

SCRUTINIZING ANTICOMPETITIVE STATE REGULATIONS  
THROUGH CONSTITUTIONAL AND ANTITRUST LENSES

DANIEL A. CRANE\*

ABSTRACT

*State and local regulations that anticompetitively favor certain producers to the detriment of consumers are a pervasive problem in our economy. Their existence is explicable by a variety of structural features—including asymmetry between consumer and producer interests, cost externalization, and institutional and political factors entrenching incumbent technologies. Formulating legal tools to combat such economic parochialism is challenging in the post-Lochner world, where any move toward heightened judicial review of economic regulation poses the perceived threat of a return to economic substantive due process. This Article considers and compares two potential tools for reviewing such regulations—a constitutional principle against anticompetitive parochialism and diminished state action immunity from antitrust law in cases brought by the Federal Trade Commission. Each tool has some advantages and disadvantages as a potential foil to anticompetitive regulation.*

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\* Frederick Paul Furth Sr. Professor of Law, University of Michigan.

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## INTRODUCTION

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

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

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

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1. This Article focuses on anticompetitive state and local regulations. Federal regulations sometimes pose similar problems. Whereas the constitutional antiparochialism principle discussed in this Article might be available in such cases, FTC preemption, which only applies when federal and state laws are in conflict, would not.

2. See *infra* Part I.

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

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

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

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3. 198 U.S. 45 (1905).

4. See *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

5. See *infra* Part II.B.

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

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

## I. WHY ANTICOMPETITIVE REGULATION SUCCEEDS

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

### A. *The Generic Story*

The generic story is largely familiar from public choice theory and the literature on the *Parker* state action doctrine. Democratic processes systematically fail to overcome two embedded hurdles to matching regulatory schemes to broad public preferences: (1) the asymmetrical distribution of costs and benefits of anticompetitive

regulations, and (2) the externalization of costs on populations outside the boundaries of the relevant democratic unit.<sup>6</sup> In tandem, these hurdles to democratic correction of cronyistic dispensations of monopoly power by governmental regulators perpetuate regulatory schemes that a broad majority of citizens would vote to overturn if they understood the issue and were sufficiently motivated to invest political energy in correcting it.<sup>7</sup>

The first democratic deficit, well documented in public choice literature, arises because producers typically receive a much more concentrated benefit from anticompetitive regulations in comparison to the relatively unconcentrated cost imposed on consumers.<sup>8</sup> A small band of producers may lobby aggressively to enact or maintain an anticompetitive scheme that permits the producers to collect significant monopoly rents.<sup>9</sup> Those rents, in turn, may be spread across thousands or millions of consumers, each one paying a relatively small increase in rent.<sup>10</sup> Collective action constraints—the cost of mobilizing consumer sentiment and action to oppose the regulation—give the producers a systematic advantage in maintaining the regulation.<sup>11</sup> As John Shepard Wiley explained in bringing public choice theory literature to bear on *Parker* immunity questions:

[I]f the group [of consumers] is large, individual members have little incentive to participate because participation is personally costly and contributes little to the group's chances for successful joint action. Small groups encounter fewer of such problems. If group members behave in this rational self-interested manner, then "there is a systematic tendency for exploitation of the great by the small"; less numerous, more intensely concerned special

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6. See DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* 146-47 (2011).

7. See *id.* at 147-49.

8. *E.g.*, KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 5-6 (1951); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (Charles K. Rowley ed., 1962); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 14, 203-04 (1957); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 95 (1965).

9. *Cf.* John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 *HARV. L. REV.* 713, 724-25 (1986).

10. *Cf. id.*

11. *Id.*

interests can predictably outmatch more numerous, more mildly concerned consumer or “public” interests in legislative or regulatory fora—even though the actions of special interests impose a net loss on society.<sup>12</sup>

The second deficit arises when governmental units—whether state or local—externalize the costs of the anticompetitive regulation outside their jurisdiction. The classic example is *Parker* itself, in which 90 percent of the raisins subject to California’s agricultural cartel mandate were sold outside of California.<sup>13</sup> Out-of-state consumers could not be counted on to mobilize democratically to oppose the California regulation, as they had no political voice in California.<sup>14</sup>

Many similar examples of jurisdictional cost externalization have been documented.<sup>15</sup> One arose in an important Supreme Court decision on state action immunity, *Town of Hallie v. City of Eau Claire*.<sup>16</sup> Hallie, Seymour, Union, and Washington were unincorporated towns adjacent to the city of Eau Claire, Wisconsin.<sup>17</sup> Their citizens could not vote in Eau Claire, but Eau Claire wanted to annex those territories into its boundaries, possibly through coercive means.<sup>18</sup> Eau Claire received federal funds to build a sewage treatment plant in its service area, which covered the four towns, then refused to supply sewage treatment services to the towns.<sup>19</sup> However, the city did agree to provide treatment services to certain homeowners in the towns if a majority of area voters voted by referendum to allow Eau Claire to annex their homes and to commit to use Eau Claire’s sewage and transportation services.<sup>20</sup> The towns claimed this scheme was designed to keep the other towns from effectively competing with Eau Claire’s sewage collection and transportation services.<sup>21</sup> The scheme also possibly allowed the

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12. *Id.* (footnote omitted).

13. *See* CRANE, *supra* note 6, at 147. *See generally* *Parker v. Brown*, 317 U.S. 341 (1943).

14. CRANE, *supra* note 6, at 147-48.

15. *See id.* at 146-49.

16. 471 U.S. 34, 36 (1985).

17. *Id.*

18. CRANE, *supra* note 6, at 148.

19. *Town of Hallie*, 471 U.S. at 37.

20. *Id.*

21. *See id.*

city to raise costs for nonresidents while at the same time leveraging the higher prices to bring the nonresidents (and presumably their property taxes) into the city.<sup>22</sup> Although the city's motivation was ultimately political rather than narrowly economic, it used an anticompetitive strategy to dump monopoly costs on nonresidents who could not vote to rescind the regulations until they joined the city, at which point the question would be moot.<sup>23</sup>

Together, these two deficits—asymmetrical costs and benefits to both producers and consumers and cost externalization—explain why democratic processes often fail to weed out anticompetitive regulations. Without concerted efforts by champions of consumer interests to overcome collective action problems and mobilize support for regulatory reform, the regulatory barriers to competition can linger indefinitely. As discussed next, these failures of democratic self-correction are exacerbated by regulations that entrench incumbent technologies at the expense of innovation.

#### *B. Additional Considerations Affecting Product Market Innovation*

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

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22. CRANE, *supra* note 6, at 148.

23. *See generally* *Town of Hallie*, 471 U.S. 34.

24. *See infra* notes 46-51 and accompanying text.

25. *See supra* Introduction.

26. *See infra* notes 57-62 and accompanying text.

these wars, the incumbents have a decisive advantage for at least three structural reasons.

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

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

For example, in recent months there have been widely reported stories of Uber drivers sexually abusing passengers.<sup>33</sup> These stories rarely report the base rate of abuse by taxi drivers or public transit

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27. See, e.g., Richard J. Gilbert & David M. G. Newbery, *Preemptive Patenting and the Persistence of Monopoly*, 72 AM. ECON. REV. 514, 514 (1982).

28. See *id.*

29. See *id.*

30. Cf. *id.* at 519.

31. See generally Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003 (2003).

32. See *id.* at 1037.

33. E.g., Sara Ashley O'Brien, *9 Women Who Allege Assaults by Uber Drivers Want the Right to Unite in Court*, CNN (May 30, 2018, 3:03 PM), <https://money.cnn.com/2018/05/30/technology/uber-proposed-class-action-driver-abuse/index.html> [<https://perma.cc/USD8-7MN8>].

workers, who might well present similar risks to passengers.<sup>34</sup> Similarly, the news media seem to wait with bated breath to report every accident involving a driverless vehicle<sup>35</sup>—even ones where the vehicle was stationary and hit by another at-fault vehicle—without reporting the base rate of nearly 40,000 deaths a year from human-driven vehicles.<sup>36</sup> The focus of news reporting seems to be on the incremental risks created by automated driving without regard to the baseline number of deaths that automated driving might diminish.<sup>37</sup> In principle, regulators should compare the likely risks of allowing new technologies to those of perpetuating the incumbent technology, but they often default to some version of the precautionary principle, insisting that new technologies prove their safety and efficacy in an absolute rather than comparative sense.<sup>38</sup> Given this baseline asymmetry, proponents of new technologies frequently must overcome significant regulatory hurdles not faced by incumbent technologies. Or, incumbent technologies may persuade regulators to force new technologies to play by rules that favor the incumbent technologies—a form of raising rivals’ costs and creating regulatory entry barriers.<sup>39</sup>

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

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34. *E.g.*, Sara Ashley O’Brien et al., *CNN Investigation: 103 Uber Drivers Accused of Sexual Assault or Abuse*, CNN TECH (Apr. 30, 2018, 5:43 PM), <https://money.cnn.com/2018/04/30/technology/uber-driver-sexual-assault/index.html> [<https://perma.cc/B8JN-FP72>].

35. *E.g.*, Daisuke Wakabayashi, *Self-Driving Uber Car Kills Pedestrian in Arizona, Where Robots Roam*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/technology/uber-driverless-fatality.html> [<https://perma.cc/NDG3-D5NE>].

36. *See General Statistics*, INS. INST. FOR HIGHWAY SAFETY, (2017), <https://www.iihs.org/iihs/topics/t/general-statistics/fatalityfacts/overview-of-fatality-facts> [<https://perma.cc/F8S6-2AZZ>] (reporting 37,461 deaths from motor vehicle crashes in the United States in 2016).

37. *See supra* notes 33-36.

38. *See, e.g.*, Sunstein, *supra* note 31, at 1019.

39. Daniel A. Crane, *Distribution Innovation and Product Innovation* (unpublished manuscript) (on file with author).

40. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

41. *Cf. id.*

In combination, these three factors create additional barriers to the expected flow of democratic processes toward majoritarian equilibria—that is to say, equilibria that favor consumers’ interests in competition and innovation over those of producers in capturing monopoly rents. In light of these factors and the collective action and cost externalization factors discussed earlier,<sup>42</sup> it is unsurprising that regulation serves as a barrier to innovation.

### *C. An Illustration from Automobile Distribution*

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

Legislatures adopted these direct distribution prohibitions at a time when American car manufacturing was dominated by the “Big Three” (Chrysler, Ford, and General Motors) and many dealers were

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42. See *supra* Part I.A.

43. See Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 IOWA L. REV. 573, 574-75 (2016).

44. *Id.* at 575, 580.

45. See Katie Fehrenbacher, *7 Reasons Why Tesla Insists on Selling Its Own Cars*, FORTUNE (Jan. 19, 2016), <http://fortune.com/2016/01/19/why-tesla-sells-directly/> [<https://perma.cc/X5TH-G3LH>].

46. Crane, *supra* note 43, at 574.

47. *Id.*

48. See *id.*

“mom and pop” businesses.<sup>49</sup> State legislatures were convinced that the dominant manufacturers were taking advantage of their franchisees by selling cars through their company-owned stores at lower prices than the dealers could afford to charge given the wholesale prices charged by the manufacturers.<sup>50</sup> The direct distribution prohibitions were justified as correcting a severe imbalance in bargaining power leading to contracts of adhesion and unfair exploitation in manufacturer-dealer relations.<sup>51</sup>

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

Recognizing that the dealer protection rationale that justified the original statutes no longer works, the dealers have attempted to recast the direct distribution prohibitions as consumer protection decisions.<sup>57</sup> They have argued that forcing consumers to buy automobiles from dealers rather than from manufacturers will lead to more price competition, and hence lower prices, and prevent

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49. *Id.* at 574, 577.

50. *See id.* at 594.

51. *Id.* at 579.

52. *See id.* at 591.

53. Daniel A. Crane, *The Fiction of Locally Owned Mom and Pop Car Dealers: Some Data on Franchised Automobile Distribution in the State of Michigan* 1 (Univ. of Mich. Law, Public Law & Legal Theory Research Paper Series, Paper No. 561, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3000497](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3000497) [<https://perma.cc/6RCG-H75Y>].

54. *Id.*

55. *Id.*

56. *See id.* (describing the rationale behind automobile dealership protections).

57. *See Crane, supra* note 43, at 579.

consumers from manufacturer exploitation.<sup>58</sup> These consumer protection arguments have been roundly rejected by economists,<sup>59</sup> the Federal Trade Commission (FTC),<sup>60</sup> and major proconsumer groups such as the Consumer Federation of America, Consumer Action, Consumers for Automobile Reliability and Safety, and the American Antitrust Institute.<sup>61</sup> Nonetheless, the dealers have succeeded in using the existing structure of dealer protection laws to block or slow Tesla's direct distribution program in a number of states.<sup>62</sup>

The Tesla story evidences most of the factors that contribute to the persistence of anticompetitive regulations. The dealers have a concentrated interest in preserving their protected position, while the costs of that protectionism are spread out over millions of consumers. In the state with arguably the most pernicious record with respect to direct distribution reform—Michigan—there is a record of antireform advocacy by a leading incumbent—General Motors—and acquiescence by the political class to protect an in-state champion against an out-of-state challenger.<sup>63</sup> Even though consumers complain more about car dealers than about any other business, indicating the baseline system is not particularly attractive to them,<sup>64</sup> the dealers have invoked fears about the risks of direct distribution in opposition to legislative reforms. And legislative

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58. *See id.* at 577-78.

59. Letter from Int'l Ctr. for Law & Econ., to Governor Chris Christie (Mar. 26, 2014), [http://laweconcenter.org/images/articles/tesla\\_letter\\_icle.pdf](http://laweconcenter.org/images/articles/tesla_letter_icle.pdf) [<https://perma.cc/GBC5-8SXZ>].

60. Press Release, Fed. Trade Comm'n, FTC Staff: Missouri and New Jersey Should Repeal Their Prohibitions on Direct-to-Consumer Auto Sales by Manufacturers (May 16, 2014), <https://www.ftc.gov/news-events/press-releases/2014/05/ftc-staff-missouri-new-jersey-should-repeal-their-prohibitions> [<https://perma.cc/9Z2W-989K>].

61. *See* Am. Antitrust Inst. et al., *Sign-on Statement to State Government Leaders About the Anti-Consumer Effects of Laws Prohibiting Direct Distribution of Automobiles* (Feb. 16, 2015), <http://www2.itif.org/2015-tesla-big-tent-letter.pdf> [<https://perma.cc/97B3-QV8T>] (containing the signatures of four of these trade groups); *see also* Daniel A. Crane, *Why Intra-Brand Dealer Competition Is Irrelevant to the Price Effects of Tesla's Vertical Integration*, 165 U. PA. L. REV. ONLINE 179, 180 (2017).

62. *See* Crane, *supra* note 61, at 179-80.

63. *See* Greg Gardner, *Gov. Snyder Signs Bill Banning Direct Tesla Sales*, DET. FREE PRESS (Oct. 22, 2014, 11:22 AM), <https://www.freep.com/story/money/cars/general-motors/2014/10/17/michigan-verge-banning-tesla-stores/17386251/> [<https://perma.cc/DQP3-26P5>].

64. *See* CONSUMER FED'N OF AM., 2013 CONSUMER COMPLAINT SURVEY REPORT 4 (2014), <https://consumerfed.org/pdfs/2013-consumer-survey-report.pdf> [<https://perma.cc/UQF6-P8U2>]; CONSUMER FED'N OF AM., 2012 CONSUMER COMPLAINT SURVEY REPORT 5 (2013), <https://consumerfed.org/pdfs/top-10-consumer-complaints-07-31-2013.pdf> [<https://perma.cc/3U46-KVFN>].

inertia has slowed the consideration of reform bills in some states, extending the incumbent regulatory scheme long past its reasonable expiration date.<sup>65</sup>

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

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

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65. In Michigan, at the time he signed a bill effectively blocking Tesla from direct distribution in the state in 2014, Governor Snyder called for a reexamination of the state's motor vehicle laws in light of changing economic and technological circumstances. *Gov. Rick Snyder Signs Bipartisan Bill Clarifying Existing Direct Auto Sales Law*, MICHIGAN.GOV (Oct. 21, 2014), [https://www.michigan.gov/snyder/0,4668,7-277-57577\\_57657-339774--,00.html](https://www.michigan.gov/snyder/0,4668,7-277-57577_57657-339774--,00.html) [<https://perma.cc/KFZ6-5VMA>]. As of this writing, no legislative reforms have been undertaken.

66. Crane, *supra* note 61, at 179.

67. Kenneth G. Elzinga, *Controversy: Are Antitrust Laws Immoral? A Response to Jeffrey Tucker*, 1 J. MKTS. & MORALITY 83, 86 (1998) (observing the fact that “no monopoly is permanent” is not a sufficient reason to disregard moral evils of monopoly).

68. *See id.*

69. *Cf. id.*

70. *See supra* Part I.B.

## II. CONSTITUTIONAL AND ANTITRUST PRINCIPLES AS A CHECK ON ANTICOMPETITIVE REGULATION

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

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

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71. *See supra* Part I.A.

72. *See supra* Parts I.A-B.

73. Daniel A. Crane, *Antitrust and the Judicial Virtues*, 2013 COLUM. BUS. L. REV. 1, 25-27.

74. *See supra* note 40 and accompanying text.

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

#### A. *Lochner*, *anti-Lochner*, and *Parker*

The stage for the current constellation of judicial doctrines and attitudes towards federal judicial review of anticompetitive state and local regulations was set through the progression of *Lochner*-era substantive due process, the anti-*Lochner* constitutional revolution of 1937, and the extension of anti-*Lochner* sentiment to federal antitrust law in the creation of *Parker*'s state action immunity doctrine in 1943.<sup>80</sup> In 1905, the Supreme Court in *Lochner* struck down a New York law regulating bakeshop working hours on substantive due process grounds,<sup>81</sup> over Justice Oliver Wendell Holmes's famous objection that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."<sup>82</sup> During the Progressive and New Deal eras, *Lochner* and *Lochnerism* were broadly vilified for interfering with progressive reforms and substituting judges' economic views for those of legislatures.<sup>83</sup> In the New Deal constitutional revolution associated with the year 1937 (although spanning a few years in either direction), the Supreme

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75. See Crane, *supra* note 73, at 3-4.

76. See *supra* INTRODUCTION.

77. See, e.g., *Lochner v. New York*, 198 U.S. 45, 64 (1905).

78. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 727, 730-32 (1963).

79. See, e.g., *Craigsmiles v. Giles*, 312 F.3d 220, 225-28 (6th Cir. 2002).

80. See generally *Parker v. Brown*, 317 U.S. 341 (1943); *Lochner*, 198 U.S. 45.

81. See 198 U.S. at 64.

82. *Id.* at 75 (Holmes, J., dissenting).

83. See, e.g., John A. Sparks, *The U.S. Supreme Court During the Progressive Era—Unfairly Maligned*, 2 GROVE CITY C. J.L. & PUB. POL'Y 165, 166-67, 188-90 (2011).

Court announced it was getting out of the *Lochner* business—that it would not strike down economic legislation simply on the grounds that it was, in the judgment of the court, ill-considered.<sup>84</sup>

Over time, it became clear that the anti-*Lochner* jurisprudence extended to nakedly anticompetitive regulations adopted to favor economic special interests to the detriment of the consuming public. In cases such as *Williamson v. Lee Optical*<sup>85</sup> and *Ferguson v. Skrupa*,<sup>86</sup> there was a fairly apparent record that the regulations in question had been adopted to stifle competition and benefit economic special interests, but the courts refused to create an exception to the anti-*Lochner* doctrine on those grounds.<sup>87</sup> In *Williamson*, the Court acknowledged that the “Oklahoma law may exact a needless, wasteful requirement in many cases,” but insisted that the “day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”<sup>88</sup> Rather, the Court held that “[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts.”<sup>89</sup>

In 1943, the Supreme Court in *Parker v. Brown* also made clear that it would not permit the federal Sherman Act to be used as an end-run around the anti-*Lochner* cases.<sup>90</sup> *Parker* involved both dormant commerce clause and Sherman Act challenges to California’s Agricultural Prorate Act, which forced farmers into a marketing plan that effectively operated as an output reduction cartel run by farmers.<sup>91</sup> The Supreme Court rejected both challenges.<sup>92</sup> Finding “nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature,”<sup>93</sup> the Court created a doctrine of state action immunity for anticompetitive state

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84. See 2 BRUCE ACKERMAN, *WE THE PEOPLE* 257 (1998).

85. 348 U.S. 483 (1955).

86. 372 U.S. 726 (1963).

87. See *id.* at 727, 730-32; *Williamson*, 348 U.S. at 487.

88. *Williamson*, 348 U.S. at 487-88.

89. *Id.* at 488.

90. See 317 U.S. 341, 350-51 (1943).

91. *Id.* at 346, 348-49.

92. *Id.* at 350-51.

93. *Id.*

and local laws.<sup>94</sup> The effect of this ruling was to restrict the Sherman Act's coverage solely to purely private conduct.<sup>95</sup> Anticompetitive schemes orchestrated by the state would be excluded from judicial review.<sup>96</sup> As Judge Merrick Garland has observed, *Parker* is best understood as a continuation of the post-1937 jurisprudence rejecting *Lochner*:

*Parker v. Brown* was much less a case about judicial faith in economic regulation than it was a case about judicial respect for the political process. *Parker* was indeed a child of its times, but the most salient element of that historical context was the Court's recent rejection of the *Lochner*-era doctrine of substantive due process, under which federal courts struck down economic regulations they viewed as unreasonably interfering with the liberty of contract. Having only just determined not to use the Constitution in that manner, the Court was not about to resurrect *Lochner* in the garb of the Sherman Act.<sup>97</sup>

### *B. The Potential for an Increased Level of Judicial Scrutiny*

As of 1943, one would have been justified in believing that, at least from the perspective of federal judicial review, anticompetitive state and local regulations would receive a free pass unless they

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94. See Jason Kornmehl, *State Action on Appeal: Parker Immunity and the Collateral Order Doctrine in Antitrust Litigation*, 39 SEATTLE U. L. REV. 1, 6-7 (2015).

95. *Id.* at 7.

96. See, e.g., James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. REV. 1555, 1570 (2010).

97. Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 499-500 (1987) (footnotes omitted); see also Cooper & Kovacic, *supra* note 96, at 1570 ("*Parker* then can be seen as a necessary concession to anticompetitive state regulation to avoid a return to the *Lochner* era.... Once the federal judiciary got out of the business of second-guessing the wisdom of states' economic regulation under substantive due process analysis, it could hardly reopen this line of attack under the guise of antitrust. *Parker* prevented this outcome."); Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CALIF. L. REV. 227, 230 n.20 (1987) ("The Court's own unsatisfying experience with economic due process during the *Lochner* era, just prior to *Parker*, no doubt increased the Court's sensitivity to the importance of independent state economic choices."); William H. Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 DUKE L.J. 618, 624 ("*Parker* was decided largely on the ground that the Court was unwilling to reenter the political mire of the *Lochner* era under the guise of Sherman Act preemption analysis.").

committed certain egregious violations, such as disadvantaging “discrete and insular minorities”<sup>98</sup> or discriminating against out-of-state commerce.<sup>99</sup> But the judicial impulse to cast a stern glance at perniciously anticompetitive regulations could not be forever stifled, and before long cracks began to appear in the courts’ anti-Lochnerian resolve.

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

The *Midcal* test invokes a democracy-reinforcement theory of antitrust judicial review.<sup>102</sup> States may enact anticompetitive regulations so long as they take conspicuous responsibility for them.<sup>103</sup> If the state can be obviously identified with the scheme, then perhaps citizens will “vote out the bums” if the costs to consumers are too high.<sup>104</sup> Alas, many anticompetitive regulations escape *Midcal*’s net because of the systemic factors identified in the previous section.<sup>105</sup> Even when a state conspicuously takes ownership of an anticompetitive scheme, democratic processes may fail to provide a remedy because of the asymmetry of costs and benefits

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98. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”).

99. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (“To determine whether a law violates this so-called ‘dormant’ aspect of the Commerce Clause, we first ask whether it discriminates on its face against interstate commerce.”).

100. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

101. *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1107-09, 1117 (2015).

102. Daniel A. Crane & Adam Hester, *State-Action Immunity and Section 5 of the FTC Act*, 115 MICH. L. REV. 365, 374 (2016).

103. *Id.*

104. *See id.*

105. *See supra* Part II.A.

between producers and consumers, the externalization of costs outside the voting jurisdiction, and the entrenched advantage of technological incumbency.<sup>106</sup>

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

Despite calls for a broader use of federal antitrust law to police anticompetitive state and local regulations, the Supreme Court continues to refine the *Parker* doctrine with an eye on *Lochner*. Then-Justice Rehnquist once worried that the Court should not “engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that th[e] Court ... properly rejected” in terminating *Lochnerism*.<sup>109</sup> In his dissenting opinion in *Community Communications Co. v. City of Boulder*, Justice

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106. Crane & Hester, *supra* note 102, at 374-76.

107. Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1207 (1997) (proposing a two-part test: “(1) Does a state regulation generate significant monopoly spillovers onto nonresidents?”; and “(2) Was the state regulation decided without political participation of the affected nonresidents as evidenced by the lack of interstate regulatory agreement? If the answer to both questions is yes, then the state regulation fails the spillover test for economic efficiency, and a Sherman Act review of the regulation is appropriate”).

108. See Crane & Hester, *supra* note 102, at 368.

109. *Cnty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 67 (1982) (Rehnquist, J., dissenting); see also *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 565 (1st Cir. 1999), *cert. denied*, 529 U.S. 1105 (2000) (“To allow federal judges to decide which of these legislative enactments should survive and which should be condemned comes close to reintroducing the kind of judgments that got the Supreme Court into so much trouble in the *Lochner* era.”).

Rehnquist warned about the risks of opening up antitrust review of municipal regulations in a way that would require cities to justify their regulations, and the courts, in turn, to weigh those justifications.<sup>110</sup> Rehnquist wrote:

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

Also in the shadow of *Lochner*, recent years have shown glimmers of a reinvigoration of constitutional doctrines checking anticompetitive abuses by state and local governments. The negative or dormant commerce clause—limited by the *Parker* Court on anti-*Lochner* grounds—has occasionally been deployed to invalidate not only anticompetitive regulatory schemes<sup>112</sup> that discriminated against out-of-state interests, but also, on occasion, those that impose significant burdens on interstate commerce without a sufficient justification.<sup>113</sup> As of this writing, Tesla is testing the limits of these

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110. 455 U.S. 40, 67 (1982) (Rehnquist, J., dissenting).

111. *Id.* at 67-68 (internal citations omitted).

112. See Crane, *supra* note 43, at 575-76.

113. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“[Nondiscriminatory statutes should] be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”).

doctrines in its challenge to Michigan's direct distribution law.<sup>114</sup> Its complaint for injunctive relief asserts:

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

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

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

In 2004, the Tenth Circuit in *Powers v. Harris* rejected a constitutional challenge to an Oklahoma statute that limited casket sales to licensed funeral parlors.<sup>117</sup> The court accepted the premise that the statute had no genuine health and safety rationale and was “a classic piece of special interest legislation designed to extract monopoly rents from consumers' pockets and funnel them into the coffers of a small but politically influential group of business people—namely, Oklahoma funeral directors.”<sup>118</sup> Nonetheless, the court held its hands were tied by the anti-*Lochner* cases—particularly

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114. See generally Complaint for Declaratory and Injunctive Relief, Tesla Motors, Inc. v. Johnson, No. 1:16-cv-01158 (W.D. Mich. Sept. 22, 2016, ECF No. 1).

115. *Id.* ¶¶ 5, 8.

116. See Linda Chiem, *6th Circ. Says Mich. Dealers Can't Duck Tesla Info Grab*, LAW360 (Mar. 5, 2018, 9:55 PM), <https://www.law360.com/articles/1018712/> [<https://perma.cc/Q3SB-NLAD>].

117. 379 F.3d 1208, 1211, 1214, 1225 (10th Cir. 2004), cert. denied, 544 U.S. 920 (2005).

118. See *id.* at 1218-21 (quoting Appellant Br. at 26).

*Williamson* and *Ferguson*, which also involved (arguably) nakedly parochial anticompetitive regulations.<sup>119</sup>

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

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

First, in practical terms, we would paralyze state governments if we undertook a probing review of each of their actions, constantly asking them to “try again.” Second, even if we assumed such an exalted role, it would be nothing more than substituting our view of the public good or the general welfare for that chosen by the states. As a creature of politics, the definition of the public good changes with the political winds. There simply is no constitutional or Platonic form against which

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119. *See id.*

120. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013) (quoting *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002)), *cert. denied*, 571 U.S. 952 (2013); *Craigmiles*, 312 F.3d at 224, 228-29.

121. *See* Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & LIBERTY 1055, 1065-67 (2014).

122. *Craigmiles*, 312 F.3d at 224.

we can (or could) judge the wisdom of economic regulation. Third, these admonitions ring especially true when we are reviewing the regulatory actions of states, who, in our federal system, merit great respect as separate sovereigns.<sup>123</sup>

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

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

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

The fear of a return to Lochnerism is in large part a fear that judicial review of economic regulatory decisions is a Pandora's box that, once open, would quickly unleash a full-scale movement toward a substitution of judicial economic philosophies for those of the democratically responsive branches.<sup>124</sup> Hence, in the current constellation of *Lochner*-phobia, it is important to explain how any doctrine that invites increased judicial scrutiny of economic regulation would be cabined or restrained by a workable limitation principle. Both the antitrust and constitutional tools under consideration embody such a limitation principle insofar as they do not propose universal federal scrutiny of all undesirable state economic regulation. Instead, they limit the scrutiny to regulations that harm

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123. 379 F.3d 1208, 1218 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005).

124. *See, e.g., id.*

competition for the benefit of identifiable special interests. In other words, the prima facie case in either event requires demonstration of competitive harm as opposed to merely social undesirability.<sup>125</sup>

The “competitive harm” limitation principle excludes from judicial review a wide set of regulations and hence limits the range of judicial interference with state regulatory schemes. Many cronyist regulations line the pockets of politically connected special interests without necessarily impairing competition. Consider, for example, a city ordinance that required disposal of a certain kind of medical waste at a pharmacy. Assume further that the waste in question could be safely disposed of through ordinary garbage collection, and the sole purpose of the scheme in question was to provide pharmacies with an opportunity to charge a fee for collecting the waste. Our hypothesized Platonic guardian would wish to overturn that regulation but could not do so on the constitutional or antitrust grounds under consideration because the regulation in question does not limit competition in any important sense. Rather than stifling competition in a legitimate market, it creates a new market for an undesired and unnecessary service.

*Lochner*-phobes may wonder whether this limitation principle is limited enough. Although the limitation carves off a large swath of cronyist regulations from review, it still includes a relatively large universe of regulations, creating the possibility that judges will have a free hand to strike down many important state regulatory programs in the name of enhanced competition. Those less worried about *Lochner* and more willing to encourage judicial review of economic regulation may worry that the limitation principle is *too* limited and that it would allow a vast universe of cronyist regulation to escape judicial scrutiny on the same grounds that much cutthroat business behavior escapes antitrust scrutiny today—it may be unethical or undesirable, but does not fall within the purview of the antitrust laws because it does not impair general market competitiveness.<sup>126</sup>

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125. *Id.*

126. See *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136-37 (1998) (noting that antitrust law does not cover routine business torts and that “other laws, for example, ‘unfair competition’ laws, business tort laws, or regulatory laws, provide remedies for various ‘competitive practices thought to be offensive to proper standards of business morality’” (quoting 3 PHILIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 78 (1996))); Brooke

Limiting the scope of judicial review to economic regulations impairing competition also raises a question of legal principle. As to antitrust, it is easy to justify such a principle. Notwithstanding Oliver Wendell Holmes's protestation that the Sherman Act "says nothing about competition,"<sup>127</sup> a century of judicial construction has oriented the antitrust laws towards a singular focus on competition.<sup>128</sup> On the other hand, it is not obvious that constitutional scrutiny should rise or fall on the effects a cronyist regulation has on competition. It may be true that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose,"<sup>129</sup> but it seems equally true that dispensing economic rents to favored discrete interest groups more generally is also not a legitimate government purpose. In either case, the argument for limiting judicial review is not that the set of targeted regulations is constitutionally legitimate, but that the process of separating sheep from goats is fraught with the potential for judicial usurpation.

### *B. Considering Governmental Justifications for Restraints on Competition*

Assuming that judicial review of anticompetitive state and local regulations is to occur with some degree of bite, the fighting question may often become how to evaluate the state's proffered justifications for the restraint on competition. Both antitrust and constitutional tools would need to allow ample room for the state to demonstrate verifiable justifications for the challenged regulations. To put this point in antitrust parlance, there are no per se unlawful state restraints on competition—the state's reasons for regulating will always be up for review in judicial or administrative proceedings challenging their validity.

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Grp., Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'" (quoting *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945))).

127. *N. Sec. Co. v. United States*, 193 U.S. 197, 403 (1904) (Holmes, J., dissenting).

128. It has become a maxim of antitrust jurisprudence that the antitrust laws protect "competition, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

129. *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002).

The critical question is how much interrogation into the state's proffered justifications a court or reviewing agency would, could, or should undertake. In conventional post-*Lochner* terms, economic regulations were subjected to no more than rational basis review—an exceedingly deferential standard of review.<sup>130</sup> The state did not have to advance any empirical support for its proffered justifications and, indeed, did not have to advance any justifications at all.<sup>131</sup> Judges were supposed to uphold the regulation if they could conceive of any justification that might plausibly support it:

A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. “[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” A statute is presumed constitutional, and “[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,” whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it “is not made with mathematical nicety or because in practice it results in some inequality.”<sup>132</sup>

That sort of rational basis review is far from the sort of review conducted by the *Craigmiles* and *St. Joseph Abbey* courts in striking down the Tennessee and Louisiana casket rules.<sup>133</sup> Those courts required evidentiary support for states’ claimed justifications and subjected the states’ claims to rigorous cross-examination for logical consistency.<sup>134</sup> In the Sixth Circuit case—*Craigmiles*—the court rejected the state’s arguments that the casket regulation protected casket quality and public health, made it more feasible for casket sellers to advise bereaved families about which casket was most suitable for their needs, and protected against sharp business

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130. See *Heller v. Doe*, 509 U.S. 312, 320 (1993).

131. See *id.*

132. *Id.* at 320-21 (alterations in original) (internal citations omitted).

133. See generally *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Craigmiles*, 312 F.3d 220.

134. See *St. Joseph Abbey*, 712 F.3d at 223-26; *Craigmiles*, 312 F.3d at 225-26.

dealing.<sup>135</sup> The court found these arguments inconsistent with the state's own regulatory practices and unsupported by any record evidence.<sup>136</sup> Similarly, in the Fifth Circuit case—*St. Joseph Abbey*—the court repeated the familiar proposition that “rational basis review places no affirmative evidentiary burden on the government,” but quickly added that “plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality.”<sup>137</sup> The court then inquired into evidentiary support for the state's proffered “rational bases.”<sup>138</sup> For example, on the ostensible consumer protection rationale for prohibiting casket sales except by licensed funeral parlors, the court observed that the FTC had largely rejected this argument as an empirical matter, noting that the FTC found “insufficient evidence that ... third-party sellers of funeral goods are engaged in widespread unfair or deceptive acts or practices” and that the empirical “record [is] ‘bereft of evidence indicating significant consumer injury caused by third-party sellers.’”<sup>139</sup>

This form of review resembles antitrust litigation, where once a plaintiff raises a *prima facie* case of anticompetitive effect (outside of *per se* rules, where no justifications are allowed), the defendant typically can proffer procompetitive justifications but bears the burden of offering evidentiary support.<sup>140</sup> Although giving lip service to the norms of rational basis review, these courts were in fact taking a hard look at the states' proffered justifications once the regulation in question appeared *prima facie* to meet the description of a measure designed to protect “discrete interest group[s] from economic competition.”<sup>141</sup>

Inquiries into offsetting justifications for *prima facie* suspect conduct raise two doctrinal-analytical questions: (1) how tight must the fit between means and ends be in order for the conduct in question to survive scrutiny, and (2) once the conduct has been shown to advance legitimate ends, should its harms be balanced against its

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135. *Craigsmiles*, 312 F.3d at 225-28.

136. *See id.*

137. *St. Joseph Abbey*, 712 F.3d at 223.

138. *Id.* at 223-26.

139. *Id.* at 225 (quoting 73 Fed. Reg. 13740, 13742, 13745 (Mar. 14, 2008)).

140. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 483 (1992).

141. *Craigsmiles*, 312 F.3d at 224.

benefits, or should it simply be deemed lawful without any balancing?<sup>142</sup> Both constitutional and antitrust tools for addressing anti-competitive regulation would need to address these questions.

As to the first question—the required tightness of means-ends fit—both constitutional and antitrust law already contain suitable doctrines. Moving up the ladder of scrutiny from rational basis review, intermediate scrutiny in constitutional law (such as that applicable to content-neutral restrictions on speech) requires that the restriction in question advance important governmental interests and not burden the protected interest (speech in the speech cases, competition in competition cases) more than necessary to further these interests.<sup>143</sup> The fit between means and ends need be only “reasonable,” not strictly necessary or essential.<sup>144</sup> Unless the constitutional limitation on anticompetitive cronyism should fall into the more stringent strict scrutiny category—a very doubtful possibility—this sort of fit between regulatory means and ends would seem applicable.

Antitrust law shares a similar approach to the less restrictive alternative analysis under the rule of reason, and it too would presumably apply to government restraints on competition under an expanded form of judicial review.<sup>145</sup> As explained in the Justice Department and FTC competitor collaboration guidelines, a reasonable, but not essential, fit between means and ends is required to credit proffered justifications for *prima facie* anticompetitive agreements:

The Agencies consider only those efficiencies for which the relevant agreement is reasonably necessary. An agreement may be “reasonably necessary” without being essential. However, if the participants could have achieved or could achieve similar efficiencies by practical, significantly less restrictive means, then the Agencies conclude that the relevant agreement is not

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142. See generally C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927 (2016).

143. *Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180, 189 (1997) (“A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”).

144. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993).

145. See Hemphill, *supra* note 142, at 938-39.

reasonably necessary to their achievement. In making this assessment, the Agencies consider only alternatives that are practical in the business situation faced by the participants; the Agencies do not search for a theoretically less restrictive alternative that is not realistic given business realities.<sup>146</sup>

A potential difference between constitutional and antitrust analysis might arise on the second important means-ends question—whether to balance harms against benefits of the regulatory restriction. For example, suppose that a regulation limiting ride-sharing services resulted in some small safety benefit to customers but an arguably much greater harm to customers in the form of diminished choice of service options and higher prices. Should a reviewing court or agency balance the safety enhancements against the harms to competition, or should it rather conclude that, having shown a legitimate reason for its existence, the regulation should stand?

Although intermediate scrutiny in constitutional law is often described as a “balancing test,” courts do not generally engage in explicit balancing after passing the less restrictive alternatives inquiry.<sup>147</sup> Some degree of value judgment must be embedded in the inquiry into whether the state’s interest is sufficiently “important,” but it is rare to see a court say, in effect, that although the state’s interest is concededly important and the regulation at stake is reasonably related to it, the harms caused by the regulation outweigh its benefits.<sup>148</sup> For purposes of the principle against protecting “discrete interest group[s] from economic competition,” it seems apparent that there is no room for balancing at all, as a state

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146. FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.36(b) (2000), [https://www.ftc.gov/sites/default/files/documents/public\\_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf) [<https://perma.cc/7X2M-72TU>].

147. See *Free Speech Coal., Inc. v. United States*, 787 F.3d 142, 152 (3d Cir. 2015) (“Our analysis when applying intermediate scrutiny ‘always encompasses some balancing of the state interest and the means used to effectuate that interest,’ and ‘varies to some extent from context to context, and case to case.’” (quoting *Bartnicki v. Vopper*, 200 F.3d 109, 124 (3d Cir. 1999), *aff’d*, 532 U.S. 514 (2001))).

148. For a famous example of the more common occurrence—that is, a state policy passing intermediate scrutiny analysis and being upheld, see generally *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979).

regulation that serves some legitimate end by definition is not “simple economic protectionism.”<sup>149</sup>

By contrast, antitrust law is, in principle, supposed to require open-ended balancing at this final step: “if the monopolist’s procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.”<sup>150</sup> If followed in state action doctrine cases, this sort of balancing could precipitate serious accusations of Lochnerizing, as it would put judges in the position of substituting their own preferences for market outcomes over the state’s legitimate regulatory objectives.

Fortunately, although antitrust law nominally calls for balancing, courts typically do not engage in it.<sup>151</sup> Even in *Microsoft*—the case that most explicitly and authoritatively called for final-stage balancing—the D.C. Circuit engaged in very little, if any, true balancing.<sup>152</sup> Perhaps because of the incommensurability between anticompetitive or procompetitive effects or concern about chilling procompetitive conduct, courts tend to exonerate competitive behavior that is necessary to procompetitive effects without asking whether the harms outweigh the benefits.<sup>153</sup> In order to stave off Lochnerizing concerns, any expanded antitrust review of state and local regulations might need to formalize this practice doctrinally: Once a state demonstrates that the regulation in question is reasonably tailored to achieve some legitimate governmental objective,

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149. *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)) (“Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.”).

150. *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001); *see also* *Abbott Labs. v. Teva Pharm. USA, Inc.*, 432 F. Supp. 2d 408, 422 (D. Del. 2006) (“Contrary to Defendants’ assertion, Plaintiffs are not required to prove that the new formulations were absolutely no better than the prior version or that the only purpose of the innovation was to eliminate the complementary product of a rival. Rather, as in *Microsoft*, if Plaintiffs show anticompetitive harm from the formulation changes, that harm will be weighed against any benefits presented by Defendants.”).

151. Further, some courts explicitly reject final-stage balancing. *See, e.g.*, *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 1000 (9th Cir. 2010) (“There is no room in this analysis for balancing the benefits or worth of a product improvement against its anticompetitive effects. If a monopolist’s design change is an improvement, it is ‘necessarily tolerated by the antitrust laws,’ unless the monopolist abuses or leverages its monopoly power in some other way when introducing the product.” (internal citation omitted)).

152. *Crane*, *supra* note 73, at 17. *See generally Microsoft*, 253 F.3d 34.

153. *See, e.g.*, *Allied Orthopedic*, 592 F.3d at 1000.

antitrust does not require balancing of the harms to competition against the legitimate governmental objectives.

A final question unique to antitrust review is whether, when it comes to means-ends review, the catalogue of permissible ends is limited to those recognized by antitrust law as “procompetitive.” One of the important doctrinal and policy structures of antitrust law is a division of the world into virtues that are said to be “procompetitive” and those that are not.<sup>154</sup> To count as a legitimate virtue in the antitrust domain, an effect must be “procompetitive,” meaning that it must work to enhance or improve market competition.<sup>155</sup> Supposed benefits of a restraint that assume that competition is itself the problem in need of curtailment are labeled with the epithet of “ruinous competition” theories and are dismissed as inconsistent with the Sherman Act’s procompetition policy.<sup>156</sup>

While this single-minded devotion to competition may make sense as to the world of private restraints, it is less clear that it can be applied sensibly to governmental regulation. Do governments not have the right to take the view that competition of certain types causes social evils that should be curtailed? For example, many regulatory restrictions on alcohol and tobacco distribution are designed to decrease competition and hence reduce output as compared to that which would be obtained in a competitive market.<sup>157</sup> While it may be undesirable for private actors to limit harmful output through private means, the state’s police power surely includes the right to do so, including by limiting competition.<sup>158</sup> This suggests that the range of regulatory interests

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154. See *N. Pac. Ry. Co. v. United States* 256 U.S. 1, 5 (1958).

155. This distinction has its origins in Justice Brandeis’s division of restraints of trade into those “merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.” *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

156. *E.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) (“Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies.”).

157. See Daniel A. Crane, *Harmful Output in the Antitrust Domain: Lessons from the Tobacco Industry*, 39 GA. L. REV. 321, 357-58 (2005).

158. See, *e.g.*, *Freedom Holdings, Inc. v. Cuomo*, 592 F. Supp. 2d 684, 700 (S.D.N.Y. 2009) (upholding tobacco Master Settlement Agreement against an antitrust challenge based in part on “important public health goals and substantial fiscal benefits” of the MSA regime), *aff’d*, 624 F.3d 38 (2d Cir. 2010).

states might legitimately advance in support of challenged regulations would be broader than those deemed “procompetitive” in conventional antitrust analysis.

Opening the door to a wider scope of justifications in cases where the restraint on competition is imposed by governmental rather than private actors would appear on first impression to favor the government. Such a widening of the rule of reason, however, raises precisely the Lochnerizing concern raised by Justice Rehnquist in his previously quoted *City of Boulder* dissent.<sup>159</sup> If courts were called upon to balance health and safety benefits against traditional competition concerns around prices and innovation, then they might well slip into a Lochnerizing mold. But perhaps such concerns could be abated by limiting the reviewing court or agency’s role to determining whether the regulation in question actually supported the state’s proffered goals. As long as the goals were permissible (that is, not simply protecting discrete interest groups from competition as a form of political patronage) and the regulations were reasonably related to the goals, the reviewing court or agency would not inquire more broadly into the regulation’s overall desirability.

### *C. Institutional and Procedural Distinctions*

Antitrust preemption and constitutional review are differently situated in one significant way: Constitutional equal protection, substantive due process, and dormant commerce clause principles are privately enforceable by any party that meets the Article III standing requirements—which, in this context, means at least anyone directly affected by a regulation impairing competition.<sup>160</sup> Antitrust has its own private right of action standing rules,<sup>161</sup> as well as an additional institutional feature that might significantly limit some of the abuses associated with Lochnerizing. One proposed route for increasing the preemptive scope of federal antitrust law over anticompetitive state and local regulation is to hold the

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159. See *supra* text accompanying notes 110-11.

160. See, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488, 493-96 (2009) (holding that Article III standing required that a plaintiff suffer specific and concrete injury due to application of regulation).

161. See, e.g., *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529 (1983).

*Parker* doctrine inapplicable to the FTC.<sup>162</sup> This would give the FTC enhanced power to challenge anticompetitive state and local regulations. Not only would this limit the incidence of challenges to state regulation (the FTC Act is not privately enforceable and only the Commission can initiate an action under the Act),<sup>163</sup> but it would also put the Commission itself, rather than an Article III court, in the position of making an initial decision on the case. An Article III court could ultimately become involved, as adverse Commission decisions are appealable to any federal court of appeal in which the case could have been initially brought.<sup>164</sup> However, lodging the antitrust review function in the FTC would grant the Commission an initial regulatory review function and the power to make factual findings subject to “substantial evidence” review.<sup>165</sup>

Whether lodging an enhanced review function in the FTC as opposed to private litigants would lessen concerns over *Lochner*izing depends in large part on what one perceives to be the central evil of *Lochner*. Was *Lochner* problematic because judges usurped the decisions rightfully committed to more democratically representative branches of government? Or was the problem that they were ideologically committed to formalistic categories such as common law baselines, the existing distribution of wealth and entitlements, and an arbitrary distinction between government action and inaction?<sup>166</sup>

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<sup>167</sup> and rejected *Lochner*ism because of the political character of judicial activism by unelected judges even while

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162. See *supra* text accompanying note 108.

163. *E.g.*, *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 988 (D.C. Cir. 1973).

164. 15 U.S.C. § 45(c) (2012).

165. *McWane, Inc. v. FTC*, 783 F.3d 814, 826 (11th Cir. 2015).

166. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987).

167. See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 47-88 (1938).

supporting activism by theoretically more democratically accountable institutions such as the FTC.<sup>168</sup> 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.<sup>169</sup> It is thus a more evidently “democratic” institution than the courts are and has a legislative mandate from Congress to make economic policy,<sup>170</sup> 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 *Lochner*izing; there would remain judicial review of the agency decision in the federal courts of appeal and, potentially, the Supreme Court.<sup>171</sup> 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.<sup>172</sup> 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.<sup>173</sup>

As to the objection that *Lochner* represented a formalistic classical ideology that entrenched antiredistributionist and laissez-faire baselines, simply handing off the review function to the FTC is not a complete answer to that concern. Enhancing the Commission’s preemptive powers over state and local regulations would

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168. See William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 723 (1991); see also Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 437 (1987) (explaining the growth of the twentieth century administrative state as a reaction to *Lochner*ism).

169. On the democratic accountability of the FTC, see Daniel A. Crane, *Debunking Humphrey’s Executor*, 83 GEO. WASH. L. REV. 1835, 1852-53 (2015).

170. See 15 U.S.C. §§ 45, 46, 57a, 57b-3 (2012).

171. Appeals from FTC decisions may be lodged in any federal appellate court in whose jurisdiction the action could have been commenced. 15 U.S.C. § 45(c).

172. Commission determinations of fact are reviewed for substantial evidence, and its determinations of law *de novo*. *McWane, Inc. v. FTC*, 783 F.3d 814, 827 (11th Cir. 2015).

173. Judicial review in an appellate court is only available to a defendant in an FTC enforcement action against whom the Commission makes an adverse ruling. 15 U.S.C. § 45(c).

represent a shift toward deregulation, as the power could only be wielded to strike down regulations—not to require more regulation or to institute regulations of the Commission’s own making. In ideological terms, state action immunity generally codes as a progressive doctrine designed to insulate regulatory schemes from challenge and, hence, many of the sharpest critiques of the *Parker* immunity doctrine have been aligned with the antiregulatory Chicago School<sup>174</sup> and probusiness Republican administrations.<sup>175</sup>

At the same time, the FTC’s preemptive agenda would be unlikely to focus on entrenching established economic interests and preserving the status quo in the distribution of property and income—the second vision of what is wrong with *Lochner*. To the contrary, as discussed earlier, the general tendency of anticompetitive state regulations is to entrench economic incumbents and incumbent technologies by denying entry to new firms and technologies.<sup>176</sup> In this context, enhanced antitrust preemption of state and local regulation would be a liberalizing force creating opportunities for new market entry—just the opposite of a set of doctrines protecting the status quo.

#### *D. Interactions Between Constitutional and Antitrust Levers*

The final category for comparing the constitutional and antitrust tools as instruments for challenging anticompetitive state and local

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174. Richard A. Epstein & Michael S. Greve, *Introduction: The Intractable Problem of Antitrust Jurisdiction*, in *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY* 1, 13 (Richard A. Epstein & Michael S. Greve eds., 2004) (describing *Parker* doctrine as enabling mutual exploitation of citizens by the states); see also Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 *J.L. & ECON.* 23 (1983), as reprinted in *COMPETITION LAWS IN CONFLICT*, *supra*, at 189, 208 (arguing for cost externalization modification to *Parker* immunity).

175. Melissa Lipman, *A Brief History of the FTC’s State Action Battles*, *LAW360* (Feb. 26, 2015, 8:56 PM), <http://www.law360.com/articles/625576/a-brief-history-of-the-ftc-s-state-action-battles> [<https://perma.cc/79FW-AP8G>] (describing task force created in 2001 by Republican FTC Chairman Tim Muris with mandate to study *Parker* immunity issues with an eye to bringing more pro-competition cases); Timothy J. Muris, Chairman, Fed. Trade Comm’n, Remarks before the Fordham Annual Conference on International Antitrust Law & Policy (Oct. 24, 2003), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/state-intervention/state-action-u.s.perspective/fordham031024.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/state-intervention/state-action-u.s.perspective/fordham031024.pdf) [<https://perma.cc/LW3S-ER94>] (outlining positive program of attacking state restraints on competition).

176. See *supra* text accompanying notes 38-40.

regulations concerns the potential interaction between the two doctrines. Procedurally and institutionally, the two theories would need to run in parallel—they could not be brought simultaneously in the same case. The FTC cannot bring constitutional challenges, and no one other than the FTC can bring a case under Section 5 of the FTC Act.<sup>177</sup> Therefore, to speak about the two theories as either substitutes or complements is not to imagine that they ever could be asserted in the same case or by the same set of actors. Rather, it is to observe that advocates of enhanced scrutiny of anticompetitive state and local regulations have choices about how and where to push for heightened review.

Someone strongly committed to a systematic challenge of anticompetitive regulations might advocate for a simultaneous charge on both fronts—reinvigorating equal protection, substantive due process, and perhaps negative Commerce Clause review, even while also curbing the *Parker* doctrine and empowering the FTC to undertake more trenchant review. However, even if such an approach were desirable in principle, there is reason to believe that it would be politically, institutionally, and doctrinally challenging to ramp up both tools at once. As is often the case when expanding potency of legal doctrines or institutions runs into background concerns about overreaching—here *Lochner*—courts and other agencies of government have a tendency to justify timidity by observing that the problem in question could be better addressed by another institution or legal doctrine.<sup>178</sup> Thus, presented with the possibility of reinvigorating constitutional restraints on competitively parochial regulations, the courts might demur on the grounds that, if there is a serious problem, then it can be addressed by an administrative institution such as the FTC, thereby avoiding the specter of *Lochner*. Conversely, if urged to whittle down *Parker* immunity in an FTC case, the reviewing courts might also demur, observing that any sufficiently serious problem might be addressed under constitutional principles.

Assuming that the political resources necessary to ramp up either the antitrust or constitutional theory are scarce and that support for

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177. See *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 988 (D.C. Cir. 1973) (holding that no private right of action exists under the FTC Act).

178. See, e.g., *Parker v. Brown*, 317 U.S. 341 (1943).

the two theories is mutually competitive, the question arises of whether it would be more effective to focus exclusively on one of the two theories or instead attempt to create two differentiated tools tailored to address different problems in different fields. Such a move would require limiting the generality of each of the tools by focusing on distinctive factors or patterns. For example, the constitutional principle against anticompetitive parochialism could be focused on failures of political processes—particularly circumstances where costs are externalized outside the boundaries of the voting jurisdiction.<sup>179</sup> By contrast, the FTC's heightened preemptive powers might be focused on circumstances involving restraints that limit innovation.<sup>180</sup> While there would obviously be some overlap between these two categories and hence some contestable turf (assuming, again, that the two theories are mutually competitive), some effort at such a division of labor might assuage concerns about a return to Lochnerism.

Finally, although the preceding analysis has assumed some benefits to making a coordinated strategic decision about which legal and policy levers to pull, such coordination may be infeasible given that—apart from the courts—the communities involved in forming antitrust and constitutional law and policy are almost entirely distinct. The antitrust bar that stocks the FTC is specialized and relatively insular.<sup>181</sup> Constitutional theories directed at anticompetitive state and local regulations have been largely pushed by public interest firms such as the Institute for Justice and the Pacific Legal Foundation, which have shown little interest in antitrust theories.<sup>182</sup> So perhaps the possibility of coordinating the

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179. See *supra* Part I.A. To the extent that anticompetitive regulations have the effect of externalizing costs by discriminating against out-of-state residents, they are already unconstitutional under the dormant commerce clause. See *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994).

180. See *supra* Part I.B.

181. See Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1160, 1163 (2008) (describing antitrust as a largely technical field managed by expert lawyers and economists).

182. See Jarod M. Bona, *The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 28, 50 (2011) (reporting that the Institute for Justice has sought declaratory and injunctive relief against occupational licensing boards on constitutional, but not antitrust, grounds, even while the FTC pursued similar theories on antitrust grounds).

deployment of the constitutional and antitrust theories is the sort of question that would interest our hypothetical Platonic guardian, but, like the rest of her hypothesized work, have little relevance to the rest of us.

### CONCLUSION

This Article has presented the case for heightening judicial and/or administrative scrutiny of state and local regulations that impair competition for the benefit of favored producers and to the detriment of consumers. Particularly in markets characterized by entrenched technological incumbents facing the threat of disruptive technologies, a series of structural factors makes it far too easy for the incumbents to hold off the new entrants through the force of often outdated regulation.<sup>183</sup>

The important policy question is whether—in light of this nation’s controversial, and now broadly maligned, experiment with economic substantive due process during the *Lochner* era—the evils of such anticompetitive regulations are simply the price of democracy, or whether steps could be taken to heighten judicial or administrative review without threatening a return to Lochnerism. This Article has compared two potential tools—a constitutional antiparochialism principle and heightened preemptive powers for the FTC. Both could potentially be effective to address anticompetitive regulations; both pose distinctive risks.

On balance, relaxing state action immunity in FTC cases and thereby granting the Commission heightened preemptive powers probably raises fewer concerns about Lochnerizing than does a broader promotion of the antiparochialism equal protection principle recognized in a handful of appellate decisions. On the other hand, granting the FTC expanded powers of this kind raises some other political risks—particularly backlash from state and local governments leading to a loss of support for the Commission in Washington, D.C., or excessive entanglement with state and local politics.<sup>184</sup>

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183. *See supra* Part I.

184. The FTC has historical experience with backlash against overreaching by the Commission leading to a significant loss of political capital. *See generally* J. Howard Beales, III, *Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present*, 12 *GEO.*

Neither tool is free from significant costs and risks, but, given the high costs to consumer welfare, innovation, and industrial freedom posed by state and local parochialism, some risks may be worth taking.

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MASON L. REV. 873 (2004) (reflecting on FTC efforts to regulate advertising to children in the late 1970s that led to widespread criticism of the Commission as a “national nanny”).