither represents nor protects them. In such an insecure environment, people conclude that taking up arms is the only recourse to protect their community. The collapse of the former Yugoslavia in the 1990s — leading to conflicts in Bosnia, Croatia, and Kosovo — is a textbook example.

Worryingly, all four warning signs Walter identifies are present, at least to some degree, in the United States today.

Several leading scholarly measures of democracy have found recent signs of erosion in America. Our political parties are increasingly split along lines of race, religion, and geography. The GOP is dominated by rural white Christians — a group panicked about the loss of its hegemonic place in American cultural and political life. Republican distrust and anger toward state institutions, ranging from state election boards to public health agencies to the FBI, have intensified.

Walter doesn’t think that a rerun of the American Civil War is in the cards. What she does worry about, and believes to be in the realm of the possible, is a different kind of conflict. “The next war is going to be more decentralized, fought by small groups and individuals using terrorism and guerrilla warfare to destabilize the country,” Walter tells me. “We are closer to that type of civil war than most people realize.”

How close is hard to say. There are important differences not only between the United States of today and 1861, but also between contemporary America and Northern Ireland in 1972. Perhaps most significantly, the war on terror and the rise of the internet have given law enforcement agencies unparalleled capacities to disrupt organized terrorist plots and would-be domestic insurgent groups.

But violence can still spiral absent a nationwide bombing campaign or a full-blown war — think lone-wolf ~~terrorism~~, mob assaults on government buildings, rioting, street brawling.

Historical examples abound, some even in advanced democracies in the not-so-distant past. For about a decade and a half beginning in 1969, Italy suffered through a spree of bombings and assassinations perpetrated by far-right and far-left extremists that killed hundreds — the “Years of Lead.” Walter and other observers have pointed to this as a possible glimpse into America’s future: not quite a civil war, but still significant political violence that terrified civilians and threatened the democratic system.

Since Barack Obama’s 2008 presidential victory, America has seen a surge in membership in far-right militias. During the Trump era, some prominent militias directly aligned themselves with his presidency — with some groups, like the heavily armed Oathkeepers and street-brawling Proud Boys, participating in the attack on the Capitol. In May, the attorney general and the secretary of homeland security both testified before Congress that white supremacist terrorism is the greatest domestic threat to America today.

Fears of white displacement — the anxieties that Walter and other scholars pinpoint as root causes of political violence — have already fueled horrific mass shootings. In 2018, a gunman who believed that Jews were responsible for mass nonwhite immigration opened fire in a Pittsburgh synagogue, killing 11. The next year, a shooter who claimed Latinos were “replacing” whites in America murdered 23 shoppers at an El Paso Walmart that has a heavily Latino clientele.

Other forms of political conflict, like the 2021 Capitol riot, may not be as deadly but can be just as destabilizing. In 1968, a wave of demonstrations, strikes, and riots initiated by left-wing students ground France to a halt and nearly toppled its government. During the height of the unrest in late May, President Charles de Gaulle briefly decamped to Germany.

In the coming years, the United States is likely to experience some amalgam of these various upheavals: isolated acts of mass killing, street fighting among partisans, protests that break out into violence, major political and social disruption like on January 6, 2021, or in May 1968.

The most likely flashpoint is a presidential election.

Our toxic cocktail of partisanship, identity conflict, and an outmoded political structure has made the stakes of elections feel existential. The erosion of faith in institutions and growing distrust of the other side makes it more and more likely that neither party will view a victory by the other as legitimate.

After the November 2020 contest, Republicans widely accepted Trump’s “big lie” of a stolen election. With the January 6 riot and its aftermath, we now have an example of what happens when a Trumpist Republican Party loses an election — and every reason to think something like it could happen again.

An October poll from Grinnell-Selzer found that 60 percent of Republicans are not confident that votes will be counted properly in the 2022 midterms. Election officials have been inundated with an unprecedented wave of violent threats, almost exclusively from Trump supporters who believe the 2020 election was fraudulent.

And Republican elites are tossing fuel on the fire. With Trump describing slain rioter Ashli Babbitt as a martyr, Tucker Carlson producing a pro-insurrection documentary called Patriot Purge, and GOP members of Congress doing their best to obstruct the House probe into the attack’s origins, party leaders and their media allies are legitimizing political violence in the face of electoral defeat.

The behavior by Republican leaders is all the more worrisome because elites can play a major role in either inciting or containing violent eruptions. In their forthcoming book Radical American Partisanship, Mason and co-author Nathan Kalmoe ran an experiment testing the effect of elite rhetoric on Americans’ willingness to engage in violence. They found that if you show Republican partisans a message attributed to Trump denouncing political violence, their willingness to endorse it goes down substantially.

Then-President Donald Trump speaks at the “Stop the Steal” rally in Washington, DC, on January 6, in an hour-long speech during which he encouraged his supporters to march to the Capitol to protest Electoral College proceedings. Tasos Katopodis/Getty Images

“Our results suggest loud and clear that antiviolence messages from Donald Trump could have made a difference in reducing violent partisan views among Republicans in the public— and perhaps in pacifying some of his followers bent on violence,” they write. “Instead, Trump’s lies about the election incited that violence” on January 6, 2021.

Doubts about the legitimacy of election results can also run the other way. Imagine an extremely narrow Trump victory in 2024: an election decided by Georgia, where an election law inspired by Trump’s lie gives the Republican legislature the power to seize control over the vote-counting process at the county level. If Republicans use this power and attempt to influence the tally in, say, Fulton County — a heavily Democratic area including Atlanta — Democrats would cry foul. There would likely be massive protests in Atlanta, Washington, DC, and many other American cities.

One can then imagine how that could spiral. Armed pro-Trump militias like the Oathkeepers and Proud Boys show up to counterprotest or “restore order”; antifa marchers square off against them. The kind of street fighting that we’ve seen in Portland, Oregon, and Charlottesville, Virginia, erupts in several cities. This is Mason’s “summer of 2020, but 10 times bigger” scenario.

Maybe these melees stay contained. But violence may also beget more violence; before you know it, America could be engulfed in its own Years of Lead.

White nationalists, neo-Nazis, and members of the alt-right clash with counterprotesters as they enter Emancipation Park during the “Unite the Right” rally in Charlottesville, Virginia, on August 12, 2017. Chip Somodevilla/Getty Images

It’s all speculative, of course. And this worst-case scenario may not even be likely. But Walter urges against complacency.

“Every single person I interviewed who’s lived through civil war, who was there as it emerged, said the exact same thing: ‘If you had told me it was going to happen, I wouldn’t have believed you,’” she warns.

Part II: Catastrophe

In McCoy and Press’s draft paper on “pernicious polarization,” they found that only two advanced democracies even came close to America’s sustained levels of dangerously polarized politics: France in 1968 and Italy during the Years of Lead.

The broader sample, which includes newer and weaker democracies in addition to more established ones, isn’t much more encouraging. The scholars identified 52 cases of pernicious polarization since 1950. Of these, just nine countries managed to sustainably depolarize. The most common outcome, seen in 26 out of the 52 cases, is the weakening of democracy — with 23 of those “descending into some form of authoritarianism.”

Almost all the experts I spoke with said that America’s coming period of political struggle could fundamentally transform our political system for the worse. They identified a few different historical and contemporary examples that could provide some clues as to where America is headed.

None of them is promising.

Viktor Orbán’s America

Since coming to power in 2010, Hungarian Prime Minister Viktor Orbán has systematically transformed his country’s political system to entrench his Fidesz party’s rule.

Fidesz gerrymandered parliamentary districts and packed the courts. It seized control over the national elections agency and the civil service. It inflamed rural Hungarians with anti-immigrant demagoguery in propaganda outlets and attacked the country’s bastions of liberal cultural power — persecuting a major university, for example, until it was forced to leave the country.

The party’s opponents have been reduced to a rump in the national legislature, holding real power only in a handful of localities like the capital city of Budapest. A desperate campaign by a united opposition in the 2022 election faces an uphill battle: a polling average from Politico EU has shown a Fidesz advantage for the past seven months.

There was no single moment when Hungary made the jump from democracy to a kind of authoritarianism. The change was subtle and slow — a gradual hollowing out of democracy rather than its extirpation.

The fear among democracy experts is that the US is ~~sleepwalking~~ down the same path. The fear has only been intensified by the American right’s explicit embrace of Orbán, with high-profile figures like Tucker Carlson holding up the Hungarian regime as a model for America.

“That has always been my view: we’ll wake up one day and it’ll just become clear that Democrats can’t win,” says Tom Pepinsky, a political scientist at Cornell who studies democracy in Southeast Asia.

In this scenario, Democrats fail to pass any kind of electoral reform and lose control of Congress in 2022. Republicans in key states like Georgia, Arizona, North Carolina, and Wisconsin continue to rewrite the rules of elections: making it harder for Democratic-leaning communities to vote, putting partisans in charge of vote counts, and even giving GOP-controlled state legislatures the ability to override the voters and unilaterally appoint electors to the Electoral College.

The Supreme Court continues its assault on voting rights by ruling in favor of a GOP state legislature that does just that — embracing a radical legal theory, articulated by Justice Neil Gorsuch, that state legislatures have the final say in the rules governing elections.

These measures, together with the built-in rural biases of the Senate and Electoral College, could make future control of the federal government a nearly insurmountable climb for Democrats. Democrats would still be able to hold power locally, in blue states and cities, but would have a hard time contesting national elections.

Political scientists call this kind of system “competitive authoritarianism”: one in which the opposition can win some elections and wield a limited degree of power but ultimately are prevented from governing due to a system stacked against them. Hungary is a textbook example of competitive authoritarianism in action — and, quite possibly, a glimpse into America’s future.

The Latin American path to a strongman

The rising hostility between the two parties has made it harder and harder for either party to get the necessary bipartisan support to pass big bills. And with its many veto points — the Senate filibuster being the most glaring — the American political system makes it exceptionally difficult for any party to pass major legislation on its own.

The result: Congressional authority has weakened, and there’s a rising executive dependence on unilateral measures, such as executive orders and agency actions. Only rarely do presidents repudiate powers claimed by their predecessors; in general, the authority of the executive has grown on a bipartisan basis.

So long as America is wracked by partisan conflict, it’s easy to see this trend getting worse. In response to an ineffectual Congress and a party faithful that demands victories over their hated enemies, presidents seize more authority to implement their policy agenda. As clashes between partisans turn more bitter and more violent, the wider public begins crying out for someone to restore order through whatever means necessary. Presidents become increasingly comfortable ruling through emergency powers and executive orders — perhaps even to the point of ignoring court rulings that seek to limit their power.

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

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

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

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

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

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

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

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

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

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

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

II. Parker and its Progeny

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Federalism-Based Objections to Sherman Act Preemption

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

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

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

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

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

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

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

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

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

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

#### It’s a cookie-cutter over simplification to say that all scholarship or all subjectivity is neoliberal.

Watts 21 [Galen Watts is Guest Professor with Special Appointment and Banting Postdoctoral Fellow, based at KU Leuven, “Are you a neoliberal subject? On the uses and abuses of a concept” 8-6-2021 Sage Journals]

On neoliberalism (4): What is a ‘neoliberal subject’?

Admittedly, scholarship on ‘neoliberal subjects’ varies in its theoretical sophistication and empirical support. Moreover, as social scientists have become increasingly familiar with the theoretical frameworks informing neoliberalisms (2) and (3), the number of empirical studies making use of one or both of these conceptions has grown exponentially. So, let me be clear: in what follows, my concern is with a particular type of social scientific scholarship on neoliberalism (4) and the distinct errors and oversimplifications it perpetrates. What distinguishes this type of scholarship is that it seeks not merely to critique the ideal typical notion of a ‘neoliberal subject’ (as defined by neo-Marxists and/ or Foucaultians), but also to demonstrate empirically the extent to which either/both neoliberalisms (2) and (3) have successfully penetrated into the psychic and embodied lives of actual individuals, by means of three discursive criteria: within this scholarship, neoliberal subjects are (a) those who invoke the language of personal responsibility or have been ‘responsibilized’; (b) those who value autonomy and speak in the language of individualism; and (c) those who employ the rhetorics of authenticity and selfrealization, and who conceive of their self as a thing to be worked on and improved. The problem with these criteria, we shall see, is that they are excessively broad, multivalent and insufficient to prove what they purport to.

Personal responsibility and responsibilization. Sociologists seem to agree on the ‘centrality of the discourse of personal responsibility in the neoliberal era’ (Foster, 2016, p. 94). As Luxton (2010, p. 180) illustratively remarks in Neoliberalism in Everyday Life, ‘The extent to which people accept personal responsibility both reveals the depth to which neoliberal ideologies have penetrated personal life and shows the centrality of such ideologies for the success of neoliberalism’. Indeed, if one had to boil what it means to be a ‘neoliberal subject’ down to a single concept, ‘responsibilization’ – the process whereby individuals are ‘made responsible’ for their choices and actions, while the state increasingly surrenders responsibility for their health, economic security and well-being – would be a legitimate candidate. Across a range of studies, scholars claiming allegiance to either/both neo-Marxist and Foucaultian theoretical traditions more and more interpret invocations of ‘personal responsibility’ as evidence of ‘neoliberalism’. For instance, in her analysis of the popular memoir Eat, Pray, Love, authored by Elizabeth Gilbert, Williams (2014, p. 620) finds in the book’s pages what she refers to as a ‘neoliberal spiritual subject’ on the grounds that this subject ‘is held responsible for putting in the “work” necessary to be happy and healthy’. And paying homage to Foucault, Williams writes that reading Gilbert’s popular memoir calls to mind ‘the neoliberal vision of the individual as entrepreneur of the self’ (2014, p. 625). Similarly, in his study of mindfulness programs in UK schools, Reveley (2016, p. 498, p. 499) draws on a synthesis of neo-Marxist and Foucaultian approaches, which he argues hold that ‘neoliberalism’s ideological correlates are personal autonomy, self-reliance, and responsibility’ in order to make the case that these programs responsibilize individual subjects because they make them ‘responsible for their own emotional well-being’. Reveley (2016, p. 498) further contends that mindfulness ‘is a practical technique that transmits the neoliberal self-responsibilizing impulse down to young people’. And in her study of Mexican migrants participating in an English language program, Ullman (2012, p. 463), drawing explicitly on the work of Harvey and Rose, argues that because her study participants view learning English as their own personal responsibility, they are repeating a ‘neoliberal mantra’. While I do not doubt the affinities between neoliberalisms (1), (2) and (3) and the rhetoric of personal responsibility, there are real problems with using the existence of the latter as evidence of the former. For one, there is nothing inherently ‘neoliberal’ about the discourse of personal responsibility, given its semantic approval by a whole gamut of other ideologies and political rationalities – be they, conservative, communitarian, civic republican and social democratic. Indeed, personal responsibility is a deeply entrenched value in democratic societies, widely considered integral to being a moral agent (Mounk, 2017, p. 160). For another, scholars have shown that in many texts alleged to disseminate ‘neoliberal discourse’, there often exist alternative conceptions of responsibility at play (e.g. Trunka & Trundle, 2014; Sletto & Nygren, 2016). Of course, an objection might be that whether or not individuals subscribe to alternative conceptions of responsibility, the fact of neoliberalism (1) cannot be dismissed. In other words, processes of responsibilization are taking place and these conditions force individuals to ‘become responsible’, regardless of their convictions. There is undoubtedly truth in this. As the Welfare State has been dismantled, leaving populaces increasingly unprotected and insecure, individuals have done what any and all humans do in the face of change: adapt. Thus, it is reasonable to conjecture that in order to ‘get by’ in these precarious times, we must become, to some extent, self-responsible subjects and furthermore, that reading Eat, Pray, Love, learning to practice mindfulness and accepting responsibility for learning English in some sense encourages and bolsters this process. Yet, even if the above story is correct, it is still not the case that what we end up with are going to be ‘neoliberal subjects’ if by this we mean something that bears some clear relation to neoliberalism (2), or even neoliberalism (3). Recall that neoliberalism (2) presumes a degree of popular, if alienated, consent; neoMarxist scholars presume that neoliberal ideology exists as doxa, in Bourdieu’s sense, informing common-sense understandings. But as Davies (2014, p. 316) remarks, there is a heated debate ‘as to whether neoliberalism is “alive,” “dead” or in some paradoxical “zombie” state’. While Don Kalb (2012, p. 319) contends that ‘neoliberalism, in whatever hybrid or even “parasitic” ... form, appears as less intellectually convincing, popularly legitimate, and more openly and radically confronted than ever in the last three decades’. In agreement, I would argue that neoliberal ideology is, in fact, extremely contested and actually not widely adhered to by ordinary citizens (even in the most ‘neoliberal’ country – America (see Saad, 2019)), so it seems unwarranted to treat the mere fact of adaptation as evidence of a wholesale embrace of neoliberal ideology. Indeed, we need to make space for the distinction proposed by Hilgers between ‘neoliberal dispositions’ and ‘dispositions produced by neoliberalism’ (2013, p. 85). But what of neoliberalism (3)? Arguably these case studies offer clear instances of neoliberal discourses and governmental technologies, which encourage individuals to become ‘entrepreneurs of the self’. But can we even say this much? Recall that, for Foucault, the new homo oeconomicus is the ultimate market actor, one who seeks opportunities for self-investment at every turn. It seems to me that this is patently not what we find in these case studies – or, more charitably, the evidence for this claim is rather weak. For why should we assume with Williams and Reveley that thinking one should bear some responsibility for one’s health and happiness is necessarily evidence of neoliberal reason? This stretches the notion of homo oeconomicus beyond anything resembling what one finds in Foucault’s writings. Or, consider how Ullman goes about identifying the ‘neoliberal mantra’ of the Mexican migrants she studied. One of her interviewees, Raul, informed her that he had a ‘failure of the will/una falta de voluntad’ because he only watched an hour of the English language program he had purchased. When asked why he did this, Raul responded that ‘it was boring’ (Ullman, 2012, p. 463) Ullman interprets this as follows: ‘This interpretation takes the program itself, its quality and the effectiveness of its pedagogical approach, out of the conversation, and makes learning English solely an individual responsibility’ – which, in Ullman’s view, is clearly ‘neoliberal’ (2012, p. 463). But is this conclusion justified? Is it really ‘neoliberal’ to feel one has failed personally because one got bored and failed to do one’s homework? Again, this is a long way from the figure of homo oeconomicus identified by Foucault. Still, there is another claim, implicit in Ullman’s analysis, which is worthy of consideration, as it has become increasingly common: discourses are allegedly ‘neoliberal’ to the extent that they obscure the structural dimensions of social life – that is, to the extent that they are methodologically individualistic.

Autonomy and individualism. Next to the discourse of personal responsibility, scholars tend to zero in on the language of autonomy and individualism as proof of ‘neoliberal subjectivity’. In fact, processes of responsibilization and ‘autonomization’ are generally considered discursively tethered, if not complementary. For instance, in their analysis of Norwegian and Turkish media discourse, Tu¨rken et al. (2016, p. 37), drawing on the work of Foucault and Rose, identify the normalization of ‘a responsible subject who needs “self-control” in order to “take charge of” and “to be able to live life”’ They write, ‘Different voices in our data discursively construct the individual as an autonomous subject who is encouraged to “take action”, “take personal responsibility”, and “work hard” to achieve a “happy life” (2016, pp. 37–38), thereby concluding that mainstream media discourse in these countries serves to disseminate ‘neoliberal thinking’ (2016, p. 35). In their study of psychotherapeutic discourse Lamarre et al. (2019, p. 239) write, ‘Neoliberal governmentality can be seen as a “conduct of conduct” (Foucault, 2008) or a strategic creation of a specific form of subjectivity’ (p. 239). They argue that psychotherapeutic discourse normalizes and produces this ‘normative neoliberal subjectivity’ which they characterize as ‘autonomous, freely choosing subjects continuously involved in self-improvement’ (2019, p. 244). They conclude, ‘Psychotherapy is inevitably informed by and potentially further perpetuates neoliberal ideology’ (Lamarre et al., 2019, p. 242). And in his study of ‘workplace spirituality’, invoking a synthesis of neoMarxist and governmentality approaches, LoRusso (2020, p. 6) contends that workplace spirituality is a ‘technology of the self’ which ‘produces the quintessential capitalist subject, a radically individualist subject for whom reality is itself merely the results of individual choices about how it is to be experienced’. Thus, for LoRusso, what makes ‘spirituality’ neoliberal is the fact that it promotes a ‘program of individual rather than social change’ (LoRusso, 2017, p. 68). Now, just as with the blanket condemnation of ‘personal responsibility’, the problem with automatically subsuming the language of autonomy and individualism under the conceptual umbrella of ‘neoliberalism’ is that it ignores Durkheim’s (1969) key insight that individualism is both a collective and polyvalent discourse, holding widely divergent consequences depending on how it is interpreted. Indeed, it is well established within sociology that there exist multiple individualisms, rooted in distinct cultural traditions (Bellah et al., 1985). Thus, as Barnett (2005, p. 11) fittingly cautions, by subsuming all individualistic rhetoric under the category ‘neoliberalism’ scholars theorize out of sight alternative political rationalities that, while wedded to the value of individual autonomy, may conceptualize this ideal in quite different ways. Moreover, as cultural sociologists have shown, individuals adopt different technologies, devices and discourses in different contexts, adapting them to their particular aims and present circumstances (Swidler, 1986). So, while it might be true that, in some instances, individuals invoke a methodologically individualistic discourse which exalts the individual over the social, it is theoretically naı¨ve to suppose that, by necessity, this discourse is always and everywhere invoked by said individual. As Scharff (2016, p. 115) remarks, ‘entrepreneurial discourses are negotiated in contexts that provide a range of discourses’. Accordingly, it seems reasonable to question any necessary connection between individualistic talk and endorsement of neoliberalism (2). Still, could we not plausibly interpret these case studies as instances of neoliberalism (3)? That is, as genealogical attempts to trace the forms of neoliberal reason underlying the governmental technologies and discourses of media, psychotherapy and workplace spirituality? Much as before, it is not clear that what we find in these case studies is in fact the kind of neoliberal reason of which Foucault has written, since mere talk of individual autonomy and free choice is insufficient evidence of homo oeconomicus. But even were we to accept this claim, it seems to me that these case studies do not actually limit themselves to neoliberalism (3), but rather make the leap to neoliberalism (4). The shift from neoliberalism (3) to neoliberalism (4) is subtle, but significant. It is characterized by a shift from the genealogical and textual analyses of Foucault and early governmentality scholars like Rose – which sought merely to chart the emergence of new discourses and associated technologies – to empirical analyses of how these discourses and technologies are allegedly internalized by actual subjects. Again, Foucault did not conceive of homo oeconomicus as a real empirical subject. Moreover, early governmentality scholars did ‘not suppose that governmental rationalities automatically determine subjectivities’ (Barnett et al., 2008, p. 629), nor did they concern themselves with the way specific discourses or technologies are implemented, adopted or refused by actual persons (Rose et al., 2006, p. 100). However, this epistemic humility has become increasingly rare in recent years – as these case studies aptly illustrate. For instance, Lamarre et al. write, ‘Following poststructuralist lines of thought, we might understand the power of the neoliberal capitalist state as both restrictive and Watts 11 productive, but always shaping what we know and how we know ourselves to be’ (2019, p. 239, emphasis added). While LoRusso maintains that, ‘At the individual level, these discourses penetrate, possess, and produce the expectations and dispositions of persons’ such that workplace spirituality ‘reshapes employees into willing participants in a neoliberal social order’ (LoRusso, 2020, p. 23, 13, emphasis added). Interestingly, Tu¨rken et al. (2016, p. 43) are more cautious. They conclude their study: ‘Although media is a powerful tool to disseminate meaning and thereby influence subjectivity in society, people do negotiate their own understandings and may even oppose media’s positioning of subjecthood’, adding, ‘The present study does not investigate how media discourse on self-development is negotiated by the readers’. And yet, after noting this critical and consequential limitation of their research, only a few lines below they boldly assert a claim for which they have provided little actual evidence: ‘the dominant individualistic subject of contemporary society is reproduced and refashioned as an entrepreneur of herself’ (Tu¨rken et al., 2016, p. 44). Accordingly, for these scholars, the homo oeconomicus identified by Foucault is no longer a mere speculative fiction of the human capital theorist’s making, but allegedly captures the psychic and embodied life of the majority of people in the twenty-first century.

The problem is that this methodological leap – from neoliberalism (3) to neoliberalism (4) – is frequently not warranted. As Tu¨rken et al. would admit, discourse analysis of media articles, psychotherapeutic manuals and workplace spirituality texts does not provide us with a transparent window into the psychic lives of individuals – what many accounts of ‘neoliberal subjectivity’ claim to have accessed. Indeed, the presumption that ‘publicly observable rationalities, procedures and techniques of state and non-state actors can be read as proxies for processes of subject-formation’ is simply untenable (Barnett et al., 2008, p. 626). And as Scharff (2016, p. 108) usefully reminds us, ‘there has been little empirical research that explores the contours of entrepreneurial subjectivity and, even more specifically, its psychic life’.

Here, then, we confront the gap between neoliberalism (3) and neoliberalism (4): It is one thing to identify discourses, technologies and apparatuses – it is something else entirely to contend that they actually induce subject-formation (Barnett, 2005, p. 10). Now, this is not to say that neoliberalism (3) cannot lead to neoliberalism (4). On the contrary, I do not doubt that neoliberal discourses have been internalized by some, shaping their behaviour and self-understanding. But the fact of the matter is these representative studies provide little evidence to show this. Furthermore, other empirical studies make clear that the story is far more complicated, involving processes of discursive contestation and refusal which are too often ignored. For instance, upon conducting interviews with freelance journalists about how they respond to popular ‘personal branding’ discourses within their industry, Vallas and Christin (2018, p. 24) found that ‘interviewees respond to entrepreneurial discourse in a multiplicity of ways, defying characterization in simple or uniform terms’. They also found that national cultural repertoires, occupational norms and the degree of material precarity experienced by these journalists considerably shapes the extent to which they become the ‘enterprising self’ naturalized in neoliberal reason (Vallas & Christin, 2018, p. 28). And in his qualitative study of how middle-class individuals read self-help books, Lichterman (1992, p. 422) writes, ‘They read books ambivalently, and in ongoing relation to other frameworks for situating personal selfhood in a social context’, thereby concluding, ‘We can not assume in advance that we know how strong or how unified an ideological message it is that self-help book readers read out of their self-help books’ (1992, p. 423). Houghton usefully explicates the implications that follow from these insights:

This difference between the actual and the ideal is a point that is at times forgotten in Foucauldian accounts of subjectivity: the extent to which individuals become a certain type of subject is always an empirical question, hence the need for empirical research. So, while we can talk of neoliberal subjects, this is not to say agents will operate exclusively through that frame. (Houghton, 2019, p. 622)

Ironically, while this might be typical of contemporary ‘Foucaultian accounts of subjectivity’, they actually conflict with the work of Foucault himself. As Green (2010, p. 318) notes, in his mature work Foucault endorsed the view that ‘disciplinary power is both more complex in its effect and perhaps less effective in subjectification than proposed by popular post-structural approaches’. It would seem, then, that even Foucault would have had trouble accepting much scholarship that claims to have identified neoliberalism (4).

Authenticity and self-realization. According to many sociologists, the ‘entrepreneurialization of subjectivity’ (Christiaens, 2019, p. 95) veils itself most conspicuously behind the language of authenticity and self-realization. The idea is that to speak, as so many today do, of the importance of ‘realizing one’s potential’, ‘improving oneself’ and ‘seeking personal growth’, is to have subjected oneself to neoliberal governmentality. To give some examples: in his analysis of the emerging discipline of Happiness Studies Binkley (2011, p. 383), an avowed disciple of Foucault, contends that ‘the current discourse on happiness’ serves as a technology of ‘neoliberal subjectification’. He writes, ‘To govern oneself through the maximization of one’s potential for happiness is to govern oneself as a subject of neoliberal enterprise’ (2011, p. 340). In their analysis of self-help discourse, Erjavec and Volcic (2009, p. 139), citing Wacquant and other neo-Marxists, critique ‘the (neo)liberal imperative of constant retraining, a “just-keep-on-learning” mentality, selfdevelopment and individual responsibility’. And in her study of contemporary spirituality, Altglas (2018, p. 87), drawing on Foucault and Rose, writes that ‘Spirituality’ entails ‘accepting the necessity for the individual to commit to a process of change, learning, and progress – what “spiritual seekers” and their teachers call “working on oneself”‘. She concludes, ‘Spirituality as self-discipline and the kind of self it celebrates... constitutes a particular way to exert power in affinity with neoliberalism’s political and economic mechanisms of privatisation’ (2018, p. 95). The notion that the rhetorics of authenticity and self-realization signal a ‘neoliberal subject’, while theoretically provocative, is problematic. For one, as Laidlaw (2015, p. 913) reminds us, ‘The idea of taking the self as a project of self-discovery in the West goes back at least to Stoicism and has been there in Asia in Buddhism and Confucianism for centuries’. In fact, the conviction that each individual has a potential that is unique to them, and that it is their life’s vocation to realize this is arguably constitutive of the modern identity (Taylor, 1989). So, why should we assume that maximizing one’s Watts 13 potential for happiness, a ‘keep-on-learning’ mentality, or continually seeking to develop one’s self are distinctly ‘neoliberal’? There seems to me no necessary connection between these qualities and endorsement of neoliberalism (2). Nor do I see a necessary connection between these features and the ‘entrepreneur of the self’ naturalized in human capital theory. Again, one potential response is that I have made an error in presuming that these scholars do, in fact, assume the success of these technologies and discourses in constituting or subjectifying actual individuals. Perhaps their only concern is with the governmental technologies and discourses themselves. That is, perhaps they are not endorsing neoliberalism (4), but rather limiting their analyses to neoliberalism (3). On this modified account, the claim would be that positive psychology, self-help and spiritual books function as technologies and devices of neoliberal governmentality, which naturalize ‘neoliberal discourse’, given their naturalization of the ideal of a self-responsible, autonomous and self-realizing subject. While this claim may be more modest, it is still not without issues. And the reason for this is that it is not merely neoliberalism which presupposes and prescribes the ideal of a self-responsible, autonomous and self-realizing subject, but that this has also been a staple of liberalism since its inception, given its critique of excessive government (Burchell, 1993). Indeed, it is for precisely this reason that Rose made sure to distinguish between ‘neoliberalism’ – which he views as a ‘highly specific rationality’ (Rose et al., 2006, p. 97) – and ‘advanced liberalism’ – which he views as ‘something with a more general salience, which underpins mentalities of government from all parts of the political spectrum’ (Rose, 1996, p. 60). In other words, according to Rose, while a neoliberal programme may well find alignment with advanced liberal forms of rule, it would be wrong to reduce the latter to the former. It should not surprise us, then, that Rose has offered strong words against what he refers to as

a kind of cookie-cutter typification or explanation, a tendency to identify any programme with neo-liberal elements as essentially neo-liberal, and to proceed as if this subsumption of the particular under a more general category provides a sufficient account of its nature or explanation of its existence. (Rose et al., 2006, p. 98).1

Furthermore, it is critical to note that Rose, like Foucault, has long distanced himself from the kind of socio-critique implicit in neoliberalism (2). And the reason for this is that he seems to think, given that advanced liberalism is the regnant form of political rule, we are all subject to it in one way or another (Barry et al., 1996).

Where does this leave us? I would put it this way: If we accept that neoliberalism (1) has created socio-economic conditions that have forced individuals to adapt and thereby become, to some extent, self-responsible subjects, then it might well be that all of us, simply by virtue of inhabiting these social conditions, have become ‘neoliberal subjects’. Indeed, if we accept Rose’s claim that we are all subject to advanced liberal forms of rule, then this would seem a natural corollary. However, the difficulty with this conception of ‘neoliberal subject’ is that it is not clear what ‘neoliberal’ in this instance actually means. It is clearly not neoliberalism (2), since this would entail not just adaptation, but acquiescence such that we, as individuals, had accepted the basic tenets of neoliberal 14 European Journal of Social Theory XX(X) ideology. Nor is it clear that it entails neoliberalism (3), which entails having one’s subjectivity constituted by neoliberal reason. Thus, it seems to me far more accurate to say that we are all (or most us, anyway) liberal subjects – those who, in one way or another, conceive of ourselves as self-responsible, autonomous and self-realizing subjects. Though it goes without saying that such a claim is not all that illuminating.

Conclusion

Let me be clear: I do not doubt that, in some cases, neoliberalisms (1), (2) and (3) have led to the production of actual ‘neoliberal subjects’ – that is, living breathing homo oeconomicus. For instance, I would conjecture that the world of corporate finance is probably densely populated with such subjects (e.g. Neely, 2020). And indeed, in my own research, I have found that Charismatic Christians who subscribe to ‘prosperity gospel’ approximate the ‘enterprising self’ normalized in human capital theory (Watts, forthcoming). However, I am quite sceptical of the claim that neoliberal subjects populate each and every social sphere, as if we are all in the thralls of neoliberal ideology, or govern ourselves exclusively according to the dictates of neoliberal reason. That said, this obviously remains an urgent research question. But if we are to pursue it, we require a methodological approach that is sensitive to institutional specificities, the extent to which discourses are polyvalent, and the complexities involved in the production of psychic and embodied subjectivities, not just a loose discourse analysis of governmental texts.

Why? For both academic and political reasons. First, the academic: to the extent that neoliberalisms (1), (2) and (3) exist, it only muddies the water to overinterpret them. Indeed, we would do better to practice analytic precision when labelling something (or someone) ‘neoliberal’. This is especially the case when researching across national contexts: it is simply not accurate that every citizen of Western liberal democracies is equally ‘neoliberal’, either in the sense that they adhere to neoliberal ideology or that they live according to neoliberal reason. And as a growing number of scholars have maintained, it is misleading to interpret the subjective lives of citizens of East Asia and the Global South as wholly colonized by either neoliberalisms (2) or (3) (Ferguson, 2009; Parnell & Robinson, 2012). However, even within specific national contexts, we must make sure to recognize that identities and discourses are multiple, such that mere invocations of aspects of ‘neoliberal discourse’ should not be taken as evidence of a comprehensive ‘neoliberal subjectivity’. In short, if our aim as social scientists is to capture the complexity, richness and diversity of subjective life in the twenty-first century, then we ought to broaden the ‘repertoire of subjectivity’ (Green, 2010, p. 331) carried in our analytic toolboxes.

Second, the political: for those of us who find something abhorrent about neoliberalisms (1), (2) and (3), it may actually undermine our cause to repeatedly give the impression that one or either of these have seeped into the subjectivities of everyone presently living. One reason for this is that to the extent that we overlook, or dismiss, extant alternative social and moral forms, we may unwittingly serve to bolster neoliberal ideology and reason, aiding and abetting their spokespeople in their goal of global domination. Indeed, John Welsh (2020, p. 68) suggests that if we are to oppose neoliberalism in all of its forms, academics must begin to ‘introduce contingency back into the interstices of this seemingly impenetrable edifice’. Interestingly, this strategy actually aligns with the mature work of Foucault, for whom scholarship should seek to disrupt that which is taken for granted. Drawing on this Foucaultian legacy, Cornelissen (2018, p. 144) convincingly argues that ‘resistance should be given a more prominent analytical role in the critique of neoliberalism’, adding, ‘resistance is not secondary to the elaboration of alternatives; rather, moments of refusal must guide the formulation of alternative analyses’. Cornelissen concludes, ‘what is at stake politically is our capacity to imagine practices or resistance to neoliberalism and to take seriously those modalities of resistance that already exist’. I could not agree more. And for this reason, I think we should be far more careful when invoking the monolithic notion of a ‘neoliberal subject’.

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

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

The Biden Administration issued a press release and fact sheet on Feb. 28, 2022, titled "Lowering Prices and Leveling the Playing Field in Ocean Shipping." The release builds on a series of ongoing efforts (see previous Holland & Knight alert, "DOJ to Collusive Price Gougers Exploiting Supply Disruptions: We Will Prosecute You," Feb. 18, 2022) to tackle supply chain disruptions by leveraging the Shipping Act and antitrust laws. The main takeaways are:

The U.S. Department of Justice (DOJ) is expanding its cooperation with the Federal Maritime Commission (FMC). Building on the DOJ-FMC 2021 memorandum of understanding (MOU), the DOJ will "provide the FMC with the support of attorneys and economists from the Antitrust Division for enforcement of violations of the Shipping Act and related laws." Likewise, the FMC will share shipping industry experience with the DOJ for Sherman Act and Clayton Act enforcement actions.

The FMC has already taken steps to audit ocean carriers, based on complaints received from cargo owners. In addition, the DOJ recently announced an initiative to investigate and prosecute antitrust activities in other parts of the supply chain. In its most recent initiative, the Administration is again focusing on ocean shipping, and highlighted high shipping costs and practices perceived to contribute to congestion and cost increases.

Shipping Act Reform. The Biden Administration called on Congress to "provide additional tools ... to address problems in the ocean shipping industry" and expressed encouragement with current legislative efforts. The Administration is referring to bills under consideration in the U.S. House of Representatives and Senate — the Ocean Shipping Reform Act of 2021 (OSRA 2021) (H.R. 4996) and the Ocean Shipping Reform Act of 2022 (OSRA 2022) (S. 3580) — proposing an array of different changes to the Shipping Act intending to target congestion, practices and charges. OSRA 2021 passed the House in December 2021 with bipartisan support. The Senate companion bill, OSRA 2022, is under consideration in that chamber. Despite the common purposes, the bills have significant differences that must be worked out.

Changes to Antitrust Immunity? The Administration also called on Congress to "address the immunity of alliance agreements from antitrust scrutiny under current law." According to the White House Fact Sheet, "Congress steadily deregulated the industry — expanding the antitrust immunity while weakening ocean carriers' obligations to publicly disclose prices and fees and treat businesses and their customers fairly." Further details were not provided, but neither OSRA 2021 nor OSRA 2022 appear to directly address antitrust immunity.

The White House also indicated that existing oversight efforts would continue, reported on progress with the FMC's audit program, new investigations, a new data initiative, and a pending FMC rulemaking on Demurrage and Detention billing currently open for public comment (through March 17, 2022).

Conclusion and Considerations

Coming on the eve of President Joe Biden's State of the Union address on March 1, it is anticipated that President Biden will highlight these and other efforts to address supply chain issues. Moving forward, expect continued activity on the legislative and regulatory fronts. Stakeholders with interests in the legislation and the current rulemaking still have opportunities for involvement.

Regarding the enhanced DOJ-FMC cooperation, the initiative points yet again in the direction of heightened scrutiny ahead, with the potential for more robust investigations, more enforcement capacity and harsher penalties. As Holland & Knight has advised previously, supply chain stakeholders should review their practices and antitrust compliance protocols, proceed cautiously and engage legal counsel before initiating discussions or entering into agreements with marketplace counterparties.

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

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

President Joe Biden’s order, signed Friday, calls on the Federal Trade Commission to boost labor market competition by writing new rules that limit “unnecessary, cumbersome” licensing requirements, often imposed by states’ regulatory boards and quasi-public organizations.

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

Potential FTC Moves

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

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

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

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

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

Gaining Attention

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

State Action

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

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

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

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

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

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

#### Court rulings on Parker empirically deny disad links

Grossman 15 [Jonathan M. Grossman, co-chair at Cozen O’Connor, Harvard Law School, J.D., 2000, 2-25-2015 https://www.cozen.com/news-resources/publications/2015/supreme-court-delivers-another-blow-to-state-action-antitrust-immunity]

Supreme Court Delivers another Blow to State Action Antitrust Immunity

Today’s Supreme Court decision in North Carolina State Board of Dental Examiners v. Federal Trade Commission1 is the second time in two years that the Court has spoken on the state action exemption to the federal antitrust laws, and the Court once again has made it clear that the days of an expansive interpretation of that exemption are over.

Under the state action exemption, which is based on the principles of state sovereign immunity, restraints imposed by a state as an act of government are exempt from federal antitrust laws. Parker v. Brown, 317 U.S. 341 (1943). Private parties carrying out a state’s regulatory program are also immune as long as the private party: 1) is acting pursuant to a “clearly articulated and affirmatively expressed … state policy;” and 2) is “actively supervised by the state itself.” Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980).

Today’s decision in NC Dental and the 2013 Supreme Court decision in Phoebe Putney2 each focused on one of the two prongs of the Midcal test, and each decision will have the effect of making it more difficult to extend the exemption beyond the state itself.

In NC Dental, the Court focused on the “active supervision” requirement and concluded that the North Carolina Board of Dental Examiners (the Board) did not meet that test. The controversy began in 2003 when non-dentists in North Carolina began to offer teeth-whitening services. The Board, which is designed as a state agency by statute, consisted of six licensed dentists, one licensed dental hygienist, and one consumer member; with the dentists and dental hygienists elected by their peers and the consumer member appointed by the governor of the state. The Board issued nearly 50 cease-and-desist letters to non-dentist providers that effectively resulted in the end of non-dentists providing teeth-whitening services in the state. In 2010, the Federal Trade Commission (FTC) issued an administrative complaint against the Board alleging that it had violated the FTC Act by excluding the non-dentist teeth-whitening providers. The Board argued that it was acting as a state agency and thus immune from federal antitrust laws. The FTC issued a final order against the Board and enjoined it from issuing further extrajudicial orders to teeth-whitening providers in North Carolina. The 4th Circuit denied the Board’s subsequent petition seeking review of the FTC order.3

In affirming the 4th Circuit decision, the Supreme Court held that a state board on which a controlling number of decision makers are active market participants in the occupation the board regulates must satisfy Midcal’s active supervision requirement in order to invoke antitrust immunity under the state action exemption. The Court noted that “when a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest.” Furthermore, while the Board did not argue that it was actively supervised by the state, the Court concluded its decision by reiterating the requirements of active state supervision: (1) the substance of the anti-competitive decision must be reviewed by a state supervisor; (2) the state supervisor must have the power to veto or modify decisions to ensure that they align with state policy; (3) the “mere potential for state supervision” is not a sufficient substitute for an actual decision by the state; and (4) the state supervisor may not be an active market participant.

The 2013 Phoebe Putney decision focused on the “clear articulation” prong of Midcal. That case arose out of a merger of a for-profit hospital with a hospital owned and operated by a county hospital authority (Authority), which was created by the state legislature but operated independently of the state government. The FTC alleged that the transaction was technically structured as an acquisition of the for-profit by the Authority, in a specific attempt to take advantage of the state action exemption. The 11th Circuit observed that Georgia’s Hospital Authorities Law granted hospital authorities the power to “operate projects” including hospitals, to “make and execute contracts and other instruments necessary to exercise the[ir] powers,” and to “acquire by purchase, lease or otherwise … projects.” Based on this broad language, the 11th Circuit found that the legislation clearly indicated that the Georgia Legislature anticipated that the powers it granted to the Authority would produce anti-competitive effects, and thus were a foreseeable result of the legislation and sufficient to meet the Midcal “clear articulation” test. The Supreme Court reversed, holding that the Georgia Legislature did not clearly articulate or affirmatively express a state policy to displace competition in the market for hospital services. The Court noted that the Authority needed to show not just that it had been delegated authority to act, but also that it was authorized to act or regulate in an anti-competitive manner.

The combined effect of NC Dental and Phoebe Putney is that any regulatory body that is not clearly part of the executive branch of a state will have a significantly higher burden to take advantage of the state action exemption. This will require state governments to review and reconsider the structure and procedures of such bodies and should force the bodies themselves to carefully consider whether the state action exemption applies before taking any action that might implicate the federal antitrust laws.

It will also mean that industry participants regulated by such quasi-governmental bodies likely will be emboldened to challenge more adverse actions in court. Given the prevalence of quasi-government entities in states – many of which include market participants – and that they regulate a wide variety of industries including energy, professional services, health care, transportation, and many others, these decisions will likely have significant policy and legal implications for years to come.

#### Reach of the 11th is extremely limited

Page & Lopatka 19 [William H. Page, Marshall M. Criser Eminent Scholar, University of Florida Levin College of Law, and John E. Lopatka, A. Robert Noll Distinguished Professor of Law, Penn State Law, ’19, Parker v. Brown, The Eleventh Amendment, and Anticompetitive State Regulation, 60 Wm. & Mary L. Rev. 1465 (2019), https://scholarship.law.wm.edu/wmlr/vol60/iss4/10

The state action doctrine and the Eleventh Amendment both provide a version of sovereign immunity from the federal antitrust laws for state-connected anticompetitive conduct.289 But these immunities have evolved separately, and they now vary in the scope of their protection.290 State action immunity would leave some conduct exposed to the full range of remedies available under the antitrust statutes that the Eleventh Amendment protects. At first glance, this enforcement gap would seem to create a substantial risk that serious anticompetitive conduct will go undeterred, especially because the state actors protected by the Eleventh Amendment wield the power of the government in pursuing their objectives. On closer examination, however, the risk proves modest. The Eleventh Amendment itself does not preclude all remedies against state actors.291 It permits private injunctive actions against state officials and federal actions for any remedy against state governmental entities and their officials.292 It does not preclude actions against private antitrust violators enabled by state actors.293 It has nothing to say about actions under state antitrust laws in state courts.294 Eleventh Amendment immunity, with all these limitations, seems less costly than eliminating the immunity or eliminating its limitations.

#### No judicial under-enforcement – even on appeal, FTC expertise given deference

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

The institutional concerns about judges substituting their own economic preferences for those of legislators and members of the executive branch might have less force in a context in which an administrative agency--here the FTC--reviewed state and local regulations for compatibility with federal antitrust law. Historically, the political coalitions that opposed economic substantive due process during the Progressive and New Deal eras were comfortable with delegating extensive regulatory powers to federal administrative agencies 167 and rejected Lochnerism because of the political character of judicial activism by unelected judges even while [\*1209] supporting activism by theoretically more democratically accountable institutions such as the FTC. 168 Though ostensibly designed to be technocratic and politically detached, the FTC is in fact politically responsive to the will of Congress, which holds its purse strings. 169 It is thus a more evidently "democratic" institution than the courts are and has a legislative mandate from Congress to make economic policy, 170 which might lend legitimacy to its review of anticompetitive state and local regulation.

Entrusting review to an agency rather than a court would not entirely dissipate concerns about potential Lochnerizing; there would remain judicial review of the agency decision in the federal courts of appeal and, potentially, the Supreme Court. 171 Still, judicial review of agency decisions is more restricted than direct judicial review of state or local regulations. For example, agency factual findings are upheld so long as supported by substantial evidence, and the courts accord a degree of deference (albeit not Chevron deference) to agency decisions on complex economic matters. 172 While opportunities remain for the appellate courts to substitute their own judgment for that of state and local regulators, they could only do so by siding with the FTC, because there would be no judicial review in a case in which the Commission had decided to uphold a regulation as consistent with federal law. 173

# 2AC

## incumbents

### Innovation Link

#### Advantage links are backwards too – national innovation regulation is key to the case

Stiglitz 21 (Joseph Stiglitz is an American economist and public policy analyst, who is University Professor at Columbia University. He is a recipient of the Nobel Memorial Prize in Economic Sciences and the John Bates Clark Medal, May 15th 2021, “A call to arms to change capitalism” The Lancet, VOLUME 397, ISSUE 10287, P1797-1799, <https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)01004-7/fulltext#%20>) CULTIV8

This view of the positive role of government to solve global challenges even within our capitalist society is part of a long tradition, especially in developmental economics. From Alice Amsden's early work on South Korea and Robert Wade's on Taiwan, to the World Bank's study on the East Asian Miracle, scholars have focused their attention on the central role of government in development—the developmental state. Similarly, scholars such as Richard Nelson, Christopher Freeman, and Bengt-Åke Lundvall, in their discussion of national innovation systems, have emphasised the key role of government.

Given her belief in the state's crucial role in driving science and innovation, it is understandable that Mazzucato should disparage much of mainstream economics, which gives primacy to markets and keeps the role of government to a minimum. Such mainstream economics embraces the view that government shouldn't be picking winners. That approach ignores the leadership role of the government in helping shape public purpose, and even its pivotal contributions in support of development and science and creating an inclusive society.

Of course, critics of government point to the instances in which government has backed losers. But these critics, not surprisingly, ignore the many failures in the private sector. Indeed, in the private sector such failures are praised as evidence of risk-taking—nothing ventured, nothing gained. But exactly the same argument applies to the public sector: if there were no failures, it would imply that the government was not taking sufficient risk. What matters is the average return, and in research and development (R&D), a few big successes like the development of the internet and the discovery of DNA can make up for a lot of failures. The average return on government R&D is in fact far, far higher than returns on private investments. As Mazzucato points out, government has often (as in the case of Tesla) not been smart about ensuring that it appropriates for itself and the public the full upside, but that's a very different matter from picking winners. In a particularly inspiring passage in the book, she writes:

“What if government, instead of being viewed as cumbersome while the private sector takes the risks, bears the greatest level of uncertainty and reforms its internal organization to take such risks? Imagine the transformation: from a bureaucratic top-down administration to a goal-oriented stimulator of new ideas from the ground up. Imagine government transformed across the board, from how procurement operates, to how research grants are made, to how public loans are structured and costs and budgeting are understood—all to fulfill public purpose. If we could think and act in this way, we could realize a new vision for sustainable cities or inspire business investment in the social infrastructure and health-care innovations required for a new understanding of well-being, or tackle the greatest challenges of our time such as climate change and health pandemics.”

Having been in government and advised governments, this is a vision that I've seen before. The challenge is to bring it about. Just willing or wishing it—or clearly articulating it—is not enough. There are political and economic forces at play, and without tackling them, it will be hard to realise this vision. It might, for instance, have been helpful if Mazzucato had more fully explained why we need government in the arena of innovation. Producing knowledge is very different from producing steel: there are important benefits to society that accrue from research and innovation that are not appropriated by researchers and those who finance them. Consequently, as the great economist Kenneth Arrow showed almost 60 years ago, markets are not efficient in either the production or use of knowledge. The failures relate both to the levels of investment and the direction of research—we need more research on saving the planet and less on trying to replace unskilled labour.

### Warm

#### Climate sustainable – 32 countries prove

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>

At the heart of Hickel’s argument is an idea that divides degrowthers and their critics: the concept of “decoupling” growth from environmental impact. Hickel and his fellow degrowthers are skeptical that economic growth as we know it can ever truly be achieved without accompanying growth in emissions. But critics argue that not only is it possible — it’s already been happening. For the past decade, as many countries have transitioned to green energy, they have successfully seen their emissions shrink while their GDP has grown. “There have been really big changes since 2005,” when people were debating whether decoupling was even possible, Zeke Hausfather, a climate scientist at the Breakthrough Institute, told me. “Green energy has gotten cheap. Solar power is the cheapest energy at the margins in every country today. Global coal use has peaked.” His research finds evidence of “absolute decoupling” — emissions shrinking while GDP grows — in 32 countries, including the United States, the United Kingdom, and Germany.

#### Warming follows the EKC

\*EKC – environmental Kuznets curve – which is a bell-shaped curve arguing that economies get dirty by industrializing and solve that problem by dematerializing, or innovating those problems out – air and water pollution are cited here as examples

McAfee 20 (Andrew, principal research scientist at MIT, “Why Degrowth Is the Worst Idea on the Planet,” 10/6/20, <https://www.wired.com/story/opinion-why-degrowth-is-the-worst-idea-on-the-planet/)///NRG>

The EKC is a direct refutation of a core idea of degrowth: that environmental harms must always rise as populations and economies do. It's not surprising that today's degrowth advocates rarely discuss the large reductions in air and water pollution that have accompanied higher prosperity in so many places around the world. Instead, degrowthers now focus heavily on one kind of pollution: greenhouse gas emissions. The claims made are familiar ones: that any apparent reductions in greenhouse gas emissions in rich countries are due to offshoring rather than actual decarbonization. Thanks to the Global Carbon Project, we can see if this is the case. GCP has calculated “consumption-based emissions” for many countries going back to 1990, taking into account imports and exports, yielding the greenhouse gas emissions embodied in all the goods and services consumed in each country each year. For several of the world's richest countries, including Germany, Italy, France, the UK, and the US, graphs of consumption-based carbon emissions follow the familiar EKC. The US, for example, has reduced its total (not per capita) consumption-based CO2 emissions by more than 13 percent since 2007. These reductions are not mainly due to enhanced regulation. Instead, they've come about because of a combination of tech progress and market forces. Solar and wind power have become much cheaper in recent years and have displaced coal for electricity generation. Natural gas, which when burned emits fewer greenhouse gases per unit of energy than does coal (even after taking methane leakage into account), has also become much cheaper and more abundant in the US as a result of the fracking revolution.

#### Agriculture, water, minerals are sustainable

\*NKP – nitrogen, potassium, phosphorus

McAfee 20 (Andrew, principal research scientist at MIT, “Why Degrowth Is the Worst Idea on the Planet,” 10/6/20, <https://www.wired.com/story/opinion-why-degrowth-is-the-worst-idea-on-the-planet/)///NRG>

How We Learned to Lighten Up Tech progress and price pressure aren't just leading to the demise of coal. They're also causing us to exploit the planet less in many other important ways, even as growth continues. In other words, EKCs are not just about pollution any more. A good place to start examining this broad phenomenon of getting more from less is US agriculture, where we have decades of data on both outputs—crop tonnage—and the key inputs of cropland, water, and fertilizer. Domestic crop tonnage has risen steadily over the years and in 2015 was more than 55 percent higher than in 1980. Over that same period, though, total water used for irrigation declined by 18 percent, total cropland by more than 7 percent. That is, over that 35-year period, US crop agriculture increased its output by more than half while giving an area of land larger than Indiana back to nature and eventually using a Lake Champlain less water each year. This was not accomplished by increasing fertilizer use; total US fertilizer consumption in 2014 (the most recent year for which data are available) was within 2 percent of its 1980 level. The three main fertilizers of nitrogen, potassium, and phosphorus (NKP) are an interesting case study. Their total US consumption (once other uses in addition to agriculture are taken into account) has declined by 23 percent since 1980, according to the United States Geological Survey. Yet some within the degrowth movement find ways to argue that these declines are also an illusion. These materials thus serve to clearly illustrate the differences in methodology, evidence, and worldview between ecomodernists like myself and degrowthers. The USGS tracks annual domestic production, imports, and exports of NKP and uses these figures to calculate “apparent consumption” each year. Consumption of each of the three resources has declined by 16 percent or more from their peaks, which occurred no later than 1998. This seems like a clear and convincing example of dematerialization—getting more output from fewer material inputs.

#### Forests sustainable

McAfee 20 (Andrew, principal research scientist at MIT, “Why Degrowth Is the Worst Idea on the Planet,” 10/6/20, <https://www.wired.com/story/opinion-why-degrowth-is-the-worst-idea-on-the-planet/)///NRG>

Forest products provide another clear example of dematerialization in the US. Total annual domestic consumption of paper and paperboard peaked in 1999, and of timber in 2002. Both totals have since declined by more than 20 percent. Could these be mirages caused by offshoring that’s not properly captured? That’s highly unlikely, as the country is now onshoring more than it’s offshoring. The US has been a net exporter of forest products since 2009 and is now the world’s largest exporter of these materials.

## cap

### 2ac – fw

#### Their scholarship standard is bad

Moravscik ‘10

(Andrew – Professor of Politics and International Affairs, Department of Politics, Woodrow Wilson School, Princeton University – “‘Wahn, Wahn, Uºberall Wahn’: A reply to Jahn’s critique of liberal internationalism,” International Theory (2010), 2:1, 113–139, <https://www.princeton.edu/~amoravcs/library/wahn_wahn.pdf>)

Conclusions: Why did we have this debate and not some other one? The underlying problem is not Jahn’s sloppiness; it is her basic mode of criticism. By arguing in this way Jahn is acting as a principled scholar, for she is deeply committed to the view that liberals like me do not know what we are talking about. That may sound ﬂip, but I mean it precisely. Jahn is, and admits to being, a theorist of false consciousness.79 She contends that all who do generalizable social science are carriers of social ‘ideologies’ who falsely obscure progressive change. It is the higher purpose of social science, a purpose reserved for critical social theorists such as Jahn, to expose and criticize such ideologies. The rest of us, quite literally, do not know what we are talking about. Anyone seriously committed to such a dismissive view of other scholars will naturally tend to spend a great deal of time lecturing them about the real meaning of what they are saying. This has two unfortunate effects. One is to transform debates between competing views of international relations into debates about competing views of the sociology of knowledge. Everyone spends less time talking about people, states, power, and other real things, and a lot more time talking about epistemology, methodology, and other abstract concepts. I did not become a scholar to do that. The second is that debates become one-sided. According to Jahn’s epistemology, only the critical theorist like herself divines the true meaning of what has been said and done. Thus Jahn seems to see little need to document precisely what liberals say before she imposes her own (mis)reading. In the end disciplinary relativism becomes a self-fulﬁlling prophecy. I believe that a scholarly community should be the site for conversations, not soliloquies. The greatest loss lies in the scholarship that might have been. I admire Jahn’s intense interest in the complex relationship between interest and ideology across the history of modern international relations. Some of her empirical work, though conjectural, is bracing and provocative. Such issues deserve more serious research. However, in order for it to be coherent and credible, it must be more tightly disciplined. It must involve concrete testing of competing mid-range theories, using objective data, communicated in a way all can understand. Had Jahn taken this route, her paper might have launched an interesting empirical and theoretical discussion about the concrete causes of liberal policy failures. But no such debate can ﬂourish as long as one deploys method and philosophy of science to evade direct confrontation with real-world evidence. Jahn spends much time lambasting liberals for their inability to imagine grand alternatives to the geopolitical status quo. Among those who view scholarship as a vocation, the ﬁrst ~~steps~~ (moves) on the road to utopia are more modest.

#### Watt’s contextualizes this in the context of neolib – inaccurately labeling scholarship as capitalist and not evaluating consequences dooms praxis

### 2ac – perm – neolib

#### 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.

#### Anti-monopoly framing solves residual links

Berk 19 [Gerald Berk, Professor of Political Science at the University of Oregon, 11-25-2019, "Antimonopoly and the Democrats," Dissent Magazine, <https://www.dissentmagazine.org/online_articles/antimonopoly-and-the-democrats>]

At first blush, it looks like antimonopoly heightens the conflict between socialists committed to overcoming capitalism and establishment centrists seeking to save it from populist attacks on the left and right. But antimonopoly once contributed to mobilization, coalition building, and sustained reform across the liberal-left spectrum, and it might do so again today.

The Antimonopoly Tradition

Democracy and markets are fragile and demanding systems, easily corrupted by formidable concentrations of power. The antimonopoly tradition recognizes this fragility, and it makes no sharp distinction between economic and political power. Excessive concentrations of political power undermine economic prosperity no less than excessive concentrations of economic power corrupt democracy. The problem for law and public policy in a democracy with markets seems simple: how to check the constant tendency to concentrated power. There’s no clear-cut way to do that, because those who seek to attain power and lock in privilege are endlessly inventive. Under the right conditions, institutions designed to check power can be used to opposite ends. As a result, antimonopoly is far more than an ideology. It is a political project that requires vigilance, action, and constant adaptation.

Reformers have drawn on the antimonopoly tradition—which is far more wide-ranging than just antitrust, a set of policies designed to prevent predatory competition and break up concentrations of economic power—throughout U.S. history. In the 1830s, Jacksonians used it to authorize privatization, dismantling the Second Bank of the United States because it locked in the privilege of an overweening aristocracy. Abolitionists in the 1840s and 1850s drew on the antimonopoly tradition to dismantle the slave power. In the 1880s, populists enacted state antitrust laws to check the growth of corporate power. In the first decades of the twentieth century, Progressives went further, breaking up corporate power and boosting countervailing forces in government, unions, and proprietary enterprise. In the New Deal, the antimonopoly tradition broke the power of banks and industrial corporations and paved the way for regulation, collective bargaining, and welfare provision. In the 1940s, liberals drew on it to outlaw discriminatory pricing and check the predatory power of chain stores. In the 1950s and 1960s, antitrust administrators broke up patent monopolies, opening the way to high technology.

The antimonopoly tradition, as this sketch demonstrates, has enabled diverse political projects. In the first Gilded Age, it provided a challenge to laissez-faire constitutionalism—the legal doctrine that markets were autonomous from politics, and that property and contracts always protected individual liberty. In today’s Gilded Age, the antimonopoly tradition confronts market fundamentalism: the belief that liberty is best realized in market transactions insulated from democratic interference; that it is possible to organize markets effectively without government supervision; and that we ought not worry about concentrations of economic power, either because they are efficient or temporary.

The turn to market fundamentalism had a major impact on the practice of antitrust, severing it from its roots in the antimonopoly tradition. The University of Chicago–trained lawyer Robert Bork, who published The Antitrust Paradox in 1978, convinced Reagan’s Justice Department that antitrust blocked efficient forms of business organization. Left alone, corporations and capital markets could decide better than government regulators whether mergers, hostile takeovers, outsourcing, or breaking up and selling off corporate assets would serve consumers. If the result was concentrated power, so be it. In time, the Democrats agreed that the only goal of antitrust was to protect consumers. By 1992, antitrust had disappeared from their platform for the first time in a century.

The resurgence of the antimonopoly tradition among Democrats indicates a sea change in how they approach economic governance. Rather than limiting debate to after-the-fact redistribution, they have begun to ask how markets and business organizations can be structured to check concentrations of power. Many Democrats are converging on a platform to rebuild a more democratic economy, even as they disagree in fundamental ways over what that means, who should benefit, and how to achieve it. Still, the antimonopoly tradition’s shared appeal could open new possibilities for party politics and reform. This might seem overly optimistic, but a closer look at how the antimonopoly tradition has informed three ideological factions within the Democratic Party—democratic socialists, (neo)liberals, and antimonopolists proper—illustrates the potential for a broader politics focused on challenging concentrated power and building a more democratic economy.

### Tech worker turn

#### ( ) Double-bind – High-Skilled Tech workers.

#### A - Alt invites all workers to its *Party.*

* Pun intended
* MSU = Green
* KU = Yellow

Foster 20, Editor of Monthly Review, and a professor of sociology at the University of Oregon (John Bellamy, The Renewal of the Socialist Ideal, *Monthly Review*, September 2020, Volume 72, Number 4)

The International of Workers and Peoples

Although untold numbers of people are engaged in innumerable struggles against the capitalist juggernaut in their specific localities all around the world, struggles for substantive equality, including battles over race, gender, and class, depend on the fight against imperialism at the global level. Hence, there is a need for a new global organization of workers based on the model of Marx’s First International.48 Such an International for the twenty-first century cannot simply consist of a group of elite intellectuals from the North engaged in World Social Forum-like discussion activities or in the promotion of social-democratic regulatory reforms as in the so-called Socialist and Progressive Internationals. Rather, it needs to be constituted as a workers-based and peoples-based organization, rooted from the beginning in a strong South-South alliance so as to place the struggle against imperialism at the center of the socialist revolt against capitalism, as contemplated by figures such as Chávez and Amin.

In 2011, just prior to his final illness, Chávez was preparing, following his next election, to launch what was to be called the New International (pointedly not a Fifth International) focusing on a South-South alliance and giving a global significance to socialism in the twenty-first century. This would have extended the Bolivarian Alliance for Peoples of Our America to a global level.49 This, however, never saw the light of day due to Chávez’s rapid decline and untimely death.

Meanwhile, a separate conception grew out of the efforts of Amin, working with the World Forum for Alternatives. Amin had long contemplated a Fifth International, an idea he was still presenting as late as May 2018. But in July 2018, only a month before his death, this had been transformed into what he called an Internationale of Workers and Peoples, explicitly recognizing that a pure worker-based International that did not take into account the situation of peoples was inadequate in confronting imperialism.50 This, he stated, would be an organization, not just a movement. It would be aimed at the

alliance of all working peoples of the world and not only those qualified as representatives of the proletariat…including all wage earners of the services, peasants, farmers, and the peoples oppressed by modern capitalism. The construction must also be based on the recognition and respect of diversity, whether of parties, trade unions, or other popular organizations of struggle, guaranteeing their real independence.… In the absence of [such revolutionary] progress the world would continue to be ruled by chaos, barbarian practices, and the destruction of the earth.51

The creation of a New International cannot of course occur in a vacuum but needs to be articulated within and as a product of the building of unified mass organizations expanding at the grassroots level in conjunction with revolutionary movements and delinkings from the capitalist system all over the world. It could not occur, in Amin’s view, without new initiatives from the Global South to create broad alliances, as in the initial organized struggles associated with the Third World movement launched at the Bandung Conference in 1955, and the struggle for a New International Economic Order.52 These three elements—grassroots movements, delinking, and cross-country/cross-continent alliances—are all crucial in his conception of the anti-imperialist struggle. Today this needs to be united with the global ecological movement.

Such a universal struggle against capitalism and imperialism, Amin insisted, must be characterized by audacity and more audacity, breaking with the coordinates of the system at every point, and finding its ideal path in the principle of from each according to one’s ability, to each according to one’s need, as the very definition of human community. Today we live in a time of the perfect coincidence of the struggles for freedom and necessity, leading to a renewed struggle for freedom as necessity. The choice before us is unavoidable: ruin or revolution.

#### B – Link author says inviting Tech Union workers kills Alt, boosts imperialism.

* Conclusion of their article

Kwet 22, PhD in Sociology from Rhodes University, visiting professor @ Yale Information Society Project (Michael, The Digital Tech Deal: a socialist framework for the twenty-first century, *Race & Class*, Vol. 63, Issue 3, modified for language that may offend - DOI:10.1177/03063968211064478)

Conclusion

The tech justice movement needs a new framework organised around the principles of eco-socialism, anti-imperialism, class abolition, identity-based intersectional equality and bottom-up democracy. A Digital Tech Deal goes hand-in-hand with Red and Green Deals for the environment. Tech justice advocates and ecosocialists must join hands if they are to achieve their visions for a different world.

It is essential that environmentalists and tech activists educate themselves and exchange ideas within and across communities so they can co-create a new framework for the digital economy. In order to do this, a clear critique of digital capitalism and colonialism is needed. People from all walks of life could come together to figure out a concrete plan for transformation. With a DTD, some workers – such as those in the ad industry – would lose their jobs, so there would have to be a just transition for workers in the advertising industry. Workers, scientists, engineers, sociologists, lawyers, educators, activists and the public could collectively brainstorm how to make such a transition practical.

While unions have been a source of worker agitation against Big Tech, there is a catch. Unions are essential to resist exploitation, yet unionising Big Tech is much like unionising the East India companies. Moreover, there is a difference between low-skilled labourers receiving little pay and overpaid skilled labourers with a stake in securing their material privilege. It remains to be ~~seen~~ (determined) if the latter would be open to dissolving their place of employment, reducing their pay and assisting the transition to a socialist digital economy.

It is impossible to challenge power at a fundamental level without a mass movement from below. The powerful will not concede their property and power without a serious fight, and will mobilise every resource at their disposal to uphold the status quo. A movement to socialise the digital economy will be fiercely resisted at every level, including at the ideological level.

### Licensing Link

The aff is the perfect middle ground --

#### We don’t remove lisenciLicensing is critical to worker wellbeing

Robinson 18 (Nick, Affiliated Fellow, Center on the Legal Profession, Harvard Law School, “The Multiple Justifications for Occupational Licensing,” Washington Law Review, vol. 93, no. 4, December 2018, p. 1903-1960. HeinOnline, <https://heinonline.org/HOL/P?h=hein.journals/washlr93&i=1937)//NRG>

D. Buffering Producers from the Market

By limiting entry into an occupation and prescribing standards of practice, occupational licensing protects practitioners from at least some of the competitive forces of the larger market. Because of this effect, economists and others have often criticized licensing for being anticompetitive.131 This anticompetitive effect may be justified because a licensing requirement protects consumers from harm or has some other social benefit, like fostering communities of knowledge or promoting social trusteeship.

Yet, this anticompetitive effect may itself serve the public interest in some contexts. For example, occupational licensing may protect producers from market instability in a market that the public relies on for needed goods or services. In Nebbia v. New York,232 the U.S. Supreme Court rejected a Fourteenth Amendment challenge to a law that fixed the price of milk because it "prevent[ed] ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk." '33 A similar argument can be made for using occupational licensing to protect certain occupations from price wars that may otherwise repel talented practitioners from the labor market or stop capable students from entering the occupation.

Such anticompetitive protectionism may also be used to explicitly stabilize the labor market for the benefit not of consumers, but of labor. Karl Polyani famously maintained that a key role of the state should be to slow the chum of modem capitalism and its dislocating effects on members of society.23 4 Occupational licensing can be seen as one way of achieving this end. Although occupational licensing may increase the price of some services for the poor and middle class, it also provides those in an occupation that requires a license (a significant portion of the workforce) with a higher income and other benefits, like less chance of being unemployed and a greater probability of receiving a pension plan. 35 Many in the poor and middle class aspire to be in an occupation that requires a license, as they once aspired to be in a union job, in the hopes of building their lives around the relative stability, prestige, and security licensing can bring.236 Like union jobs, these better-paid, more secure positions may provide broader positive externalities to society, such as creating a stable environment for families to prosper.

In this way, occupational licensing may be viewed as an imperfect check against some of the harshness of the modem economy, whether this is volatile labor markets, wage stagnation or decline, or reduction in worker autonomy.23 Unlike alternative strategies to deal with economic volatility, such as resource transfers from winners to losers, licensing provides a buffer that can allow those in these occupations to continue to build skills and work with dignity.

#### The aff prevents the worst forms of their links

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 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

For the remainder of the twentieth century, the Court struggled to define the boundaries of state activity immune from antitrust suit. In conceiving of the task as a perimeter-drawing exercise with a binary result - "inside" gets immunity, "outside" does not - it borrowed from constitutional federalism's theory that the Constitution gives states the right to regulate autonomously where the feds do not or cannot. This boundary theory of antitrust federalism placed an emphasis on formalism in defining the state, and largely left up to the states themselves the question of what "the state" is for purposes of antitrust immunity. But the boundary method faltered, both because formal lines around state activity turned out to be unworkable, and because such deference to states hobbled the Sherman Act and permitted extremely anticompetitive state regulation. 8 Cracks in the formalist foundation began to show in the 1980s, but the Court still struggled to preserve the paradigm of separate federal and state turf.

Today, the Court has broken with the boundary model and crafted a new antitrust federalism for the twenty-first century. The Court's last three antitrust federalism cases have virtually abandoned formal definitions of "the state" and have adopted an accountability-based test for whether state regulation enjoys immunity from federal antitrust law. 9 The model for power sharing no longer comes from constitutional federalism, but from administrative law where courts use procedural review to control agency decision making. As in administrative law, power sharing means some deference; a federal court hearing an antitrust case [\*1391] will defer to a state's regulatory choices, but only where states adhere to certain decision-making procedures. I call this mode of review "accountability review" because the procedures imposed by the Court are designed to maximize states' exposure to political heat for the regulation's adverse effects on competition.

This Article argues that the Court's new antitrust federalism is an improvement upon the old. First, it is superior to the boundary model because boundaries proved unworkable and because the constitutional federalism model was an imperfect theoretical fit in the antitrust context. Second, process review aimed at political accountability is a better tool for curbing anticompetitive regulation without abrogating state autonomy. It promises to reduce states' reliance on the most competitively risky kind of regulation - industry self-regulation - without second-guessing the regulation for which states take transparent political responsibility.

Its success, however, is not guaranteed. If accountability review fails, the Court has intimated that it may be willing to face the specter of Lochner v. New York 10 and directly review the substance of anticompetitive state regulation. Much depends on how the Court fills in the most important piece still missing from the antitrust federalism puzzle. The Court's recent cases have held that regulation delegated to the industry itself must be ""actively supervised' by the State" 11 to enjoy immunity from the Sherman Act, 12 but the Court has not provided a concrete definition of active supervision. If the Court defines "active supervision" to give accountability review real bite, then the new antitrust federalism has a chance of survival. If not, the Court may find itself in the unenviable position of having to choose between accusations of Lochnerism and letting the states trample federal antitrust policy at their discretion.

### 2ac – antitrust link

#### No link and Turn - Reductionist and rejects tools that curtail violence.

* … post-dating oddly matters bc past examples don’t assume how the Aff/Khan might deploy anti-trust.
* … more than link D – Alt forgoes workable option to re-shape the very power they criticize.
* Author = uber-qual’d… peer-reviewed cultural theory journal recent lit..

Paul ‘22

Sanjukta Paul - Assistant Professor of Law, Romano Stancroff Research Scholar, Wayne State University - J.D., Yale Law School - From the article: “A Democratic Vision for Antitrust” - From the Journal – Dissent - Published by University of Pennsylvania Press - Volume 69, Number 1, Winter 2022, pp. 56-62 (Article) – modified for language that may offend - available via Project Muse

Last spring, prominent Big Tech critic Lina Khan became the new chair of the Federal Trade Commission (FTC)—an appointment widely ~~seen as~~ (considered) a coup for progressive reform. In her confirmation hearing, she characterized the agency’s overarching goal in terms of “fair competition.” This choice of emphasis is significant for understanding the antitrust reform project of which Khan is a leader. At its core, the project is a policy paradigm aimed at creating fair markets—markets characterized by socially beneficial competition, fair prices, and decent wages.

While both proponents and detractors of this reform project sometimes conflate competition policy with the goal of maximizing economic competition for its own sake, in reality, competition law has always assessed economic rivalry and coordination in relation to broader social ends. For a long time, that assessment has been obscured—not to mention insufficiently tethered to the original goals of federal antitrust law. The reform project aims to reorient the use of antitrust in expressly egalitarian and democratic directions.

For decades, competition law and policy have been dominated by the neoclassical law and economics paradigm, which claims that visible market design and coordination interfere with competitive dynamics that would otherwise lead to an efficient allocation of social resources, and thus to the maximization of social welfare. While recent shifts in mainstream economic thinking have led to more discussion of imperfect competition, particularly in labor markets, the “market failures” and power imbalances that justify interventions are on this view still essentially special cases. Moreover, this idealized picture of markets still obscures certain forms of background coordination—especially the often hierarchical and extractive coordination that happens within business firms—while treating other coordination mechanisms as exceptional, with the potential to distort ideal market outcomes.

Conventionally organized business firms are just one of the many means we have to coordinate economic activity; others include labor unions, producers’ cooperatives, and public price boards, to take just a few examples. Because competition law makes ground-up decisions about many forms of economic coordination, and influences the regulatory stance toward others, antitrust reforms hold the potential to affect a broad set of economic policies.

We should not act as if putatively neutral, technocratic appeals to idealized competition can replace moral and political choices about economic life. Nor, however, should we treat actual competition as inherently tainted by its association with neoclassical theory. Channeled appropriately, competition is healthy rivalry: it encourages technological and operational innovations that can have broad social benefits, and it represents an important check on arbitrary bureaucratic power by preserving outside options for workers, consumers, and businesses. Channeled inappropriately, competition can lead to the destructive undermining of rivals (in contrast to constructive outperformance), overwhelm socially valuable independent enterprises, and destroy existing market settlements characterized by fair prices and decent wages. There is no universal logic of competition for policymakers to apply, either dark or redemptive: it is legal, social, and political choices (almost) all the way down.

To move from principles to some specifics, we can ~~look at~~ (consider) the approach the reform project might take in three policy areas: policing corporate mergers and acquisitions, accommodating horizontal and bottom-up economic coordination, and re-regulating the law of vertical restraints. *These* reforms, which are mutually reinforcing, all have the power to help build a more equal and democratic legal organization of the economy.

### 2ac – licensing link

#### 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 28th 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

#### Advantage links are backwards too – national innovation regulation is key to the case

Stiglitz 21 (Joseph Stiglitz is an American economist and public policy analyst, who is University Professor at Columbia University. He is a recipient of the Nobel Memorial Prize in Economic Sciences and the John Bates Clark Medal, May 15th 2021, “A call to arms to change capitalism” The Lancet, VOLUME 397, ISSUE 10287, P1797-1799, <https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)01004-7/fulltext#%20>) CULTIV8

This view of the positive role of government to solve global challenges even within our capitalist society is part of a long tradition, especially in developmental economics. From Alice Amsden's early work on South Korea and Robert Wade's on Taiwan, to the World Bank's study on the East Asian Miracle, scholars have focused their attention on the central role of government in development—the developmental state. Similarly, scholars such as Richard Nelson, Christopher Freeman, and Bengt-Åke Lundvall, in their discussion of national innovation systems, have emphasised the key role of government.

Given her belief in the state's crucial role in driving science and innovation, it is understandable that Mazzucato should disparage much of mainstream economics, which gives primacy to markets and keeps the role of government to a minimum. Such mainstream economics embraces the view that government shouldn't be picking winners. That approach ignores the leadership role of the government in helping shape public purpose, and even its pivotal contributions in support of development and science and creating an inclusive society.

Of course, critics of government point to the instances in which government has backed losers. But these critics, not surprisingly, ignore the many failures in the private sector. Indeed, in the private sector such failures are praised as evidence of risk-taking—nothing ventured, nothing gained. But exactly the same argument applies to the public sector: if there were no failures, it would imply that the government was not taking sufficient risk. What matters is the average return, and in research and development (R&D), a few big successes like the development of the internet and the discovery of DNA can make up for a lot of failures. The average return on government R&D is in fact far, far higher than returns on private investments. As Mazzucato points out, government has often (as in the case of Tesla) not been smart about ensuring that it appropriates for itself and the public the full upside, but that's a very different matter from picking winners. In a particularly inspiring passage in the book, she writes:

“What if government, instead of being viewed as cumbersome while the private sector takes the risks, bears the greatest level of uncertainty and reforms its internal organization to take such risks? Imagine the transformation: from a bureaucratic top-down administration to a goal-oriented stimulator of new ideas from the ground up. Imagine government transformed across the board, from how procurement operates, to how research grants are made, to how public loans are structured and costs and budgeting are understood—all to fulfill public purpose. If we could think and act in this way, we could realize a new vision for sustainable cities or inspire business investment in the social infrastructure and health-care innovations required for a new understanding of well-being, or tackle the greatest challenges of our time such as climate change and health pandemics.”

Having been in government and advised governments, this is a vision that I've seen before. The challenge is to bring it about. Just willing or wishing it—or clearly articulating it—is not enough. There are political and economic forces at play, and without tackling them, it will be hard to realise this vision. It might, for instance, have been helpful if Mazzucato had more fully explained why we need government in the arena of innovation. Producing knowledge is very different from producing steel: there are important benefits to society that accrue from research and innovation that are not appropriated by researchers and those who finance them. Consequently, as the great economist Kenneth Arrow showed almost 60 years ago, markets are not efficient in either the production or use of knowledge. The failures relate both to the levels of investment and the direction of research—we need more research on saving the planet and less on trying to replace unskilled labour.

### 2ac – sustainability

#### 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.

#### Even pessimistic projections support sustainability – the transition backfires

Bazhanov 22 (Andrei V., M.V. Lomonosov Moscow State University, Moscow School of Economics, “Extraction path and sustainability,” Resources Policy, Volume 76, June 2022, <https://www.sciencedirect.com/science/article/pii/S0301420722000174)//NRG>

Sustainability requires coordination of market activities with the ability of economy to satisfy the current and future consumption needs using limited stocks of nonrenewables. This ability depends on the consistency of intertemporal distribution of a stock with the possibility to gradually replace the resource with other factors. This paper assumes the weakest form of this possibility (unitary long-run elasticity of resource–capital substitution) that still gives a chance for sustainability. More pessimistic assumptions can lead to collapse-inducing policies such as complete decapitalization in finite time while sustainability may be possible.

The paper provides a closed-form expression for a family of extraction paths that guarantee long-run sustainability of an imperfect economy. A path from this family leads to a monotonic growth of output with a decreasing rate of growth if a sustainability condition holds. Otherwise, the path leads either to a bounded decline or U-shaped path of output depending on a parameter. That is, the offered approach allows to quantify degrowth scenarios.

The paper does not assume that a planner should commit to the offered path. It is known that inevitable variations in technologies and other uncertain parameters such as stock estimates and consumer preferences lead to dynamic inconsistency. A sensitivity analysis provides practical recommendations on the path corrections depending on these changes. For example, an increase in capital–resource substitutability may be accompanied by a slower decrease in the short run extraction. Another example shows that stock underestimation and dynamic reestimation of extraction path depending on stock updates works as an investment rather than just insurance against future collapse.

Theoretical results are illustrated with numerical examples for a hypothetical upper middle-income oil extracting economy. In particular, these estimates show that the long-run sustainability requires a fast short-run decrease of extraction consistently with the IPCC goals on cutting GHG emissions. That is, the offered approach may work as an incentive-compatibility mechanism for resource-extracting countries: domestic production sustainability requires the same actions as the global goal of mitigating climate change.

### 2ac – alt

#### Vague alts are a voter for mooting clash and justify 1ar perm modifications

#### Alt fails and causes war

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 upheaval. In the scramble to win those battles, even the socialists would almost certainly abandon their limitation on fossil-fuel use — either to support military efforts, or to keep the population from turning against them. The precedent here is the Soviet Union, whose multidecade effort to reshape its economy by force amid confrontation with the West led to profound environmental degradation. The world's climate does not have several decades to spare.

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

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

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

# 1AR

## Case

### 1AR---AT: Decoupling

#### **Only the aff solves in time – solutions to climate**

Aronoff 21 (Kate Aronoff is a staff writer at The New Republic. She is the co-author of A Planet To Win: Why We Need A Green New Deal (Verso) and the co-editor of We Own The Future: Democratic Socialism, American Style (The New Press), INTERVIEW BY, Daniel Denvir, “Capitalism Can’t Fix the Climate Crisis” August 25th 2021, Jacobin Magazine, <https://jacobinmag.com/2021/08/capitalism-climate-crisis-global-green-new-deal-clean-energy-fossil-fuel-industry>) MULCH

You write: “My argument in this book is not that capitalism has to end before the world can deal with the climate crisis. Dismantling a centuries-old system of production and distribution, and building a carbon-neutral and worker-owned alternative, is almost certainly not going to happen within the small window of time the world has to avert runaway disaster. The private sector will be a major part of the transition off of fossil fuels. Some people will get rich, and some unseemly actors will be involved. Capitalist production will build solar panels, wind turbines, and electric trains.

But whether we deal with climate change or not can’t be held hostage to executives’ ability to turn a profit. To handle this crisis, capitalism will have to be replaced as society’s operating system, setting out goals other than the boundless accumulation of private wealth.”

This argument provoked a bit of controversy in the audience a few years back in Chicago when we discussed it on a panel at the Socialism Conference. Both of us would love to live in a socialist world, and we’ve got to continue to fight for one. But why do you think that it’s important for people to understand that we need to deal with climate change before we win an entirely new mode of production? What’s entailed by the conclusion that we need to pursue radical social-democratic reforms on the road to socialism?

Is this a theory of how radical social-democratic reforms can lead to socialism? Is it just a reality that the fast-ticking climate clock imposes on us? Or is it some of both?

KA

It’s a reality. If the climate crisis were playing out over the course of two hundred, three hundred, or a thousand years, one could have an interesting theoretical debate about whether we should change the system we have and tweak it slightly in order to take on the crisis, or whether we should create an entirely new mode of production and build up a workaround alternative.

Unfortunately, we just don’t have that time. The Intergovernmental Panel on Climate Change outlined in its 2018 report on 1.5 degrees Celsius that we had roughly twelve years. That is now nine years in which to rapidly decarbonize the global economy, which is an enormous challenge. In order to meet that ever-shrinking twelve-year window, we have to use the productive system in which we live — which is not my ideal situation, but then again, neither is global warming.

There are different ways of meeting that crisis; there are enormous political stakes in how we use those twelve years. There are different visions of climate action, which can put us on a path toward something like socialism or leave many of the extractive systems that define capitalism today in place. There’s nothing baked into capitalism that says it has to run on fossil fuels, and it’s an enormously resilient system. There’s no reason to think that it will be invulnerable to the climate crisis, or that it won’t figure out a way to extract profit off of renewables, solar, and wind.

## k

### 1AR---AT: Alt

#### This is also offense:

#### 1. crackdowns are extremely violent and elites cling on by imposing the costs on workers through surveillance, detention, and censorship---that’s Mason. It’s important to consider the way elites respond bc it replicates ivory tower elitism to ignore how they respond.

#### 2. Transition wars---economic decline empirically raises the risk of conflicts between countries risks extinction from nuclear war.

glaser ev is about decline of heg---our impact isnt exceptionalist, it's empirically proven by instability in countries

#### Market disruption alone fails---rebounds will be capitalist

Bradshaw et al 21 (Corey J. A. Bradshaw, Global Ecology, College of Science and Engineering, Flinders University, Australia, Australian Research Council Centre of Excellence for Australian Biodiversity and Heritage; Paul R. Ehrlich, Department of Biology, Stanford University; Andrew Beattie, Department of Biological Sciences, Macquarie University, Australia; Gerardo Ceballos, Instituto de Ecología, Universidad Nacional Autónoma de México; Eileen Crist, Department of Science, Technology, and Society, Virginia Tech; Joan Diamond, Millennium Alliance for Humanity and the Biosphere, Department of Biology, Stanford University; Rodolfo Dirzo, Department of Biology, Stanford University; Anne H. Ehrlich, Department of Biology, Stanford University; John Harte, Energy and Resources Group, University of California, Berkeley, The Rocky Mountain Biological Laboratory; Mary Ellen Harte, The Rocky Mountain Biological Laboratory; Graham Pyke, Department of Biological Sciences, Macquarie University, Australia; Peter H. Raven, Missouri Botanical Garden; William J. Ripple, Department of Forest Ecosystems and Society, Oregon State University; Frédérik Saltré, Global Ecology, College of Science and Engineering, Flinders University, Australia, Australian Research Council Centre of Excellence for Australian Biodiversity and Heritage; Christine Turnbull, Department of Biological Sciences, Macquarie University, Australia; Mathis Wackernagel, Global Footprint Network; and Daniel T. Blumstein, La Kretz Hall, Institute of the Environment and Sustainability, and Department of Ecology and Evolutionary Biology, University of California, Los Angeles; “Underestimating the Challenges of Avoiding a Ghastly Future,” Frontiers in Conservation Science, 1-13-2021, DOI: 10.3389/fcosc.2020.615419)

Simultaneous with population growth, humanity's consumption as a fraction of Earth's regenerative capacity has grown from ~ 73% in 1960 to 170% in 2016 (Lin et al., 2018), with substantially greater per-person consumption in countries with highest income. With COVID-19, this overshoot dropped to 56% above Earth's regenerative capacity, which means that between January and August 2020, humanity consumed as much as Earth can renew in the entire year (overshootday.org). While inequality among people and countries remains staggering, the global middle class has grown rapidly and exceeded half the human population by 2018 (Kharas and Hamel, 2018). Over 70% of all people currently live in countries that run a biocapacity deficit while also having less than world-average income, excluding them from compensating their biocapacity deficit through purchases (Wackernagel et al., 2019) and eroding future resilience via reduced food security (Ehrlich and Harte, 2015b). The consumption rates of high-income countries continue to be substantially higher than low-income countries, with many of the latter even experiencing declines in per-capita footprint (Dasgupta and Ehrlich, 2013; Wackernagel et al., 2019). This massive ecological overshoot is largely enabled by the increasing use of fossil fuels. These convenient fuels have allowed us to decouple human demand from biological regeneration: 85% of commercial energy, 65% of fibers, and most plastics are now produced from fossil fuels. Also, food production depends on fossil-fuel input, with every unit of food energy produced requiring a multiple in fossil-fuel energy (e.g., 3 × for high-consuming countries like Canada, Australia, USA, and China; overshootday.org). This, coupled with increasing consumption of carbon-intensive meat (Ripple et al., 2014) congruent with the rising middle class, has exploded the global carbon footprint of agriculture. While climate change demands a full exit from fossil-fuel use well before 2050, pressures on the biosphere are likely to mount prior to decarbonization as humanity brings energy alternatives online. Consumption and biodiversity challenges will also be amplified by the enormous physical inertia of all large “stocks” that shape current trends: built infrastructure, energy systems, and human populations. It is therefore also inevitable that aggregate consumption will increase at least into the near future, especially as affluence and population continue to grow in tandem (Wiedmann et al., 2020). Even if major catastrophes occur during this interval, they would unlikely affect the population trajectory until well into the 22nd Century (Bradshaw and Brook, 2014). Although population-connected climate change (Wynes and Nicholas, 2017) will worsen human mortality (Mora et al., 2017; Parks et al., 2020), morbidity (Patz et al., 2005; Díaz et al., 2006; Peng et al., 2011), development (Barreca and Schaller, 2020), cognition (Jacobson et al., 2019), agricultural yields (Verdin et al., 2005; Schmidhuber and Tubiello, 2007; Brown and Funk, 2008; Gaupp et al., 2020), and conflicts (Boas, 2015), there is no way—ethically or otherwise (barring extreme and unprecedented increases in human mortality)—to avoid rising human numbers and the accompanying overconsumption. That said, instituting human-rights policies to lower fertility and reining in consumption patterns could diminish the impacts of these phenomena (Rees, 2020). Failed International Goals and Prospects for the Future Stopping biodiversity loss is nowhere close to the top of any country's priorities, trailing far behind other concerns such as employment, healthcare, economic growth, or currency stability. It is therefore no surprise that none of the Aichi Biodiversity Targets for 2020 set at the Convention on Biological Diversity's (CBD.int) 2010 conference was met (Secretariat of the Convention on Biological Diversity, 2020). Even had they been met, they would have still fallen short of realizing any substantive reductions in extinction rate. More broadly, most of the nature-related United Nations Sustainable Development Goals (SDGs) (e.g., SDGs 6, 13–15) are also on track for failure (Wackernagel et al., 2017; Díaz et al., 2019; Messerli et al., 2019), largely because most SDGs have not adequately incorporated their interdependencies with other socio-economic factors (Bradshaw and Di Minin, 2019; Bradshaw et al., 2019; Messerli et al., 2019). Therefore, the apparent paradox of high and rising average standard of living despite a mounting environmental toll has come at a great cost to the stability of humanity's medium- and long-term life-support system. In other words, humanity is running an ecological Ponzi scheme in which society robs nature and future generations to pay for boosting incomes in the short term (Ehrlich et al., 2012). Even the World Economic Forum, which is captive of dangerous greenwashing propaganda (Bakan, 2020), now recognizes biodiversity loss as one of the top threats to the global economy (World Economic Forum, 2020). The emergence of a long-predicted pandemic (Daily and Ehrlich, 1996a), likely related to biodiversity loss, poignantly exemplifies how that imbalance is degrading both human health and wealth (Austin, 2020; Dobson et al., 2020; Roe et al., 2020). With three-quarters of new infectious diseases resulting from human-animal interactions, environmental degradation via climate change, deforestation, intensive farming, bushmeat hunting, and an exploding wildlife trade mean that the opportunities for pathogen-transferring interactions are high (Austin, 2020; Daszak et al., 2020). That much of this degradation is occurring in Biodiversity Hotspots where pathogen diversity is also highest (Keesing et al., 2010), but where institutional capacity is weakest, further increases the risk of pathogen release and spread (Austin, 2020; Schmeller et al., 2020). Climate Disruption The dangerous effects of climate change are much more evident to people than those of biodiversity loss (Legagneux et al., 2018), but society is still finding it difficult to deal with them effectively. Civilization has already exceeded a global warming of ~ 1.0°C above pre-industrial conditions, and is on track to cause at least a 1.5°C warming between 2030 and 2052 (IPCC, 2018). In fact, today's greenhouse-gas concentration is >500 ppm CO2-e (Butler and Montzka, 2020), while according to the IPCC, 450 ppm CO2-e would give Earth a mere 66% chance of not exceeding a 2°C warming (IPCC, 2014). Greenhouse-gas concentration will continue to increase (via positive feedbacks such as melting permafrost and the release of stored methane) (Burke et al., 2018), resulting in further delay of temperature-reducing responses even if humanity stops using fossil fuels entirely well before 2030 (Steffen et al., 2018). Human alteration of the climate has become globally detectable in any single day's weather (Sippel et al., 2020). In fact, the world's climate has matched or exceeded previous predictions (Brysse et al., 2013), possibly because of the IPCC's reliance on averages from several models (Herger et al., 2018) and the language of political conservativeness inherent in policy recommendations seeking multinational consensus (Herrando-Pérez et al., 2019). However, the latest climate models (CMIP6) show greater future warming than previously predicted (Forster et al., 2020), even if society tracks the needed lower-emissions pathway over the coming decades. Nations have in general not met the goals of the 5 year-old Paris Agreement (United Nations, 2016), and while global awareness and concern have risen, and scientists have proposed major transformative change (in energy production, pollution reduction, custodianship of nature, food production, economics, population policies, etc.), an effective international response has yet to emerge (Ripple et al., 2020). Even assuming that all signatories do, in fact, manage to ratify their commitments (a doubtful prospect), expected warming would still reach 2.6–3.1°C by 2100 (Rogelj et al., 2016) unless large, additional commitments are made and fulfilled. Without such commitments, the projected rise of Earth's temperature will be catastrophic for biodiversity (Urban, 2015; Steffen et al., 2018; Strona and Bradshaw, 2018) and humanity (Smith et al., 2016). Regarding international climate-change accords, the Paris Agreement (United Nations, 2016) set the 1.5–2°C target unanimously. But since then, progress to propose, let alone follow, (voluntary) “intended national determined contributions” for post-2020 climate action have been utterly inadequate. Political Impotence If most of the world's population truly understood and appreciated the magnitude of the crises we summarize here, and the inevitability of worsening conditions, one could logically expect positive changes in politics and policies to match the gravity of the existential threats. But the opposite is unfolding. The rise of right-wing populist leaders is associated with anti-environment agendas as seen recently for example in Brazil (Nature, 2018), the USA (Hejny, 2018), and Australia (Burck et al., 2019). Large differences in income, wealth, and consumption among people and even among countries render it difficult to make any policy global in its execution or effect. A central concept in ecology is density feedback (Herrando-Pérez et al., 2012)—as a population approaches its environmental carrying capacity, average individual fitness declines (Brook and Bradshaw, 2006). This tends to push populations toward an instantaneous expression of carrying capacity that slows or reverses population growth. But for most of history, human ingenuity has inflated the natural environment's carrying capacity for us by developing new ways to increase food production (Hopfenberg, 2003), expand wildlife exploitation, and enhance the availability of other resources. This inflation has involved modifying temperature via shelter, clothing, and microclimate control, transporting goods from remote locations, and generally reducing the probability of death or injury through community infrastructure and services (Cohen, 1995). But with the availability of fossil fuels, our species has pushed its consumption of nature's goods and services much farther beyond long-term carrying capacity (or more precisely, the planet's biocapacity), making the readjustment from overshoot that is inevitable far more catastrophic if not managed carefully (Nyström et al., 2019). A growing human population will only exacerbate this, leading to greater competition for an ever-dwindling resource pool. The corollaries are many: continued reduction of environmental intactness (Bradshaw et al., 2010; Bradshaw and Di Minin, 2019), reduced child health (especially in low-income nations) (Bradshaw et al., 2019), increased food demand exacerbating environmental degradation via agro-intensification (Crist et al., 2017), vaster and possibly catastrophic effects of global toxification (Cribb, 2014; Swan and Colino, 2021), greater expression of social pathologies (Levy and Herzog, 1974) including violence exacerbated by climate change and environmental degradation itself (Agnew, 2013; White, 2017, 2019), more terrorism (Coccia, 2018), and an economic system even more prone to sequester the remaining wealth among fewer individuals (Kus, 2016; Piketty, 2020) much like how cropland expansion since the early 1990s has disproportionately concentrated wealth among the super-rich (Ceddia, 2020). The predominant paradigm is still one of pegging “environment” against “economy”; yet in reality, the choice is between exiting overshoot by design or disaster—because exiting overshoot is inevitable one way or another. Given these misconceptions and entrenched interests, the continued rise of extreme ideologies is likely, which in turn limits the capacity of making prudent, long-term decisions, thus potentially accelerating a vicious cycle of global ecological deterioration and its penalties. Even the USA's much-touted New Green Deal (U. S. House of Representatives, 2019) has in fact exacerbated the country's political polarization (Gustafson et al., 2019), mainly because of the weaponization of ‘environmentalism' as a political ideology rather than being viewed as a universal mode of self-preservation and planetary protection that ought to transcend political tribalism. Indeed, environmental protest groups are being labeled as “terrorists” in many countries (Hudson, 2020). Further, the severity of the commitments required for any country to achieve meaningful reductions in consumption and emissions will inevitably lead to public backlash and further ideological entrenchments, mainly because the threat of potential short-term sacrifices is seen as politically inopportune. Even though climate change alone will incur a vast economic burden (Burke et al., 2015; Carleton and Hsiang, 2016; Auffhammer, 2018) possibly leading to war (nuclear, or otherwise) at a global scale (Klare, 2020), most of the world's economies are predicated on the political idea that meaningful counteraction now is too costly to be politically palatable. Combined with financed disinformation campaigns in a bid to protect short-term profits (Oreskes and Conway, 2010; Mayer, 2016; Bakan, 2020), it is doubtful that any needed shift in economic investments of sufficient scale will be made in time.

#### No one will join their movement

Buch-Hansen, 18—Department of Business and Politics, Copenhagen Business School (Hubert, “The Prerequisites for a Degrowth Paradigm Shift: Insights from Critical Political Economy,” Ecological Economics Volume 146, April 2018, Pages 157-163, dml)

6. Consent

It is also safe to say that degrowth enjoys no “passive consent” from the majority of the population. For the time being, degrowth remains unknown to most people. Yet, if it were to become generally known, most people would probably not find the vision of a smaller economic system appealing. This is not just a matter of degrowth being ‘a missile word that backfires’ because it triggers negative feelings in people when they first hear it (Drews and Antal, 2016). It is also a matter of the actual content of the degrowth project.

Two issues in particular should be mentioned in this context. First, for many, the anti-capitalist sentiments embodied in the degrowth project will inevitably be a difficult pill to swallow. Today, the vast majority of people find it almost impossible to conceive of a world without capitalism. There is a ‘widespread sense that not only is capitalism the only viable political and economic system, but also that it is now impossible to even imagine a coherent alternative to it’ (Fisher, 2009: 2). As Jameson (2003) famously observed, it is, in a sense, easier to imagine the end of the world than it is to imagine the end of capitalism. However, not only is degrowth – like other anti-capitalist projects – up against the challenge that most people consider capitalism the only system that can function; it is also up against the additional challenge that it speaks against economic growth in a world where the desirability of growth is considered common sense.

Second, degrowth is incompatible with the lifestyles to which many of us who live in rich countries have become accustomed. Economic growth in the Western world is, to no small extent, premised on the existence of consumer societies and an associated consumer culture most of us find it difficult to completely escape. In this culture, social status, happiness, well-being and identity are linked to consumption (Jackson, 2009). Indeed, it is widely considered a natural right to lead an environmentally unsustainable lifestyle – a lifestyle that includes car ownership, air travel, spacious accommodations, fashionable clothing, an omnivorous diet and all sorts of electronic gadgets. This Western norm of consumption has increasingly been exported to other parts of the world, the result being that never before have so many people taken part in consumption patterns that used to be reserved for elites (Koch, 2012). If degrowth were to be institutionalised, many citizens in the rich countries would have to adapt to a materially lower standard of living. That is, while the basic needs of the global population can be met in a non-growing economy, not all wants and preferences can be fulfilled (Koch et al., 2017). Undoubtedly, many people in the rich countries would experience various limitations on their consumption opportunities as a violent encroachment on their personal freedom. Indeed, whereas many recognize that contemporary consumer societies are environmentally unsustainable, fewer are prepared to actually change their own lifestyles to reverse/address this.

#### Their rev gets crushed

Flaherty 5[USC BA in International Relations, researcher in political affairs, activist and organic farmer in New Zealand, 2005, <http://cryptogon.com/docs/pirate_insurgency.html>]

In order to understand the national security implications of militant electronic piracy, an examination of conventional insurgency against the American Corporate State is necessary.

THE NATURE OF ARMED INSURGENCY AGAINST THE ACS Any violent insurgency against the ACS is sure to fail **and will only serve to enhance the state's power**. The major flaw of violent insurgencies, both cell based (Weathermen Underground, **Black Panthers,** Aryan Nations etc.) and leaderless (Earth Liberation Front, People for the Ethical Treatment of Animals, etc.) is that they are attempting to attack the system using the same tactics the ACS has already mastered: terror and psychological operations. The ACS attained primacy through the effective application of terror and psychological operations. Therefore, it has far more skill and experience in the use of these tactics than any upstart could **ever** hope to attain.4 **This makes the ACS impervious to traditional insurgency tactics.**  - Political Activism and the ACS Counterinsurgency Apparatus The ACS employs a full time counterinsurgency infrastructure with resources that are **unimaginable** to most would be insurgents. Quite simply, violent insurgents have **no idea** of just how powerful the foe actually is. Violent insurgents typically start out as peaceful, idealistic, political activists. Whether or not political activists know it, even with very mundane levels of political activity, they are engaging in low intensity conflict with the ACS. The U.S. military classifies political activism as “low intensity conflict.” The scale of warfare (in terms of intensity) begins with individuals distributing anti-government handbills and public gatherings with anti-government/anti-corporate themes. In the middle of the conflict intensity scale are what the military refers to as Operations Other than War; an example would be the situation the U.S. is facing in Iraq. At the upper right hand side of the graph is global thermonuclear war. What is important to remember is that the military is concerned with ALL points along this scale because they represent different types of threats to the ACS. Making distinctions between civilian law enforcement and military forces, and foreign and domestic intelligence services is no longer necessary. After September 11, 2001, **all national security assets would be brought to bear against any U.S. insurgency movement.** Additionally, the U.S. military established NORTHCOM which designated the U.S. as an active military operational area. Crimes involving the loss of corporate profits will increasingly be treated as acts of terrorism and could garner anything from a local law enforcement response to activation of regular military forces. Most of what is commonly referred to as “political activism” is viewed by the corporate state's counterinsurgency apparatus as a useful and necessary component of political control. Letters-to-the-editor... Calls-to-elected-representatives... Waving banners... “Third” party political activities... Taking beatings, rubber bullets and tear gas from riot police in free speech zones... Political activism amounts to an utterly useless waste of time, in terms of tangible power, which is all the ACS understands. Political activism is a cruel guise that is sold to people who are dissatisfied, but who have no concept of the nature of tangible power. Counterinsurgency teams routinely monitor these activities, attend the meetings, join the groups and take on leadership roles in the organizations. It's only a matter of time before some individuals determine that political activism is a honeypot that accomplishes nothing and wastes their time. The corporate state knows that some small percentage of the peaceful, idealistic, political activists will eventually figure out the game. At this point, the clued-in activists will probably do one of two things; drop out or move to escalate the struggle in other ways. If the clued-in activist drops his or her political activities, the ACS wins. But what if the clued-in activist refuses to give up the struggle? Feeling powerless, desperation could set in and these individuals might become increasingly radicalized. Because the corporate state's counterinsurgency operatives have infiltrated most political activism groups, the radicalized members will be easily identified, monitored and eventually compromised/turned, arrested or executed. The ACS wins again.

### 1AR---AT: Capture Link

#### No agency capture---it’s not true for agencies---their card is abt private litigants.

McGinnis 21 (John O. McGinnis, George C. Dix Professor @ Northwestern University; and Linda Sun, J.D., Associate, Wilmer Pickering Hale & Dorr LLP; “Unifying Antitrust Enforcement for the Digital Age;” 2021, Washington & Lee Law Review, Vol. 78, Accessed through HeinOnline, TM)

Both these arguments for dual enforcement also sit uneasily with the structure of the rest of the administrative state. As we discuss below,90 one agency is generally charged with enforcing a single set of laws.91

**[[FOOTNOTE 91]]**

91. The general presumption in favor of making one agency responsible for a regulatory area refutes any notion that the way to respond to fear of agency capture is to create multiple agencies. In any event, both the Antitrust Division and FTC are less likely to be captured than many agencies that singly enforce their laws. They are "relatively well insulated from such influence by the need to apply objective economic principles." Joshua D. Wright et al., Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust, 51 ARIZ. ST. L.J. 293, 365 (2019). Moreover, unlike many other agencies, important businesses both are sued and seek to sue at different times under the antitrust law, making it harder for businesses to form a unified front of influence.

**[[END FOOTNOTE 91]]**

The dual enforcement structure for antitrust is anomalous and its anomality has more costs than before, because of the need for certainty in our dominant technology sector.

### 1AR---AT: 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

#### It's sustainable---by every metric cap causes improvements

Schrager **‘**20 [Allison; Winter 2020; Ph.D. in Economics from Columbia University, Senior Fellow at the Manhattan Institute; "Why Socialism Won't Work," https://foreignpolicy.com/2020/01/15/socialism-wont-work-capitalism-still-best/]

WITH INCREASINGLY UBIQUITOUS IPHONES, internet, central air conditioning, flat-screen TVs, and indoor plumbing, few in the developed world would want to go back to life 100, 30, or even 10 years ago. Indeed, around the world, the last two centuries have brought vast improvements in material living standards; billions of people have been lifted from poverty, and life expectancy across income levels has broadly risen. Most of that progress came from capitalist economies.

Yet those economies are not without their problems. In the United States and the United Kingdom, the gap between the rich and poor has become intolerably large as business owners and highly educated workers in urban areas have become richer while workers' wages in rural areas have stagnated. In most rich countries, more trade has brought a bigger, better variety of goods, but it has also displaced many jobs.

With social instability in the form of mass protests, Brexit, the rise of populism, and deep polarization knocking at the capitalist economies' doors, much of the progress of the last several decades is in peril. For some pundits and policymakers, the solution is clear: socialism, which tends to be cited as a method for addressing everything from inequality and injustice to climate change.

Yet the very ills that socialists identify are best addressed through innovation, productivity gains, and better rationing of risk. And capitalism is still far and away the best, if not only, way to generate those outcomes.

TODAY'S SOCIALISM IS DIFFICULT TO DEFINE. Traditionally, the term meant total state ownership of capital, as in the Soviet Union, North Korea, or Maoist China. Nowadays, most people don't take such an extreme view. In Europe, social democracy means the nationalization of many industries and very generous welfare states. And today's rising socialists are rebranding the idea to mean an economic system that delivers all the best parts of capitalism (growth and rising living standards) without the bad (inequality, economic cycles).

But no perfect economic system exists; there are always trade-offs--in the most extreme form between total state ownership of capital and unfettered markets without any regulation or welfare state. Today, few would opt for either pole; what modern socialists and capitalists really disagree on is the right level of government intervention.

Modern socialists want more, but not complete, state ownership. They'd like to nationalize certain industries. In the United States, that's health care--a plan supported by Democratic presidential candidates Elizabeth Warren (who does not call herself a socialist) and Bernie Sanders (who wears the label proudly). In the United Kingdom, Labour Party leader Jeremy Corbyn, who was trounced at the polls in mid-December, has set his sights on a longer list of industries, including the water, energy, and internet providers.

Other items on the socialist wish list may include allowing the government to be the primary investor in the economy through massive infrastructure projects that aim to replace fossil fuels with renewables, as Green New Deal socialists have proposed. They've also floated plans that would make the government the employer of a majority of Americans by offering guaranteed well-paid jobs that people can't be fired from. And then there are more limited proposals, including installing more workers on the boards of private companies and instituting national rent controls and high minimum wages.

For their part, modern capitalists want some, but less, state intervention. They are skeptical of nationalization and price controls; they argue that today's economic problems are best addressed by harnessing private enterprise. In the United States, they've argued for more regulation and progressive taxation to help ease inequality, incentives to encourage private firms to use less carbon, and a more robust welfare state through tax credits. Over the past 15 years, meanwhile, capitalist Europeans have instituted reforms to improve labor market flexibility by making it easier to hire and fire people, and there have been attempts to reduce the size of pensions.

No economic system is perfect, and the exact right balance between markets and the state may never be found. But there are good reasons to believe that keeping capital in the hands of the private sector, and empowering its owners to make decisions in the pursuit of profit, is the best we've got.

ONE REASON TO TRUST MARKETS is that they are better at setting prices than people. If you set prices too high, many a socialist government has found, citizens will be needlessly deprived of goods. Set them too low, and there will be excessive demand and ensuing shortages. This is true for all goods, including health care and labor. And there is little reason to believe that the next batch of socialists in Washington or London would be any better at setting prices than their predecessors.

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In fact, government-run health care systems in Canada and European countries are plagued by long wait times. A 2018 Fraser Institute study cites a median wait time of 19.8 weeks to see a specialist physician in Canada. Socialists may argue that is a small price to pay for universal access, but a market-based approach can deliver both coverage and responsive service. A full government takeover isn't the only option, nor is it the best one.

Beyond that, markets are also good at rationing risk. Fundamentally, socialists would like to reduce risk--protect workers from any personal or economywide shock. That is a noble goal, and some reduction through better functioning safety nets is desirable. But getting rid of all uncertainty--as state ownership of most industries would imply--is a bad idea. Risk is what fuels growth. People who take more chances tend to reap bigger rewards; that's why the top nine names on the Forbes 400 list of the richest Americans are not heirs to family dynasties but are self-made entrepreneurs who took a leap to build new products and created many jobs in the process.

Some leftist economists like Mariana Mazzucato argue that governments might be able to step in and become laboratories for innovation. But that would be a historical anomaly; socialist-leaning governments have typically been less innovative than others. After all, bureaucrats and worker-corporate boards have little incentive to upset the status quo or compete to build a better widget. And even when government programs have spurred innovation--as in the case of the internet--it took the private sector to recognize the value and create a market.

And that brings us to a third reason to believe in markets; productivity. Some economists, such as Robert Gordon, have looked to today's economic problems and suggested that productivity growth--the engine that fueled so much of the progress of the last several decades--is over. In this telling, the resources, products, and systems that underpin the world's economy are all optimized, and little further progress is possible.

But that is hard to square with reality. Innovation helps economies do more with fewer resources--increasingly critical to addressing climate change, for example--which is a form of productivity growth. And likewise, many of the products and technologies people rely on every day did not exist a few years ago. These goods make inaccessible services more available and are changing the nature of work, often for the better. Such gains are made possible by capitalist systems that encourage invention and growing the pie, not by socialist systems that are more concerned with how the existing pie is cut. It is far too soon, in other words, to write off productivity.