# Aff vs. Navy-Texas AP- Texas Round 3

# MSU KV policy 1AC

### Innovation – 1AC

#### Advantage One: Innovation

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

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

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

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

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

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

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

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

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

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

#### Disruptive innovation in healthcare solves pandemics

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

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

Introduction

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

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

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

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

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

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

I. WHY ANTICOMPETITIVE REGULATION SUCCEEDS

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

A. The Generic Story

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

B. Additional Considerations Affecting Product Market Innovation

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

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

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

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

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

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

C. An Illustration from Automobile Distribution

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

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

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

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

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

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

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

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

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

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

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

A. Lochner, anti-Lochner, and Parker

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

B. The Potential for an Increased Level of Judicial Scrutiny

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Considering Governmental Justifications for Restraints on Competition

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

C. Institutional and Procedural Distinctions

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

### Plan

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

### Advantage Two: Federalism

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Introduction

IN just three relatively obscure antitrust cases, 1

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

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

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

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

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

III. DOCTRINAL CRITICISM

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

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

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

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

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

IV. PROPOSED SOLUTIONS

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

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

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

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

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

B. Spillover Effects and Antitrust Federalism

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# 2AC

### Innovation – IL – A2: Private Fails – 2AC – Short

#### Spillover - the plan modifies the effects test of the midcal test, public actors will get on board to better comply with federal standards and regulations

#### Private’s the biggest issue here….

Sandefur 14 [Timothy Sandefur, \*Principal Attorney and Director of the Program for Judicial Awareness, Pacific Legal Foundation 2014 https://www.cato.org/sites/cato.org/files/pubs/pdf/nc-dental-merits-brief.pdf]

This Court should presume strongly against granting state-action immunity in antitrust cases. It makes little sense to impose powerful civil and criminal punishments on private parties who are deemed to have engaged in anti-competitive conduct, while exempting government entities—or, worse, private parties acting under the government’s aegis—when they engage in the exact same conduct. As Chief Justice Burger observed, if the antitrust laws were “‘meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade,’” then it is “wholly arbitrary” to treat government-imposed restraints of trade as “beyond the purview of federal law.” City of Lafayette, La. v. Louisiana Power & Light Co., 435 U.S. 389, 419 (1978) (opinion of Burger, C.J.) (citation omitted).

This Court has declared that the antitrust laws are concerned with “the result[s]” and not “the form of the combination or the particular means used,” so that it is “not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful.” American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946). Thus there can only rarely be any justification for treating a state-approved restraint of trade differently from one that lacks government’s imprimatur.

Antitrust immunity for private parties who act under color of state law is especially problematic, given that anticompetitive conduct is most likely to occur when private parties are in a position to exploit government’s regulatory powers. See Hallie v. City of Eau Claire, 471 U.S. 34, 47 (1985) (“[w]here a private party is engaging in the anticompetitive activity, there is a real danger that ~~he is~~ [they are] acting to further his own interests, rather than the governmental interests of the State.”). And where, as here, private parties have an explicit conflict of interest when put in charge of state policy, the Court should be especially wary of according those parties immunity. The Board of Dental Examiners is made up of members of the trade who privately benefit from excluding potential competitors from the market, and who answer to other members of the trade who share that interest. For the state to empower them to restrict entry into the trade obviously brings about the danger Justice Stevens warned about in Hoover v. Ronwin, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting): it empowers private parties to exploit licensing laws “to advance their own interests in restraining competition at the expense of the public interest.”

### Health Innovation – 2AC

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

### Health Innovation – Innovation K2 Disease

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Innovation – Impact – Extinction

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

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

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

### Federalism – IL – 2AC

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

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

### Federalism – IL – Spillovers

#### Status quo Parker immunity allows private parties to create interstate spillovers that wreck federalism – interstate effects of private entities should be reviewed by the federal government

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

II. The Status of State-Imposed Restraints Under the Sherman Act

The Sherman Act forbids contracts and other arrangements that unreasonably restrain “trade or commerce among the several [s]tates.” The classic example is a railroad cartel that charges non-competitive rates for the interstate transportation of goods or passengers. What, though, if states themselves interfere with free competition and restrain trade? Such interference can take three forms. First, states can authorize private parties to engage in anticompetitive conduct themselves by, for example, legalizing horizontal price fixing or mergers that result in monopoly. Second, states can compel private parties to restrain trade, by, for instance, requiring firms to charge prices above the competitive level. Third, states can ban conduct within interstate commerce that federal courts have previously determined to be reasonable and thus lawful under the Sherman Act. A contemporary example of this third category is state bans on minimum resale-price maintenance (“rpm”), despite the Supreme Court’s holding that the practice often creates wealth and is analyzed under the Rule of Reason.

The Sherman Act condemns restraints in the first category, despite ostensible state approval, unless the state “actively supervises” the resulting prices or other conduct. In Parker v. Brown, the Supreme Court evaluated the second type of restraint: California’s coercive restriction on farmers’ raisin output. Over 90% of the state’s raisin crop was exported from the state, and a private cartel producing the same result would have violated the Sherman Act. Nonetheless, the Supreme Court unanimously held that the Sherman Act does not preempt such legislation, rejecting the contrary argument by the United States, as amicus curiae. Invoking the Constitution’s “dual system,” in which states are “sovereign,” the Court declined to impute to Congress an intent to ban the restraint, which “derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command,” even though that “command” restrained interstate commerce as much as analogous and illegal private conduct. Nearly five decades later, the Court reiterated that Parker rested upon: “principles of federalism and state sovereignty,” and held that the Sherman Act did not ban anticompetitive restraints imposed “as an act of government.”

Subsequently the Court applied similar logic to the third category of state-imposed restraints, namely, bans on private wealth-creating conduct. In Exxon Corp. v. Governor of Maryland, the Court rejected antitrust preemption of Maryland’s ban on vertical integration and procompetitive price discrimination by gasoline refiners, both of which were lawful under federal antitrust law. The Court conceded that the bans had an “anticompetitive effect” and interfered with “economic liberty,” the latter of which, the Court said, was the central policy of the Sherman Act. Nonetheless, the Court opined that antitrust preemption would “effectively destroy” states’ ability to regulate economic activity. In so holding, the Court implicitly equated “regulation” with coercive interference with wealth-creating activity.

In California v. ARC America, the Court rejected Sherman Act preemption of state antitrust regulation, namely, a provision allowing indirect purchasers to recover damages from state antitrust violations. The Court emphasized that state antitrust laws predated the Sherman Act; Congress was aware of these laws but did not mean to displace them when it passed the Act.

There appears to be a scholarly consensus that Parker, Exxon, and ARC America were correctly decided. Professor Hovenkamp, for instance, has asserted that: “nothing in the federal antitrust laws even hints that Congress intended to preempt state and local economic law simply because that law interferes with competitive markets.” Other scholars agree that courts should read the Sherman Act in light of federalism considerations, imputing to the 51st Congress a preference for federalism over national policy favoring free interstate markets. With rare exception, these scholars (properly) agree with Professor Hovenkamp that Congress could preempt state-imposed cartels restraining interstate commerce. Nonetheless, they agree that Congress did not choose to do so.

There is similar agreement that the Sherman Act does not preempt state regulation, including antitrust regulation, banning conduct deemed reasonable under the Sherman Act. Here again Professor Hovenkamp is in the vanguard, asserting that: “the legislative history of the Sherman Act is replete with statements that the Act was designed to supplement rather than to abrogate existing state antitrust enforcement.” Other scholars agree, invoking the same federalism considerations that supposedly convinced Congress not to preempt state-imposed cartels.

It seems that some antitrust scholars would prefer a different result, however. Professor Hovenkamp, for instance, has explained that state restraints can both enrich local producers and also create interstate spillovers that harm consumers located in other states.

[Footnote 22] Herbert Hovenkamp, Federalism and Antitrust Reform, 40 U.S.F. L. REV. 627, 643–45 (2006) (describing the problem of interstate spillovers in a regime that allows local regulation of interstate commerce); id. at 640 (“[C]ourts must develop a coherent doctrine with which to address spillovers.”); see also Herbert Hovenkamp & John A. Mackerron III, Municipal Regulation and Federal Antitrust Policy, 32 UCLA L. REV. 719, 770–71 (1985).

The Parker case, he explains, provides an example: local raisin producers reaped the benefits of the restraint, while out-of-state consumers paid higher prices and purchased reduced output.

[Footnote 23] Parker v. Brown, 317 U.S. 341, 367 (1943) (“The program . . . undoubtedly affected the [interstate] commerce by increasing the interstate price of raisins and curtailing interstate shipments to some undetermined extent.”); Hovenkamp & Mackerron, supra note 22, at 769 (“[A]lthough all the beneficiaries of the regulation were within the jurisdiction of the regulating sovereign, almost all of its victims, those forced to pay a higher price because of the restrictions on output, were located outside. The statute effectively legalized a cartel of California raisin growers selling their raisins to customers located outside California.”).

As Professor Hovenkamp has said, the principle of federalism, properly understood, does not countenance state legislation enriching in-state producers at the expense of out-of-state consumers.

[Footnote 24] Hovenkamp, supra note 22, at 644 (“It is one thing to approve an anticompetitive state regulatory scheme when the burden falls substantially on that state’s own residents. But federalism does not require federal authority to permit states to export anticompetitive regulatory schemes. Under the current formulation of the state action exemption, extraterritorial impact of state regulatory schemes is not even regarded as relevant.”).

Thus, despite his belief that Parker accurately ascertained congressional intent, Professor Hovenkamp seems open to some limitation of the state-action doctrine that accounts for such spillovers.

[Footnote 25] Id. at 640 (“[C]ourts must develop a coherent doctrine with which to address spillovers.”); id. at 645 (“A coherent doctrine of spillovers and its inclusion as a state action immunity requirement will therefore require some new directions in case development.”).

### Per Se – 2AC – Short

#### We meet --- removing immunity exposes conduct to per-se prohibitions

**PAGE 19** --- WILLIAM H. PAGE, Marshall M. Criser Eminent Scholar, University of Florida Levin College of Law, & JOHN E. LOPATKA, A. Robert Noll Distinguished Professor of Law, Penn State Law, “Parker v. Brown, The Ele own, The Eleventh Amendment, and Anticompetitiv enth Amendment, and Anticompetitive State Regulation “, 3-15-2019 , https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3804&context=wmlr

Significantly, given our later focus on remedies in this Article, the state action doctrine also does not distinguish between actions for damages and actions for injunctions: **if the immunity is not available** to the state or local agency, **all remedies are on the table**.51 The Court has suggested that private parties can be held liable for antitrust damages despite acting pursuant to apparent state authority, if the conditions for immunity are not met.52 If the immunity is present, however, **it precludes actions for all types of relief**.53

A doctrine related to, but separate from, state action holds that a statute may be preempted by the Sherman Act pursuant to the Supremacy Clause54 if the statute on its face mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.55 “Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases **a per se violation**.”56 Conduct that is taken pursuant to a statute that is not preempted in the abstract may or may not be illegal under the **rule of reason**.57

#### Counterinterp:

#### Substantially means “considerable amount” – *qualitative* not *quantitative*

**Prost 4** (Judge – United States Court of Appeals for the Federal Circuit, “Committee For Fairly Traded Venezuelan Cement v. United States”, 6-18, http://www.ll.georgetown.edu/federal/judicial/fed/opinions/04opinions/04-1016.html)

The URAA and the SAA neither amend nor refine the language of § 1677(4)(C).  In fact, they merely suggest, without disqualifying other alternatives, a “clearly higher/substantial proportion” approach.  Indeed, the SAA specifically mentions that no “precise mathematical formula” or “‘benchmark’ proportion” is to be used for a dumping concentration analysis.  SAA at 860 (citations omitted); see also Venez. Cement, 279 F. Supp. 2d at 1329-30.  Furthermore, as the Court of International Trade noted, the SAA emphasizes that the Commission retains the discretion to determine concentration of imports on a “case-by-case basis.”  SAA at 860.  Finally, **the definition of** the word “**substantial**” undercuts the CFTVC’s argument.  The word “substantial” generally means “**considerable in amount**, value or worth.”  Webster’s Third New International Dictionary 2280 (1993).  **It does not imply a specific number** or cut-off.  What may be substantial in one situation may not be in another situation.  The very breadth of the term “substantial” undercuts the CFTVC’s argument that Congress spoke clearly in establishing a standard for the Commission’s regional antidumping and countervailing duty analyses.  It therefore supports the conclusion that the Commission is owed deference in its interpretation of “substantial proportion.”  The Commission clearly embarked on its analysis having been given **considerable leeway to interpret a particularly broad term**.

#### Business practices includes all operations

**Blumenthal 14** --- Text of a bill introduced by Richard Blumenthal, Senator, 113TH CONGRESS 2D SESSION S. 2615, “A BILL To establish criminal penalties for failing to inform and warn of serious dangers.”, July 2014, https://www.congress.gov/113/bills/s2615/BILLS-113s2615is.pdf

“(3) the term ‘business practice’ means a meth od or practice of—

“(A) manufacturing, assembling, designing, researching, importing, or distributing a covered product;

“(B) conducting, providing, or preparing to provide a covered senice; or

“(C) otherwise carrying out business operations relating to covered products or covered sendees;

#### Prohibitions hamper business-as-usual

**Ward 21** --- Christine Ward, judge on the Allegheny County Court of Common Pleas, COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA, 3/22/2021, https://www.leechtishman.com/wp-content/uploads/2021/03/Ungarean-Opinion.pdf

This Court is not persuaded by Defendant’s argument that, in order to be entitled to Civil Authority coverage, the action of civil authority must be a complete and total prohibition of all access to Plaintiff’s property by any person for any reason. If this Court were to accept Defendant’s cramped interpretation of the phrase “prohibits access,” it would result in businesses being precluded from coverage in **nearly every instance** where an action of civil authority **effectively closes** the business to the vast majority of the general public, but does not necessarily preclude employees, or certain other individuals, from entering the premises to clean, maintain the building, obtain important documents, or to perform other similar functions, which, while important, remain secondary to the activities that actually generate business income.

Once again this Court notes the importance of reading the insurance contract’s provisions as a whole so that all of its parts fit together. In so doing, this Court recognizes that the insurance contract provisions at issue are generally designed to provide business owners with coverage for lost busines income in the event that their business’ operations are suspended. Accordingly, this Court’s primary focus when interpreting the phrase “prohibits access,” at least in the context of this insurance contract, is the extent to which the action of civil authority prevented the insured from accessing its premises in a manner that would normally produce actual and regular business income. Given this understanding of the insurance contract, the fact that some employees, and even some limited number of patients, were still permitted to go to Plaintiff’s property for emergency procedures does not necessarily mean that Plaintiff is altogether precluded from coverage under the Civil Authority provision. The contract merely requires that “an action of civil authority . . . prohibits access to” Plaintiff’s property. **It does not clearly and unambiguously state that any such prohibition must completely and totally bar** all persons from **any form of access** to Plaintiff’s property **whatsoever**.

**Prefer it:**

**Aff ground – per se excludes immunity affs and makes aff sitting duck for PICs**

#### Overlimits

**Hovenkamp 18** --- Herbert J. Hovenkamp University of Pennsylvania Carey Law School, “THE RULE OF REASON”, 2018, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2780&context=faculty\_scholarship

Courts evaluate most antitrust claims under a “rule of reason,” which requires the plaintiff to plead and prove that defendants with market power have engaged in anticompetitive conduct. To conclude that a practice is “reasonable” means that it survives antitrust scrutiny.1 This is in contrast to antitrust’s “per se” rule, in which power generally need not be proven and anticompetitive effects are largely inferred from the conduct itself.2 However, the domain of the per se rule has been **narrowing**.3 Today it extends to “**naked**”4 **price fixing** and **market division agreements**, **a small subset** of boycotts, or concerted refusals to deal, **and—by a** very thin thread—some tying arrangements.5

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

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

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

### FTC – 2AC

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

#### It’s best:

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

#### Aff over-specification destroys the Neg

#### Cross-ex checks

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

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

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

### FTC – Counter-Definitions – 2AC

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

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

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

Absolute Astronomy ‘9

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

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

#### Optional:

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

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

#### ( ) Elmore does not apply – we solve agent questions and it doesn’t contextualize given cplans.

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

### FTC OS – 2AC

#### Doesn’t force spillover – aff gives FTC the option to pursue immunity cases but doesn’t require burdensome enforcement

#### No link – FTC capacity is high and already closely review state immunity cases

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

B. Institutional Constraints and Capacities

Beyond the core concerns about the anti-democratic and pro-laissez faire tendencies of economic substantive due process, there lurk questions about institutional constraints and capacities. Allowing the Sherman Act to become an aggressive anti-regulatory charter would pose considerable risks of unwieldy and excessive challenges to state regulatory regimes and state sovereignty, since the Sherman Act is privately enforceable.251 Further, the federal courts may lack the expertise and fact-finding processes to make well-informed decisions over whether state regulatory decisions reflect exercises of police power in the public interest, or, rather, naked pork-barreling for the benefit of concentrated economic interests. On these scores, FTC enforcement under Section 5 of the FTC Act enjoys a considerable advantage over the Sherman Act.

First, Section 5 of the FTC Act is enforceable only by the FTC, not by private plaintiffs.252 Superior preemption under Section 5 would not lead to a flood of private challenges against state regulations, nor would it injure state interests by forcing the states to constantly defend anti-regulatory actions by private interests. (Recall that Parker itself involved a private challenge to state law, as have many of the important state-action immunity cases since).253 Rather, preemption of state law would depend on an administrative decision by a majority of the FTC commissioners to bring an action or otherwise declare a state law preempted. Preemption would not flow directly from the statute, but from a decision of the FTC to enforce the statute in a particular context. The burden of the intrusion on federalism interests and state sovereignty would therefore be considerably lower than if the Sherman Act were read to directly preempt anticompetitive state laws, permitting private plaintiffs to seek invalidation of state laws whenever the laws infringed on competition.

Second, and relatedly, the FTC enjoys a much greater capacity to evaluate the range of competing interests entailed by state regulations than does a federal court. Not only does the commission employ a large staff of expert economists,254 but it wields broad investigatory powers to investigate trade conditions through mandatory processes such as document requests and depositions.255 The FTC already serves the states in a consultative capacity, giving advice on proposed legislation and engaging in competition advocacy by issuing reports on various competition issues or intervening as amicus curiae in litigation.256 Unlike generalist federal courts, the FTC has the capacity to study the competitive effects and justifications for state regulatory schemes, consult formally or informally with state officials and other interested parties, and bring to bear its economic expertise in mediating competing claims about the effects of regulations on consumers or other interests.

#### Lots of thumpers

Zakrzewski 8-19 (Cat Zakrzewski, technology policy reporter at The Washington Post, covers antitrust, privacy and the debate over regulating social media companies, former reporter for Wall Street Journal Pro Venture Capital, BS Journalism, Northwestern University; **internally citing competition policy director at the consumer group Public Knowledge Charlotte Slaiman, and George Washington University professor and former FTC chair William Kovacic**; “Lina Khan’s first big test as FTC chief: Defining Facebook as a monopoly,” The Washington Post, 8-19-2021, https://www.washingtonpost.com/technology/2021/08/19/ftc-facebook-lawsuit-lina-khan-deadline/)

“There’s multiple signals that FTC is serious about doing their job of investigations and bringing these cases and fighting them hard,” said Charlotte Slaiman, competition policy director at the consumer group Public Knowledge.

Though the most significant, the Facebook case is but one of a wide range of issues on Khan’s plate. A month after she assumed office, the Biden administration issued a sweeping competition executive order, which called for her agency to take a tougher line on concentration throughout the economy.

So far, Khan has taken a series of steps to signal a shake-up has arrived at the FTC. She’s started hosting open meetings to open the agency’s business to the public, and she’s warned that greater scrutiny of mergers is on its way.

But the challenge will be for the agency to remain focused on the most important cases, including Facebook, Kovacic said. “She has a downpour of demands from both ends of the avenue,” he said.

And none of her other efforts will matter if she can’t show that she can win against companies, including Facebook, in court.

“The real measure to business decision-makers of your effectiveness and seriousness is your ability to prosecute and win cases,” Kovacic said.

#### No tradeoff – newest resolution creates more capacity

Gehl 9-24 (Kate, Senior Counsel for Foley and Lardner LLP, Elizabeth A. N. Haas, Partner, Alan D. Rutenberg, Partner, H. Holden Brooks, Partner, Benjamin R. Dryden, Partner, Foley and Lardner LLP“A Divided FTC Approves Omnibus Resolutions to Step Up Enforcement Actions and Votes to Withdraw the 2020 Vertical Merger Guidelines” [https://www.foley.com/en/insights/publications/2021/09/divided-ftc-approves-omnibus-resolutions Published 9-24-2021](https://www.foley.com/en/insights/publications/2021/09/divided-ftc-approves-omnibus-resolutions%20Published%209-24-2021), MSU-MJS)

According to the FTC’s press release, the resolutions are aimed at broadening its ability “to obtain evidence in critical investigations on key areas where the FTC’s work can make the most impact.” The resolutions also will purportedly permit the FTC to “better utilize its limited resources” to quickly investigate potential misconduct. The FTC views the resolutions as one method to increase efficiency at the FTC, which certain Commissioners believe has become necessary due to the “increased volume of investigatory work” caused by a “surge” in merger filings in recent months.

In practice, these resolutions allow a single Commissioner, instead of a majority of sitting Commissioners, to approve compulsory process requests in any investigation within the scope of the resolution for the next 10 years. What practical effect these resolutions will have remains to be seen; however, businesses engaged in conduct that may be implicated by the resolutions should be aware that FTC staff will now have an expedited ability to carry out compulsory process requests, which will very likely increase the number and scope of investigations conducted by the FTC.

#### Funding is normal means – AND boosts are coming

Byers 21 (Dylan Byers, senior media reporter for NBC News; **internally citing George Washington University professor and former FTC chair William Kovacic**; “Is Facebook untouchable? It's complicated,” NBC News, 7-1-2021, https://www.nbcnews.com/tech/tech-news/facebook-untouchable-complicated-rcna1323)

The House Judiciary Committee recently advanced six bills that would bolster the government's ability to regulate Big Tech. They range from simple budgeting measures — one would give more funding to the FTC and the Department of Justice for their antitrust enforcement efforts — to profound reforms — one that would stop platform companies from preferencing their products over those of their competitors and another that would make it illegal for companies to eliminate competitors through acquisitions.

This legislative package faces an arduous road ahead. House Majority Leader Steny Hoyer, who sets the House floor schedule, has said none of the six bills are ready for a vote, which suggests they don't have broad bipartisan support. If and when they do make it through the House, they face an even harder battle in the Senate.

"It's hard to imagine that the larger legislative package is accomplished this year," Kovacic said, though he predicted a few of the less-threatening bills — budgeting, for example — are likely to pass on their own.

"The funding for the FTC and DOJ antitrust divisions, it's nearly 100 percent likely that Congress will pass that law," he said. He said another bill, which would block the tech firms from moving court hearings to more favorable states, was also likely to pass.

#### Other entities can enforce.

Jones 20 [Alison Jones & William E. Kovacic, Jones is a professor at King’s College London; Kovacic is Global Competition Professor of Law and Policy, The George Washington University Law School, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy,” The Antitrust Bulletin, vol. 65, no. 2, SAGE Publications Inc, 06/01/2020, pp. 227–255]

C. Improving Capability: Agency Cooperation and Project Selection

The U.S. antitrust system is famous for its decentralization of the power to prosecute, giving many entities – public agencies (at both the federal and state levels), consumers, and businesses – competence to enforce the federal antitrust laws. The federal enforcement regime also coexists with state antitrust laws and with sectoral regulation, at the national and state levels, that include competition policy mandates.

The extraordinary decentralization and multiplicity of enforcement mechanisms supply valuable possibilities for experimentation and provide safeguards in case any single enforcement agent is ~~disabled~~ [hamstrung](e.g., due to capture, resource austerity, or corruption).75 Among public agencies, there is also the possibility that federal and state government institutions, while preserving the benefits of experimentation and redundancy, could improve performance through cooperation that allows them to perform tasks collectively that each could accomplish with great difficulty, or not at all, if they act in isolation. In the discussion below, we suggest approaches that preserve the multiplicity of actors in the existing U.S. regime but also promise to improve the performance of the entire system through better inter-agency cooperation – to integrate operations more fully “by contract” rather than a formal consolidation of functions in a smaller number of institutions.

#### States fill-in

Wisking et al 20 (Stephen Wisking, Kyriakos Fountoukakos and Marcel Nuys, Herbert Smith Freehills LLP, “Digital Competition 2021,” Law Business Research Ltd., October 2020, https://docplayer.net/201129322-Digital-competition-2021.html)

There is a clear trend towards increased antitrust scrutiny of digital markets by federal and state antitrust enforcers and the US Congress. In July 2019, the DOJ announced it was reviewing the practices of market-leading online platforms and in October 2020 filed suit against Google. The FTC formed a Technology Enforcement Division in 2019 that is actively conducting investigations and the agency is reportedly on the verge of bringing a suit against Facebook. State Attorneys General of all or nearly all 50 states have had active investigations of Google and of Facebook, and investigations of other technology firms have recently been initiated. Eleven states joined the DOJ in its suit against Google, while other states indicated that they may pursue other claims against Google, and still others are reportedly considering a suit with or without the FTC against Facebook. In Congress, both the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law and the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights have held antitrust hearings on digital markets. And in October 2020, the majority staff of the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law issued a digital markets report recommending numerous proposals to restore competition in digital markets and to strengthen antitrust law and enforcement generally. Legislators have proposed legislation aimed at strengthening antitrust enforcement. Developments among litigated cases before courts are mixed. In 2020, the DOJ lost its effort to block Sabre’s acquisition of an allegedly nascent competitor, Farelogix, but the DOJ later had the decision vacated on appeal after the parties abandoned their transaction. In 2019, the Supreme Court ruled against Apple, finding that iPhone owners had standing to sue Apple for federal antitrust violations regarding the App Store. Individual companies are increasingly filing private litigation against some of the largest technology firms as well.

**Vague Alts---2AC**

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

### PIKS---2AC

#### Floating PIKs are illegit and a voting issue---the Neg can’t endorse the aff---it kills ground because there are an infinite number of possible reps or language they can critique and stealing the plan makes offense impossible---it’s also a reason to vote Aff because logically they agree the plan is good

### Conditionality---2AC

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

**Perms---2AC**

#### Perm: do both

#### Perm: do the plan and all non-mutually exclusive parts of the alt

### Perms---Life is a Prerequisite---2AC

#### Prolonging life is a pre-requisite to alt

**Tallis 97** (Raymond, Neurologist and Professor of Geriatric Medicine at the University of Manchester, ENEMIES OF HOPE: A CRITIQUE OF CONTEMPORARY PESSIMISM, p.400-402)

At any rate, we may anticipate that future progress in medical science will make possible only finite additions to lifespan, palliating rather than curing our transience. This raises the question of what (finite) additions to a finite lifespan are worthwhile? The answer will change as our perceptions of the curve of life are altered by medical and social advance; in particular the definition of premature, ‘tragically early’, death will be revised upwards. Nietzche’s Zarathustra recommended that, since we cannot live forever, we should at least die at the right time. When is the right time to die? According to Paul Valery’s M.Tester.   It is said that there are two kinds of death, the natural (complete) and the ordinary- giving back to the world nothing but a corpse empty of its possible consciousness.      The ordinary is the ordinary dead man (and on his features, the expression of a man surprised and slightly shocked, impolitely interrupted by some trifle in an interesting conversation.)  The natural or true death would be the total exhaustion of the possibilities of the systems of an individual man. All the inner combinations of his capacities, incomplete in themselves, would be exhausted. He has told himself everything he knew.   This seems an unlikely prospect and we may assume that all human beings will leave much unfinished business behind when they die and death will remain as poignant. Does not the Utopian dream of progress, therefore, distract from this fundamental certainty and so render us spiritually more shallow? I don’t think so; indeed, I would argue the **reverse**: life and death in Utopia will be more, not less; metaphysical.   With more effective ways of retarding the onset of diseases and limiting their adverse effects, it seems likely that ‘old age’ will come to play a bigger role in limiting the quality and duration of life. The distinction between disease and ageing not as clear-cut as has been suggested by those who have been appropriately anxious that woes in older people should not be dismissed as (untreatable) ‘ageing; and opportunities for improving (treatable) illnesses lost. Even, however, supposing ageing and disease were clearly seperable, they would still interact and converge, having a common ultimate outcome- death- and a common pathway to that outcome- death- and a common pathway to that outcome- homeostatic failure. The question that then concerns us is whether death purely or predominantly question that then concerns us is whether death purely or predominantly by ageing would be an advance over death by clearly defined disease. Death in old age will, of course, seems more appropriate (or less inappropriate) than death in youth; but, beyond this, death from old age may be less unpleasant, not being associated with intrusive symptoms such as pain, nausea, shortness of breath and gross disability. Instead, we may envisage a subtle and progressive reduction in life-space associated with an increased probability of a demise that is more easily achieved- as if the distance to be traversed between life and death had been abbreviated. The image of death by ageing as the end-result of gradual but harmonious failure of all organs is attractive. It is compatible with current conceptions of ageing in the absence of clearly defined disease, which suggest a picture of progressive, roughly synchronous decline in function of many different organs. Such a death would seem to be less likely to be more conscious more metaphysical, than death typically is at present. ‘Do not go gentle into that good night.’ No; but do not go kicking and screaming, either. Instead, proceed by a series of grey-scale gradations of evenings to oblivion. The tragedy is not blunted but purified of the kind of distractions that dominate decline and death at present. Physical suffering is not necessarily a more translucent metaphysical window than painless decline; quite the reverse: to suffer is to be nailed to the particular to endure an **involuntary narrowing of** an **attention** made almost absolute.   Utopia and Utopian medicine will not, therefore, cure transience, but may permit a death that is more in keeping with the possibilities of man the metaphysical animal. It is absurd, therefore, to see progress towards Utopia as being a means by which humankind is made shallower; on the contrary, it may be the means by which human beings come nearer to fulfilling the mysterious potential within them to become ever more richly and complex aware of themselves and of the world around them.

**FW---2AC**

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

#### ​​No impact – people have very individualized reactions to the fear of death

**Mikulincer 96** (Psychological Inquiry, 6, 33-36, Department of Psychology at Bar-Ilan University)

Another individual relevant facot may be related to the subjective meaning of the fear of personal death. TMT viewsthe fear of death as a universal, unitary phenomenon, which leads everyone to adopt normative cultural worldviews in a similar way as a means for self-preservation. Therefore, it is assumed that the impact of mortality salience would not differ among various individuals and different person-environment transactions. However, Pyszcynski et al. overlook theoretical and empirical evidence showing that the fear of death is a **subjective**, **multidimensional** phenomenon (Florian and Kravetz, 1983; Florian and Snowden, 1988; Neimeyer, 1994). From this perspective, the impact of mortality salience on the activation of terror management mechanisms would depend on the extent to which a person environment transaction touches on those specific meanings that an individual attributes to his or her own death. Indeed, it was found that people tend to activate defensive motives mainly when they perceive a threat to those specific matters which they are afraid to lose in their encounter with death (Florian and Mikulincer, 1994). In other words, every person has ~~his or her~~ own unique concerns about the consequences of his or her own death, and when it threatens these concerns, ~~he or she~~ will be prone to manage the threat strongly.

# 1NR

## Case

1AR FEderalism:

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

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

This means the status quo Parker immunity akiws for interstate spillovers, the aff mitigates this - “saving” federalism from being wreck, see our Meese 15 evidence. And the effects of these sillovers must be reviewed by the federal government, aka COURTS

Healthcare Innovation:

The NEG has proved they don’t want to solve for anything, including extinction. Life is valuable! Think about it! - hat’s what the Neg is doing rather than solving for extinciiton. There is no life to appreciate, if non of us r alive and r dead by diease

The issue is the Parker Immunity doctrine in the squo prohibits the ability for other companies to innovate. This is an issue because the lack of innovation won’t counter threats of extinction. In fact, it will lead to extinction, immunity for these private entities r the issue, see our sandefur ev - this innovation is key, see our Nam evidence

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

 Future pandemics is solved by the capacity to innovate and PREVENt solving those invisible thresholds and combating extinction - that’s Penn, that’s why the limited parker immunity WORKS, because it allows the companies to innovate and solve for future extinction risk

## T Per Se

#### Sherman 2 is all RoR because courts have to determine market power to evaluate a violation --- they would have you believe no conduct in Sherman 2 is a business practice

TUDOR 12 --- ELENA CRISTINA TUDOR, Faculty of Law - University of Valladolid, Spain, “ANTICOMPETITIVE PRACTICES IN ANTITRUST LAW”, 2012, http://www.internationallawreview.eu/fisiere/pdf/03-Elena-Cristina-Tudorx.pdf

It would be worth mentioning that the “rule of reason” *always applies to practices* deemed antitrust, *according to Section II under the Sherman Act* (relative to monopolization and attempted monopolization). Consequently, Courts have asserted that it is essential to prove not only that the defendant enjoys a dominant position in the relevant market, but also that this position has been misused. In the case U.S. vs. Grinnell Corp. [384 U.S. 563, (1966) there were embodied integrated elements of the monopolization conduct, which follow: a) the possession of monopoly power of the defendant in the relevant market and b) the willful acquisition / maintenance of that power - in other words, when neither the maintenance, nor the acquisition of the existing power is due to business acumen of the defendant, such as placing on the market of a product of superior quality as compared to existing ones, increase in the company’s efficiency, or just simply the existence of favorable foreign circumstances. As it also appears in the case of “monopolistic” practices, the presumption of existence of the conduct’s antitrust character can be challenged should it be evidenced that the disappearance of competitors in the relevant market is a consequence of either special merits listed above. In other words, if the defendant fails to prove, by any evidence admitted in American law, the existence of this acumen, the practice carried out shall be deemed as antitrust practice and shall be sanctioned as per the law in force.

## DA

## They are a performative contradiction by running the FTC Tradeoff DA by just having an impact meaning that they are doing exactly what the Death K is talking about when it comes to death anxiety and fear of death- they don’t link and if they want an impact they are performatively contradicting themselves- DA should be kicked because of this

#### FTC expertise avoids tradeoff costs- no impact

Hoofnagle 19 [Chris Jay Hoofnagle is an American professor at the University of California, Berkeley 8-8-2019 https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress/]

Given these *constraints*, FTC attorneys make *pragmatic choices* in their case selection. At any given time, line attorneys are investigating many companies and weighing decisions on where to target limited enforcement resources. The FTC can only bring actions against a *small fraction* of infringers, and *it has chosen* cases *wisely* to make loud statements to industry about how to protect privacy.

Even with these *severe limitations*, it has managed to bolster important norms and send strong signals to industry that have influenced the practices of many companies. It has become a significant enforcement agency that industry pays attention to. It has an enforcement record that compares quite well to other agencies in the US as well as around the world.

#### Empirics prove

Murray 20 (Iain Murray, vice president of strategy at the Competitive Enterprise Institute, “Big Tech: Conservatives Should Be Wary of Compromise on Antitrust,” National Review, 10-14-2020, https://www.nationalreview.com/2020/10/big-tech-conservatives-should-be-wary-of-compromise-on-antitrust/)

To begin with, the minority accepts many of the majority staff’s arguments. It believes it has found evidence of anticompetitive behavior by the Big Tech firms. If this is the case, Representative Sensenbrenner is right, and the regulators will be able to bring a case and prove it. We will soon have two test cases here, as the Department of Justice and the Federal Trade Commission (FTC) are said to be on the verge of launching cases against Google and Facebook, respectively.

However, the response, authored by Representative Ken Buck (R., Colo.), agrees with the majority staff that more resources are needed for regulators to prosecute more cases. The *theory* is that *resource constraints prevent* the regulators from *winning cases*. This *simply isn’t so*. Regulators *tend to win their cases* — the *FTC* went *19 years* from 1995 to 2014 *without* suffering a *defeat in court* — and have *power in simply bringing action*, as when its challenge to Illumina Inc.’s planned acquisition of PacBio earlier this year led to the parties abandoning the deal. At the very least, the minority should wait to see how the Google and Facebook cases go before suggesting that more resources are needed to bring more cases.

### K Fear of Death

#### Perm --- do both --- reflection solves the impact

#### Perm: do the alt---any theory objection links to the K

#### Impact’s empirically denied and links to the Neg --- voting issue because contradictions make offense impossible

#### No link. We didn’t say all risks are bad, just that some---especially the aff ones ones---should be avoided.

#### “Affirming life” is useless and tautological

Amrine 92 – Frederick Amrine, Associate Professor of German at the University of Michigan, The Crisis of Modernism, Ed. Bunvick and Douglass, p. 143

By simultaneously endowing "life" with ultimate value and refusing it any and all defining characteristics, Nietzsche turns "life" into the kind of empty evaluative term that C. S. Lewis has called a "semantic halo." Lewis's own example is the word "gentleman," once a purely descriptive term, which gradually acquired a "quasi-ethical sense," and eventually became "the mystique by which a whole society lived" (Lewis 282), a purely evaluative tern that has become a "useless synonym for good or bad" (Lewis 7). One of many examples from Nietzsche that could be quoted here (several others have been adduced already in other contexts above, of course) is no. 586 in the section "Man Alone with Himself' in part I of Human, All Too Human: Of the hour-hand of life. -Life consists of rare individual moments of the highest significance and countless intervals in which at best the phantoms of those moments hover about us. Love, spring, a beautiful melody, the mountains, the moon, the sea - they all speak truly to our heart only once: if they ever do in fact truly find speech. For many people never experience these moments at all but are themselves intervals and pauses in the symphony of real life. (Samtliche Werke 11: 337; trans. Hollingdale, p. 189) Again, a passage so very typical of Nietzsche: one that seems on the surface to be full of content, but turns out on analysis to be entirely empty. "Living" has in fact become here an entirely passive and unarticulated experience: it means to absorb fully just everything that goes on outside us. Some are fully immersed, and thus by implication "good" at "living." while others stand apart, and thus are "bad." Here Nietzsche seems to have forgotten entirely what he argued elsewhere: that there is not one single human "life," but rather different kinds of "lives" are possible, each defined by seeking some experiences and avoiding others. Here Nietzsche seems to imply that even part of "life" is good. But if even part of some universal "life" is good, then no particular kind of life is good. Hence "life" becomes a semantic halo, "a purely and therefore unspecifically evaluative term" (Lewis 288); in other words, it becomes an empty quasi-ethical tautology (Who is most alive? Those who experience the most of life; those who live most fully) of the sort we have analyzed at length above.

#### We straight-turn “securitization of life”---preserving a baseline of security distinct, not life-denying, and provides the space for *elective* *danger*

Booth 7 – Dr. Kenneth Booth, Professor of International Relations at the University of Aberystwyth, Theory of World Security, p. 104-105

Perhaps the most hideous image of the congruity of insecurity and the determined life in the Western imagination was that of the inmates of the Nazi death-camps. Years after the war, Primo Levi related how, driven by thirst on his first day in Auschwitz, he reached for an icicle. A guard snatched it away. When Levi asked 'Warum? the guard pushed him away: 'Hier ist kein wanim' ('There is no why here)." Here was survival, for a shorter or longer time, but definitely no security, not even the choice of asking 'Why?' The determined life in extrernis of the death- camp inmate is rare, though not as rare as one would hope. Nonetheless, people can live honourable lives surviving in extreme insecurity. There is some space for human dignity in the death-camp, in the trenches, or grubbing for food on rubbish tips. But there is not much Such a life is not much different from that of non-human animals existing only to feed and protect their young, driven by some biological imperative to survive. Since the earliest times societies have shared the belief that human being/being human should be more than this. 22 The most basic task for emancipatory politics must therefore be to create conditions in which sentient bodies are never driven into sites of insecurity where the freedom to ask Why?' and to live in dignity is never present. It is important here to distinguish between insecurity that is enforced and life-determining, and danger that is chosen. Insecurityof the sort discussed above and elective dangerare not synonymousWhen people choose risky pastimes or when powerful states choose to take on ambitious foreign interventions, they place themselves in some danger, but they are not facing insecurity in the sense discussed above. Elective danger is synonymous with a sort of freedom. The insecure of the earth have neither the time nor the resources to engage in Formula One car racing, nor in organising expeditions to climb the highest peaks. There is all the difference in the world between those who go into the mountains for recreation and challenge - and have the time and money to do so - and those Kurds who went into the mountains to flee from Saddam Hussein's forces in 1991. Security allows choice, and some choices (the result of security rather than insecurity) may be life-threatening. Elective danger is a privilege of the secure; direct and unavoidable danger is the determining condition of the world's insecure. Those whose lives are dominated by the search for scraps of food on a refuse tip on the edges of Sao Paulo have no choice about what to do. There is no money to buy hooks, or the opporhinity to go across the city to attend the theatre. Such opportunities were also denied the family in Glasgow mentioned earlier, and the woman working in the rnaquiladora. If one lives in an autocratic. state, which punishes those who think unacceptable thoughts, it is necessary to self-police those thoughts. Equally, weak states have to defer to mighty and ambitious neighbours. Manipulating insecurity may of course be functional for the powerful (individuals regimes, and states) by helping to keep the weak 'in their place' through deference and self-policing. But such insecurity obstructs the opportunities for the victims to achieve self-realisation in their lives. A determined life is not one in which humans, in whole or in part, can flourish. Those in such a situation are never even given the opportunity to know 'Why?' because they do not have the power to ask the question in the first place.

#### No alt: fear of death’s inevitable --- natural part of human existence --- they can’t stop it

#### Inclusion of a plan solves

#### They assume we simply read impacts – promotion of clear solutions overcomes fear the alt creates helplessness

Sandman 86 (Peter M., Professor of Public Health, Rutgers University, Founder and Director of the Environmental Communication Research Program, and Communications Counsel for Environmental Defense Fund, and JoAnn M., Professor of Communications, Brigham Young University, January (“Scared Stiff – or Scared into Action” – Bulletin of Atomic Scientists, the Article Won the 86/87 Olive Branch Award for Outstanding Coverage of the Nuclear Arms Issue) http://www.psandman.com/articles/scarstif.htm)

“The main obstacle to action,” writes Frank, “is neither apathy nor terror but simply a feeling of helplessness. To combat it, I have perhaps overemphasized the small signs that antinuclear activities are at last beginning to influence the political process.”(19) Helplessness, hopelessness, futility, and despair are words one hears even more often than fear from the barely active and the formerly active. And like fear, these emotions can easily lead to psychic numbing. Those who feel powerless to prevent nuclear war try not to think about it; and it serves the needs of those who do not wish to think about nuclear war to feel powerless to prevent it. Messages of hope and empowerment, however, break this vicious circle. The label “hope,” as we use it, subsumes a wide range of overlapping concepts: for example, optimism, a sense of personal control and efficacy, confidence in methods and solutions, a sense of moral responsibility, and a vision of the world one is aiming for. It is well established (and hardly surprising) that hope is closely associated with willingness to act. Activism appeals most to people who feel positive about both the proposed solution and their personal contribution to its achievement. Over the long term, this means that antinuclear organizers must communicate a credible vision of a nuclear-free world. Meanwhile, they must offer people things to do that seem achievable and worthwhile. The nuclear-weapons-freeze campaign attracted millions of new activists in 1982 because it offered credible hope. By 1985 many of those millions could no longer ground their hope in the freeze; some found other approaches and some returned to inactivity. Most social psychologists today see the relationship between hope and action as independent of fearor other feelings. For example, Kenneth H. Beck and Arthur Frankel conclude that three cognitions (not emotions) will determine whether people do something about a health risk: recognizing the danger as real, believing the recommended plan of action will reduce the danger, and having confidence in their ability to carry out the plan. (20)

### Fear of Death – Good – Survival – 1AR

#### Fear checks extinction – provides an active consciousness which sustains peace

Futterman 94 (J. A. H., Ph.D. – UT-Austin and Physicist – University of California's Lawrence Livermore National Laboratory, “Obscenity and Peace: Meditations on the Bomb”, 1990, http://www.dogchurch.com/scriptorium/nuke.html)

But the inhibitory effect of reliable nuclear weapons goes deeper than Shirer's deterrence of adventurer-conquerors. It **changes the way we think** individually and culturally, preparing us for a future we cannot now imagine. Jungian psychiatrist Anthony J. Stevens states, [15] "History would indicate that people cannot rise above their narrow sectarian concerns without some **overwhelming paroxysm**. It took the War of Independence and the Civil War to forge the United States, World War I to create the League of Nations, World War II to create the United Nations Organization and the European Economic Community. **Only catastrophe**, it seems, **forces people to take the wider view**. Or what about fear? Can the horror which we all experience when we contemplate the possibility of nuclear extinction mobilize in us sufficient libidinal energy to resist the archetypes of war? Certainly, the moment we become blasé about the possibility of holocaust we are lost. As long as horror of nuclear exchange remains uppermost we can recognize that nothing is worth it. War b**ecomes** the **impossible** option. Perhaps horror, the experience of horror, the consciousness of horror, is our only hope. Perhaps **horror alone** will enable us to overcome the otherwise invincible attraction of war." Thus I also continue engaging in nuclear weapons work to help fire that world-historical warning shot I mentioned above, namely, that as our beneficial technologies become more powerful, so will our weapons technologies, unless genuine peace precludes it. We must build a future more peaceful than our past, if we are to have a future at all, with or without nuclear weapons — a fact we had better learn before worse things than nuclear weapons are invented. If you're a philosopher, this means that I regard the nature of humankind as mutable rather than fixed, but that I think most people welcome change in their personalities and cultures with all the enthusiasm that they welcome death — thus, the fear of nuclear annihilation of ourselves and all our values may be what we require in order to become peaceful enough to survive our future technological breakthroughs.[16] Of course, we could just try for a world-wide halt to scientific research and technological change. This is obviously not desirable because technological change serves humanity like biological diversity serves life in general -- it gives us ways to cope with new challenges to our existence. For example, medical scientists deliberately forced the smallpox virus into virtual extinction. Nor is halting technological change possible, because the demand for such change is so great — people want the new stuff so much that they actually buy it. The fear of nuclear annihilation may be what we require in order to become peaceful enough to survive our future technological breakthroughs. In other words, when the peace movement tells the world that we need to treat each other more kindly, I and my colleagues stand behind it (like Malcolm X stood behind Martin Luther King, Jr.) saying, **"Or else."** We provide the peace movement with a **needed sense of urgency** that it might **otherwise lack**.

#### Allows for self-preservation and is based on a love of life

Singer 92 [Professor of Philosophy at MIT, 1992 (Irving, MEANING IN LIFE, p. 65)

I conclude that there is no basis for considering it necessarily irrational to fear death. Unless we are convinced that greater benefits will compensate us for the loss of cherished goods enjoyed the process of living, the dear of death is always rational. I do not'mean that this feeling is inevitable or unavoidable; and certainly it is counterproductive when it becomes a painful obsession that interferes with our ability to savor life and go on living. On many occasions the fear of death is needed for self- preservation. Without a salutary fear we might run risks that would markedly decrease our chances for survival. In the long run our gene pool would suffer and the species might even be imperiled. From this we can infer that it is something desirable to fear death. That must depend on the consequences in each case, but it does indicate that one can imagine circumstances in which the fear of death would indeed be wholly justified. In the final analysis we fear death because we love life, at least enough of it and in sufficient degree to believe that our existence is worth continuing.

### Fear of Death – Good – Nuclear War – 1AR

#### K’s of fear are all wrong. The better mistake’s to err with us.

Kroenig 12 Matthew Kroenig: Assistant Professor of Government, Georgetown University and Stanton Nuclear Security Fellow, Council on Foreign Relations – “The History of Proliferation Optimism” – Nonproliferation Policy Education Center Reports – May 26, 2012 – http://www.npolicy.org/article.php?aid=1182&tid=30.

Should we worry about the spread of nuclear weapons? At first glance, this might appear to be an absurd question. After all, nuclear weapons are the most powerful weapons ever created by man. A single nuclear weapon could vaporize large portions of a major metropolitan area, killing millions of people, and a full-scale nuclear war between superpowers could end life on Earth as we know it. For decades during the Cold War, the public feared nuclear war and post-apocalyptic nuclear war scenarios became a subject of fascination and terror in popular culture. Meanwhile, scholars carefully theorized the dangers of nuclear weapons and policymakers made nuclear nonproliferation a top national priority. To this day, the spread of nuclear weapons to additional countries remains a foremost concern of U.S. leaders. Indeed, in his 2012 annual threat assessment to the U.S. Congress, Director of National Intelligence James Clapper argued that nuclear proliferation poses one of the greatest threats to U.S. national security.[1] Recently, however, academics have become more vocal in questioning the threat posed by the spread of nuclear weapons. Students of international politics known as “proliferation optimists” argue that the spread of nuclear weapons might actually be beneficial because it deters great power war and results in greater levels of international instability.[2] Other scholars, whom I label “proliferation anti-obsessionists,” maintain that nuclear proliferation is neither good nor bad, but irrelevant.[3] They claim that nuclear weapons do not have any meaningful effect on international politics and that the past seventy years of world history would have been roughly the same had nuclear weapons never been invented. Some take this line of argument even further and argue that the only real problem is not the nuclear weapons themselves, but great power nonproliferation policy.[4] They argue that the cure that countries like the United States implement in order to prevent other states from acquiring nuclear weapons is much worse than the disease of the spread of nuclear weapons itself. While these arguments remain provocative, they are far from new. The idea that a few nuclear weapons are sufficient to deter a larger adversary and keep the peace has its origins in the early strategic thinking of the 1940s. Moreover, a critical review of this literature demonstrates that many of these arguments are much less sound than they initially appear. Indeed, both proliferation optimism and proliferation anti-obsessionism rest on internal logical contradictions. In this essay, I argue that the spread of nuclear weapons poses a grave threat to international peace and to U.S. national security. Scholars can grab attention by making counterintuitive arguments about nuclear weapons being less threatening than power holders believe them to be, but their provocative claims cannot wish away the very real dangers posed by the spread of nuclear weapons. The more states that possess nuclear weapons, the more likely we are to suffer a number of devastating consequences including: nuclear war, nuclear terrorism, global and regional instability, constrained U.S. freedom of action, weakened alliances, and the further proliferation of nuclear weapons. While it is important not to exaggerate these threats, it would be an even greater sin to underestimate them and, as a result, not take the steps necessary to combat the spread of the world’s most dangerous weapons.

#### Their K is wrong. They have faulty data – presumption’s with us.

Kroenig 12 Matthew Kroenig: Assistant Professor of Government, Georgetown University and Stanton Nuclear Security Fellow, Council on Foreign Relations – “The History of Proliferation Optimism” – Nonproliferation Policy Education Center Reports – May 26, 2012 – http://www.npolicy.org/article.php?aid=1182&tid=30.

This chapter analyzed the past, present, and future of proliferation optimism. It began by reviewing the academic and policy origins of the pillars of proliferation optimism thinking. Next, I examined more recent work in this tradition, including a review of both proliferation optimism and proliferation anti-obsessionism. I demonstrated that this literature brings an important perspective to bear on the question of nuclear proliferation and reins in worst-case analyses of the consequences of nuclear proliferation. At the same, I argued that, in making the case for the irrelevance of nuclear weapons, this literature swings too far in the opposite direction. Moreover, I demonstrated that too often these theorists support their arguments with contradictory logics and weak empirical evidence. Finally, I restated the argument about why the spread of nuclear weapons continues to pose a threat to international peace and security. Despite the claims of optimists, there is no getting around the fact that nuclear proliferation increases the risks of nuclear war, nuclear terrorism, emboldened nuclear powers, constrained U.S. freedom of action, weakened U.S. alliances, and further proliferation. The findings of this article have important implications for the scholarly study of nuclear proliferation. While proliferation optimism and proliferation anti-obsessionism have made the field of nonproliferation studies more interesting in recent years, their inherent logical weaknesses means that they should remain niche, not mainstream, approaches to the study of nuclear proliferation. This article, therefore, aims to bring proliferation pessimism back in. The diffusion of the most powerful weapons ever invented by man is a serious problem. Period. The burden of proof is on those who wish to claim otherwise. So far, the optimists and anti-obsessionists have made us think, but they have not made their case. It is not yet (and my guess is that it never will be) time for the discipline to shift its null hypothesis from the point of view that the spread of nuclear weapons is bad to the position that it is either good or irrelevant.

#### Alt fails---individual affirmation makes truth and practice subjective---causes total rejection of life

~~Lang 3 (Shian, “Pitfalls in Genealogical Method+Possible Repercussions of Overthrowing Slave Morality: Frederich Nietzsche Discussion Desk”, 12-8, http://westerncanon.com/cgibin/lecture/FrederichNietzschehall/cas/55.html)~~

~~Despite the positive lesson we can learn from Nietzsche’s account on slave morality, we should understand certain pitfalls of his genealogical methods of interpreting slave morality. In his Feb 5th review essay, Jason summarized the value of genealogy as follows: "Nietzsche's genealogy serves, first, to separate the content of morality from the subject itself, by showing the actual, historical development of different and indeed opposite conceptions of morality in history. The second purpose is to show the historical contingency of "moral" valuations altogether; that, is, Nietzsche hopes to dispel the aura of morality "in itself" and any intuitive morality of altruism by showing the purposes for which morality has been used, and by showing that morality originated in pursuit on values." The method of genealogy, however, does not seem like the best tool with which to accomplish these two goals. Separating the content of morality from the subject largely requires avoiding the most common method of moral theorizing: starting from presumptions about what constitutes moral behavior and then building a theory around those presumptions. As for what positive method should be used, we ought to start with fundamental questions, ones that do not presuppose moral content, namely "What are values? Why does man need them?" (Rand, VOS 15). Hoping to separate subject from content by historical investigation is much less likely to be fruitful. For example, just about every moral theory has presupposed fundamental conflicts of interests between individuals. A historical investigation will fail to reveal that this premise is questionable. The fact that Nietzsche's own moral theorizing fails to uproot or even question this basic presupposition indicates a failure of the genealogical method. Without a successful questioning on the presupposition of moral content,~~ **~~it becomes potentially dangerous~~** ~~to live with Nietzsche’s hope of overthrowing the dominant culture of slave morality. Nietzsche's historical perspective suggests that we should interpret the past subjectively, and take lessons so that we will not be trapped by the traditional framework of values the past has created. However, a subjective view of the past, while an exciting prospect, is potentially dangerous.~~ **~~Personal interpretation makes truth subjective; we each extract different lessons from the past~~**~~. If there is a multitude of narratives, it is likely that we are manipulating the truth to serve our purposes. While many of us formulate healthy, life-serving interpretations of the past, others select the negative aspects to exalt and admire. Nietzsche envisions a society in which human being is able to overcome oneself, to be the superman who is capable to recreate one’s values. However,~~ **~~not every individual is able to develop~~** ~~the kind of~~ **~~positive self-overcoming~~**~~. For such individuals, the overthrow of traditional moral framework, compounded by the lack of examination of why human beings need values, will likely to result in two~~ **~~negative extremes: arbitrary use of will to power or complete rejection of life~~** ~~because of the incapability to achieve personal goals. Without a discipline in controlling individual’s will to power, society will end up in constant chaos.~~

#### ~~It destroys cooperation required to prevent existential risks---these outweigh their impacts~~

~~Winchester 94 – James J. Winchester teaches Philosophy at Spelman College Nietzsche's Aesthetic Turn~~

~~As uninformed as it is to assume that there is an easy connec- tion between his thought and National Socialism, it is neither diffi- cult nor misguided to consider his lack of social concern. Nietzsche saw one danger in our century, but failed to see a second. His critique of herd mentality reads like a prophetic warning against the dictatorships that have plagued and continue to haunt the twentieth cen- tury. But the context of our world has changed in ways that Nietzsche never imagined. We now have, as never before, the ability to destroy-the planet. The threat of the destruction of a society is not new. From the beginnings of Western literature in the Iliad and the Odyssey, the Western mind has contemplated the destruction that, for example, warfare has wrought. Although the Trojan war destroyed almost everyone involved, both the victors and the van- quished, it did not destroy the entire world. In the twentieth century, what has changed is the scale of destruction. If a few countries destroy the ozone layer, the whole world perishes, or if two countries fight a nuclear or biological war, the whole planet is threatened. This is something new in the history of the world/ The intercon- nectedness of the entire world has grown dramatically. We live, as never before, in a global community where our actions effect ever- larger numbers of the world's population. The earth's limits have become more apparent. Our survival depends on working together to solve problems like global pollution. Granted mass movements have instituted reigns of terror, but our survival as a planet is becoming ever-more predicated on community efforts of the sort that Nietzsche's thought seems to denigrate if not preclude. I do not criticize Nietzsche for failing to predict the rise of problems requiring communal efforts such as the disintegration of the ozone layer, acid rain, and the destruction of South American rain forests. Noting his lack of foresight and his occasional extrem- ism, I propose, in a Nietzschean spirit, to reconsider his particular tastes, without abandoning his aesthetic turn. Statements like "com- mon good is a self-contradiction" are extreme, even for Nietzsche. He was not always so radical. Yet there is little room in Nietzsche's egoism for the kind of cooperation and sense of community that is today so important for our survival. I am suggesting that the time for Nietzsche's radical individualism is past. There are compelling pragmatic and aesthetic reasons why we should now be more open to the positive possibilities of living in a community. There is nothing new about society's need to work together. What has changed is the level of interconnectedness that the technological age has pressed upon us.~~

#### ~~Doesn’t solve the case – impact is short-term extinction – and, it turns their impact – domination and violence creates rigid boundaries and undermines individual joy and pride – shatters the ability to affirm life~~

~~Schutte 84 (Ofelia, Professor of Philosophy – University of South Florida, Beyond Nihilism: Nietzsche Without Masks, p. 159-160)~~

~~Nietzche’s fascination with domination—itself a project of Western values—ruptured the intent of his project and brought the transvaluation of all values to a halt. The concrete result of Nietzsche’s alienation can be seen in the way he handles the relationship of the elite to the masses as well as that of men to women in his mature and late works. Some of the psychological and political aspects of this problem will be discussed in Chapter 7. It should be clear so far, however, that the psychology of domination calls for the war of all against all. Out of distrust for the people, out of distrust for women, out of distrust for one’s own body, the authoritarian conscience establishes the need for obedience regardless of the absurdity of the rule. Under the psychology of domination, the contribution to personal well-being that grows out of a healthy and life-affirming morality is replaced by the commanding voice of a despot who would very much like to rule the world. This reversion to repression undermines all the liberating aspects of Nietzsche’s philosophy. The Dionysian affirmation of self-transcendence is contradicted by the implementation of rigid boundaries in human life (“leader” and “herd”). The joy and pride in one’s own values (“it is… our work—let us be proud of it”) is undermined by the defense of breeding and slavery. Above all, the union of truth and life which was the aim of the Dionysian transvaluation of values is completely shattered when the doctrine of the overcoming of morality is used to sever truth from life.~~

#### ~~Even if the Aff is somewhat life-denying---they are comparatively worse~~

~~Langdon 98 (Michael, “Slave Moralities: Why We Must Embrace Them”, http://www.msu.edu/~langdon8/lit/editorial/flawphi2.html)~~

~~Nietzsche's basic assertion is that all previous moralities, whether deontological or consequential, are the result of people who have "lost" in life and history, but are attempting to "win" some small piece of the game by limiting the actions and winnings of others with their moralities. He goes on to slander this way of thinking and living, calling it a result of a repulsive slave like nature. However, in the end, his major objection is to the negative directives presented by these moralities. He feels that a morality should offer direction on what to do as opposed to what not to do. So Nietzsche tells us that we should all seek power, that having the good things in life will make us good, and not evil, regardless of the means by which we reach these goals. So what is the result of living this morality? Nietzsche predicts what I will say and explains it in this way: "The slave has an unfavourable eye for the virtues of the powerful; he has a scepticism and distrust, a refinement of distrust of everything good that is there honoured - he would fain persuade himself that the very happiness there is not genuine." And it is true that I am skeptical of the happiness brought about by this sort of life, but~~ **~~whether this makes me a slave is yet to have been proven~~**~~. In Nietzsche's morality, it is not important that we ever consider the happiness of others and we become solipsistic and unfulfilled. There is no room for companionship, if this way of thinking is to be truly be followed, but only continual self gratification and an emptiness unparalleled. If any man can come to the end of his life, having met every tangible goal he has had, and yet feeling empty and fearful of death, then of what consequence is Nietzsche's morality? I contend that it is the happiness of others, especially those for whom we feel inexplicable attachments, that can make a person happy in a meaningful way, and that only a return of this gratuitous gratification can result in a lasting sort of happiness. The things of the world can satisfy us temporarily, but we must love the people of the world to bring about any real happiness. The main flaw of Nietzsche's morality,~~ **~~aside from its inability to bring happiness~~**~~, is its complete ignorance of the ramifications of the free will assumed in the creation of a moral system. If one is to have free will and therefore responsibility for one's actions, does it not follow that these actions have more meaning beyond their place as means to an end? Nietzsche rejects man's responsibility for his actions proclaiming, "there is nothing outside the whole!" However, to do this is to reject the idea of any morality, and for Nietzsche to denounce all moralities as he is setting the basis for his own is ludicrous. It seems Nietzsche would prefer that we would all be rabid animals, as that would fit his moral arguments much more nicely, but even then he would have to deal with the instinctual sympathies of these animals which lead them to care for their young. To illustrate a flaw in Nietzsche's system, let's look at Charles Manson. From watching any recent interview of this man we can infer that he enjoys himself and feels no guilt for his involvement in a number of brutal murders in the sixties. Nietzsche's standpoint suggests that Manson is a winner, or was until he was brought down by a slave morality, the American justice system. Now examine Manson's life, he was able to bring himself to power over a large group of people, three of whom killed for him. Is this the moral standard by which the world ought to be judged? Regardless of whether it is the truth the human history, should we not subjugate this inhumanity? By condemning the philosophies of Nietzsche, it may not be particularly evident that I have supported the tenets of utilitarianism. Yet if you reject Nietzsche in these ways, it becomes clear that~~ **~~any morality which recommends doing good for others~~** ~~and even sometimes placing them above yourself~~ **~~would be better~~**~~, if not necessarily perfect. One only becomes a slave to utilitarianism if one does not feel truly compelled to sympathize with others. It is difficult to believe that any human being exists that never wants to help others, or that such a person can be called a human being. It is our moral system that defines us as anything more than shrieking beasts, regardless of a belief in God, and this system which is inherently based on our sympathies for other living creatures.~~ **~~Slave morality or not, utilitarianism does not cease to be preferable to anything Nietzsche offers~~**~~.~~

#### ~~Nietzschean themes are narcissistic and violently wrong.~~

~~Koontz ‘8~~

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~~Nietzsche’s constant belief in “tests” ensures a violent world. The 20th century fulfilled Nietzsche’s hope. Plenty of tests, ridiculous amounts of violence, and the world has emerged an absolute wreck, continuing in that way into the 21st century. Take global warming. A Nietzschean argument places global warming as just another test – just another “well, if it doesn’t kill me it will surely make me stronger”. What utterly irresponsible narcissism. Nietzsche’s tunnel vision ultimately placed all value in his own strength – he both embraced his own status as an invalid and sought to “overcome” it. His own fate of insanity should have tipped people off as to the common result, but instead his supporters laud his “genius” as being such \*because\* of his physical weakness.¶ Nietzsche was endlessly optimistic, but optimism is not reality and global warming, totalitarianism, and nuclear weapons are not “tests” of humanity, they are THREATS to humanity. Humanity needs maturity, not Nietzsche. Orwell takes us through Nietzsche’s political “test” – an absolute hellhole. Far from making humanity stronger, the test is actually torture – it degrades and permanently damages the humans who undergo it.¶ “What does not kill me only makes me stronger” is not wisdom, and is ONLY wisdom when applied highly selectively, in a controlled environment. Nietzsche treated this wisdom as universal instead of identifying the contexts in which it is true, which opened the door for the embrace of human disaster.~~