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T Prohibit

#### Business practices are ongoing conduct defined by the behaviors of many market participants

Kerry Lynn Macintosh 97, Associate Professor of Law, Santa Clara University School of Law. B.A. 1978, Pomona College; J.D. 1982, Stanford University, “Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based On Business Practices?,” 38 Wm. & Mary L. Rev. 1465, Lexis

These new and revised articles reflect a strong trend toward choosing default rules 4 that codify existing business practices. 5 [FOOTNOTE 5 BEGINS] In this Article, the term "business practices" is used to refer to practices that emerge over time as countless market participants exercise their freedom to engage in profitable transactions. For an account of the evolution of business practices, see infra Part II. As used here, "business practices" is broader and less technical than "trade usage," which the Code narrowly defines as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. 1-205(2). [FOOTNOTE 5 ENDS] This is particularly true of the recent revisions to Articles 3 (Negotiable Instruments), 4 (Bank Deposits and Collections) and 5 (Letters of Credit).

#### Only per se illegality prohibits a practice---rules of reason prohibit anticompetitive effects for individual acts, or instances of ‘practice.’

John Paul Stevens 90, Justice, Supreme Court of the United States, “FTC v. Superior Court Trial Lawyers Ass'n,” 493 U.S. 411, Lexis

LEdHN[3C] [3C]LEdHN[14] [14]Equally important is the second error implicit in respondents' claim to immunity from the per se rules. In its opinion, the Court of Appeals assumed that the antitrust laws permit, but do not require, the condemnation of price fixing and boycotts without proof of market power. 15 The opinion further assumed that the per se rule prohibiting such activity "is only a rule of 'administrative convenience and efficiency,' not a statutory command." 272 U.S. App. D. C., at 295, 856 F. 2d, at 249.This statement contains two errors. HN10 [\*\*\*\*42] The per se [\*433] rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands. Moreover, while the per se rule against price fixing and boycotts is indeed justified in part by "administrative convenience," the Court of Appeals erred in describing the prohibition as justified only by such concerns. The per se rules also reflect a long-standing judgment that the prohibited practices by their nature have "a substantial potential for impact on competition." Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

[\*\*\*\*43] LEdHN[15] [15]As we explained in Professional Engineers, HN11 the rule of reason in antitrust law generates

"two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal per se.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." 435 U.S., at 692.

[\*\*\*873] "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344 (1982).

[\*\*781] LEdHN[16] [16] [\*\*\*\*44] The per se rules in antitrust law serve purposes analogous to per se restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen.

[\*434] If the especially skilled drivers and pilots were to paint messages on their cars, or attach streamers to their planes, their conduct would have an expressive component. High speeds and unusual maneuvers would help to draw attention to their messages. Yet the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous.

In part, the justification for these per se rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community. An unpredictable event may overwhelm the skills of the best driver or pilot, even if the [\*\*\*\*45] proposed course of action was entirely prudent when initiated. A bad driver going slowly may be more dangerous that a good driver going quickly, but a good driver who obeys the law is safer still.

#### Voting issue---key to link uniqueness and preventing bidirectionality on an otherwise virtually unlimited topic

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T Subsets

#### ‘Core antitrust laws’ must be economy wide---the aff only effects a subset

Gerber ’20 [David; October; Distinguished Professor of Law at Chicago-Kent College of Law, Illinois Institute of Technology; Oxford Scholarship Online, Competition Law and Antitrust, “What is It? Competition Law’s Veiled Identity,” Ch. 1, p. 14-15]

C. A Core Definition

The Guide uses the terms “competition law” and “antitrust law” to refer to a general domain of law whose object is to deter private restraints on competitive conduct. We look more closely at the terms:

1. “General”—The laws included are those that are applicable throughout an economy and thereby provide a framework for all market operations (there are always some exempted sectors). Laws dealing only with specific markets (e.g., telecommunication) do not play that role.

2. “Domain of Law” here refers to a politically authorized set of norms and the institutional arrangements used to enforce them.

Is it law—or is it policy? The relationship between “competition law” and “competition policy” is not always clear. Often the terms are used interchangeably, but there can be important differences between them. Both can refer to norms used to combat restraints on competition, but they represent two different ways of looking at the relevant laws, and the differences can influence how norms are interpreted and applied. “Law” implies that established methods of interpretation are used to interpret and apply the norms and that established procedures are the sole or primary means of enforcing and changing the norms. In this view, the norms are a relatively stable component of a legal system. Thinking of those same norms as “policy,” on the other hand, implies that they are a tool of whatever government is in power and that it can use and modify them as it wishes.

3. “Restraint” refers to any limitation imposed by one or more private actors that reduces the intensity of competition in a market.

4. “Competition” refers to a process by which firms in a market seek to maximize their profits by exploiting market opportunities more effectively than other firms in the market.

#### Substantial’ means in totality of circumstances

U.S. First Circuit Court of Appeals ’98 [United States Circuit Court; August 25; Federal Appeals Court of the First Circuit; Southwestern Learning, “Court Uses ‘Totality of Circumstances’ for Test of Substantial Abuse by Debtor,” http://www.swlearning.com/blaw/cases/court\_uses.html]

Decision Affirmed. The court joins other circuits in adopting the "totality of the circumstances" test as the measure of substantial abuse under the Bankruptcy Code. This is a flexible standard adopted by Congress to allow bankruptcy courts to consider the factors involved in each case and to prevent abuse of Chapter 7 filings. When there is evidence that the consumer can pay their debts, there is likely to be found substantial abuse.

#### Voting issue---creates a moral hazard to rush to small non-controversial tweaks that shreds limits and ground

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T Private Sector

#### Private sector excludes the states

OED ’89 [Oxford English Dictionary Online; second edition published in 1989 and updated continuously since; “private, adj.1, adv., and n.”]

private sector n. that part of an economy, industry, etc., which is privately owned and free from direct state control.

#### Voting issue---the aff prohibits a practice by states not business

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Neolib K

#### The 1AC’s attempt to maximize competition naturalizes a fundamentally unethical and econologically unsustainable neoliberal worldview

Monbiot 16 [George Monbiot is the author of the bestselling books The Age of Consent: A Manifesto for a New World Order and Captive State: The Corporate Takeover of Britain, as well as the investigative travel books Poisoned Arrows, Amazon Watershed and No Man's Land. His latest book is Feral: Searching for Enchantment on the ­Frontiers of Rewilding (being published in paperback as Feral: Rewilding the Land, Sea and Human Life), Neoliberalism – the ideology at the root of all our problems, Guardian, 4-1-2016, Accessible Online at https://www.theguardian.com/books/2016/apr/15/neoliberalism-ideology-problem-george-monbiot] 7-13-2016

Imagine if the people of the Soviet Union had never heard of communism. The ideology that dominates our lives has, for most of us, no name. Mention it in conversation and you’ll be rewarded with a shrug. Even if your listeners have heard the term before, they will struggle to define it. Neoliberalism: do you know what it is? Its anonymity is both a symptom and cause of its power. It has played a major role in a remarkable variety of crises: the financial meltdown of 2007‑8, the offshoring of wealth and power, of which the Panama Papers offer us merely a glimpse, the slow collapse of public health and education, resurgent child poverty, the epidemic of loneliness, the collapse of ecosystems, the rise of Donald Trump. But we respond to these crises as if they emerge in isolation, apparently unaware that they have all been either catalysed or exacerbated by the same coherent philosophy; a philosophy that has – or had – a name. What greater power can there be than to operate namelessly? Inequality is recast as virtuous. The market ensures that everyone gets what they deserve. So pervasive has neoliberalism become that we seldom even recognise it as an ideology. We appear to accept the proposition that this utopian, millenarian faith describes a neutral force; a kind of biological law, like Darwin’s theory of evolution. But the philosophy arose as a conscious attempt to reshape human life and shift the locus of power. Neoliberalism sees competition as the defining characteristic of human relations. It redefines citizens as consumers, whose democratic choices are best exercised by buying and selling, a process that rewards merit and punishes inefficiency. It maintains that “the market” delivers benefits that could never be achieved by planning. Attempts to limit competition are treated as inimical to liberty. Tax and regulation should be minimised, public services should be privatised. The organisation of labour and collective bargaining by trade unions are portrayed as market distortions that impede the formation of a natural hierarchy of winners and losers. Inequality is recast as virtuous: a reward for utility and a generator of wealth, which trickles down to enrich everyone. Efforts to create a more equal society are both counterproductive and morally corrosive. The market ensures that everyone gets what they deserve. We internalise and reproduce its creeds. The rich persuade themselves that they acquired their wealth through merit, ignoring the advantages – such as education, inheritance and class – that may have helped to secure it. The poor begin to blame themselves for their failures, even when they can do little to change their circumstances. Never mind structural unemployment: if you don’t have a job it’s because you are unenterprising. Never mind the impossible costs of housing: if your credit card is maxed out, you’re feckless and improvident. Never mind that your children no longer have a school playing field: if they get fat, it’s your fault. In a world governed by competition, those who fall behind become defined and self-defined as losers. Neoliberalism has brought out the worst in us Among the results, as Paul Verhaeghe documents in his book What About Me? are epidemics of self-harm, eating disorders, depression, loneliness, performance anxiety and social phobia. Perhaps it’s unsurprising that Britain, in which neoliberal ideology has been most rigorously applied, is the loneliness capital of Europe. We are all neoliberals now.

#### The alternative is engaged withdrawal---that’s mutually exclusive with the aff

**Graeber 4** [David Graeber, arguably the most important anthropologist of the 21st century, American-born, London-based anthropologist and anarchist activist, leading figure in Occupy Wall Street who coined the phrase “We are the 99 Percent,” assistant professor and associate professor of anthropology at Yale from 1998–2007, teaches anthropology at the London School of Economics, activist whose direct action campaigns before OWS includes protests against the 3rd Summit of the Americas in Quebec City in 2001, and the 2002 World Economic Forum in New York City, *Fragments of an Anarchist Anthropology,* Prickly Paradigm Press: Chicago, IL (2004), p. 60-64]

The theory of exodus proposes that the most effective way of opposing capitalism and the liberal state is not through direct confrontation but by means of what Paolo Virno has called “engaged withdrawal,” mass defection by those wishing to create new forms of community. One need only glance at the historical record to confirm that most successful forms of popular resistance have taken precisely this form. They have not involved challenging power head on (this usually leads to being slaughtered, or if not, turning into some—often even uglier—variant of the very thing one first challenged) but from one or another strategy of slipping away from its grasp, from flight, desertion, the founding of new communities. One Autonomist historian, Yann Moulier Boutang, has even argued that the history of capitalism has been a series of attempts to solve the problem of worker mobility—hence the endless elaboration of institutions like indenture, slavery, coolie systems, contract workers, guest workers, innumerable forms of border control—since, if the system ever really came close to its own fantasy version of itself, in which workers were free to hire on and quit their work wherever and whenever they wanted, the entire system would collapse. It’s for precisely this reason that the one most consistent demand put forward by the radical elements in the globalization movement—from the Italian Autonomists to North American anarchists—has always been global freedom of movement, “real globalization,” the destruction of borders, a general tearing down of walls. The kind of tearing down of conceptual walls I’ve been proposing here makes it possible for us not only to confirm the importance of defection, it promises an infinitely richer conception of how alternative forms of revolutionary action might work. This is a history which has largely yet to be written, but there are glimmerings. Peter Lamborn Wilson has produced the brightest of these, in a series of essays which include reflections, on, among other things, the collapse of the Hopewell and Mississippian cultures through much of eastern North America. These were societies apparently dominated by priestly elites, castebased social structures, and human sacrifice—which mysteriously disappeared, being replaced by far more egalitarian hunter/gathering or horticultural societies. He suggests, interestingly enough, that the famous Native American identification with nature might not really have been a reaction to European values, but to a dialectical possibility within their own societies from which they had quite consciously run away. The story continues through the defection of the Jamestown settlers, a collection of servants abandoned in the first North American colony in Virginia by their gentleman patrons, who apparently ended up becoming Indians, to an endless series of “pirate utopias,” in which British renegades teamed up with Muslim corsairs, or joined native communities from Hispaniola to Madagascar, hidden “triracial” republics founded by escaped slaves at the margins of European settlements, Antinomians, and other little-known libertarian enclaves that riddled the continent even before the Shakers and Fourierists and all the betterknown nineteenth-century “intentional communities.” Most of these little utopias were even more marginal than the Vezo or Tsimihety were in Madagascar; all of them were eventually gobbled up. Which leads to the question of how to neutralize the state apparatus itself, in the absence of a politics of direct confrontation. No doubt some states and corporate elites will collapse of their own dead weight; a few already have; but it’s hard to imagine a scenario in which they all will. Here, the Sakalava and BaKongo might be able to provide us some useful suggestions. What cannot be destroyed can, nonetheless, be diverted, frozen, transformed, and gradually deprived of its substance—which in the case of states, is ultimately their capacity to inspire terror. What would this mean under contemporary conditions? It’s not entirely clear. Perhaps existing state apparati will gradually be reduced to window-dressing as the substance is pulled out of them from above and below: i.e., both from the growth of international institutions, and from devolution to local and regional forms of selfgovernance. Perhaps government by media spectacle will devolve into spectacle pure and simple (somewhat along the lines of what Paul Lafargue, Marx’s West Indian son-in-law and author of The Right to Be Lazy, implied when he suggested that after the revolution, politicians would still be able to fulfill a useful social function in the entertainment industry). More likely it will happen in ways we cannot even anticipate. But no doubt there are ways in which it is happening already. As Neoliberal states move towards new forms of feudalism, concentrating their guns increasingly around gated communities, insurrectionary spaces open up that we don’t even know about. The Merina rice farmers described in the last section understand what many would-be revolutionaries do not: that there are times when the stupidest thing one could possibly do is raise a red or black flag and issue defiant declarations. Sometimes the sensible thing is just to pretend nothing has changed, allow official state representatives to keep their dignity, even show up at their offices and fill out a form now and then, but otherwise, ignore them.

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#### The United States federal government should:

#### -establish a national innovation policy to oversee procurement reform, incentives for research and development, and workforce training;

#### -establish a program to cover 4.8% of the surface of the Earth’s oceans in a monolayer of 0.1 µmdiameter latex particles, bearing a conventional stabilization system that is inactivated in salt water;

#### -fund the construction of synthetic trees designed for the capture of carbon dioxide.

#### National policy restarts innovation ---every plank is an alt cause.

Sadat ’20 [Mir; November 22; former Policy Director leading interagency coordination on defense and space policy issues, including at the Department of Defense and National Security Council, Ph.D. from Claremont Graduate University; The Hill, “Why innovation is so important to America's global leadership,” <https://thehill.com/opinion/technology/526535-why-innovation-is-so-important-to-americas-global-leadership>]

The U.S. government must mitigate the harm to America’s innovation base. So far, the government has yet to craft a national innovation policy and stand up a true national innovation council to modernize government; coordinate between the government, industry and academia; transform monopolistic or oligopolistic markets into competitive sectors; and ensure that America regains global economic leadership through foreign partnerships. Reform of American innovation is necessary for several reasons.

First, to harness the untapped potential of exponential technologies, the government must democratize its requirements processes that have advantaged legacy systems and traditional technology providers. The government must evolve its industrial age procurement policies, practices and beneficiaries to the digital age by placing innovation at the core of its activities. The innovation base needs public and private investment capital, scaled to the risk and importance of the invention, to level the playing field for startups and scale-ups, and to increase competitiveness. In short, the government must increase funding and incentives for Apollo-scale research and development (R&D) programs.

Second, to create exponential technologies in an era of unprecedented disruption, America’s workforce requires continuous training and education. The “lone innovator” is a myth because every American invention is a mix of persistence, genius, teamwork, business model and resource management. The government must establish whole-of-nation policies that stimulate world-class innovators in the areas of science, technology, engineering and mathematics (STEM); support nationwide STEM access and diversity; promote R&D and economic growth in technologically underserved areas using economic opportunity zones; and improve mentorship programs for underrepresented persons.

Third, individual innovators and their teams are challenged to achieve successful outcomes because of the high costs and risks, the uncertainty and gaps in funding, and the vicissitudes of the market’s readiness. America’s innovators are strewn across the federal enterprise, the national security establishment, state and local governments, startups and established corporations, universities and research institutions, and other consortiums. Innovators must collaborate by leveraging innovation multipliers such as diversity of effort, thought and demographics.

Fourth, if rules-based, free-market innovation is to compete economically and demonstrate American leadership, then the government must create and enhance opportunities for innovators to compete in international markets and garner global funding. Innovation is the global competition that transcends borders. We must be the first to disrupt our markets, rather than others who could render particular industries potentially obsolete.

#### The counterplan solves warming and avoids solvency deficits associated with traditional ocean albedo modifications

**Morgan 11** [10/8/11, John, PhD in physical chemistry, runs R&D programmes at a Sydney startup company, research experience in chemical engineering in the US and at the Commonwealth Scientific and Industrial Research Organisation, Australia's national science agency, “Low intensity geoengineering – microbubbles and microspheres,” <http://bravenewclimate.com/2011/10/08/low-intensity-geoengineering-microbubbles-and-microspheres/>]

Is there another way to look at this? The Achilles heel of the hydrosol approach is the short bubble lifetime. But are there other ways to brighten water? Are there any other micron sized light scattering particles cheaply available in prodigious quantities, which float in water and don’t dissolve?

It turns out the answer is yes. Synthetic latex is produced on a huge scale – 1010 kg in 2005. A latex is a dispersion of polymer microspheres in water (Figure 5). The particle size is typically around 0.1 – 0.5 μm. The polymer content is high – about 50% by weight. And its cheap – a bit over a dollar per kilo wet. It looks like a bright white opaque liquid, like wood glue, which is a polyvinylacetate latex. Its a bulk commodity used in adhesives, paper coatings, paint and many other applications.

Lets run the numbers on this and ask, what would it take to reverse current warming? First we need to know how much light these particles scatter back to space. I used Mie theory to analyse scattering of 500 nm wavelength light (roughly the solar peak) from 0.1 μm diameter polystyrene spheres, as if the sun were overhead. The back scattering from these very small particles is intense – 42% of overhead light returns to space. And this is just direct scattering. Some of the light that scatters forward will scatter off a second particle, and a third. Multiple scattering will see more than 42% of light returned to space.

Since these particles attach to the surface, lets consider, for the moment, a monolayer on the water surface. This requires 1014 particles per square metre, with a volume of 5.2×10-8 m3 per m2 (or 5 parts per billion of the top 10 m, for comparison with Seitz’ figures). Polystyrene has a density of 1050 kg m-3, so that’s a mass of 55 mg m-2. Over 3.16×1014 m2 of ocean that’s 1.7×1010 kg polymer.

What would this do to the earth’s energy balance? Average insolation (accounting for cloud cover [Jin et al. 2002, cited by Seitz]) is 239 Wm-2. The monolayer cross sectional area fraction is pi/4. So the energy returned by direct overhead scattering is about 78 W. That’s huge compared to the current CO2 forcing of about 2.25 Wm-2.

Modelling reported by Seitz indicates an increase of ocean albedo of 0.05 translates to an increase of planetary albedo by 0.031 [Seitz 2010; Figure 5]. So I’ll assume planetary albedo increase is 60% of the ocean albedo increase, which means we need ocean backscattering of 3.75 Wm-2. **We would only need 4.8% of a monolayer to offset current CO2 forcing** (ignoring the contribution from multiple scattering).

4.8% of a whole ocean monolayer is 8.3×108 kg of dry polymer, or about 1.7×109 kg wet latex. At say $1.20 per kg, this would cost $2.0 billion and account for 17% of 2005 global production capacity.

This is, surprisingly, well within reach. **$2.0b to reverse global warming is cheap.** Restricting dispersal to the mid latitudes where the greatest effect is achieved, using core-shell latex technology, and properly accounting for multiple scattering would see this cost drop even further. Annual growth in latex production grew organically by 4.5% per annum between 2000-2005. Ramping production by 17% would be completely feasible.

The ongoing cost depends on the residence time of the particles at the ocean surface. Equatorial currents run at about 1 ms-1, which would imply a traversal time of about 1 year for the Pacific ocean. Mid latitude the currents are much slower. The latex particles themselves will degrade in the environment, and there will be losses by association and entrainment in a complex marine environment.

But let’s provisionally estimate a cost of $2b per year. This is significantly cheaper than, say, stratospheric sulfur aerosol injection which is estimated at $25-50b per year, let alone space sunshades. And it doesn’t require exotic engineering, enabling R&D, or orbital launches – it uses existing materials at a rate well inside existing production capacity.

Conclusion

So consider this final elaboration of Russell Seitz’ bright idea: 0.1 µm diameter latex particles, possibly hollow, or of core-shell morphology, bearing a conventional stabilization system that is inactivated in salt water ensuring that the particles are retained at and near the surface, are produced in bulk using about 17% of existing production capacity and using commercial recipes, and are sprayed onto the sea from tanks aboard ships or crop dusting aircraft, oil rigs, and other structures, in the mid latitudes.

**For a cost in the order of a mere $2b per year we could offset current global warming,** subject to the many disclaimers and qualifications discussed above, and many others not mentioned. More limited, local applications, such as the direct cooling of coral reefs as envisaged by Seitz for the microbubble concept, are also possible.

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Statute-Independent Common Law CP

#### Without reference to the laws of the United States, the United States federal government should determine that private sector [anticompetitive activity] constitutes an unlawful restraint on trade and commerce. The United States Congress should restrict the scope of its core antitrust laws to exclude increasing prohibitions on private sector [anticompetitive activity].

#### The CP creates federally preemptive statute-independent common law with the same effect as the plan.

HLR 20, Harvard Law Review, “Antitrust Federalism, Preemption, and Judge-Made Law,” 133 Harv. L. Rev. 2557, Lexis

None of this is to say that ERISA preemption fails to raise federalism concerns or that the concerns addressed in Part II are unique to anti- trust. In its decision to expressly preempt state law in ERISA, a wise Congress should have considered the difficulties of preemption via judge-made law. Part II’s concerns with preemption via judge-made law could be applied to any delegation to the judiciary that overrides the states’ will. But given the brevity of federal antitrust statutes and the relative lack of executive branch involvement, Congress should be even more wary if it decides to preempt state antitrust law.159 [FOOTNOTE 159 BEGINS] 159 Complaints about brevity and lack of executive branch involvement land an even stronger blow against preemption via statute-independent federal common law. A grant of federal common lawmaking power does not have to be statutory. All that is needed to support the development of federal common law is “some expressed or implied affirmative grant of power to the national government by the Constitution or a statute enacted pursuant to it.” 19 MILLER, supra note 132, § 4514. When courts make law from a constitutional grant, there may not even be a brief statute. See, e.g., Clearfield Tr. Co. v. United States, 318 U.S. 363, 366–67 (1943) (“When the United States disburses its funds . . . it is exercising a constitutional function or power. . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.”); see also 19 MILLER, supra note 132, § 4515; Volokh, supra note 94, at 1429 (discussing courts’ “statute-independent federal common-lawmaking powers”). Because statute-independent common law is created completely by the courts, preemption via statute- independent common law will preempt the states while also excluding the federal executive branch.

Part II’s critique then undermines statute-independent common law preemption even more than it undermines a preemptive Sherman Act. But Part II proffers only an argument that weighs against preemption; that argument must be balanced against the various pro-preemption critiques of Part I. When it comes to statute-independent common law, the pro-preemption arguments may simply be greater than they are in the antitrust arena. After all, such statute-independent common-lawmaking power exists only “in suits implicating a sufficiently strong interest of the national government.” 19 MILLER, supra note 132, § 4515. And it makes sense that common law grounded in the Constitution has more sway than does common law grounded in statute. Although antitrust law has sometimes been likened to the Constitution or other founding documents, see United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) (“Antitrust laws . . . are the Magna Carta of free enterprise.”); Thomas B. Nachbar, The Antitrust Constitution, 99 IOWA L. REV. 57, 69 (2013), courts simply give its commands less weight than those of the Constitution. Compare, for example, the (limited) deference given to professionals in the antitrust sphere, see Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 696 (1978) (analyzing agreements by professionals under the rule of reason), to the zero deference given to professionals under the First Amendment, see Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371–72 (2018). Even if statute-independent common law’s complete lack of input from the democratic branches increases the power of the federalism critique, that increase is rebutted by an increase in the power of the pro-preemption arguments. [FOOTNOTE 159 ENDS]

CONCLUSION

There is little doubt that Congress could decide to preempt state antitrust law. However, although the merits of avoiding a patchwork antitrust regime are compelling, Congress would trigger federalism pitfalls if it were to reform antitrust law by expressly preempting state antitrust law. A preempting Congress should weigh any benefits against the complications of federalism’s procedural and political safeguards and of the judiciary’s weak policymaking ability.

Of course, there is reason to believe that if Congress were to expressly preempt state antitrust law, it would do so as part of a more major antitrust reform effort. Recently, federal antitrust policy has been the subject of critique. Fed up with the seeming omnipresence of corporate giants, some scholarly160 and journalistic161 discourse has turned on the federal government’s antitrust policies. As things stand, if Congress decides to preempt state antitrust law with current federal antitrust jurisprudence, it would have to decide that the pros of preemption mentioned in Part I outweigh the federalism cons of Part II. But if Congress were to reform antitrust law by creating a new, detailed antitrust regime for courts to interpret, preemption of state antitrust law could avoid the perils of preemption via judge-made law.

#### This reinvigorates non-statutory common-law protections against government-licensed monopolies

Steven G. Calabresi & Larissa C. Liebowitz 13, Calabresi is Professor of Law at Northwestern University, Visiting Professor of Political Science at Brown University, and Co‐founder of The Federalist Society for Law and Public Policy Studies; Liebowitz is JD Class of 2012 from Northwestern University, “Monopolies and the Constitution: A History of Crony Capitalism,” Harvard Journal of Law & Public Policy, Vol. 36, No. 3, pp 983-1097

Government‐conferred monopolies granted by English kings and queens plagued England in the late sixteenth and early seventeenth centuries, leading to both The Case of Monopolies and the parliamentary Statute of Monopolies. Although today the word “monopoly” generally is used to refer to the private accumulation of economic power, this is not the meaning that was originally attached to the term. The original meaning of the word “monopoly” was an exclusive grant of power from the government—in the form of a “license” or “patent”—to work in a particular trade or to sell a specific good. The word “monopoly” comes from the Greek roots “mono,” meaning “single” or “one,” and “polein,” meaning “to sell.”1 The Greek word “monopolion” referred to an exclusive legal right of sale issued by the government.2 Sir Edward Coke defined monopo‐ lies in the early seventeenth century as being

Institution[s], or allowance[s] by the King by his [g]rant, [c]ommission, or otherwise to any person or persons, bodies politick or corporate, of or for the sole buying, selling, mak‐ ing, working, or using of any thing, whereby any person or persons, bodies politick or corporate, are sought to be re‐strained of any freedom[] or liberty that they had before, or hind[e]red in their lawful trade.3

Samuel Johnson’s dictionaries from the eighteenth century likewise defined a monopoly as “[t]he exclusive privilege of selling any thing.”4

The 1828 first edition of Noah Webster’s An American Dictionary of the English Language defined a “monopoly” as being:

The sole power of vending any species of goods, obtained either by engrossing the articles in market by purchase, or by a license from the government confirming this privilege. Thus the East India Company in Great Britain has a monopoly of the trade to the East Indies, granted to them by charter. Monopolies by individuals obtained by engrossing, are an offense prohibited by law. But a man has by natural right the exclusive power of vending his own produce or manu‐ factures, and to retain that exclusive right is not a monopoly within the meaning of law.5

The American colonists thus shared English concerns that exclusive monopoly privileges issued by the government could impose enormous costs on the general public, and especially on consumers.6 George Mason, Thomas Jefferson, and several Anti‐federalists argued in favor of including an antimonopoly clause in the federal Constitution.7 Although no such clause was added at the federal level, constitutional drafters in two states recognized the danger of monopolies and prohibited government‐ granted monopolies in their state constitutions.8 More states added antimonopoly clauses to their constitutions in the first one hundred years after the federal Constitution was adopted.9 Others prohibited monopolies using different language, including clauses that forbade the giving of exclusive privileges to one class of citizens over another, or clauses that forbade the abridging of the privileges or immunities of citizens.10 The Framers of the Fourteenth Amendment to the federal Constitution shared this concern with what they called “class legislation,” a concern that led four United States Supreme Court Justices to say that state‐granted monopolies were unconstitutional in an important dissent in the Slaughter‐House Cases.11

This objection to government‐granted monopolies and to forms of caste or class legislation is not merely a part of this country’s history; it is also relevant today. In a 2011 Washington Post opinion piece, George Will describes a legal challenge to the constitutionality of a monopoly granted by the state of Washington to a ferry boat company.12 The ferry boat company has a legal monopoly on boat service to a town that can otherwise only be reached by plane.13 The challengers to the Washington state law creating the monopoly are residents of that remote town who wish to open a competing boat service to provide an easier way to access their town.14 But the problem of government‐conferred monopolies is not unique to one town in the state of Washington, because it is now routine in many states for the government to require licenses for various industries, often for the purpose of bestowing economic favors.15 Licensing requirements of this kind sometimes take the form of a complete prohibition (as is the case in Washington), but they may also take the form of barriers to entry that prevent or reduce competition. Many local and state governments license businesses for no legitimate health or safety reason. For example, tourist guides, funeral attendants, and florists are all sometimes required to be licensed professionals despite the evident lack of a legitimate public health or safety reason for such laws.16

Local public schools provide another example of a government‐sponsored monopoly provider of public services. Like most monopoly providers, many public schools provide poor service to their consumers (parents and children) while diverting monopoly rents in the form of bloated salaries and benefits to the providers of education (bureaucrats and teachers’ unions).17 Polls suggest that most Americans feel strong pressure to send their children to public schools because they are taxed to pay for public schools even if they ultimately choose to send their children to private schools or to home‐school them.18 The public school monopoly is especially objectionable because it interferes with parents’ control over raising and educating their own children.19 Since the New Deal, the Supreme Court has applied the very deferential rational basis test when reviewing the constitutionality of federal and state economic regulations, including those that grant monopoly status.20 Such laws are rarely challenged and even more rarely struck down. This is a mistake. The post‐New Deal case law on economic liberties, epitomized by Williamson v. Lee Optical Co.,21 is wrongly decided, and the right to be free from class legislation, monopolies, and grants of special privilege is deeply rooted in this nation’s history and traditions.22 We therefore think this right is embodied in the Fourteenth Amendment to the U.S. Constitution and that it can only be trumped by just laws enacted for the good of the whole people.23 We think George Will is right when he denounces government licensing schemes because they “lack[] constitutional warrant and repudiate[] the nation’s foundational philosophy” and because they require entrepreneurs to “approach government on bended knee to beg it to confer upon them a right—the right to compete.”24

As John Tomasi argues in his new book, Free Market Fairness, economic liberties are just as important to freedom as are all of the other liberties embraced by modern liberals.25 This Article helps to spell out the legal underpinnings and history of the economic liberties that Tomasi identifies; its analysis and To‐ masi’s are mutually reinforcing. Tomasi defends economic lib‐ erty from the perspective of political philosophy to which we seek here to add the perspective of history and law.

Part I of this Article discusses the history of government‐ licensed monopolies in seventeenth century England and the landmark events limiting the King’s power to grant monopo‐ lies—The Case of Monopolies and Statute of Monopolies. Part I also discusses the spread of the English concern with govern‐ ment grants of monopoly to the American colonies and the role trade monopolies played in building support for the American Revolution in colonial America. Part II discusses the effort by some of the Framers of the U.S. Constitution to include an an‐ timonopoly clause therein, an effort that ultimately failed. Part II then shows how antimonopoly ideas infused themselves into the Supreme Court’s early Contracts Clause case law and the central role they played in the emergence of the Fourteenth Amendment as a ban on class‐based or caste‐based legislation. Part II finally discusses the connection between the various federal antitrust laws and government‐granted monopolies. Part III discusses the adoption of antimonopoly clauses in state constitutions, beginning at the Founding and continuing through the early twentieth century. Part III also considers the move toward general laws governing incorporation and away from special legislative charter grants and surveys how the monopoly concept came to reflect a concern with private eco‐ nomic power in some states, as well as the application of state antimonopoly provisions. The Article concludes with a few parting words about the decline in concern for the protection of economic liberty in modern American constitutional law.

I. A BRIEF HISTORY: HOW MONOPOLIES CAME TO BE HATED

A. The English Experience with Monopolies

The English hatred of monopolies dates back to the reigns of Queen Elizabeth I and King James I. Two principal events— one coming from the common law courts and the other coming from Parliament—highlight the strong disapproval of govern‐ ment monopolies that existed in early seventeenth century England. The first event is the case of Darcy v. Allen commonly known as The Case of Monopolies, which was decided in 1603.26 In this case, a common law court reviewed a royal grant of trade privileges and struck down the grant as being void under the common law.27 The second key event is the passage in 1624 of the Statute of Monopolies,28 which was the result of years of pressure by the House of Commons to prohibit the King or Queen from granting the same kinds of monopoly privileges as those that had been struck down in Darcy. These two events characterize a period when intellectuals and lawyers began to truly recognize the rights of Englishmen to work for a living and to compete with each other without interference from gov‐ ernment grants of special economic privilege.29

1. Darcy v. Allen

During Queen Elizabeth’s very long reign she oftentimes found herself in need of more money than Parliament had al‐ lotted for her use. As a result, she sometimes tried to supple‐ ment her subsidy from Parliament by selling royal monopo‐ lies.30 Some in Parliament criticized this practice because of the burden it imposed on subjects in addition to their preexisting tax burden.31 A royal grant of monopoly privileges meant that subjects suffered a loss of jobs: Some people were shut out of their trades, and consumers were forced to pay higher prices because legal monopolies allowed producers to drive up the price of goods. For example, in a speech at Parliament in 1571, Robert Bell argued for reform of the royal monopoly system on that grounds that “by Licences a few only were enriched, and the multitude impoverished.”32 As Adam Smith later described in The Wealth of Nations, the punishment for violating grants of monopoly privileges was sometimes severe:

Like the laws of Draco, these laws may be said to be all writ‐ ten in blood. . . . [T]he exporter of sheep, lambs or rams, was for the first offence to forfeit all his goods for ever, to suffer a year’s imprisonment, and then to have his left hand cut off in a market town upon a market day, to be there nailed up; and for the second offence to be adjudged a felon, and to suffer death accordingly.33

Queen Elizabeth’s response to complaints about the monopo‐ lies she was granting was, at first, entirely dismissive: “We are to let you understand, her Majesty’s pleasure in that behalf that her Prerogative Royall may not be called in question for the val‐ liditie of the letters patents.”34 But opposition to exclusive trade privileges reappeared in 1597 when Parliament petitioned Queen Elizabeth I to stop the practice of granting royal monopo‐ lies.35 Parliament gently requested “her Highness[’s] most gra‐ cious care and favour, in the repressing of sundry inconven‐ iences and abuses practiced by Monopolies and Patents of priviledge.”36 In addition, at the end of the ninth parliament, the Speaker raised the issue of monopolies in his closing speech—a bold move given that such speeches were customarily ceremo‐ nial in nature, not substantive, and that they typically included the presentation of Parliament’s subsidy to the Queen.37 In re‐ sponse, Queen Elizabeth asked Parliament to let her continue the practice, thus seeming to acknowledge that Parliament pos‐ sessed the ability to regulate her prerogative power to grant mo‐ nopolies—a clear weakening of her earlier position:

[H]er Majesty hoped that her dutiful and loving Subjects would not take away her Prerogative, which is the chiefest Flower in her Garden, and the principal and head Pearl in her Crown and Diadem; but that they will rather leave that to her Disposition. And as her Majesty hath proceeded to Trial of them already, so she promiseth to continue, that they shall all be examined, to abide the Trial and true Touchstone of the Law.38

However, it became clear that Queen Elizabeth had no inten‐ tion of carrying out her promise to regulate the distribution and functioning of royal monopolies, despite her apparent rec‐ ognition of Parliament’s power in this area.39 Accordingly, in 1601 the topic of royal power to grant monopolies was again heavily debated in Parliament, and a draft bill to outlaw royal monopolies was introduced.40 But before a decision was made with regard to the draft bill, Queen Elizabeth offered Parlia‐ ment a compromise. Traditionally, cases regarding royal mo‐ nopolies could only be heard by the Court of Star Chamber, a fortress of royal power in which the common law of England did not apply. Queen Elizabeth proposed as a compromise both to cancel some of the least popular monopolies she had granted and, more importantly, to allow new cases involving the legality of monopolies to be heard in common law courts.41

This compromise paved the way for the famous 1603 case of Darcy v. Allen, often called The Case of Monopolies.42 Interest‐ ingly, Darcy did not involve a challenge to the legality of royal monopolies, but rather was brought by a monopoly‐holder to protect his privilege. The suit was brought in 1602 by Edward Darcy, who claimed that Thomas Allen had infringed on his monopoly right (through a royal patent granted by Queen Elizabeth) to produce, import, and sell all trading cards in Eng‐ land.43 The court ruled for Allen, finding that Darcy’s royal pa‐ tent was void.44 There was no written judicial opinion of the case,45 and the extant records suggest that the justices explained little of the reasoning supporting their judgment in open court.46 However, Sir Edward Coke, the most famous lawyer of his day, did write up a report on Darcy v. Allen.47 Coke’s report has been so influential that, with regard to Darcy’s meaning in the common law today, it effectively can be treated as the offi‐ cial opinion in the case.48 Interestingly, Coke represented Darcy in the case, as Coke was the Attorney General and was bound to defend the legality of the monopoly that was being chal‐ lenged there.49 Coke’s report, which was written an entire twelve years after the case was decided,50 describes the com‐ mon law court’s rationale as a strong statement about the im‐ portance of open and free trade. It states that the court struck down the royal monopoly because allowing people to work in their respective trades was not only beneficial for them, but was also necessary for the well‐being of the whole country:

All trades . . . which prevent idleness . . . and exercise men and youth in labour, for the maintenance of themselves and their families, and for the increase of their substance, to serve the Queen when occasion shall require, are profitable for the commonwealth, and therefore the grant to the plain‐ tiff to have the sole making of them is against the common law, and the benefit and liberty of the subject.51

And the financial benefits of the royal monopoly were consid‐ erable, Coke’s report suggests that the case was as much a statement about the negative consequences of exclusive trade privileges as it was about the individual right to economic lib‐ erty. In fact, it was critical to have the freedom to pursue one’s livelihood—“[E]very man’s trade maintains his life, and there‐ fore he ought not to be deprived or dispossessed of it, no more than of his life.”52

Coke’s report also discusses the many problems with mo‐ nopolies, particularly the ways monopolies diminish wealth. First, monopolies serve only the interests of those who are granted the monopoly:

The sole trade of any mechanical artifice, or any other mo‐ nopoly, is not only a damage and prejudice to those who ex‐ ercise the same trade, but also to all other subjects, for the end of all these monopolies is for the private gain of the pat‐ entees; and although provisions and cautions be added to moderate them, yet . . . it is mere folly to think that there is any measure in mischief or wickedness.53

More specifically, Coke discusses the undesirable effects trade of privileges on people who wish to enter a trade but who are prohibited from doing so because of the exclusive right to prac‐ tice the trade that a royal monopoly furnishes on another:

[This leads] to the impoverishment of divers artificers and others, who before, by the labour of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary.54

Further, but perhaps secondarily in Coke’s mind and for others during the era, monopolies hurt the entire public because mo‐nopolies lead to higher prices and poorer quality goods and services:

[T]he price of the same commodity will be raised, for he who has the sole selling of any commodity, may and will make the price as he pleases . . . . [A]fter the monopoly [has been] granted, the commodity is not so good and merchantable as it was before: for the patentee having the sole trade, regards only his private benefit, and not the common wealth.55

It is important to note that Coke’s report in The Case of Mo‐ nopolies has been challenged by some scholars who accuse Coke of exaggerating the free trade stance of the common law.56 The primary evidence that Coke’s report of the case was indeed an exaggeration is the continued practice of kings and queens to issue monopoly royal patents for many years after Darcy. Queen Elizabeth died the year Darcy was decided, whereupon King James I took the throne. James I was not nearly as well‐ liked in Parliament as Queen Elizabeth had been, which did not bode well for his ability to receive subsidies.57 Unlike Queen Elizabeth, King James I pursued an aggressive and cost‐ ly foreign policy, and he failed to exercise fiscal conservatism in his personal finances.58 Because of King James I’s extensive military engagements, his inability to control spending, and his poor relationship with Parliament, the new king found himself increasingly using his powers to issue royal patents as a means to raise money.59

Because King James I continued to issue royal monopoly trade privileges, the House of Commons again pushed for adoption of a law to prohibit the King from granting monopo‐ lies.60 Although King James resisted, some signs of change be‐ gan to appear. For example, in 1610, King James issued his Book of Bounty, in which he stated that exclusive trade privileges were contrary to the common law and his own policies, that he intended to discontinue the privileges, and that he promised not to entertain any new suitors regarding monopolies.61

Despite the Book of Bounty, however, James continued to is‐ sue monopolies. For example, in 1614 Sir Edward Coke, who was by then the Lord Chief Justice of England struck down a guild incorporated under a royal charter.62 The King’s actions apparently came as no surprise to Parliament. As one member of Parliament quipped, “Yet, as in a Garden, clean weeded, Weeds next Year; so here, by new Patents, Proclamations.”63 As a result, King James’s relationship with Parliament continued to worsen, and the King dissolved Parliament whenever there was a disagreement.64 Not surprisingly, Parliament decided in 1614 to discontinue King James’s subsidy until resolutions re‐ garding the granting of monopolies and impositions were reached.65

These events after Darcy v. Allen raise a question about what we should make of Sir Edward Coke’s report of the famous case. At least one scholar argues that at the time Coke pub‐ lished his report of Darcy v. Allen in 1615, his view on the royal patent power was no longer as controversial, and perhaps his views on the court’s rationale evolved as a result of events in the twelve years between the case and his published report.66 Further, even if Coke’s report of Darcy v. Allen did exaggerate the common law’s embrace of free trade principles (which can‐ not be known for sure as there is no official published opinion), it has been described as “exceptionally durable” and has been cited as good law for centuries in both England and the United States, including in some modern case law.67 Sir Edward Coke’s views on monopolies were also not unique to him—similar ar‐ guments were made at the same time, and even earlier, in the House of Commons. As previously mentioned, a few decades earlier, Robert Bell argued against granting monopolies in Par‐ liament, stating that “by Licences a few only were enriched, and the multitude impoverished.”68 Even if Coke’s report of the case itself was an exaggeration, Coke’s rationale and reasoning became the accepted rule of the common law. As will be dis‐ cussed below, it was Sir Edward Coke’s report of The Case of Monopolies —and no other report—that influenced some of the Founding Fathers, the Antifederalists, and the American state governments when they adopted or amended their own consti‐ tutions. Thus, even if Coke’s views were idiosyncratic or wrong about the law of England, the Framers of the United States Constitution took them as true. Founding‐generation Ameri‐ cans might very well have believed there was an ancient Eng‐ lish right to be free of monopolies.

2. The Statute of Monopolies

By 1614, the relationship between the King and Parliament had significantly deteriorated, an important precursor to the assertions of Parliamentary authority that helped lead to the English Civil War in the 1640’s.69 King James I abused the royal prerogative and dissolved his first two Parliaments, leading Parliament to refuse to give King James a royal subsidy.70 Without such a subsidy, the King was forced to find other sources of revenue, turning in large part to the granting of mo‐ nopoly trade privileges. In the process, however, the entire sys‐ tem of the granting of such privileges broke down:

The . . . system was regulatory chaos. . . . Patents were granted, routinely revoked . . . and re‐issued to someone else. Eventually, revocation became so common that patents being issued included language permitting revocation by vote of the Privy Council. Increasingly desperate for reve‐ nue, James granted broad supervisory control over whole industries and with it broad powers to search and arrest in‐ fringers. These powers were predictably subject to frequent and profound abuse by the patentees, who were commonly unpopular favorites of James . . . further fomenting public scorn for both the monopolies and the monopolists. The administrative mechanism for controlling the patents having broken down, their use was completely unmanaged. The pa‐ tents were economically burdensome and politically un‐ popular, but their use was so poorly administered that James received very little of the economic rents they gener‐ ated.71

King James I called his third Parliament in 1621, a point at which the issue of royally granted monopolies was prominent on the agenda in the House of Commons.72 The increased atten‐ tion to the issue was attributed in part to a severe economic depression at that time, even though the monopolies them‐ selves did not appear to be the primary cause of the depres‐ sion.73 The House of Commons established a Committee of Grievances, with Sir Edward Coke, by then a Member of Par‐ liament, as chairman.74 Coke had been fired as Lord Chief Jus‐ tice of England by King James for his unwillingness to decide legal cases as the King wished.75 He entered Parliament as a foe to the King, and, by 1621 was an outspoken critic of royally granted monopolies. A draft bill banning monopolies was quickly reported in Parliament.76 However, the bill did not pass the House of Lords at that time, in part because of concern among the Lords that the bill would overly constrain the royal prerogative.77 In an effort to appease the House of Commons, King James issued yet another proclamation cancelling some patents and submitting others to common law courts.78 He also later established a committee by royal proclamation to hear and address grievances regarding monopolies.79

Between 1621 and 1624, debate over foreign policy consumed much of Parliament’s time.80 However, eventually a bill, which became the Statute of Monopolies passed the House of Com‐ mons with language that was largely the same as that in the 1621 bill.81 When the bill reached the House of Lords, the Lords proposed a number of exceptions to the general prohibition on monopolies, such as for the granting of patents and for the chartering of corporations. 82 Sir Edward Coke did not ultimately object to the exception for chartering corporations, because he did not think the Statute of Monopolies applied to them. 83 Further, Parliament wanted to maintain full employment, which the guilds (also exempted from the Statute of Monopolies) and corporations were both thought to have an interest in protecting. 84 The guilds exerted an enormous amount of political power at this time. 85 As a result, during the same term that Parliament passed the Statute of Monopolies, it also passed a seemingly conflicting statute, which permitted only free members of the Cheesemongers and Tallow-chandlers guilds to purchase cheese and butter for resale in London. 86 For the Statute of Monopolies to pass the House of Lords, it also was necessary to alter the act to include exceptions for glassmaking and for alum mines. 87

Guilds were not necessarily monopolies per se. Historically, guilds had been fraternal associations, which in this context were joined together by a shared craft or trade. 88 However, by obtaining patents or charters within the city in which they operated, the guilds often gained monopoly control over their respective crafts or trades. 89 Because English guilds held more sway with Parliament than with the Crown, the guilds sought support from Parliament to protect them from the royally granted monopolies, which sometimes conflicted with their control of a particular market. 90

The Statute of Monopolies, as amended by the House of Lords and approved by the House of Commons in 1624, is strongly worded and broad in scope, reaching all types of royally [\*999] granted monopolies. As Chancellor of New York James Kent later described the law, it was the "'Magna Charta of British Industry/ because it 'contained a noble principle, and secured to every subject unlimited freedom of action, provided he did no injury to others, nor violated statute law.'" 91 In Section One it provides that:

[A]ll monopolies and all commissions, grants, licences, charters and letters patents heretofore made or granted, or hereafter to be made or granted to any person or persons, bodies olitic or corporate whatsoever, of or for the sole buying, selling, making, working or using of any thing within this realm or the dominion of Wales, or of any other monopolies, or of power, liberty or faculty, to dispense with any others, or to give licence or toleration to do, use, or exercise any thing against the tenor or purport of any law or statute . . . and all proclamations, inhibitions, restraints, warrants of assistance, and all other matters and things whatsoever, any way tending to the instituting, erecting, strengthening, furthering, or countenancing of the same or any of them, are altogether contrary to the laws of this realm, and so are and shall be utterly void and of none effect, and in no wise to be put in u[s]e or execution. 92

Section Two makes it clear that litigation involving monopolies was subject to trial in the common law courts. 93 Section Six of the Statute contains exceptions for invention patents, which were subject to a time limit:

[A]ny declaration before mentioned shall not extend to any letters patents and grants of privilege for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use. 94

[\*1000] Interestingly, Section Seven exempts grants of monopoly privileges by Parliament:

[T]his act or anything therein contained shall not in any wise extend or be prejudicial to any grant or privilege, power, or authority whatsoever heretofore made, granted, allowed, or confirmed by any act of parliament now in force, so long as the same shall so continue in force. 95

As previously mentioned, Sections Nine through Fourteen provide exceptions for corporations and specific patents. 96

King James's response to Parliament's passage of the Statute of Monopolies was predictably negative:

Touching my Patents in general, I am grieved that you have called them in and condemned them upon so short examination. I confess I might have passed some upon false suggestion and wrong information, but you are not to recall them before they be examined by the judges… Therefore I advise you to be careful, that you have a good ground before you call for your patents, that you do not defraud patentees. … I say to you when you judge of patents, hear patiently, say not presently, it is against the law, for patents are not to be judged unlawful by you. 97

Thus, again King James questioned Parliament's authority to enact the statute, although he "begrudgingly" assented to it. 98 However, given King James's views, it is perhaps unsurprising that despite the statute's sweeping language, monopoly royal trade privileges continued to be granted well past King James I's reign (which ended with his death in 1625) and through the reign of King Charles I. 99

Parliament continued to complain and protest against royal monopolies after the adoption of the Statute of Monopolies. For example, monopolies were one of the main issues that confronted the Long Parliament, which lasted from 1640 to 1648, 100 [\*1001] and one of the most famous statements criticizing royal monopolies was made at this time:

They are a nest of wasps--a swarm of vermin which have overcrept the land. Like the frogs of Egypt they have gotten possession of our dwellings, and we have scarce a room free from them. They sup in our cup; they dip in our dish; they sit by our fire. We find them in the dye-fat, wash-bowl, and powdering-tub. They share with the butler in his box. They will not bait us a pin. We may not buy our clothes without their brokage. These are the leeches that have sucked the commonwealth so hard that it is almost hectical. 101

Eventually, Parliament successfully cancelled some monopolies and, in 1691 abolished the Court of Star Chamber, the primary court that had enforced and protected the royally granted monopoly privileges. 102 The Statute of Monopolies came eventually to be seen as a declaration by Parliament of its authority to legislate against royally granted monopolies and as expressing Parliament's strong support for the common law courts. 103 Indeed, Parliament's exercise of power in opposing royal monopolies eventually led to the exertions of parliamentary power that culminated in the English Civil War and the Glorious Revolution of 1688, which took place just decades later. 104 The adoption of the English Bill of Rights of 1689, which ended the king's claim that he could ignore or alter statutory law, confirmed for all time Parliament's power to bind the King by making statutory law. 105

In some sense the struggle over the Statute of Monopolies was as much a struggle over political power as it was a statement about free trade, as Section Seven of the Statute made monopolies issued by the crown illegal, but permitted such monopolies when issued by Parliament. 106 King James I may only have assented to the Statute of Monopolies because England [\*1002] was then at war with Spain, making the King more willing to concede power to Parliament to ensure funding for the impending war. 107 In any event, the Statute received the royal assent and so it became part of the supreme law of England.

The debate over monopolies should also be viewed in light of the efforts during the late 1620s of King James I's son, King Charles I, to tax Englishmen without parliamentary approval. 108 King Charles I's preferred way of doing so was to arrest wealthy individuals and then say he would only release them in exchange for a forced loan. 109 Outraged, Sir Edward Coke led Parliament in forcing Charles I to sign the Petition of Right, which "protested martial law, billeting, arbitrary taxation, and arbitrary imprisonment." 110 The belief of colonial Americans that they could not be taxed by an English parliament in which they were not represented in part dates back to Parliament's successful efforts in the 1620s to stop monopolies and to prevent the King from taxing his subjects without Parliament's consent. 111

Although the Statute of Monopolies was a tremendous accomplishment from a constitutional perspective, it had some serious shortcomings because of its various exceptions and its reservation to Parliament of the power to grant monopolies. Why did the Statute pass in the form in which it did? First, members of Parliament had to make compromises for the sake of political expediency as part of the lawmaking process, which necessitated the inclusion of exceptions for politically powerful special interest groups, such as the various guilds. 112 In addition, the guilds who were leading advocates of the Statute of Monopolies because of the power it took away from the Crown, exerted a huge influence on the drafting of the Statute. 113 The guilds obviously did not support the Statute of Monopolies because it stood for free trade, but rather because the [\*1003] Statute would help them economically by protecting the guilds from royal monopolists. 114 Second, the theoretical underpinnings for the benefits of free trade had not yet been expounded by Adam Smith and other modern economists: England was dominated by mercantilism at the time the Statute of Monopolies was enacted. 115 Adam Smith's The Wealth of Nations--the fundamental work in classical economics--was not published until 1776, over 150 years after the Statute. 116 Britain's free trade era did not begin until the mid-nineteenth century.

Nonetheless, the negative effects of monopolies were already recognized by the early seventeenth century, 117 and monopolies were in fact limited in post-Revolutionary England relative to Tudor and early Stuart rule. 118 The limits set on monopolies both in the common law and in the Statute of Monopolies show an awareness of the costs monopolies impose. This concern with the evils of monopolies traveled with Englishmen when they crossed the Atlantic Ocean to settle the New World.

B. Colonial America

The North American colonists generally considered themselves Englishmen, and they believed that English statutes and common law rights and privileges should extend to them as they had applied to their English ancestors. 119 Their inability to vindicate these same rights and privileges was one of the many grievances expressed by the colonists around the time of the writing of the Declaration of Independence:

[T]he respective colonies are entitled to the common law of England … [and] they are entitled to the benefit of such of the English statutes as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances. 120

[\*1004] In practice, courts would find that English statutes applied to the colonies only if the statute so specified. 121 As for application of the common law to the colonists, matters were complicated by the fact that the colonies' interpretation of the "common law" did not always correspond to the English interpretation, and, in any event, the common law in the North American colonies varied according to local circumstances. 122 Moreover, although some language in the thirteen colonial charters suggested that the common law of England extended to the North American colonies, it is unlikely that the King's lawyers who drafted the charters meant to extend full common law rights to the colonies. 123

The Statute of Monopolies did not state explicitly that it extended to the colonies, so it did not apply, and common law precedents were of questionable application as well. 124 As a result, the colonies enacted their own versions of the Statute of Monopolies both to grant patents for economic development purposes and to place restrictions on the issuance of patents. For example, Massachusetts's 1641 Body of Liberty provided that "[n]o monopolies shall be granted or allowed amongst us, but of such new Inventions that are profitable to the Countrie, and that for a short time." 125 Connecticut passed a similar law in 1672. 126 Compared to the Statute of Monopolies, these acts have been described as "mainly declaratory" and the text of these provisions was much less comprehensive. 127 The assembly was generally left to determine on a case-by-case basis whether to grant a patent and under what terms. 128

It is essential to note that, if it were not for the Crown's ability to grant royal charters, the colonies themselves would not have existed. All of the original thirteen colonies were established [\*1005] through the grant of royal charters, by which the King established and empowered their respective governments. 129 However, it was the language in the charters that the colonists relied on as their relationship with England deteriorated. For instance, Virginia's charter of 1611-1612 established an assembly to meet four times per year to create laws "[s]o always, as the same be not contrary to our Laws and Statutes of this our Realm of England." 130 Colonial charters were similarly written in the other North American colonies. 131

On this point, it is important to recognize the influence of Sir Edward Coke, who may be thought of as a hero for the colonists, especially the Puritans who settled in Massachusetts and Connecticut. Discussing the colonists' reliance on Coke for their understanding of the English common law, Theodore Plucknett wrote in a 1927 article that the common law was the "palladium of their civil liberties." 132 Coke proclaimed in Bon-ham's Case that the common law governed parliamentary acts, 133 and the colonists repeatedly relied on this declaration to argue that the colonies could use common law to oppose British regulations. 134 For example, the Massachusetts Bay Colony relied directly on Coke when King James II abrogated its original colonial charter in 1684 and attempted to consolidate all the [\*1006] New England colonies, along with the colonies of New York and New Jersey, in a so-called Dominion of New England. This event "provoked an outspoken claim [of] independence" and Bostonians were said to "hold forth a law book, & quote the Authority of the Lord Cook [sic] to Justifie their setting up for themselves; pleading the possession of 60 years against the right of the Crown." 135 Sir Edward Coke's name and authority were also used by James Otis in Paxton's Case, challenging the writs of assistance that provided general search warrants, often in customs cases. 136 In fact, it is fair to say that Otis's entire argument in Paxton's Case relied upon Coke and Bonham's Case! 137

Another example of the hold that Sir Edward Coke had on the legal thinking of colonial Americans comes from the controversy over the Stamp Act of 1765. This Act taxed the colonists without their consent, which elicited the complaint that the Act "violated 'Magna Carta and the natural rights of Englishmen, and therefore[,] according to Lord Coke[,] [was] null and void.'" 138 Samuel Adams expressed a similar view when he said that "whether Lord Coke has expressly asserted it or not,… an act of parliament made against Magna Charta in violation of its essential parts, is void." 139 As the Royal Governor of Massachusetts, Thomas Hutchinson, complained, the colonists took "advantage of a maxim they find in Lord Coke that an Act of Parliament against Magna Carta or the peculiar rights of Englishmen is ipso facto void." 140 In addition to relying on Bonham's Case, when John Adams, writing under the pseudonym "Novanglus," asserted in 1774 that Parliament had no authority over the colonies and that each was a separate realm [\*1007] under the king with its own independent legislature, he started his analysis with an argument from Coke's Institutes 141

Thus, the American colonists, relying in part on Coke, believed that all the constitutional protections afforded to Englishmen also applied to them--including the protections conferred by the Statute of Monopolies 142 and by Darcy v. Allen. 143 For example, William Penn, the founder of the Province of Pennsylvania and a proponent of the idea that the rights of Englishmen extended to those in the colonies, 144 wrote about the evil of monopolies and the harm they caused. In a section of a 1687 pamphlet called The Excellent Priviledge of Liberty & Property Being the Birth-Right of the Free-Born Subjects of England, William Penn summarized the Statute of Monopolies and Darcy v. Allen, writing: "Generally all Monopolies are against the great charter because they are against the Liberty and Freedom of the Subject, and against the Law of the Land." 145 Thus, Thomas Barnes is quite right when he says: "Do not examine too closely the extent to which Sir Edward Coke fell in behind Citizen Sam. Scores of others of our Founding Fathers had no doubt which side Lord Coke was on, and none questioned the magnitude of the aid he gave them." 146

England's continued practice of issuing monopolies was a direct cause of the American Revolution. England enacted an extensive set of laws granting English merchants monopolies in colonial trade for a variety of markets--from manufactured goods to all kinds of raw materials. 147 Black markets arose in the colonies as a response to England's mercantilist trade policy. [\*1008] 148 As a result, the English mercantile laws were enforced with great intrusiveness, which in turn had grave consequences for England's relationship with the American colonies. 149 For instance, although the main point of protest in Boston over the Tea Act was taxation without representation, the Boston Tea Party was an act against the British government and the East India Company, which had a monopoly over tea importations to the colonies. 150 The havoc wreaked by the English monopoly system on England's relationship with the American colonies cannot be overstated:

[T]he efforts of the English government, backed by English merchants and manufacturers, to deny to the Americans the right to compete in foreign markets and to secure the benefits of foreign competition was one of the most potent causes of the American Revolution. The spirit of monopoly which had permeated English business life for centuries and worked injury in so many ways now wrought irreparable harm to the British Empire by bringing about the loss of invaluable dominions and the irrevocable division of the English people. 151

Thus, the English experience with monopolies influenced colonial America in two ways. First, some colonies adopted their own versions of the Statute of Monopolies, because the English Statute of Monopolies and common law were generally thought not to extend to the colonies. 152 Second, England's monopolistic trade laws led to protest by the colonists and eventually the American Revolution, just as King James I's monopolies had so outraged Englishmen in Parliament in the 1620s and led to the English Civil War in the 1640s. 153 In both instances, complaints were made about taxation without representation, and in both instances monopolies were in part to blame. King George III, like James I, imposed a double burden on his people by both taxing his people directly and by indirectly taxing them through the issuance of royal monopolies. The colonists were both taxed on imports and subjected to British control over foreign trade without representation in Parliament.

[\*1009] II. MONOPOLIES IN THE UNITED STATES

A. At the Founding

The evils of the English monopolies and their impact on the American colonists guaranteed that the right to be free from monopolies would merit attention during the drafting and ratifying of the federal Constitution. Several of the Founders themselves, as well as the Antifederalists and the state ratifying conventions, took the position that the United States Constitution should have an antimonopoly clause. 154

George Mason and Thomas Jefferson led the way in urging that the new U.S. Constitution contain an antimonopoly clause. 155 Mason's concern about the evils of monopoly coupled with the grants of power to Congress in the Commerce Clause and the Necessary and Proper Clause partly explains his refusal to sign the proposed Constitution after the Philadelphia Convention. 156 Mason was concerned that the Commerce Clause and the Necessary and Proper Clause might be used to regulate navigation in favor of the northern and eastern states by granting monopolies in trade:

By requiring only a Majority to make all commercial and navigation Laws, the five Southern States (whose Produce and Circumstances are totally different from that of the eight Northern and Eastern States) will be ruined; for such rigid and premature Regulations may be made, as will enable the Merchants of the Northern and Eastern States not only to demand an exorbitant Freight, but to monopolize the Purchase of the Commodities at their own Price, for many years: to the great Injury of the landed Interest, and Impoverishment of the People: and the Danger is the greater, as the Gain on one Side will be in Proportion to the Loss on the other . . . .

Under their own Construction of the general Clause … the Congress may grant Monopolies in Trade and Commerce . . . . 157

[\*1010] George Mason's concern was not exactly far-fetched given that the English colonial government had misused its powers over trade in precisely this way. 158 Indeed, the English abuse of power is similar to the federal government's abuses of power in the nineteenth century--after 1861, the newly ascendant Republican Party protected northern manufacturing interests to the disadvantage of the South with a policy of extremely high protectionist tariffs. 159

Thomas Jefferson also hated monopolies and believed that they should be constitutionally banned. 160 In a letter to James Madison, complaining about the lack of a Bill of Rights in the proposed Constitution, Jefferson put the principle of freedom from government monopolies on par with all of the other rights now enshrined in the Bill of Rights, such as the freedom of the press and of religion:

I will now add what I do not like. First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury … Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference. 161

Specifically on the issue of monopolies, Jefferson later wrote:

[It] is better to . . . abolish . . . Monopolies, in all cases, than not to do it in any. . . . [S]aying there shall be no monopolies lessens the incitements to ingenuity . . . but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression. 162

[\*1011] In response, Madison argued that monopolies should be allowed in the limited circumstances where they were beneficial, and that it was thus necessary not to have an outright prohibition against them:

With regard to Monopolies, they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it? 163

In fact, Madison proposed during the Philadelphia convention to give the federal government the power to grant "charters of incorporation." 164 However, this proposal was voted down because, as Rufus King of Massachusetts argued, it might lead to "mercantile monopolies," as had happened in England before the American Revolution. 165 George Mason also objected to giving Congress the power to grant charters of incorporation, arguing that this power would lead to "monopolies of every sort." 166

Jefferson refused to give in after reviewing a draft of the Bill of Rights, and he wrote to Madison again saying that he would have liked to have seen the following provision added to the Bill of Rights:

Art. 9. Monopolies may be allowed to persons for their own productions in literature and their own inventions in the arts for a term not exceeding years but for no longer term and for no other purpose. 167

Jefferson did not say what he meant by the word "monopoly," but Samuel Johnson's dictionary at the time defined the term as "the exclusive privilege of selling any thing." 168

[\*1012] Interestingly, Jefferson also opposed the creation of the federal Post Office 169--perhaps the most venerable monopoly in American history. Jefferson wrote to James Madison that he thought the newly created Post Office was "a source of boundless patronage to the executive" and would provide

[J]ob[s] to members of Congress & their friends, and a bottomless abyss of public money. You will begin by only appropriating the surplus of the post office revenues; but the other revenues will soon be called into their aid, and it will be a scene of eternal scramble among the members, who can get the most money wasted in their State; and they will always get most who are meanest. 170

As will be discussed in more depth below, Jefferson's opposition to the postal monopoly was shared by Lysander Spooner, the radical political reformer and abolitionist who challenged the federal postal monopoly in the mid-nineteenth century by creating a direct competitor, the American Letter Mail Company. 171

Jefferson was not the only Framer to express concern about the Constitution and grants of monopoly privilege; the Anti-federalists also spoke out about the evils and dangers of monopoly. The most outspoken of the Antifederalists on this topic was Agrippa. 172 Looking to Europe's experience with monopolies in trade, Agrippa recognized that the main threat to competition in most countries did not come from the market, but, rather, from the government itself:

In most countries of Europe, trade has been confined by exclusive charters. Exclusive companies are, in trade, pretty much like an aristocracy in government, and produce nearly as bad effects… [I]n the British islands all these circumstances together have not prevented them from being injured by the monopolies created there. Individuals have been enriched, but the country at large had been hurt… because they consequentially defeat the trade of the out-ports, [\*1013] and are also injurious to the general commerce, by enhancing prices and destroying that rivalship which is the great stimulus to industry. 173

Other Antifederalists voiced the same concerns about monopolies. "A Son of Liberty" feared that "monopolies in trade, [would be] granted to the favorites of government, by which the spirit of adventure will be destroyed, and the citizens subjected to the extortion of those companies who will have an exclusive right, to engross the different branches of commerce." 174 The Federal Farmer, likewise wrote that "[a]s monopolies in trade perhaps, can in no case be useful, it might not be amiss to provide expressly against them." 175

Agrippa called for strong restraints on the ability of the federal government to grant monopolies in the new Constitution, recognizing that the "unlimited power over trade, domestic as well as foreign, is another power that will more probably be applied to a bad than to a good purpose." 176 Echoing Adam Smith, whose book, The Wealth of Nations, was fittingly first published in 1776, Agrippa argued:

The freedom that every man, whether his capital is large or small, enjoys of entering into any branch that pleases him, rouses a spirit of industry and exertion, that is friendly to commerce. It prevents that stagnation of business which generally precedes public commotions. Nothing ought to be done to restrain this spirit. 177

Six states wanted to include provisions banning monopolies and grants of special privilege in the U.S. Constitution: New Hampshire, Massachusetts, New York, North Carolina, Virginia, and Rhode Island. 178 Massachusetts's proposal on February 6, 1788, was that the Constitution be amended to state "[t]hat Congress erect no company with exclusive advantages [\*1014] of commerce." 179 New Hampshire and North Carolina proposed similar amendments. 180 New York recommended "[t]hat the congress do not grant monopolies or erect any Company with exclusive Advantages of Commerce." 181 Rhode Island's belated ratification of the Constitution in 1790 recommended the same language as New York, although it was too late to have an influence. 182 Virginia's proposal was "[t]hat no man or set of men are entitled to separate or exclusive public emoluments or privileges from the community, but in consideration of public services, which not being descendible, neither ought the offices of magistrate, legislator, or judge, or any other public office, to be hereditary." 183 All of these proposed antimonopoly amendments to the Constitution came from the state ratifying conventions, but since the task of writing the federal Bill of Rights in response to the requests for amendments from the States fell to newly elected Congressman James Madison, an antimonopoly clause was omitted from the federal Bill of Rights. 184 Madison was stubborn, persistent, and successful in keeping an antimonopoly clause out of the Founders' Constitution! This omission is remarkable since even Alexander Hamilton, a notorious proponent of a strong central government and of mercantilism, acknowledged the pressure from the States for an antimonopoly clause. As Hamilton said regarding the constitutionality of a national bank:

It is remarkable that the State conventions, who had proposed amendments in relation to this point, have most, if not [\*1015] all of them, expressed themselves nearly thus: Congress shall not grant monopolies, nor erect any company with exclusive advantages of commerce! Thus, at the same time, expressing their sense, that the power to erect trading companies or corporations was inherent in Congress, and objecting to it no further than as to the grant of exclusive privileges. 185

Interestingly, only one of the states that sought a federal anti-monopoly clause (North Carolina) actually banned monopolies in its own state constitution. 186 The scarcity of state bans suggests that there was greater concern about monopoly abuses at the federal level than at the state level. This fact makes some sense when we remember that colonial America had been confronted with English monopolies backed by a powerful central government. 187 It must also be noted that, in drafting their own state constitutions, the States focused more on the structures of state government than on producing state bills of rights. 188 Only seven states had separate state bills of rights at the Founding, while four others included some protection of rights within their constitutions. 189

Of course, no ban on monopolies made its way into the federal Constitution or Bill of Rights. This is probably in large part due to Madison's view that representational government at the federal level would prevent a repeat of the English experience with monopolies:

Is there not also infinitely less danger in this abuse in our Governments than in most others? Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power as with us is in the many not in the few the danger cannot be very great that the [\*1016] few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many. 190

Madison made it clear elsewhere that the right to be free of monopolies was of vital importance. 191 He expressed his recognition of the importance of the right of individuals to earn a living in their trade when he proclaimed:

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called. 192

B. Monopolies and the Original Federal Constitution

There are two provisions in the federal Constitution that relate closely to the English history with monopolies. First, the Patent and Copyright Clause in Article 1, Section 8 provides that "Congress shall have the Power … To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." 193 As discussed above, Thomas Jefferson criticized the inclusion of this clause in his correspondence with James Madison. 194 Just as the Statute of Monopolies in 1624 explicitly left some monopolies in place, 195 so too did the Framers of the U.S. Constitution allow for monopolies in the form of copyrights and patents for new writings and inventions so as to promote industry and creativity. 196

[\*1017] The other provision in the original Constitution that was relevant to the monopoly issue was the Privileges and Immunities Clause of Article IV, Section 2, which states that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." 197 Similar privileges and immunities clauses had also been included in many of the colonial charters and in the Articles of Confederation, which was in some respects America's first constitution. 198 It is clear from an early draft of the Articles of Confederation that the "privileges" [\*1018] and "immunities" that the Articles of Confederation protected were the traditional rights that the American people had always possessed as Englishmen. This early draft of the Articles provided that "[t]he Inhabitants of each Colony shall henceforth always have the same Rights, Liberties, Privileges, Immunities and Advantages in the other Colonies, which the said Inhabitants now have . . . ." 199 Of course, those traditional rights of Englishmen included the right to be free from monopolies, 200 so this right was conferred on Americans through the Articles of Confederation, and it informs the original meaning of the Privileges and Immunities Clause of Article IV.

This interpretation of the Article IV Privileges and Immunities clause as banning monopolies was recognized in the years following the adoption of the Federal Constitution. While riding circuit in 1823, Justice Washington explained the meaning of the Privileges and Immunities Clause of Article IV in Corfield v. Coryell. 201Corfield involved a challenge to a New Jersey law forbidding nonresidents from gathering oysters and clams. 202 Although Justice Washington upheld the law, he explained that the Privileges and Immunities Clause protected a large number of fundamental rights:

We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit [\*1019] of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.' 203

Justice Washington's dictum seems to recognize federal constitutional protection for broad economic rights, including the right to choose a trade or profession. As we will discuss shortly, Justice Washington's definition of privileges and immunities strongly influenced the drafters of the Privileges or Immunities Clause of the Fourteenth Amendment, 204 and later the Justices of the U.S. Supreme Court in their landmark decision in the Slaughter-House Cases, 205 which interpreted that clause.

The antimonopoly principle was also evident early in our federal constitutional history in the Supreme Court's Contracts Clause case law. Nineteenth-century Contracts Clause cases, like Trustees of Dartmouth College v. Woodward 206 in 1819 and Charles River Bridge v. Warren Bridge 207 in 1837, reflect concerns about monopoly. In Woodward, the Marshall Court held that Dartmouth College's corporate charter, which was granted by King George III in 1769, was a private contract between two parties and was protected by the Contracts Clause in Article I, Section 10. 208 Thus, although the state argued that the charter was in fact a license to do business that the state could subsequently [\*1020] alter, 209 the Supreme Court held that the New Hampshire legislature could not alter the corporation's charter by changing the identity of the corporation's trustees, because doing so impaired a private contract among private individuals. 210 The Woodward case was thus crucial in empowering private corporations, because once corporations were created, the state could not subsequently take away their corporate charter rights. 211 The reasoning of the Court's opinion applied to for-profit corporations, as well as to non-profit corporations like Dartmouth College, 212 and made it clear that while the English government could revoke corporate "monopoly" powers, 213 the State governments in the United States could not do so without running afoul of the Contracts Clause. 214 This holding greatly empowered U.S. corporations and contributed substantially to U.S. economic growth in the nineteenth century. 215 Once corporations were no longer viewed as the monopoly recipients of special governmental grants of privilege, they were able to play a "rapidly growing part in the economy." 216

In 1837, the Taney Court modified and limited the Woodward decision in Charles River Bridge v. Warren Bridge. 217 Massachusetts had contracted in 1785 with the Charles River Bridge Company to build and maintain a toll bridge across the Charles River and, in 1792, the state legislature extended the charter grant to the Charles River Bridge Company from forty to seventy years. 218 The population in Boston grew extremely rapidly, and in 1828 the state legislature changed its mind about the seventy-year charter and allowed another company to build a competing bridge nearby--the Warren Bridge. 219 This new bridge would initially charge a fee but would eventually become free for travelers [\*1021] to use. 220 Once the Warren Bridge became free to use, the value of the Charles River Bridge, its owners alleged, would be destroyed. 221 The Charles River Bridge Company sued, arguing that the Contracts Clause protected its corporate charter monopoly. 222 The company argued that the state of Massachusetts could not breach its contract with the Charles River Bridge Company that gave the latter exclusive rights to operate a toll bridge over the Charles River by allowing another company to manage a competing free bridge. 223

Chief Justice Roger B. Taney, a Jacksonian, held that in cases in which a corporation has an agreement with the government for exclusive monopoly-like privileges, the terms of the agreement should be construed as narrowly as possible, because monopolies were disfavored as a matter of both constitutional history and public policy. 224 Chief Justice Taney held that the charter merely granted the Charles River Bridge Company the right to build a bridge but not necessarily the exclusive privilege of maintaining the only bridge across the river. 225 This view would undoubtedly have surprised the original builders of the Charles River Bridge had they known as much back in 1785 when the bridge was built. Chief Justice Taney was particularly concerned that upholding the charter as a grant of exclusive privilege would promote monopoly, which he viewed as contrary to English law and to American law by adoption:

Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there any thing in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? . . . We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter; the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavourably to [\*1022] the public, and to the rights of community, than would be done in a like case in an English court of justice. 226

Chief Justice Taney explained that if the charter given to the Charles River Bridge company were construed broadly as a grant of an exclusive privilege to operate a bridge for seventy years, it would become difficult for courts to draw a line as to how far that right should extend. 227 For example, charters for turnpike roads were by 1837 facing competition from charters issued to newly created railroads. 228 If turnpike charters were interpreted broadly by the courts, then the holders of turnpike charters might use their old charters to prevent technological change by challenging the competing railroad charters. 229 As Stanley Kutler explains in his book on the Charles River Bridge case, the Charles River Bridge Company was viewed as a monopoly "imposed upon the communities because of special legal privileges." 230 Jacksonians, like Chief Justice Taney, were ardently opposed to government grants of monopoly and special privileges to the powerful and wealthy 231--a phenomenon that Americans today call "crony capitalism."

Justice Joseph Story, the closest ally of then-deceased Chief Justice John Marshall, concurred in the decision in the Woodward case but wrote a scathing dissent in Charles River Bridge. He argued that the Charles River Bridge Company's exclusive privilege should be protected by the Contracts Clause. 232 Despite his association with the Democratic-Republican Party, Justice Story was greatly influenced by Alexander Hamilton and Chief Justice John Marshall, and thus believed that private property rights should be strongly protected and that commerce should be promoted. He saw the Charles River Bridge case not as a defeat for crony capitalism, but as a violation of private property rights. 233 Justice Story was opposed to Jacksonian democracy because he feared that popular majorities would invade the private property rights of the wealthy and [\*1023] would hurt private businesses. The tension between the views of Justices Taney and Story--the protection of corporate property rights granted by the state versus an aversion to special laws and monopoly privileges--helped to shape the debate over the Fourteenth Amendment in the three decades after the Charles River Bridge case was decided.

Importantly, the Charles River Bridge case had an "immediate and widespread impact at the state level." 234 As Stanley Kutler notes in his book about the case, it "opened the floodgates and courts now directly confronted and denied exaggerated implied claims of vested rights. The state court reports for the next two decades are replete with cases implementing the Charles River Bridge doctrine." 235 For example, in Mohawk Bridge Co. v. Utica & Schenectady Rail Road Co., 236 a New York court applied Charles River Bridge's rule of strict construction to hold that a bridge proprietor's charter did not prohibit competition from a ferry. 237 Similarly, in Tuckahoe Canal Co. v. Tuckahoe & James River Rail Road Co., 238 the Supreme Court of Appeals of Virginia held that a canal company's charter did not give the canal company an exclusive right of way, and that a railroad company could construct bridges that would compete with the canal. 239 Fearing the tendency of holders of special privileges to claim more exclusive rights than had originally been intended, the court noted that "monopoly is very ingenious in extending its rights and enlarging its pretensions." 240

C. The Fourteenth Amendment: A Ban on Class-Based Legislation

Chief Justice Taney's concern with the creation of monopolies in the Charles River Bridge case was part of a movement beginning in the early nineteenth century to ban special or partial laws. 241 During this period, many states amended their constitutions to restrict the state's ability to grant special privileges or [\*1024] monopolies. 242 Prominent legal commentators, such as Chancellor Kent and later Thomas Cooley, argued that laws must be general and not class-based. 243 There was widespread opposition to class legislation, to the granting of exclusive privileges, and to government-conferred monopolies. 244 This Jacksonian concern, which was eventually adopted by Abolitionists and Republicans, helped lead to the adoption of the second sentence of Section One of the Fourteenth Amendment in 1868, which provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. 245

We think the Fourteenth Amendment has its roots in part in the Jacksonian fear of monopolies and grants of special privilege, and that the Amendment bans not only systems of caste but also all special or partial laws that single out certain persons or classes for special benefits or burdens. This is essentially the view that was taken by the four dissenters in the Slaughter-House Cases. 246

If there was one thing that all Jacksonians hated, it was government-conferred monopolies or special privileges, also known as "class legislation." Class legislation in this sense means any legislation that singles out groups, individuals, or classes of people and grants them special privileges or imposes on them special burdens that are not shared by the rest of society. [\*1025] 247 The Jacksonian aversion to class legislation is broader than an aversion to "caste," a term that refers only to hereditary class traits which may be immutable (such as race, or other physical features) or which are theoretically mutable but practically immutable because of social attitudes. A well-known example of theoretically mutable but practically immutable characteristics is the traditional Hindu caste system of the nineteenth century wherein a hereditary social order was created that distinguished Brahmins from Untouchables, with several other castes in between. 248 Notably, nineteenth-century dictionary definitions of caste described it as not only being based on physical or racial features but as also including a "tribe or class of the same profession" 249 or people with "fixed occupations" 250 or with "the same rank, profession, or occupation." 251 The view that class or caste legislation was reprehensible came to be widely held in the 1860s by the Framers of the Fourteenth Amendment. 252

Importantly, opposition to class legislation was not a new idea invented by the Jacksonians, but was instead deeply rooted in John Locke's belief that the role of government is to protect individuals' natural rights. 253 Locke believed that laws should have equal application to everyone in society and that the government should not use its power to create laws that favor or burden particular groups. 254 The opposition to special interest laws, however, was not due solely to Lockean philosophical ideas on the proper role of government. There were also important practical reasons to oppose class legislation: Favoritism and discrimination undermine the democratic process and [\*1026] encourage corruption. 255 The Framers of the original Constitution sometimes expressed this view; for example James Madison said that the state should be "neutral between different parts of the Society," 256 and that "equality … ought to be the basis of every law." 257

There is ample support in the text of the original federal Constitution for the idea that there should be generality in lawmaking and equality before the law. As one of the Authors has pointed out in an article with Abe Salander, there are many instances where the Constitution requires that the laws be general and not class-based. 258 First, the preamble to the Constitution states that the purpose of the Constitution is to "provide for the common defence" and "promote the general Welfare." 259 Likewise, Article I, Section 8 empowers Congress "[t]o establish an [sic] uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States." 260 The Full Faith and Credit Clause allows Congress to pass only "general Laws." 261 The Constitution's ban on bills of attainder, 262 ex post facto laws, 263 and titles of nobility 264 may also be viewed as bans on various forms of class legislation.

President Andrew Jackson's famous hatred for the Bank of the United States stemmed in part from the fact that the Bank was a private institution that enjoyed special privileges above and beyond those enjoyed by ordinary banks. In his message to Congress in 1832 vetoing a statute that would have renewed [\*1027] the Bank's corporate charter--a veto message which Roger B. Taney helped to draft 265--President Jackson repeatedly referred to the bank as a monopoly because it was the only bank allowed to operate under a charter from the federal government and because it had significant control over the foreign and domestic exchange. 266 Pointing to the Patent and Copyrights Clause, which gives Congress the power to grant monopolies in the limited instances of patent and copyright, President Jackson wrote that any other grant of monopoly was the equivalent of a legislative amendment to the Constitution:

Every act of Congress, therefore, which attempts by grants of monopolies or sale of exclusive privileges for a limited time, or a time without limit, to restrict or extinguish its own discretion in the choice of means to execute its delegated powers is equivalent to a legislative amendment of the Constitution, and palpably unconstitutional. 267

For Jackson, the Bank of the United States, as a monopoly, was contrary to the principle of the equal protection of the laws:

Many of our rich men have not been content with equal protection and equal benefits, but have besought us to make them richer by act of Congress. By attempting to gratify their desires we have in the results of our legislation arrayed . . . interest against interest, and man against man, in a fearful commotion which threatens to shake the foundations of our Union. … If we can not at once, in justice to interests vested under improvident legislation, make our Government what it ought to be, we can at least take a stand against all new grants of monopolies and exclusive privileges, against any prostitution of our Government to the advancement of the few at the expense of the many . . . . 268

Rather than accede to the requests of rich men, the government should "confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor." 269 Jackson's hatred of banks was not unique, however; there were similar challenges brought to the special [\*1028] privileges granted to banks in some state courts during the nineteenth century, as well. For example, in 1813, the special debt recovery rules for a state bank in North Carolina were challenged as a violation of North Carolina's constitution, which provided that "no man, or set of men, are entitled to any exclusive or separate emoluments or privileges from the community, but in consideration of public services." 270 Similarly, in 1856 a state bank charter in Indiana was challenged under that state's privileges or immunities clause because it was exempt from certain forms of taxation. 271

The antimonopoly cause also influenced opposition to the federal government's postal monopoly. In 1844, Lysander Spooner, the famous political reformer and abolitionist, founded the American Letter Mail Company with the primary purpose of challenging the constitutionality of the Post Office. 272 Spooner argued that the federal postal monopoly exceeded the grant of power given to Congress in Article I, Section 8, Clause 7 "[t]o establish Post Offices and post Roads," 273 and alleged that the Post Office charged exorbitantly high postage rates due to its monopoly power. 274 Spooner's constitutional argument, with which Justice Joseph Story agreed, 275 was that the constitutional grant of power to establish post offices and post roads is narrower than the power given to Congress under the Articles of Confederation, which granted Congress the "sole and exclusive right [of] . . . establishing and regulating post offices." 276 Like Sir Edward Coke, Spooner understood the creation of monopolies as a practice of arbitrary and despotic governments:

The idea, that the business of carrying letters is, in its nature, a unit, or monopoly, is derived from the practice of arbitrary governments, who have either made the business a monopoly in the hands of the government, or granted it as a [\*1029] monopoly to individuals. There is nothing in the nature of the business itself, any more than in the business of transporting passengers and merchandise, that should make it a monopoly, either in the hands of the government or of individuals. Probably one great, if not the principal motive of despotic governments, for maintaining this monopoly in their own hands, is, that in case of necessity, they may use it as an engine of police, and in times of civil commotion, it is used in this manner. The adoption of the same system in this country shows how blindly and thoughtlessly we follow the precedents of other countries, without reference to the despotic purposes in which they had their origin. 277

Spooner concluded that:

the only absolute constitutional guaranty, that the people have against all these evils and dangers, is to be found in the principle, that they have the right, at pleasure, to establish mails of their own. And if the people should now surrender this principle, they would thereby prove that their minds are most happily adapted to the degradation of slavery. 278

As discussed earlier, Thomas Jefferson--who was also opposed to monopolies--was wary of Congress's power to create postal roads and wrote to Madison that he thought this would be "a source of boundless patronage to the executive, jobbing to members of Congress & their friends, and a bottomless abyss of public money." 279 Jefferson's concerns, voiced nearly fifty years prior, thus resurfaced in Spooner's efforts to challenge the federal government's postal monopoly. Due to a combination of fines, government seizure of its mail, and competition from other mail-delivery providers, however, Spooner's American Letter Mail Company was forced out of business. 280 Nonetheless, Spooner is credited with significantly lowering the postage rates--indeed, the New York Times's obituary described him as the "Father of Cheap Postage in America." 281

[\*1030] As Professor Melissa Saunders explains in her article, Equal Protection, Class Legislation, and Colorblindness, at least two esteemed legal commentators and treatise writers prior to 1868--Chancellor Kent and Thomas Cooley--adopted and endorsed the Jacksonian idea that the laws must be general and that they may not be class- or caste-based. 282 For example, Chancellor Kent wrote in 1816 that "laws should 'have a general and equal application' and be 'impartial in the imposition which [they] create[].'" 283 Thomas Cooley similarly wrote about "unequal and partial legislation" that was invalidated in various state court cases. 284 Cooley considered it axiomatic in state constitutional law that

[E]very one has a right to demand that he be governed by general rules, and a special statute that singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but an arbitrary mandate, unrecognized in free government. … "[Those who make the laws] are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor . . . ," 285

Cooley also wrote that "[e]quality of rights, privileges, and capacities unquestionably should be the aim of the law" and that "[s]pecial privileges are obnoxious, and discriminations against persons or classes are still more so." 286 This view found its way into several state constitutions, as will be discussed in more detail below. A number of states had adopted constitutional provisions aimed at prohibiting special or partial laws prior to the ratification of the Fourteenth Amendment in 1868. 287

There was an important exception to the ban on class legislation, however: a law would be upheld if it could be shown to serve a "public purpose." As Justice Field later explained in the 1885 case of Barbier v. Connolly, 288 the Fourteenth Amendment [\*1031] prohibits "[c]lass legislation, discriminating against some and favoring others," but does not prohibit "legislation which, in carrying out a public purpose, is limited in its application" to certain individuals or groups. 289 Importantly, the purpose of the law cannot be to grant a special benefit to a particular individual or group; the purpose must be to promote an important public purpose. 290 The Fourteenth Amendment thus only permits laws that discriminate between individuals if the laws "are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good." 291 This idea was expressed as well in Corfield v. Coryell, 192 in which Justice Washington indicated that fundamental rights could always be trumped by just laws enacted for the good of the whole people. 293

Opposition to class legislation and the need for generality in lawmaking were expressed in state court decisions throughout the country in the period from the 1820s to the 1860s. In 1825, for instance, the Maine Supreme Court stated that "it can never be within the bounds of legitimate legislation, to enact a special law . . . granting a privilege and indulgence to one man" that is not granted to "all other persons." 294 Rather, laws should be "prescribed for the benefit and regulation of the whole community" because all individuals "have an equal right" to their protection. 295 Similarly, in 1851, the Pennsylvania Supreme Court reasoned that "when . . . general laws are enacted, which bear . . . on the whole community, if they are unjust and against the spirit of the constitution, the whole community will be interested to procure their repeal." 296

In an 1831 decision, the Tennessee Supreme Court of Errors struck down a law prohibiting suits from being brought by an Indian reservee if the suit was prosecuted for the benefit of another party. 297 The state law applied only to a small amount of [\*1032] land that was established under treaties between the Cherokees and the U.S. government. 298 Because the treaties secured to the reservees the right of citizenship, they were entitled to the same constitutional protections as the citizens of the state. 299 The court explained that "no free man shall be disseized of his freehold, or deprived of his property, but by the judgment of his peers or the law of the land." 300 Further, "every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void." 301 Because the law applied only to a small amount of land granted to reservees under the treaty, the court ruled that the law was unconstitutional and void as a partial law. 302

In another Tennessee case in 1844, the state Supreme Court ruled that a law that allowed trustees of a particular trust to receive a donation made to an unincorporated association was void because of the constitutional requirement that legislators may not suspend a general law for the benefit of particular individuals. 303 According to the Constitution:

[T]he legislature shall have no power to pass any law, for the benefit of individuals, inconsistent with the general laws of the land, nor to pass any law granting to any individuals rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of this law. 304

Similarly, in 1859 the Wisconsin Supreme Court explained the need for generality in lawmaking in the course of striking down a law that taxed some property at a lesser rate than other property within a city. 305 In doing so, the court noted:

The theory of our government is, that socially and politically all are equal, and that special or exclusive, social or political privileges or immunities, cannot be granted, and ought not to be enjoyed. In consonance with this theory … the burdens of supporting the government should be borne equally by all the [\*1033] individuals composing it, in proportion to the benefits conferred … This principle of justice and equality … lies at the foundation of our political system; and, in our opinion, it was to give to it a greater permanency and force, and to secure its more rigid observance, that the section [at issue] was introduced into the constitution [of this state]. 306

Likewise, in an 1859 Ohio Supreme Court case, the dissent argued against a law that established separate schools for blacks and whites 307 on the grounds that such "caste-based legislation" is

[T]he inveterate vice of absolute governments, and is inconsistent with the theory and spirit of a free and popular government like ours; asserting in its bill of rights the equality of all men. A free government like ours must be presumed, so far as practicable, to avoid class-legislation; and rather to trust and favor the natural liberty and right of individuals to form and regulate their own social circles and classification according to their respective predilections and prejudices. 308

Recognizing a change in the law over the past decade, the justice concluded, "[I]t seems to me alike unwise and wholly out of character with the progress, the general intelligence, and liberality of the age, at this time--more than ten years after the repeal of the 'black laws,' … to give an extent and effect to those disabling statutes . . . ." 309

In a habeas corpus proceeding in the Supreme Court of Georgia in 1859, the court ruled that a law requiring a license to sell goods in the market--which the court described as class legislation--did not prohibit a man from selling goods outside the market. 310 The justice remarked that "[e]xcessive legislation--the vice of all free governments--is, perhaps, the fault of the State. Through haste, inadvertence, and other causes… class legislation is to be found frequently upon our statute book[s]. Something should be done to arrest this evil. The dearest rights of the people are jeopardized." 311 Further, "[a] peaceable citizen, who discharges punctually all his public duties, [\*1034] and respects scrupulously the rights of others, should be left free and untrammeled as the air he breathes, in the pursuit of his business and happiness," 312 and, the justice said,

The best sympathies of my heart are, and always will be, interested for one who is, or may be, incarcerated, because, in the proud consciousness of a freeman, he claims the right to offer for sale . .. any commodity he may possess, the traffic in which is not forbidden by the laws of the land. 313

By the 1840s and 1850s, opposition to special and partial laws was so widespread among Jacksonian Democrats that even their Abolitionist opponents began to borrow the Jacksonian idea. Abolitionists argued--quite rightly--that the "Slave Power" in the South had seized the government and was using it to create an oligarchy that oppressed African-Americans. 314 The famous abolitionist Lysander Spooner is an example of someone who understood this connection. Spooner was both an early opponent of monopolies--as evidenced in his opposition to the federal postal monopoly in the 1840s 315--and one of the most outspoken abolitionists of this time period. In 1860, Spooner argued in The Unconstitutionality of Slavery, that the institution of slavery was contrary to the Constitution. 316 Further, the Constitution should be read to be consistent throughout and "the right to send and receive letters by post [which he believed to be the case], is a right inconsistent with the idea of a man's being a slave." 317

The Abolitionists' Slave Power argument was attractive to many erstwhile Jacksonian Democrats, a number of whom eventually joined the antislavery cause. 318 For example, Representative Norton Townshend, a Democrat from Ohio, spoke out against slavery in the following terms on the House floor:

I protest against all these interpolations into the Democratic creed, and against any such interpretation of Democracy as makes it the ally of slavery and oppression. Democracy and [\*1035] slavery are directly antagonistic. Democracy is opposed to caste, slavery creates it; Democracy is opposed to special privileges; slavery is but the privilege specially enjoyed by one class--to use another as brute beasts and take their labor without wages; Democracy is for elevating the laboring masses to the dignity of perfect manhood; slavery grinds the laborer into the very dust. . . . [S]lavery is but the extreme of class legislation… [S]lavery is nothing more than the privilege some have of living out of others. . . . 319

Representative John F. Farnsworth, who associated at times with the Democratic Party but who allied himself with the Radical Republicans, similarly said:

As a moral being, as a man, I hate slavery in the States of this Union as I hate serfdom in Russia--which, by the way, is about to be abolished in that Empire, while we are quarrelling over the extension of slavery in this--just as I hate caste in India; just as I hate oppression everywhere. 320

Indeed, as Saunders explains, by the mid-1850s "thousands of these heirs of the Jacksonian political tradition left the Democratic Party for the Republican Party, driven by the belief that the former was 'no longer the champion of popular rights that it had been in Jackson's day's but had become 'the tool of a slave-holding oligarchy.'" 321 The radical Republican, Senator Sumner, explained the connection between slavery and monopoly as follows:

The Rebellion began in two assumptions . . . first, the sovereignty of the States, with the pretended right of secession; and, secondly, the superiority of the white race, with the pretended right of Caste, Oligarchy, and Monopoly, on account of color. . . . The second showed itself at the beginning, when South Carolina alone, among the thirteen States, allowed her Constitution to be degraded by an exclusion on account of color . . . . 322

In fact, for Sumner, slavery was a system of caste:

[\*1036] A Caste cannot exist except in defiance of the first principles of Christianity and the first principles of a Republic. It is Heathenism in religion and tyranny in government. The Brahmins and the Sudras in India, from generation to generation, have been separated, as the two races are now separated in these States. If a Sudra presumed to sit on a Brahmin's carpet he was punished with banishment. But our recent rebels undertake to play the part of the Bramhins, and exclude citizens, with better title than themselves, from essential rights, simply on the ground of Caste, which, according to its Portuguese origin, casta, is only another term for race. 323

Sumner went as far as to propose legislation banning all systems of caste, class, and monopoly in the Senate in 1866. 324 The language he used for the proposed statute was extremely broad:

[T]here shall be no Oligarchy, Aristocracy, Caste, or Monopoly invested with peculiar privileges and powers, and there shall be no denial of rights, civil or political, on account of color or race anywhere within the limits of the United States or the jurisdiction thereof; but all persons therein shall be equal before the law . . . . 325

The connections between the Abolitionist movement, disenfranchisement of blacks, and opposition to class-based laws generally were drawn in a series of 1857 Maine Supreme Court decisions that were reached on the same day. These cases rejected the Supreme Court's decision in Dred Scott 326 and concluded that free black men have the right to vote as citizens of the state of Maine. 327 The decisions in Maine were in response to an interrogatory from the Maine State Senate asking whether "'free colored persons, of African descent, having a residence established in some town in this state . . .' are men, women, children, paupers, persons under guardianship, or unnaturalized foreigners" and, thus, whether they have the right to vote. 328

In an opinion from Judge Appleton, the court makes clear its views on Dred Scott and its reading of the Privileges and Immunities [\*1037] Clause in Article IV. Judge Appleton began by proclaiming that "[t]he constitution of Maine recognizes as its fundamental idea, the great principle upon which all popular governments rest--the equality of all before the law. It confers citizenship and entire equality of civil and political rights upon all its native born population." 329 The court relied on historical evidence: original state constitutions, the Declaration of Independence, and state court decisions recognizing the freedom of inhabitants without regard to ancestry or color. 330 It concluded that "colored freemen were regarded as citizens, and entitled to the right of suffrage, in most of the states, during the whole period of the revolution." 331 It said as well that Dred Scott was not "obligatory" on the state courts. 332 Since the federal Constitution does not impose restrictions as to who might become citizens of a state, and because the people of Maine did not make distinctions on the basis of status or class, but instead "formed a constitution upon principles of the purest democracy, making no distinctions and giving no preferences, but resting upon the great idea of equality before the law," black men must and do have the right to vote. 333 As Judge Davis also explained in a third opinion, if the federal government really were able to define certain classes as either citizens or non-citizens under the guise of construing Article IV's Privileges and Immunities Clause, then the federal government would effectively be "establishing privileged classes, in violation of [the Constitution's] letter and spirit." 334

Immediately after the end of the Civil War, many southern states adopted a set of racially discriminatory laws that came to be known as the Black Codes. These laws limited the rights to contract, own property, travel, and testify in court of all the former slaves. The Black Codes:

[P]erpetuated or created many discriminations in the criminal law by applying unequal penalties to Negroes for recognized offenses and by specifying offences for Negroes only. Laws which prohibited Negroes from keeping weapons or from selling liquor were typical of the latter. Examples of [\*1038] discriminatory penalties were the laws which made it a capital offence for a Negro to rape a white woman or to assault a white woman with intent to rape …

In addition to the discriminations of the criminal laws, postwar black codes hedged in the Negroes with a series of restraints on their business dealings of even the simplest form. Though in many states the Negro could acquire property, Mississippi put sharp limitations on that right. But most restrictive were the provisions concerning contracts for personal service. Many statutes called for specific enforcement of labor contracts against freedmen, with provisions to facilitate capture should a freedman try to escape. Vagrancy laws made it a misdemeanor for a Negro to be without a long-term contract of employment; conviction was followed by a fine, payable by a white man who could then set the criminal to work for him until the benefactor had been completely reimbursed for his generosity. 335

The Black Codes were widely criticized as being a forbidden form of class legislation that sought a monopoly over black labor. For example, an 1866 editorial in the Chicago Tribune warned that "if the several States can practi[c]e class legislation, as between whites and blacks . . . they can also create class distinctions in the future between .. . rich and poor, or between any other divisions of society." 336

The Thirty-Ninth Congress responded to the Black Codes by enacting the Civil Rights Act of 1866. 337 The Civil Rights Act required that there be no discrimination in civil rights or immunities among the inhabitants of any state or territory of the United States on account of race, color, or "previous condition of slavery." 338 Despite the broad language, it was explained by the bill's drafters that the Act only applied to "civil" rights enumerated in the Bill of Rights (and not "political" rights, such as the right to vote). 339 This included the right to make and enforce contracts, to sue, to be parties, to own land and personal property, and to be subject to the same criminal punishments. 340

[\*1039] After the Civil Rights Act of 1866 was passed, however, there was still fear among supporters of Reconstruction that the Act would be struck down as an unconstitutional exercise of congressional power to enforce the Thirteenth Amendment. As a solution, Congress began working on the Fourteenth Amendment to write the Civil Rights Act into the Constitution. This would protect it from challenge in the courts or from changes to the law by a later Congress. 341 However, the purpose of the Fourteenth Amendment went beyond merely enshrining in the Constitution the protections of the Civil Rights Act. As Professor Saunders explains, the support for legislation to guarantee the civil rights of blacks among the Republicans and Jacksonian Democrats was based primarily on opposition to class legislation and the spirit of monopoly more generally. 342 As Senator Howard stated in support of the Fourteenth Amendment, "Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another … is meted out to the member of another caste, both castes being alike citizens of the United States . . . ?" 343 The Black Codes themselves were objectionable because they violated Blackstone's maxim that "the restraints introduced by the law should be equal to all," as Senator Lyman Trumbull, co-sponsor of the Civil Rights Act, explained. 344 Thus, the purpose of the Fourteenth Amendment went beyond eliminating discrimination against blacks and to include within its reach all class-based legislation.

Popular accounts of the Amendment also understood it to be far reaching. For example, the San Francisco Daily Evening Bulletin characterized it as an "opportunity … for the masses to break down the domination of caste and aristocracy," 345 and the Boston Daily Advertiser described its purpose as "compel[ling] the States to . . . throw the same shield over the black man as over the white, over the humble as over the powerful." 346 Similarly, the Cincinnati Commercial noted that the Amendment constitutionalized "the great Democratic principle of equality before [\*1040] the law" and invalidated all "legislation hostile to any class." 347 As one of the authors has argued:

By connecting the old-world problems of aristocracy and feudalism with race discrimination and caste in America, these commentators provide more evidence that the American public conceived of the word caste at a higher level of generality than the word race. The Framers and ratifiers of the Fourteenth Amendment would have understood it to ban European feudalism or the Indian caste system, as well as the special-interest monopolies that so outraged Jacksonian Americans. 348

The meaning of the Privileges or Immunities Clause itself grew out of the Privileges and Immunities Clause of Article IV. Article IV was well-understood at the time of the Fourteenth Amendment to be a ban on discrimination against nonresidents of a state, as the Supreme Court laid out in the Corfield case discussed above. 349 Similarly, then, the Fourteenth Amendment's Privileges or Immunities Clause was a ban on discrimination, but in this case it was a ban on class or caste discrimination. As one of the authors has explained elsewhere, 350 the Amendment's references to "privileges or immunities" together with the verb "abridge" is a legal term of art. 351 The Fourteenth Amendment's use of the word "abridge" makes this point clearer. Abridge means to shorten or abbreviate. In banning abridgments of privileges or immunities, the Fourteenth Amendment banned the Black Codes, which shortened or lessened the civil rights of African Americans as compared to white citizens. 352 The Black Codes would fall because they were an example of the Slave Power trying to perpetuate itself by giving its supporters monopoly power over the lives of the freed African-Americans. 353 In fact, President Andrew Johnson argued in his December 1865 State of the Union address that the Black Codes were objectionable because "'there is no room for favored classes or monopolies,' for 'the principle of our Government [\*1041] is that of equal laws,' which 'accord equal and exact justice to all men, special privileges to none.'" 354 Johnson shared a similar view regarding slavery, which he said was "a monopoly of labor." 355 Thus, "abridge" is meant to be synonymous with discrimination, similar to its use in the Fifteenth Amendment, 356 which states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." 357

The intellectual, legislative, and judicial history leading up to the adoption of the Fourteenth Amendment thus confirms what the text of Section 1 of that Amendment implies. The Fourteenth Amendment is a ban not only of racially discriminatory laws but also on all class-based legislation and certainly on any legislation that sets up a caste system or monopoly. This includes the right to be free from unreasonable government interference in one's trade. Representative John Bingham, the primary author of the Privileges or Immunities Clause, understood the Clause to protect "the liberty … to work in an honest calling and contribute by [one's] toil in some sort to the support of yourself, to the support of [one's] fellowmen, and to be secure in the enjoyment of the fruits of [one's] toil." 358 Similarly, another representative asked during the Amendment's drafting: [\*1042] "[H]as not every person a right, to carry on his own occupation, to secure the fruits of his own industry, and appropriate them as best suits himself . . . ?" 359 Thus, grants of monopoly would certainly be prohibited under Section 1 unless they were somehow just laws enacted for the general good of the whole people. The original public meaning of the words of Section 1 of the Fourteenth Amendment in 1868 would have been understood to be a ban on caste, monopoly, and on systems of class legislation.

D. Economic Liberty Cases: Slaughter-House, Lochner, & the New Deal Cases

The meaning of the Fourteenth Amendment quickly became the subject of controversy in 1872 in the Slaughter-House Cases. 360 In that case, a group of Louisiana butchers challenged the constitutionality of a state statute that incorporated and granted a twenty-five year monopoly to the Crescent City Live-Stock Landing and Slaughter-House Company to have and maintain slaughterhouses within certain states parishes. 361 The butchers challenged the statute as violating the Thirteenth and Fourteenth Amendments. 362 Importantly, the butchers also argued at length that the Louisiana slaughtering monopoly violated the common law rule of Darcy and the Statute of Monopolies 363--in fact, counsel for the butchers read Sir Edward Coke's report of Darcy to the Court and cited it in full in the brief. 364 Emphasizing that the English creation of monopolies had helped give rise to the American Revolution, the butcher's counsel then pointed out:

It was from a country which had been thus oppressed by monopolies that our ancestors came. And a profound conviction of the truth of the sentiment… that every man has a right to his own faculties, physical and intellectual, and that this is a right, one of which no one can complain, and no one deprive him--was at the bottom of the settlement of the country by them. Accordingly, free competition in business, [\*1043] free enterprise, the absence of all exactions by petty tyranny, of all spoliation of private right by public authority--the suppression of sinecures, monopolies, titles of nobility, and exemption from legal duties--were exactly what the colonists sought for and obtained by their settlement here, their long contest with physical evils that attended the colonial condition, their struggle for independence, and their efforts, exertions, and sacrifices since. 365

Counsel for the butchers explained that several state courts recognized this common law right before the adoption of the Fourteenth Amendment in 1868. 366 For example, in 1856, Connecticut's Supreme Court of Errors relied on the Statute of Monopolies to strike down a law that granted a franchise to a corporation giving it an exclusive privilege to use streets to lay gas pipe. 367 In 1837, the New York Chancery Court refused to enforce a city ordinance that would have prohibited a manufacturer of pressed hay from erecting a wooden frame building while allowing another manufacturer to do so. 368 And in a case with facts remarkably similar to those in the Slaughter-House Cases, the Supreme Court of Illinois struck down a Chicago ordinance that limited the ability to slaughter animals to a single firm. 369 Referring to the city's municipal laws, the court stated that such a law "impairs the rights of all other persons, and cuts them off from a share in not only a legal but a necessary business." 370 Additionally, such laws "must be reasonable, and such as are vexatious, unequal or oppressive, or are manifestly injurious to the interest, of the corporation, are void. And of the same character are all by-laws in restraint of trade, or which necessarily tend to create a monopoly."371 As Justice Field declared in his dissenting opinion in the Slaughter-House Cases, "In all these cases there is a recognition of the equality of right among citizens [\*1044] in the pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common right, and void." 372 Significantly, although none of the above-mentioned states had provisions in their constitutions prohibiting monopolies, the local ordinances were still struck down.

The butchers' counsel in the case also argued that the Privileges or Immunities Clause of the Fourteenth Amendment embodied an unenumerated right to be free from monopolies that went beyond Darcy v. Allen and the Statute of Monopolies. As the butchers' counsel explained, the rights protected under the Privileges or Immunities Clause "are undoubtedly the personal and civil rights which usage, tradition, the habits of society, written law, and the common sentiments of people have recognized as forming the basis of the institutions of the country." 373 Justice Field, in his dissenting opinion for four members of the Court, agreed with the butchers. Citing Corfield v. Coryell, 374 Justice Field adopted Justice Washington's definition therein of the term "privileges and immunities" as encompassing a number of unenumerated rights that he deemed fundamental. 375 Thus, because Article IV's Privileges and Immunities Clause prohibited discriminatory legislation against nonresidents, the Fourteenth Amendment likewise functioned to prohibit such discriminatory class legislation by residents of one state against other residents of the same state:

What the clause in question did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States. If under the fourth article of the Constitution equality of privileges and immunities is secured between citizens of different States, under the fourteenth amendment the same equality is secured between citizens of the United States. 376

Justice Field argued that Justice Washington's definition of "privileges and immunities" in Corfield should be taken as definitively [\*1045] informing the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment. 377 He then explained why he thought that the right to be free from partial laws was a fundamental right of United States citizens:

This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition… This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name. The fourteenth amendment, in my judgment, makes it essential to the validity of the legislation of every State that this equality of right should be respected. 378

Justice Field also quoted Adam Smith's Wealth of Nations at length (as did the butchers in their briefs). 379 He emphasized the idea that a person's labor is his property and is the foundation for all other property:

"The property which every man has in his own labor," says Adam Smith, "as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper." 380

Thus, in a sense Justice Field's dissenting opinion merged the previously opposing views in Charles River Bridge v. Warren [\*1046] Bridge. 381 For Chief Justice Taney, what was offensive in Charles River Bridge was the state's grant of a monopoly to the bridge company. However, for Justice Story, it was paramount to protect the bridge company's property right in what he saw as its contract with the state. 382 Justice Field folded both of these views into his dissenting opinion in the Slaughter-House Cases, recognizing both the right to be free from monopolies and the right to one's property in his or her labor.

Nevertheless, a majority of the Supreme Court in the Slaughter-House Cases rejected the butchers' arguments, holding that the state-granted monopoly was constitutional and nearly writing the Privileges or Immunities Clause out of the Fourteenth Amendment. In his opinion for the Court, Justice Miller limited the Privileges or Immunities Clause to apply only to those rights that "owe their existence to the Federal government, its National character, its Constitution, or its laws." 383 This included things like the ability to assert claims against one's government, free access to seaports, protection while on the high seas and when within the jurisdiction of a foreign government. 384

Interestingly, Louisiana later amended its constitution to ban monopolies like that in the Slaughter-House Cases. The monopolist butchers, who had won in federal court, challenged the amendment to the state constitution under the Contracts Clause--just as the Charles River Bridge Company had done thirty-five years earlier in Charles River Bridge. Once again the Supreme Court held that a state could abolish a monopoly without violating the Contracts Clause, so it upheld Louisiana's constitutional amendment, eliminating the butchers' slaughtering monopoly. 385 The Slaughter-House dissenters returned to their arguments in Slaughter-House, again arguing that the grant of monopoly violated the Fourteenth Amendment and Darcy in the first place. 386 However, the majority [\*1047] ruled on a narrower ground that Louisiana did not have the power to make the state-granted monopoly irrevocable. 387

The Slaughter-House Cases closed a door on reading the Privileges or Immunities Clause to strike down grants of economic privilege and of monopoly, and other cases--such as Munn v. Illinois in 1877 388 and Barbier v. Connolly in 1885 389-further weakened the protection of economic liberty and constraints on the state police power under the Fourteenth Amendment. Yet later Court decisions reached different conclusions. The idea that the Fourteenth Amendment bans class legislation and embodies the protection of economic rights was revived at the turn of the twentieth century with the 1897 case Allgeyer v. Louisiana 390 and in 1905 in Lochner v. New York. 391 Justice Field's Slaughter-House dissent clearly inspired the Supreme Court majority in both Allgeyer and Lochner. As one legal scholar has written, "[i]n 1873, a bare majority resisted the dissenters' appeal to social compact and natural law and vested rights ideology; but a generation later, a new majority embraced substantive due process." 392 In Lochner, Justice Rufus Peckham held that a law which limited bakers' hours to ten-hour days and sixty-hour weeks violated the liberty of contract, which he viewed as protected by the Due Process Clause of the Fourteenth Amendment. 393 Justice Peckham's view was that the purpose of the regulation was to equalize bargaining power [\*1048] between employers and employees, and that it was not a just law enacted for the good of the whole people and to promote health and safety concerns as was claimed by the state. 394 Lochner rendered constitutionally suspect at least some forms of redistribution of wealth, 395 and the opinion seemed to imply that the sixty-hour work week for bakers was motivated by a desire to protect big bakeries from competition from smaller, harder-working immigrant competitors. 396 There was thus an element of state-enforced special privilege or monopoly to the case. As a result of the Lochner opinion, a wave of "liberty of contract" cases were decided in federal and state courts. Ultimately, the whole period of time between 1905 and 1937 became known as the Lochner era. 397

Justice Peckham's opinion in Lochner, like the Slaughter-House dissent, became famous for its robust conception of constitutionally protected economic liberties. One scholar has argued that many of the laws struck down during the Lochner era were in fact the result of rent-seeking behavior. 398 Both the Lochner decision and Slaughter-House dissent show an interest in one's right to work freely. But the decision in Lochner can also be distinguished from the decision in the Slaughter-House Cases. Whereas Lochner announced a right to liberty of contract in all contexts, the Slaughter-House Cases dealt with a different and arguably distinct issue--the Fourteenth Amendment's prohibition on grants of monopoly or special privilege. And although some laws aimed at restricting economic liberty may be discriminatory class-based legislation, such as exemptions for one industry and not for another, it is not always the case that laws that restrict economic liberty are class based.

In the wake of the Great Depression and of President Franklin D. Roosevelt's New Deal, the Supreme Court eventually retreated from the holding and opinion in Lochner, and rejected the idea that the Constitution protected a broad liberty of contract. [\*1049] First, the Supreme Court significantly weakened Lochner in 1934 when it relaxed the level of scrutiny it would apply in cases of economic regulation in Nebbia v. New York. 399 Although the Court in Nebbia did not explicitly repudiate Lochner, it held that a price control setting the minimum price for milk was constitutional so long as (1) it was nondiscriminatory and (2) bore a reasonable relationship to a legitimate governmental purpose. 400 In 1937, however, the Supreme Court radically repudiated Lochner and its progeny in West Coast Hotel Co. v. Parrish. 401 In that case, the Court overturned a prior decision in Adkins v. Children's Hospital, 402 and upheld a state minimum wage law for women. 403 West Coast Hotel thus proved to be a decisive repudiation of the entire line of Lochner cases.

Lochner had been decided on the belief that an individual's liberty of contract could only be overcome by a reasonable exercise of the police power, and the Lochner Court evaluated reasonableness using a standard that readers today might call intermediate scrutiny. 404 The New Deal Supreme Court never abolished liberty of contract, but it reduced the level of scrutiny for state regulations of the police power from Lochner-era intermediate scrutiny to a deferential form of rational basis review. In its landmark 1938 holding in United States v. Carotene Products Co., 405 the Supreme Court stated that economic regulations are presumed to be constitutional and will be upheld unless they are irrational, even if the legislators' actual intent cannot be proven. 406 The Court expressed no interest whatsoever in determining whether a law created exclusive privileges or whether it reflected monopolistic class legislation. To the Carotene Products Court, all economic and social legislation was constitutional unless it discriminated against a discrete and insular minority, or closed off the channels of political change, or violated [\*1050] one of the first eight amendments in the Bill of Rights. 407 Lochner was officially dead.

This new, highly deferential rational basis review did not, however, immediately take hold in all the cases decided by the New Deal Supreme Court after 1937. As Professor Victoria Nourse explains in her book In Reckless Hands: Skinner v. Oklahoma and the Near Triumph of American Eugenics, the New Deal Supreme Court decided at least one important case using the old nineteenth-century idea that the Fourteenth Amendment banned forms of arbitrary class legislation. 408 In Reckless Hands recounts the use of eugenics in the 1920s and 1930s in asylums and prisons across the United States, and the challenge to one eugenics law in the famous New Deal-era case Skinner v. Oklahoma. 409 In Skinner, an Oklahoma law was challenged by a man who was sentenced to sterilization for being a repeat offender--he had stolen chickens and had also been convicted of armed robbery. 410 The goal behind the Oklahoma statute, like other eugenics laws, was to "weed out" criminals from society by sterilizing repeat offenders who violated many criminal statutes; however, it provided exceptions for repeat violations of "prohibitory laws, revenue acts, embezzlement, [and] political offenses." 411

Clarence Darrow, the famous lawyer from the Scopes Monkey Trial, had earlier commented on Oklahoma's imposition of sterilization for robbers but not embezzlers, asserting that it was not only "'senseless and impudent,'" but also that it "impos[ed] a 'caste system.'" 412 Indeed, a lawyer on the case argued: 413

I have wondered upon what rational basis the Legislature could have arrived at the conclusion that all those committing minor offenses would transmit to their progeny only vices; while the dishonest financier who appropriates trusting depositor's monies in the banks, or trustees who convert [\*1051] funds of confiding clients, and the saboteur, and the inciter of treason could spew from his loins only progeny blessed with virtues. The terms of the Act exclude from its penalties the Capones, the Ponzis and the Benedict Arnolds. 414

In an opinion by Justice Douglas, the Supreme Court struck down the eugenics law, reasoning that, under the traditional pre-1937 understanding of the Equal Protection Clause, laws that draw arbitrary lines were unconstitutional as a form of class legislation or a grant of an exclusive privilege. 415 As Professor Nourse points out, arbitrariness was the "basic test for equal protection claims," even into the 1930s, 416 and that laws which provided arbitrary exemptions for certain classes of people showed unconstitutional legislative favoritism. 417

Class legislation, under the traditional understanding, is, as Professor Nourse describes it, a "theory of failed governance." 418 In so arguing, Professor Nourse draws correctly on the work of John Hart Ely in his work Democracy and Distrust. 419 When a legislature draws a line between classes and provides exemptions, it favors the exempted group and discriminates against a class. In Skinner, the legislature protected those convicted of "high class" crimes, such as political or financial criminals, and burdened those guilty of "low class" crimes, such as chicken thieves, who were subject to sterilization if they were repeat offenders. 420 Such laws create an "'aristocracy of crime.'" as one of Skinner's lawyers described it, by violating the "rule of generality" that was promoted by Thomas Cooley, who in turn had borrowed the same ideas from John Locke. 421 As Cooley stated, there ought to be "'one law for rich and poor, for the favorite at court and the countryman at plough.'" 422 As Professor Nourse concludes:

Contrary to conventional wisdom, Skinner fits standard legal models that put the prohibition of "caste" legislation at the [\*1052] core of constitutional equality protections. The problem in Skinner was not with the distinction between the chicken thieves and embezzlers simpliciter. The problem was with a criminal law as a rule of genetics, as a rule of blood--this was class made permanent. . . . Oklahoma's law created a line between privileged and unprivileged blood, the sign of caste and aristocracy. 423

Professor Nourse also notes that that from 1868 until 1937, equal protection cases were usually about "property, taxes, and the right to work" rather than being about race or sex as they commonly are today. 424 The traditional concern with class legislation, exclusive privileges, and monopoly "focused on exemptions in statutes as a proxy for political favoritism, on the theory that the law should be general, not partial." 425 Such principles "reach[] as far back as the founding generation," and it is "clear" that the founders "aimed to prevent aristocracy, [and] rule by blood. . . . The theory of 'class legislation' has always been about the fight against aristocracy." 426

Skinner v. Oklahoma proved to be a temporary backward glance by the Justices of the Supreme Court to the nineteenth century-era when the Fourteenth Amendment was understood to ban class legislation and associated monopolies. The 1937 decision in West Coast Hotel and the 1938 decision in Carotene Products foretold the future of the Fourteenth Amendment, which was to be about strict scrutiny of racial classifications and rational basis scrutiny for almost everything else. While not mentioning Lochner by name, the Court made clear, in its 1949 decision in Railway Express Agency v. New York, 427 that Lochner-style review for economic regulations was no longer available. The Court noted:

We do not sit to weigh evidence… in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. 428

[\*1053] The new standard of rational basis review of economic and social legislation, in fact "looked more like judicial abdication than judicial review." 429

In 1955, Williamson v. Lee Optical 430 demonstrated the emptiness of the new rational basis review standard, holding that if there were any hypothetical rationale that the justices could imagine for a law, even if it was not the actual rationale of the legislature, the law would be upheld. 431 The facts in Williamson are troubling. An Oklahoma law prohibited anyone who was not a licensed optometrist or ophthalmologist from dispensing lenses or fitting lenses into frames except where there was a prescription from a licensed optometrist or ophthalmologist. 432 The law also prohibited solicitation for sale of eyeglass frames by those did not have the required license. 433

Justice Douglas could not point to the legislature's rationale behind this law, but he finally hypothesized that perhaps the law would encourage people to get needed eye exams. 434 The law in Williamson was a clear example of special interest legislation enacted to financially benefit optometrists and ophthalmologists by forcing patients to get a potentially unwanted and unneeded eye exam every time they wanted to buy a new pair of glasses. The fact the Supreme Court upheld it sent a signal that anything goes in the area of economic and social legislation. The Fourteenth Amendment may have been meant to bar caste- and class-based legislation, exclusive privileges, and monopolies, but after Williamson that was all moot.

In 1963, the Court finally explicitly overruled Lochner in Ferguson v. Skrupa, 435 holding that "[t]he doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases--that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely--has long since been [\*1054] discarded." 436 Ironically, just two years later, in Griswold v. Connecticut 437 the Supreme Court reinvented substantive due process with respect to certain social matters, but not to economic regulation. This doctrine ultimately led to the Court's invalidation of abortion laws in Roe v. Wade 448 and to its invalidation of sodomy laws in Lawrence v. Texas. 439 The modern Supreme Court has shied away from economic substantive due process, but it has enforced the Takings Clause with a pre-1937 vigor in such cases as Dolan v. City of Tigard, 440 Lucas v. South Carolina Coastal Council, 441 and Nollan v. California Coastal Commission. 442 The Supreme Court also abandoned the New Deal Court's use of the rational basis test for sex-discrimination cases in Goesaert v. Cleary 443 and United States v. Virginia, 444 and it has struck down a law targeted at homosexuals using the rational basis test in Romer v. Evans. 445 It also struck down an ordinance that burdened persons with mental retardation using the rational basis test in City of Cleburne v. Cleburne Living Center, Inc. 446 The Court has further held that alienage and illegitimacy are suspect classes. 447

In short, the Supreme Court's current case law interpreting the Fourteenth Amendment is a mess. The Court has made exceptions to New Deal rational basis scrutiny in discrimination cases involving sex, sexual orientation, mental retardation, alienage, and illegitimacy, while it has also abandoned the rational basis [\*1055] test with respect to abortion laws, laws governing contraception, laws banning sodomy, and the incorporated federal Bill of Rights. Recent takings cases reviewing zoning regulations seem clearly contrary to the post-1937 New Deal understanding. The Supreme Court should abandon the tiers of scrutiny and focus on the original meaning of the Fourteenth Amendment. That is, it should remember that the Fourteenth Amendment bans class legislation, the granting of exclusive privileges, and grants of government monopoly power. In a recent concurring opinion, Judge Janice Rogers Brown of the United States Court of Appeals for the District of Columbia Circuit described current protections of economic liberty since the New Deal in frank terms: "America's cowboy capitalism was long ago disarmed by a democratic process increasingly dominated by powerful groups with economic interests antithetical to competitors and consumers. And the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s." 448

The Court's approach to economic liberty cases is at war with the original meaning of the Constitution and the Fourteenth Amendment. The Framers of the Constitution understood the shortcomings of the democratic process, and they foresaw the development of factions (special interest groups) who would game the legislative process to gain monopoly or oligopoly rents. 449 The Constitution was written to empower the courts to protect the Republic from the worst excesses of factions. In other words, the Constitution was designed, as Judge Brown says, to "thwart more potent threats to the Republic: the political temptation to exploit the public appetite for other people's money--either by buying consent with broad-based entitlements or selling subsidies, licensing restrictions, tariffs, or price fixing regimes to benefit narrow special interests." 450 The Founders envisioned a government that was capable of preventing grants of special privileges and, in extreme cases, preventing the conferral of outright monopolies, just as Sir Edward Coke argued almost four centuries ago. The responsibility for striking down infringements on economic liberty [\*1056] falls to the courts. 451 Over the last half-century, the courts have failed to meet this responsibility. Judicial abdication over the last half century is troubling in light of the overwhelming evidence summarized in this paper--from English and colonial history, the debates on the federal Constitution and its ratification, and the legislative history on the Fourteenth Amendment--that people have a right to be free from monopolies and grants of special privilege.

E. "Private" Monopolies and Federal Antitrust Law

There remains a final wrinkle in this analysis of the federal government and the problem of monopolies: How did the monopoly problem come to be seen after 1890 as a problem that stemmed mostly from private concentrations of economic power and not from corrupt government grants of power and licenses? The answer is that there was a growing concern with private monopolies--those that developed without special grants from the state--in the late nineteenth century, in part because of what we would today call "crony capitalism." With the establishment of general incorporation laws in many states, parties for the first time became able to establish separate corporate entities. 452 Prior to the adoption of general incorporation laws, corporations were created, one at a time, by an act of the legislature, or else in England by a charter from the King. This system of private incorporation leant itself to corruption and abuse and to the granting of special privileges or monopolies. 453 As a result, it was replaced in the United States by general laws beginning in the early nineteenth century that allowed incorporation whenever certain preexisting conditions were met. 454

General incorporation laws, however, led to abuses. In some cases, these laws consolidated capital in the hands of a few players. 455 As Thomas Cooley warned in 1874, "[T]he most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually [\*1057] [have] greater influence in the country at large and upon the legislation of the country than the States to which they owe their corporate existence." 456

As a result, there was a growing fear among members of the general public after the Civil War that corporate monopolists would work to ensure that the state served only their private economic interests rather than the general interests of the public at large. 457 For example, as early as 1880, the Greenback and Anti-Monopoly parties began speaking out against the "land, railroad, money and other gigantic monopolies." 458 Even the patent system was called into question for conferring private monopolies that undermined the public's well-being. For example, General Ben Butler, the presidential candidate for the Greenback and Anti-Monopoly parties, criticized the sewing machine monopoly, which benefited from the protection of a patent. 459 The Union Labor Party (a coalition of the Greenback Party, the Knights of Labor, and the farmer movement) declared in 1888 that "[t]he paramount issues to be solved in the interests of humanity are the abolition of usury, monopoly, and trusts, and we denounce the Democratic and Republican parties for creating and perpetuating these monstrous evils." 460

The railroads were one of the most despised industries. In fact, as early as the Civil War period, the railroad monopoly was recognized as a problem. The industry was a hotbed of crony capitalism, thanks to land grants from the federal government to build railways in the West. Even during the Civil War, the federal government seized some railroads for the war effort. 461 In 1864, the House of Representatives found it necessary to pass a bill to authorize every railroad company in the country to carry government supplies, freight, mails, troops, [\*1058] and passengers notwithstanding any contrary monopoly. 462 The bill's not-so-hidden goal was to abolish one railroad monopoly granted by the State of New Jersey in particular. 463 The Camden and Amboy Railroad of New Jersey held a monopoly on the right of transit through New Jersey (including transportation outside the state to New York City and Philadelphia). 464 The State granted the monopoly charter in exchange for stock in the railroad. 465 Senators who were in favor of the bill to abolish the New Jersey state monopoly included none other than Charles Sumner, the radical Republican who decried monopolies and grants of special privilege in his support of the Civil Rights Act of 1866 and the Fourteenth Amendment. 466

In the 1865 Senate debates on the bill, Senator Sumner referred to the English history and the historic ban on monopolies while explaining his support of the federal override of the New Jersey state monopoly. 467 Senator Sumner also approvingly quoted Daniel Webster's argument against the monopoly granted by the State of New York in Gibbons v. Ogden as support for the constitutionality of Congress's using the Commerce Clause to override a state granted monopoly. He stated, "Now I think it very reasonable to say that the Constitution never intended to leave with the States the power of granting monopolies either of trade or of navigation; and therefore, that as to this, the commercial power is exclusively in Congress." 468 Then again he says: "I insist that the nature of the case and of the power did imperatively require that such important authority as that of granting monopolies of trade and navigation should not be considered as still retained by the states.'" 469 Sumner even likened the [\*1059] New Jersey monopoly to Apollyon in Pilgrim's Progress, 470 with New Jersey as the Valley of Humiliation "through which all travelers north and south must pass, and the monopoly, like Apollyon, claims them all as 'subjects,' saying 'for all that country is mine, and I am the prince and god of it.'" 471

Sumner described the monopoly not only as hostile "to the Union," but, importantly, "as hostile to the spirit of the age, which is everywhere overturning the barriers of commerce." 472 Painting a graphic picture of what would occur if New Jersey were not checked in its grant of monopoly, Senator Sumner feared other states would soon follow:

The taste of revenue is to a Government like the taste of blood to a wild beast, quickening and maddening the energies, so that it becomes too deaf to all suggestions of injustice; and the difficulties must increase where this taxation is enforced by a far-reaching monopoly. The State, once tasting this blood, sees only an easy way of obtaining the means it desires; and other States will yield to the same temptation. …

A profitable Usurpation, like that of New Jersey, would be a tempting example to other states. . . . Let this Usurpation be sanctioned by Congress, and you hand over the domestic commerce of the Union to a succession of local imposts. … Each State will play the part of Don Quixote, and the Union will be Sancho Panza, compelled to receive on his bare back the lashes which were the penance of his master. 473

Senator Sumner further tied his opposition to the railroad monopoly to his hatred of the institution of slavery--which, as discussed previously in this article, he also argued was a government-granted monopoly over the labor of African-Americans:

The present pretension of New Jersey belongs to the same school with that abhorred and blood-bespattered pretension of South Carolina.

[\*1060] . . . The monopoly which was founded on the hideous pretension of property in man obtained a responsive sympathy in that other monopoly which was founded on the greed of unjust taxation, and both were naturally upheld in the name of State rights. Both must be overthrown in the name of the Union. South Carolina must cease to be a slave State, and so must New Jersey. All hail to the genius of universal emancipation! All hail to the Union, triumphant over the Rebellion, triumphant also over a Usurpation which menaces the unity of the Republic! 474

Despite Senator Sumner's colorful arguments, and despite other efforts by advocates of the bill, the measure was not brought to a vote in the Senate because of a lack of the votes to pass it. 475

Opposition to railroad monopolies did not end with the federal opposition to the New Jersey railroad monopoly, however. As it turned out, the 1864 debate foreshadowed public hostility toward the railroads in the coming years. By the 1870s, the Grange Movement was formed by a group of farmers, who rallied primarily against monopolies and whose motto was, in part, the phrase "Down with monopolies." 476 The "Grangers," as they were called, were mostly opposed to the railroad industry, which had driven up the price of transportation for grain. Although the railroad companies were private companies and had not necessarily received exclusive privileges to operate railways, they did receive substantial benefits from the government, which helped them establish monopoly economic power. Indeed, railroad companies received "tremendous" government subsidies, including both state and federal land grants, vast eminent domain powers, special tax treatment, and government bonds. 477 These special benefits or privileges were well known both by Congress and by some members of the general public in the late nineteenth century. Railroads may well be natural monopolies, but the railroads in the United States had also received substantial government aid in securing the very land on which to lay their tracks. There was undoubtedly an element of crony capitalism at work in the building of the American railroads.

[\*1061] In the early debates regarding regulation of the railroad industry, speakers drew on several newspaper articles to support their positions before the House Committee on Commerce regarding the railroad industry:

"Sooner or later the people will understand their rights and will maintain them, if this is their government and not one of the railroad fools and rings."--New York Journal of Commerce.

"[The railroad companies] have been hedged in and protected on every side by statutes in their interests, while the people, who have nourished them until they have grown to the stature of giants, and in many cases the insolence and despotism of tyrants, are left almost wholly at their mercy. It is surely time that the people began to look after their own interests."--Rochester Morning Gerald, December 21,1881.

"No people in the world have welcomed the railroad era so joyfully as Americans; no other people have done so much, by land-grants and corporate aid, to build railroads. . . ."--Buffalo Express. 478

Special treatment for railroads was justified on the grounds that railroads provided a public benefit by enabling people and goods to be transported across the country, which was surely true. As for the railroad companies' eminent domain powers, takings of land on which to lay tracks were consistently upheld during the antebellum era because the land would be used for the public purpose of providing transportation, even though the direct benefits accrued to the private railroad companies. 479 But the Grange Movement's proposed solution to the railroads' vast accumulation of economic power was more regulation--and more government power--rather than less regulation and a more free-market solution. 480 The public came to think that the railroad industry in Europe was highly regulated from the early stages of its development, and that it did not suffer from the same rate-abuse problems as did the railroad system in the [\*1062] United States. 481 As a result, the Interstate Commerce Act was passed in 1887, primarily to regulate railroad rates.

The Grangers, however, along with many others during this period in American history, such as the Greenback and Anti-monopoly Parties, not only opposed the railroads, but monopolies in general. 482 This included the big trusts, such as the Standard Oil and U.S. Steel trusts. These groups feared that these trusts threatened liberty because they would corrupt politicians by seeking special benefits and government monopoly privileges. 483 The trusts did indeed benefit enormously from the very high protective tariffs which late nineteenth-century politicians enacted into law and which protected the trusts' industries from foreign competition. 484 The trusts sought, and received, from politicians a very high tariff during this era, which directly benefitted American manufacturers at the expense of consumers. 485 The trusts were also accused of both driving out competitors and driving up prices--thus hurting other businesses and consumers. 486 The Sherman Antitrust Act, passed in 1890, was largely aimed at prohibiting these kinds of privately established restraints on trade, as well as regulating the various railroad cartels. 487

In his landmark book critiquing the state of federal antitrust law in the 1970s, The Antitrust Paradox, Judge Robert H. Bork argued that the 1890 Sherman Act's primary aim was the promotion of consumer welfare. 488 Similarly, the original 1914 Clayton Antitrust Act and the 1914 Federal Trade Commission Act were both passed, according to Judge Bork, to reinforce the [\*1063] consumer welfare protections of the Sherman Act. 489 The concern in the Progressive Era with protecting consumer welfare called for prohibitions on predatory business tactics and on horizontal mergers aimed at creating monopolies and cartels. 490 Wide discretion was left to the courts to develop specific rules. 491 Another stated purpose of the Sherman Act's sponsor, Senator John Sherman, was to codify at the federal level the common law rule, which existed in many states, outlawing private contracts that operated as restraints on trade. 492 However, as Judge Bork points out, the common law doctrine on restraints of trade and monopolies had been quite "diverse" and "contradictory" and did not consistently promote competition. 493 For example, Senator Sherman relied on cases suggesting that the common law prohibited Standard Oil's railroad rebates, cartel agreements, and horizontal mergers aimed at the creation of a monopoly, while ignoring other cases that might have suggested a contrary conclusion. 494 That said, Senator Sherman and other supporters of the Sherman Antitrust Act of 1890 were quite clear about their version of the common law. 495 Judge Bork describes that version as an "an artificial construct, made up for the occasion out of a careful selection of a few recent decisions from different jurisdictions, plus a liberal admixture of the senators' own policy prescriptions." 496

The English Statute of Monopolies inspired, at least in small part, the Sherman Antitrust Act of 1890. For example, both the Statute of Monopolies and the Sherman Act gave common law courts the power to hear cases regarding alleged monopolies and provided for the same remedies: treble damages and costs to the aggrieved parties. 497 In addition, while arguing for passage of the law, Senator Sherman said that the trusts "smacked of tyranny, 'of a kingly prerogative', and a nation that 'would not submit to an emperor . . . should not submit to an autocrat of [\*1064] trade.'" 498 Recognizing, at least in part, that the government itself might be involved with the trusts' monopoly power, Sherman agreed that "[i]f the combination is aided by our tariff laws they should be promptly changed, and, if necessary, equal competition with all the world should be invited in the monopolized article." 499 It is doubtful that Senator Sherman was sincere regarding tariff policy, however; shortly after the Sherman Act was passed, he supported the highly protectionist McKinley Tariff in 1890, which raised the average duty on imports to nearly fifty percent!

The Sherman Antitrust Act did break with the traditional English and American concern about monopolies in one critical regard. By its plain language, the Act applies to all monopolies, regardless of their source: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 500 Nonetheless, notwithstanding a few rare cases involving governments outside the United States, 501 antitrust policy in the United States has been aimed primarily at prohibiting only private monopolies, which is ironic because the most effective monopolies are undoubtedly those that are backed by government power. In addition, under the current Parker doctrine, state-sanctioned monopolies today are immune from scrutiny under the Sherman Antitrust Act, in recognition of state sovereignty and the importance of federalism. 502 The Parker doctrine has rightly been critiqued as a "complete inversion of the proper approach." 503 As Professor Richard Epstein argues, "State-sponsored cartels in the aftermath of the New Deal legitimation are more permanent and more dangerous than privately-operated ones, but they are [\*1065] given complete immunity from the antitrust act. This is not the way we want the system to operate." 504

#### Restraints chill telemedicine---solves the aging crisis.

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B. LICENSURE OF PROVIDERS

Generally, medical professionals must be licensed by state authorities in every jurisdiction in which they wish to practice--they must have the requisite test score, pay the required fees, and wait for approval.81 This system of state licensure of healthcare providers is another barrier to interstate growth of telehealth.82

Each state has its own medical licensing authority, which sets its own rules \*320 and requires passing an examination.83 There are several widely accepted licensing examinations that need only be taken once to fulfill licensing requirements in most states. The United States Medical Licensing Examination, for example, is accepted in all U.S. states, though the passing score required varies.84 The application for licensure goes to the state medical boards and, pending no abnormal background or concerns, is typically granted in approximately 60 days.85

The traditional rule has been that the law of the patient's location applies.86 Therefore, if a doctor is licensed in California but is providing telemedicine services to a patient in ten other states, then the doctor is subject to all of those states' licensing laws and standards of care.87 The simplest and most impactful change would be to flip this rule, so that the physician's location is essential for licensure. This model has been used in other domains, but raises concerns about a “race to the bottom,” where physicians would seek out the jurisdictions with the least oversight.88 A reciprocity regime for states with substantially equivalent levels of oversight would solve this problem.

States have taken modest efforts to minimize the burden of securing multiple state licenses. A majority of states offer a consultation exception that allows out-of-state licensed doctors to practice in very limited situations without the specific state's license.89 This exception allows out-of-state licensed doctors to consult on patients provided that they work with or offer services at the request of an in-state doctor.90 This exception typically requires consultations to be infrequent or that the in-state doctors make the final medical decisions.91 These rules essentially require doctor redundancy. Another approach followed by nine states is to have special licenses related to telehealth.92 These allow doctors to provide services remotely across state lines, as long as they do not set up a physical office in the state.93

The Interstate Medical Licensure Compact (“IMLC” or “Compact”), which began issuing licenses in April 2017, is an agreement between 29 states and the 43 Medical and Osteopathic Boards in those states.94 The IMLC creates an expedited process for eligible doctors to apply for licensure in compact states, and it is intended to reduce time and difficulty for doctors seeking licenses in multiple states.95 According \*321 to the IMLC, “approximately 80 percent of doctors meet the criteria for licensure through the IMLC.”96 Once qualified, the doctor may select any number of Compact states in which they desire to practice.97

A compact permits states to maintain agency over their licensing procedures while providing medical professionals an expedited process to gain medical licenses.98 These are not, however, cross-border licenses.99 The Compact still requires that a medical professional apply for license in each state in which they wish to practice, which is less efficient than automatic reciprocity of a potential uniform law, or a federal solution.100 Contrast the doctor IMLC with the Nurse Licensure Compact, which is more like a “multi-state license similar to a driver's license, where the license is recognized in the home state and other compact member states,” without making further applications.101

Notwithstanding these avenues of reform, many states continue to restrict healthcare providers from practicing telemedicine by requiring a full license in the state of service.102 These states often define “the practice of medicine broadly to include phone calls, e-mails, and on-line discussions, circumscribe[ing] the use of the new technology.”103 To the extent that these state licensing laws are designed to favor local providers, they may arguably be subject to challenge under the dormant commerce clause of the U.S. Constitution,104 or under federal antitrust laws.105 Regardless, Congress should consider affirmatively preempting them as hindrances to interstate commerce and federal spending, such as Medicare. Likewise, Congress preempted state doctrines around corporate practice of medicine, to the extent that they interfere with the work of Health Maintenance Organizations (“HMOs”).106

Similar to when and how a healthcare relationship should be established, states may claim that strict licensure laws improve standardization and quality of care,107 but if the benefit is slim, then it may not offset the chilling effect of the on cross-border practice, and hence, provider participation and patient access. In fact, state licensure laws do not vary substantially, and a more ambitious alignment seems to be a promising path forward.108

C. REIMBURSEMENT OF COSTS

\*322 In this section, we describe current approaches by insurers, including Medicare, Medicaid, and private carriers, to reimburse for telehealth services. We discuss related state laws, and suggest how to optimize reimbursement for greater telehealth adoption.

On the private payor front, 40 states and the District of Columbia have laws governing reimbursement for telehealth.109 These laws either require coverage parity, which ensures that a service is reimbursed if provided through telehealth, or payment parity, which ensures that reimbursement is at the same rate as when care is delivered in-person.110 If the policy goal is to increase use of telehealth, then payment parity can reassure doctors that telehealth will not undercut their revenues. However, payment parity laws can defeat the policy advantage of telehealth to reduce costs.111

Because the majority of states have private-payer reimbursement laws of some sort, the current practice is to amend a law to expand its applicability to additional specialties.Minnesota, for example, did this when it expanded its private-payer law to cover dental coverage, while Utah's expansion singles out telepsychiatry services,112 and Washington allows telemedicine to be offered from “any location determined by the individual receiving the service.”113 It is important to question whether these private-payer laws are necessary to expand reimbursement efforts given increasing market demand. A Milbank report documented interviews in six states that did not have parity in payment laws, yet found that almost all private health insurers covered telehealth services and paid the same rate as in-person services.114

The aforementioned expansion of MA plans to cover telehealth could be an excellent natural experiment to compare before and after 2020. The clear implementation date could determine whether and how much reimbursement changes are improving overall utilization, access to care, better health outcomes, and lower costs when compared to the traditional Medicare population, in essence the control group. Comparisons between states may also be striking as most MA enrollees, forty percent, reside in six states (Florida, Hawaii, Minnesota, Oregon, Pennsylvania, and Wisconsin) and Puerto Rico, and, by contrast, rural states have lower rates of MA enrollees.115

MA's expansion into the telehealth may create additional market pressure for private insurers (who often also administer MA plans) to voluntarily reimburse for telehealth services. Traditional Medicare may follow the pathway that MA is starting with a bipartisan bill that was reintroduced on October 30, 2019 entitled Creating Opportunities Now for Necessary and Effective Care Technologies “CONNECT” for Health Act, which is currently pending in the Senate Finance Committee.116 This bill would reduce geographic and site-specific requirements for traditional Medicare so \*323 that these beneficiaries would also receive telehealth delivered care directly in their homes.117 This pending legislation could make an enormous impact on telehealth utilization nationwide where the pool of patients would surge to nearly 60 million people.

The MA move may also influence Medicaid, especially as the largest payor for long-term care in America. There are over six million older adults on Medicaid who have both Medicare and Medicaid coverage (aka “dual-eligibility”), and this is largely attributable to them going through their savings paying for some form of long-term care.118 In an effort to extend personal finances, a phenomenon of “aging in place” is gaining primacy as the preferred long-term care model, rather than a nursing home or institutional setting.119

Telehealth coverage and reimbursement in state Medicaid programs vary considerably. Almost all states (49) and the District of Columbia have some coverage for telehealth, and nearly all reimburse for live video telehealth.120 Some state Medicaid programs impose restrictions such as limits on the sort of facilities where telehealth care can be received, by what type of healthcare provider, and geographic restrictions.121 As of 2016, eight state Medicaid programs reimbursed for telehealth under their home health services, but this number more than doubled to 19 states by 2019.122 Patients are eligible for these Medicaid services if they have two or more chronic conditions, one chronic condition and are at risk for a second, or have one serious and persistent mental health condition.123 Given the prevalence for chronic conditions and mental health among older adults, as previously discussed, many will be able to meet the eligibility requirement.124

States are removing some of these restrictions, for instance, the majority of state Medicaid programs no longer have rural requirements that must be met for telehealth reimbursement.125 Additionally, a number of states are demonstrating innovative efforts with funding support from the federal government, namely through grants and waivers for home health programs.126 With the consent of the U.S. Department of Health and Human Services, Alabama, Iowa, Maine, New York, Ohio, and West Virginia have all used state plan amendments that include telehealth coverage in their home health proposals.127 Similarly, Kansas, Pennsylvania, and South Carolina have used waivers to cover remote patient monitoring for long-term care services.128

Across all these domains of insurance, the quick expansion of telehealth coverage may be worrisome if it forces patients who would otherwise prefer an in-person visit to only have access to care via telehealth. One option to help curtail this \*324 issue is for insurance regulators to require that insurers maintain an in-person option for members. Nonetheless, such insurance mandates may wreak inefficiency, if they do not reflect consumer preferences.

CONCLUSION

Telehealth is increasingly important to the future practice of medicine, but poses a unique set of challenges for state lawmakers as they attempt to navigate interstate practice. Additionally, state and federal lawmakers are being confronted with how to provide high-quality, affordable care for an aging population that will live for an average of two decades with multiple chronic conditions.129

It is clear that law plays a substantial role in how quickly telehealth operators can achieve the scale necessary to provide care for an older population in their homes. Fortunately, state licensure laws are actively reducing some of the administrative burdens that had limited cross-border practice with support for an interstate compact.130 But much more can be done on this front; the fragmentation of state-based licensure likely does not promote quality or efficiency compared to a unified or seamless system. Furthermore, the CMS rule to allow MA plans to reimburse for care received in the home is an essential move for telehealth to suddenly reach a much broader and older population where utilization has been disproportionately low compared to other age groups.131 This federal-private insurer effort combined with the work already underway via state Medicaid programs should continue nationwide growth for telehealth adoption.

An area that continues to remain variable across states is the establishment of a healthcare relationship. The position of the AMA and the states that follow it reflect a presumption that in-person interactions should remain the baseline for healthcare standards. Also discussed, to require an in-person visit for patients who cannot leave their homes without substantial difficulty, and for conditions where the standard of care would not require a physical exam, seems unnecessarily onerous and costly for all parties. A more flexible, forward-looking approach would be for lawmakers to allow alternatives or exceptions that recognize telehealth's unique capabilities and the patients that would most benefit from this form of care.

#### Extinction

Ivaylo Vladev & Rositsa Vladeva 20, Konstantin Preslavsky University of Shumen, Faculty of Natural Sciences, “The Demographic Problem - One of the Main Problems of Contemporary,” Acta Scientifica Naturalis, vol. 7, no. 2, Sciendo, 07/01/2020, pp. 158–171

The aim of the present study is to analyze the essential features of the global problems of the contemporary stage in the development of human society and to highlight the place of the demographic problem as an objective factor for the existence of modern civilization.

To realize the goal it clarifies the criteria for determining a problem as a global one and makes classification of the global problems from a geographic point of view. It identifies the causes for the demographic problem, analyses and specifies its different dimensions at the global, regional and national levels.

Materials and Methods

In order to study the processes of globalization and the specific features of the demographic problem, comparative analysis, content analysis and quantitative methods are applied. In order to clarify the criteria for determining a given problem as a global one, methods of systematization and classification from a geographic point of view are applied.

Results and Discussion

One of the essential characteristics of the modern development of the society is its globalization. It is known as international integration on a large scale in all areas of economics, culture and society. The processes of globalization should be explored in the context of the relationship of the planetary problems with some aspects of economic and social life on a global, regional and national level [2].

Globalization is a complex process that provokes many controversies, but also determines the overarching changes in our times. According to U. Bek, „globalization is certainly the most commonly used - the wrongly used - and the most rarely defined, probably the most vague, the most fuzzy and the most politically influential word in the last but also in the coming years“ [1, p. 42]. Most researchers regard globalization as an inevitable process of forming common principles of current civilization development and common criteria for the qualitative assessment of the development.

We can therefore accept globalization as a complex integrative process, characterized by the following main features:

- universality - a tendency towards integration of all economic, social, political, cultural, environmental and demographic processes in their entirety and interdependence;

- democracy - engaging and actively participating in the process of globalization of all social strata;

- spontaneity - absence of an external source as a special moderator;

- chaoticity - inconsistency of the ongoing integration processes and presence of random fluctuations.

Globalization is a phenomenon, but it is not an ideal process as well as its results and it affects differently individuals, social communities, countries, regions, and the planet as a whole. It has its positive and negative consequences, encompassing socio-economic, demographic, natural-geographic processes, transforming human relationships into a state of globality.

Globality as a problem is also associated with the global problems of civilization. During its development the human society frequently encounters complex problems originating from its local nature and cover significant parts of the globe. According to P. Lakov, „the global problems are provoked by the chronological unity and the rapid rate of destruction of the balance between nature and society and should therefore be considered as an undivided system of dynamically changing interdependent phenomena in the space“ [3, p. 24].

The global problems of the contemporary stage of the development of the world civilization are already fully manifested in the second half of the 20th century, but from the end of the 1990s to the present day as a result of the introduction of the new information and communication technologies and the enhanced processes of economic and political integration a kind of „globalization boom“is observed. Therefore, the studying of the global problems is necessary to take into account both the general patterns and trends in the development of the world economy, as well as the action of the social factors of development, including the rapid growth of the population of the planet, the strengthening of interaction and interdependence between states.

According to their origin, the global problems are the result of the processes of globalization that are taking place in today's world and play the role of drivers for the development of the world system. Because they arise from the functioning of the global systems and their interaction, they can not be considered in isolation, but their unity and interrelation must be taken into account.

The global problems are wide ranging and continually create hazards for the existence and development of human society. The world of the 21st century inherited from the 20th century poverty, economic problems, resource shortages, mass diseases and nationalism and religious fanaticism, dozens of „hot spots“ and international terrorism. The old dangers in the form of weapons of mass destruction are complemented by new ones.

Though diverse in nature, the global problems have a common specificity that separates them from the other processes and phenomena in world development and they are distinguished by certain features:

- they endanger the future of all human civilization;

- they are an objective factor for the world development;

- targeted and coordinated actions of much of humanity are needed to overcome them;

- failure to resolve them can lead to serious and irreversible consequences for the whole of humanity. Some authors believe that the global problems are the result of the following inconsistencies:

- between the unlimited production factors entering the system „technically“ and the limited reproduction capabilities of the system of nature;

- between the „industrial“ system widely used in the technics and the other „small craft“ and „,partly craft“ system under the name „human“;

- between the unique products of the „classical culture“ and the unrestricted circulation of „mass culture“ products;

- between the global balances according to which the stability of processes in nature and society depends on the degree of their balance [4, p. 280-281].

The territorial character of the global problems could be pointed out as their specific feature. Geographically they cover the whole of the world, but at the same time they are manifested at the regional level as well, with local indications in different countries. This proves the relationship between the categories: „common“(global) – „special“(regional) – „individual“(local).

In order not to identify the public, regional and local problems with global ones, it is necessary to specify criteria that can define a given problem as a global one (Figure 1).

[FIGURE 1 OMITTED]

It should be noted that these criteria together can only establish the global nature of a given problem, because each of them can not be a decisive factor. At the same time, we must emphasize the high dynamism of every global problem caused by the combination of many different factors and their state in specific historical conditions and geographic regions.

There is a wide variety of views regarding the classification of global problems: depending on their severity, the time of their emergence, their nature, the actual real dependencies between them, the sequence of decision-making to overcome them, etc. Their grouping according to certain attributes helps to identify the existing links, to specify the priorities, to determine the degree of exacerbation of objectively existing global problems and to rank the sequence of the actions for their solution.

In order to realize the purpose of the study and to clarify the essence of the global problems, an attempt was made to create a geographical classification. Without claiming to be exhaustive, we formulate fourteen global problems on the basis of their relevance, severity and importance. They are grouped into three large groups depending on the spheres in which they appear and prove the trinity of nature – man – society. Accordingly, the groups are geodemographic, population-related; natural-geographic, arising from the components of the natural environment and socio-economic, related to the economy, the social sphere, the culture, the social development (Figure 2).

Based on the classification, the following conclusions can be made:

- Global problems increase their number and sphere of manifestation;

- The greatest number of global problems (1/2 of all classified) occurs in the contact areas of interaction;

- Regardless of the conditional and relative nature of the proposed classification, the occurrence of the global problems is in close interdependence and interrelation;

- Most of the global problems has a complex nature because they occur under the influence of two (3, 4, 6, 8) or three main groups (2, 5, 7);

- Due to their complex nature the global problems require a system of comprehensive measures to resolve them.

From these examples it can be summarized that the assignment of one or another problem to a given group is conditional and depends on the criteria of partitioning, the degree of relevance of the individual problems and the regional view of the authors on them. Therefore, the proposed classification should be seen not as a definitive solution to the issue but as a possible way of reconstructing the complex system, helping to better understand the essence of the interrelations between the global problems.

[FIGURE 2 OMITTED]

1. Demographic

2. Food-related

3. Healthcare problems

4. Educational problems

5. Preservation of world peace

6. Problems of international security

7. Ecological

8. Depletion of natural resources

9. Global warming

10. Water-related

11. Global catastrophes and natural disasters

12. Socio-economic conflict between poor and rich countries

13. Social inequality

14. Spiritual and moral crisis of humanity

Every global problem should be seen from three main points: what is the present situation, where, how and why the situation has become dangerous and how we can try to change it for the better by applying different strategies. The choice and the decision depend to a great extent on the social-ethical and moralhumanistic norms created in society, which is also the goal of its development [5, p. 12].

It is known that the problem is a scientific or public issue that has to be investigated and solved. It is caused by a certain inconsistency in the course of a natural, social or demographic process, the carrying out of some human activity and the lack of the expected result.

The demographic problem is a leading among the global problems of our time, because its emergence and solving influence the solution of food problems, the environmental problem, the preservation of the world peace, the problems of the international security, the health care and the education.

Demographic problems arise in the reproduction of the population and the level of compliance of resources for the development of humanity and of individual peoples and societies. The main criterion for assessing the course of demographic processes is the ability to carry out normal and appropriate reproduction of the population according to the conditions and resources. Demographic development is not limited only to the process of increasing the number of inhabitants of the planet, but also includes the problems of increasing population in relation to the natural resource potential of the territory, the condition and quality of the environment, hindering the food supply of the population, urbanization, inter-ethnic relations, refugees, lack of employment. All this proves that the interrelations between demography, economy and politics are complex and multilayered.

Therefore, the demographic problem is the mismatch between the level of socio-economic development, the resource availability for the economy, food and commodity production and population growth. Generally speaking, the demographic problem is that the population is rapidly growing due to the high fertility rate and life expectancy, the shortage of natural resources and production capacities for food and consumer goods.

Today, the effects of relative and absolute population growth become so topical that they are becoming a global problem. The dynamics of population growth in the world, presented in Table 1, is very distinctive.

The point of 1 billion is exceeded at the beginning of the 19 century. While the first doubling after 1810 required 110 years, the second one was in 40 years (1920 – 1960), the third one in 14 years (1960 – 1974) and the last one in 12 years (1999 – 2011). For the last 18 years, the population has increased by more than 1.5 billion and 94.5% of the growth is in the developing countries and only 5.5% of the developed ones. At the end of 2017, the world population reached 7.5 billion.

[TABLE 1 OMITTED]

The rate of population growth is the rate at which demographic indicators change. The highest rates of population growth in the world occurred in the 1970s and 1980s – about 2% average annual growths. Then they began to decline and in the first decades of the 21st century they were set at 1.2%. It is expected that in the middle of the 21st century they will increase again to 2.8%.

According to estimates of UN experts, the world population by 2025 will reach 8.2 billion, by 2040 – 9.2 billion, by 2050 – 9.7 billion and by 2055 – almost 10 billion. Population growth, according to the expected trends for this period, will be formed by developing countries in a ratio of 97: 3.

Much or little is the present world population of 7.5 billion people? The world population itself, however significant, can not be considered as large or little, isolated from the natural and human resources and the established political and socio-economic conditions.

Scientists maintain two different opinions and carry on intensive discussions. Some of them believe that the Earth is still far from absolute overpopulation and unlikely to reach it. Another part of them believe that the Earth is already overpopulated. Reason for this opinion is the misery, malnutrition and hunger, avalanche escalation of environmental problems in overpopulated areas.

Very often, population growth is seen as one of the factors not only hindering the fulfilment of life needs, but also threatening the viability of human civilization. Together with the increased consumption of natural resources, technical and energy equipment, the amount of waste resulting from human life and production activity is constantly increasing. Moreover, the socio-demographic situation in developed and developing countries is diametrically opposed, denoted by the term „demographic division of the world“.

In different countries and regions, the demographic problem has different dimensions. In developed countries, the demographic problem is mainly reflected in the aging of the population and the reduction of human resources for the economic development of the countries. In developing countries, the demographic problem is reflected in a predominant increase of the population to the basic necessities of life and the occurrence of significant difficulties in feeding the population, its health care and the development of education. The extent and the nature of the demographic problem in individual countries depend to a large extent on their socio-economic development and the stage of the demographic transition they are on. At a regional and national level, demographic problems, depending on the type of reproduction of the population, have different dimensions – demographic explosion, demographic stagnation and demographic crisis. Human development across individual regions and countries is assessed through the two problems – a demographic explosion and a demographic crisis.

The rapid increase in population in the world, in a particular geographic region or in a particular country is defined as a demographic explosion. It is characterized by a high birth rate, a sharp drop in mortality, and especially child mortality and increased life expectancy. This is an unfavourable demographic situation because it reduces the opportunities for most people to feed, the opportunities for health care, education, jobs, etc.

The accelerated growth of the world population is now predominantly determined by the developing countries. Due to the high relative share of the population at sub-working age (1/4 of the population up to 16 years old) these countries will preserve the high growth rate of their population. Demographic explosion has a restraining effect on the country and region's development prospects. It is characteristic for the most countries in Africa, some countries in Asia and Latin America. At present the epicentre of the demographic explosion is in Africa.

High birth rate is the main prerequisite for triggering the demographic explosion. It, under the conditions of decreasing mortality, ensures the large population growth. The most significant birth rates occur in the continent of Africa and mostly in the West, Central, East and partially in South Africa.

In 2017, 43 African countries had birth rates above 30‰. The highest figures are in Niger (50‰), Chad (48‰), Angola (46‰), Democratic Republic of Congo (46‰), Central African Republic (45‰), Mozambique (45‰), Mali (44‰), Somalia (44‰), Burkina Faso (44‰), Burundi (43‰), Zambia (43‰) and others. The countries in Asia are with high birth rates too. 5 of them have a birth rate above 30‰: the Democratic Republic of Timor – Leste (36‰), Afghanistan (34‰), Yemen (33‰), Tajikistan (33‰), Iraq (31‰); and in 34 of them the birth rate is between 20 and 30‰. Haiti, Bolivia, Guyana and Guatemala in Latin America have a birth rate of between 25 and 30‰.

The decreasing overall mortality is the second most important prerequisite for the demographic explosion. It is mainly due to the development of healthcare and medicine and to the raising living standards of the population. Under this influence is the mortality rate in most European countries, East Asia, North America, the Gulf region (Oman, UAE, Qatar, Bahrain, Kuwait, Saudi Arabia). Decreasing mortality rate in these countries leads to an increased average life expectancy and aging of the population. The lower mortality rate in a number of countries is due to the age structure of the population with a strong predominance of younger generations (25-30% of the population up to 16 years old) and is denoted by the term „demographic spring“. This applies to most African countries.

The mortality rate is in close relation with the average life expectancy. The latter grows almost continuously. This is due to the increased living standards, the way of life and the improvement of health care.

According to UN data in 2017, the expected average life expectancy in the world is 69 years, for men 67 years and for women 71 years [6]. The highest average life expectancy is in the developed countries: Monaco (89.4 years), Japan (85.5 years), Singapore (85.5 years), Iceland (83.1 years), Israel (82.7), Switzerland (82.7), Malta (82.7 years), the Republic of Korea (82.5 years), the Australian Union (82.4 years), Italy (82.4 years), Luxembourg (82.4 years) and others.

Geographical regions with the highest average life expectancy are Western Europe and North America. For men, life expectancy is the highest in Monaco (85.5 years), Singapore (82.8 years), Japan (82.2 years) and Iceland (80.9 years). Women have the highest life expectancy in Monaco (93.4 years), Japan (89 years), Singapore (88.3 years) and Republic of Korea (85.8 years). The lowest life expectancy is in the poor African and Asian developing countries, such as Mozambique (54.1 years), the Central African Republic (53.3 years), Somalia (53.2 years), Zambia (53 years), Lesotho (53 years) and Afghanistan (52.1 years). Decreasing child mortality in developing countries and the high birth rates have an impact on the population growth and hence on the demographic explosion. At the end of the 20th century, child mortality in the world was about 54‰ and in 2017 it declined to 32.9‰. Thus, while in 2000 the continent with the highest child mortality rate in the world, Africa, it ranged from 87‰ (West Africa) to 140‰ (Central and Eastern Africa), in 2017 there was no African country with child mortality over 100‰.

Today, it varies in a wide range from 20 to 93‰ and decreases as a result of measures to combat diseases, hunger and malnutrition and to improve healthcare. Over the last decades, the child mortality rates in Arab countries rapidly decrease, especially in the Persian Gulf region (below 8‰), where it has reached the level of the most developed countries.

Analyzing the demographic situation in the world in the context of the demographic explosion, we should note that the larger population has a stronger impact on the environment and increases the „demographic burden“ on the territory.

It is simultaneously influenced by several factors: the absolute population growth, the extent of consumption (lifestyle, income, and infrastructure development), the social inequality of the population, and the level of technology used. The development of the modern economy requires the use of an increasing amount of natural resources. The acuteness of the problem is related not only to the depletion of the limited resources, but also with the nature of their impact on the environment during use. The increase of the population in the world and its migration intensify this impact by preventing the stabilization of the unemployment problem; make it difficult to solve the problems of education, healthcare and social welfare. Consequently, any socio-economic problem includes a demographic problem as well.

Decreasing the population in a particular geographic region or country forms the situation of a demographic crisis. It is due to low birth rates, average mortality rates, aging of the population, negative or zero natural growth and shortage of labour resources.

As a global problem it is still considered the demographic explosion, not paying due attention to the upcoming demographic problems as depopulation, narrowed reproduction of the population and its aging, which will cause irreversible negative social and economical problems and demographic crises, especially among the small nations.

The aging of the population forms an unfavourable demographic situation, consisting in increasing the number and relative share of people in over-working age, reducing the number of people in sub-working age and limiting the labour resources. It is especially distinctive for most countries in Europe, Japan and others.

The aging of the population is characterized by the average age of the population (a characteristic of the age structure of the population, which is calculated as a weighted average value of the population in all age groups). It reveals the level reached in the process of population aging in the world and countries.

In 2017, the average age of the population in the world is 30.6 years. It ranges from a low age of 15.5 to 16 years in the African countries of Niger, Mali, Chad, Uganda and Angola up to 43 years or more in some European countries and Japan. The countries with high living standards and high life expectancy have the highest average age like Monaco (53.8 years), Japan (47.7 years), Germany (47.4 years) and Italy (45.8 years). The high average age is a feature of countries with a very high level of emigration of young people, such as Slovenia (44.2 years), Lithuania (44), Latvia (43.9 years), Croatia (43.3 years), Bulgaria (43 years), Estonia (43 years) and others [6].

Thus, the relative share of the population in over-working age in 2025 in these countries will account for over 1/4 of the total population, which will cause significant losses for health care and social security. At the same time, the birth rate in most economically developed countries can no longer provide for simple reproduction of the population. This process is called „demographic winter“.

The phenomenon of the demographic crisis is primarily centred on the countries of Eastern Europe and is not yet typical for the developed countries. It becomes topical to the researchers of the population from the mid-1990s when the most unfavourable parameters of the demographic situation are reached – very low birth rates, high total mortality and high mortality in the individual age groups, old age structure, emigration, high unemployment, etc. About 80% of the natural population growth of the EU member states since 1994 is due to emigrants. According to demographic projections, almost all countries in Europe are expected to be covered by a demographic crisis in 2025.

The demographic crisis has its strongest manifestations in countries like Bulgaria, Latvia, Lithuania, Estonia, Hungary, Romania, Croatia and others. It is due to the negative natural growth and mass emigration of young population to Western Europe and North America. The term „demographic crisis“ can be interpreted as a profound violation of reproduction of the population. In 2017, Lithuania (14.8‰), Bulgaria (14.5‰) and Latvia (14.5‰) are at the top of the world's highest mortality rates, followed by Ukraine (14.3‰), Serbia (13.6‰), Belarus (13.2‰) and others. The lowest birth rates are in Japan (7.5‰), Puerto Rico (8‰), Portugal (8.2‰), Greece (8.3‰), Bulgaria (8.5‰) 5‰), Germany (8.6‰).

Since the beginning of the 21st century, the continent of Europe has a negative natural growth, with the highest negative figures being in Bulgaria (-6‰), Lithuania (-5‰), Latvia (-4.9‰), Serbia (-4, 7‰), Ukraine (-4.2‰), Hungary (-3.9‰), Croatia (-3.6‰). Thus, due to the low birth rates and high mortality, there is a disruption of the normal reproduction of human generations. The demographic crisis naturally reduces the population of a given country or region to a different extent, with a severe disruption of the basic demographic structures.

The demographic crisis is characterized by the fact that the real growth (the total value of the natural and mechanical growth) of the population in these countries is negative and forms a reduction of the population. In 2017, the reduction of the population is most pronounced in Lithuania (-11.1‰), Latvia (- 11‰), Moldova (-10.8‰), Bulgaria (-6.3‰), Estonia (-6‰), Croatia (-5.3‰), Serbia (-4.7‰), Ukraine (- 4.2‰), Romania (-3.5‰), Montenegro (-3.4‰), Hungary (-2.6‰), Belarus (-2.5‰) and others. The reduction of the population in each of these countries is not only related to higher mortality rates and lower birth rates but also to the significant emigration rates. The demographic crisis exists in Puerto Rico (-16‰) and Lebanon (-11.3‰) and the European countries Germany, Poland, Italy, Portugal, Greece are entering the crisis as well as Japan in Asia.

Many countries in the world are characterized by demographic stagnation. Its typical feature is maintaining the constant population. The actual growth is zero or around zero. This demographic situation is formed at and is characteristic for countries on different stages of demographic transition and different levels of socio-economic development. This group includes mainly developed countries with almost zero natural growth and a positive mechanical population growth, such as Austria, the Czech Republic, Slovakia, Slovenia, Finland, Spain and others.

The indicated negative trends in population development cover all developed and highly developed countries. The consequences for the society and the demographic systems in the developed countries are similar, but they vary in intensity over time. As the demographic crisis in these countries is largely blunted by immigration and increasing the average life expectancy.

Conclusions

Based on the report we can formulate the following results:

- The processes in the globalizing world are generating the global problems of today. They act as driving forces in the development of the world system.

- On the basis of their relevance and significance, in order to prove the trinity of nature – man – society, fourteen global problems are formulated in three large groups, depending on the spheres in which they manifest.

- Problems related to the dynamics of the human population affect the whole world and in some parts of the planet there is overpopulation, which can lead to depletion of natural resources as well as poverty and malnutrition.

- Global efforts to resolve the global demographic problem are contrary to the interest of countries that have unfavourable demographics including Bulgaria.

- There are countries with decreasing birth rates and increasing life expectancy everywhere in the world. The aging population leads to higher healthcare and pensions costs, and the number of workers and tax payers is steadily decreasing. As a result, these countries are at risk to become „demographic bombs“ which means a crisis due to too few people working.

- The demographic picture of the world is highly contrasting and moves between the two extremes - a demographic explosion and a demographic crisis. The factors that determine it affect the socio-economic development, income distribution, employment, unemployment, social security, health care, education, housing and the sources of water, food, energy, raw materials as well as environmental conditions and climate change.

- Stabilizing the population of our planet and resolving the demographic problem in the future is not an end in itself but a means of improving the lives of the present and future generations.

### 1NC---OFF

#### The Court will decline to overturn abortion precedent now---it hinges on a centrist bloc cajoled by Robert’s political capital.

Robinson ’21 [Kimberly; June 18; Reporter; Bloomberg Law, “Barrett Channels Roberts’ ‘Go-Slow’ Approach in Landmark Cases,” <https://news.bloomberglaw.com/us-law-week/barrett-channels-roberts-go-slow-approach-in-landmark-cases>]

The U.S. Supreme Court’s newest justice is showing signs that she’s more aligned with John Roberts and Brett Kavanaugh in the center than she is with her other conservative colleagues, refusing to support broad rulings that could shake the court’s credibility.

Amy Coney Barrett is “starting to show her stripes” as a moderate who prefers small movements in the law, not huge shifts, South Texas College of Law Houston professor [Josh Blackman](https://www.stcl.edu/about-us/faculty/josh-blackman/) said.

The justices handed down victories to both liberals and conservatives on Thursday saving the [Affordable Care Act](https://www.supremecourt.gov/opinions/20pdf/19-840_6jfm.pdf) again but siding with a religious group in the latest battle over [LGBT protections](https://www.supremecourt.gov/opinions/20pdf/19-123_g3bi.pdf).

Roberts, the chief justice, is viewed as an institutionalist who wants to conserve the public’s confidence in the court. So far, he favors incremental shifts in the law. “That’s been one of the Chief’s primary goals all along,” said Case Western Reserve law professor [Jonathan Adler](https://case.edu/law/our-school/faculty-directory/jonathan-h-adler).

He recently gained an ally in Kavanaugh in this pursuit, and it appears Barrett may join their ranks.

The court as a whole has has largely agreed in cases this year. The unanimous decision in the LGBT case was the 25th time the justices were unanimous in 41 rulings so far this term. There are 15 to go in coming days.

But the big test for Barrett will be next term starting in October when the justices will tackle hot-button issues like guns, abortion, and possibly affirmative action.

“It is a very conservative Court, even if we will only get glimpses of it this year,” said UC Berkeley law school Dean [Erwin Chemerinsky](https://www.law.berkeley.edu/our-faculty/faculty-profiles/erwin-chemerinsky/).

Kicking the Can

Both the Affordable Care Act and LGBT rulings were “very, very narrow,” Georgia State law professor [EricSegall](https://law.gsu.edu/profile/eric-j-segall/) said.

In the Obamacare case, California v. Texas, the 7-2 majority handed down a procedural ruling to avoid undoing the landmark 2010 law. The justices said red states led by Texas didn’t have a legal basis—or standing—to challenge it.

Only Justices Samuel Alito and Neil Gorsuch would have voted to gut the act, long a priority of Republicans.

The LGBT ruling, while unanimous in its outcome, was splintered in its reasoning. Hiding under the 9-0 breakdown was a dispute about whether to overturn the court’s divisive ruling in Employment Division v. Smith, which sparked the passage of the bipartisan Religious Freedom Protection Act and mini state versions across the country.

The court in Smith refused to require an exception from Oregon’s prohibition on peyote, saying religious objectors don’t get a free pass on “generally applicable” laws.

On opposite ends in the court’s LGBT ruling were the liberal justices—Stephen Breyer, Sonia Sotomayor, and Elena Kagan—along with Roberts, who wanted to uphold the court’s precedent in Smith, and the court’s most conservative members—Clarence Thomas, Alito, and Gorsuch—who wanted it overruled once and for all.

In the middle was Barrett, joined by Kavanaugh, who acknowledged Smith‘s shortcomings but was concerned with the fallout should the court overrule it. “Yet what should replace Smith?” Barrett asked in a short concurrence.

Both cases were a punt, Blackman said, with the issues likely to return to the court at some point in the future.

End of the World

But the ACA and LGBT cases, along with the extraordinary agreement all term, suggests a majority of the justices don’t think it’s the right time to make major changes in the law.

“In the throes of everything"—the pandemic, Barrett’s first term, Kavanaugh’s biting confirmation, calls for Breyer to retire, and the caustic 2020 presidential election—"they didn’t want to shock the world this year,” Segall said.

“Preserving the court’s own political capital is incredibly important to the justices because they know their only capital is the confidence of the American people,” he added.

Adler said the court has developed a sort of 3-3-3 split—that is, three liberals, three conservative justices willing to chuck precedents they don’t agree with, and three conservative justices hesitant to overturn cases they may disagree with. Roberts, Kavanaugh, and now, apparently, Barrett make up that last group.

Adler said that split will create some interesting pressures for the three justices in the middle next term, when—as Segall said—"the world will end.”

The end of the world was a reference—in part—to the court’s abortion case, which could call into question the landmark ruling in Roe v. Wade and later cases.

#### Antitrust expansion is judicial activism---crushes capital and legitimacy.

Yoo ’17 [John; 2017; Professor of Law at the University of California at Berkeley, Visiting Scholar at the American Enterprise Institute; University of Chicago Law Review, “Taming Judicial Activism: Judge Robert Bork's Coercing Virtue,” vol. 80]

Judge Bork describes that as law crosses borders, judicial activism spreads with it.11 He sees both phenomena as two sides of the coin, where the legalization of global affairs encourages judges to impose their own policy preferences.12 Extending a theme that runs consistently through his work on antitrust and constitutional law, Bork argues that judges possess neither democratic legitimacy nor special expertise to incorporate international norms. 13 Anyone who cares about democratic accountability should pay attention when unaccountable judges use judicial review to advance policy goals that would never survive at the ballot box. 14 Naturally, Bork does all this in his characteristically acerbic style.

Coercing Virtue is noteworthy for challenging internationalists-those who favor automatic American adoption of international law-on their own turf. Judge Bork does not only rely on the intentions of the Framers of the Constitution. He also looks at jurisprudence abroad to evaluate judicial decisions at home. Coercing Virtue is a comparative study that examines the convergence of judicial activism in the United States, Canada, and Israel.15 It shows that a dialogue among legal elites in these countries has led to both the import and export of judicial activism. 16 Judicial activism, indeed, has gone global.

Coercing Virtue influenced my work. In Taming Globalization, Professor Ku and I build on Judge Bork's legacy by examining globalization's effects on American constitutional law.17 We argue that globalization has placed pressure on federalism and separations of powers. 18 Like Judge Bork, we find several recent Supreme Court cases in the field wanting, particularly those relying on international and foreign legal sources as authority.19 To preserve the American bedrock principle of popular sovereignty, we argue for rejuvenating non-self-executing treaties and limiting Missouri v Holland.20 These foreign-affairs doctrines would limit judicial discretion and place the authority to adopt international law in the elected branches of government. Where Coercing Virtue diagnosed the problem, we hoped to identify solutions for the American constitutional and political system.

II. The Antidemocratic New Class

Coercing Virtue goes beyond the analysis of doctrine to seek the political underpinnings of the movement toward judicial activism on a global scale. Judge Bork takes issue with the cultural left, which he believes has commandeered the courts to advance its policy agenda.21 Members of the New Class, as Judge Bork calls it, "traffic, at wholesale or retail, in ideas, words, or images and have at best meager practical experience of the subjects on which they expound."22 According to Judge Bork, the New Class possesses an "impulse toward socialism" that manifests itself in both economic and cultural aspects of life.23 Because the New Class often operates as a political minority in individual countries, it must find ways to circumvent the results of elections.24 The judiciary makes for an ideal weapon because it allows a minority to win policies that cannot command majorities of the electorate.25

If confined to the ivory tower, socialist programs would pose little danger. But, Judge Bork argues, activist judges have taken up the New Class's agenda.26 Without any authority to make political choices, the courts must invent constitutional meaning to advance the cause of the New Class.27 Activist judges, he explains, "decide cases in ways that have no plausible connection to the law they purport to be applying, or [ ] stretch or even contradict the meaning of that law."28 "They arrive at results by announcing principles that were never contemplated by those who wrote and voted for the law."29

The critical question for conservatives is, why do judges adopt the New Class's agenda in the first place? Even if judges have discretion to choose between adopting an international law norm or not, they could always choose to defer to the political branches. It is here that Judge Bork's foray into political science and sociology becomes necessary. Lawyers and judges, he believes, have fallen sway to the siren song of the professoriate.30 Indeed, judges are "certified members of the intelligentsia," having passed through its training grounds of colleges and law schools.31 "The prestige of a judge depends on being thought well of in universities, law schools, and the media, all bastions of the New Class."32 Professors may think up destructive socialist ideas, and pundits may popularize them, but without the judges they would remain the fodder of debate societies. 33 Judges are the sharp end of the intellectuals' spear.

Judge Bork believes that judges became the engine room for the New Class. When activist judges take hold in a country, they shift its culture faster to the left.34 And when activist judges begin to copy similar examples from other countries, they accelerate the process even faster. The defects of judicial activism, he explains, will only become magnified, including the loss of democratic self-rule, the imposition of cultural values held by a minority, and the politicization of law.35 International law in the hands of such judges will be used to outmaneuver the US democratic process. 36 Judge Bork suspects that a kind of "sinister element" may exist in international law because the New Class may hope to have their views adopted abroad and then imposed here in the United States.37

#### Backsliding on reproductive freedom tips hotspots into global war and crushes diplomatic leverage---extinction.

Emond ’19 [Rachel; September 23; Scoville Fellow at the Center for Arms Control and Non-Proliferation; Inkstick Media, “How Anti-Choice Policies Increase the Likelihood of War,” <https://inkstickmedia.com/how-anti-choice-policies-increase-the-likelihood-of-war/>]

The political discourse surrounding abortion and health care has dominated election cycles and governance in the United States for quite some time, but its impact doesn’t end at the border. In some fragile communities throughout the world, the politicization of access to abortions in the United States could lead them into conflict.

Just three days after his inauguration in 2017, President Trump [signed](https://www.kff.org/global-health-policy/fact-sheet/mexico-city-policy-explainer/) an extremely restrictive anti-choice policy that will likely have wide-reaching negative impacts on global peace and security and US influence abroad.

This policy is actually an updated version of the “Mexico City Policy,” the Reagan-era act that prohibited non-governmental organizations that provide abortion-related services from receiving any US federal funding related to family planning and reproductive health.

The Trump Administration’s version of the Mexico City Policy has gone a step further. It prohibits foreign non-governmental organizations that provide abortion-related services from receiving any form of US global health assistance.

Beyond family planning and reproductive health, US global health assistance also includes funding for organizations doing work related to maternal and child health; nutrition; HIV under the US President’s Emergency Plan for AIDS Relief (PEPFAR); prevention and treatment of malaria, tuberculosis and other diseases; and hygiene programs. Many of the organizations that receive US global health assistance also receive aid from non-US sources, and use those alternative sources of funding to pay for reproductive health programs and abortion-related services. The Trump Administration’s policy would take that option off the table, should an organization want to continue receiving US funds.

Opponents of the policy have dubbed it the “Global Gag Rule,” because of the way it prevents local-level health care providers from not only providing abortions, but also from advocating for the legalization of abortion and educating about abortion as an option. Originally reported by Casey Quackenbush in TIME, some critics say the policy “holds life-saving aid hostage to ideology.”

Throughout the last 33 years, the Mexico City Policy has been a political football between Administrations: repealed by Democrats and dutifully reinstated by Republicans. This process forces a domestically politicized issue onto the international stage and in practice, this policy can actually have dangerous effects on US security.

In communities in which conflict already exists or tensions are high, inadequate access to health care can exacerbate the prevailing issues. The reverse is also true. During an outbreak of violence, health issues, such as communicable disease outbreaks and maternal mortality all rise.

According to the World Health Organization, “Investing in health is investing in peace. Health needs and contributes to physical, psychological, social and economic security. Investing in health can reduce the risk of conflict as well as mitigate its impact… Placing social services high on the political agenda helps maintain social stability, and reduce militarization in situations where the risk of violent conflict is high.”

Recent publications by the [United States Institute of Peace](https://www.usip.org/sites/default/files/SR_301.pdf), the [World Health Organization](https://www.who.int/social_determinants/resources/csdh_media/promoting_equity_conflict_2007_en.pdf), and the journal on [Health Research Policy and Systems](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6376698/), have reported about the positive impact that effective health systems and equitable access to those systems has on reducing drivers of fragility, such as conflict or overall mortality rates. That is why development experts and global advocates for women’s rights believe that the newly expanded Mexico City Policy will affect the world’s most vulnerable individuals in the world’s most fragile communities.

Advocates of this policy contend that the effects of it will only be felt by abortion providers. In reality, it isn’t quite so simple.

In states such as [Madagascar](https://www.washingtonpost.com/graphics/2018/world/how-a-change-in-us-abortion-policy-reverberated-around-the-globe/?utm_term=.9c3fe386b27f), Kenya, and [Colombia](https://foreignpolicy.com/2019/06/19/how-trumps-global-gag-rule-is-killing-women-colombia/), those living in rural communities often depend on non-governmental organizations for their healthcare. These services are provided by clinics that provide a multitude of services, including those related to sexual and reproductive health, tuberculosis, HIV/AIDs, and malaria. Because the aid they receive is intermingled, it can be difficult for these organizations to completely change their service model in order to sign and comply with the US Mexico City Policy. When organizations either cannot or choose not to sign on to the policy, clinics end up closing. This severely limits already at-risk individuals from access to even the most basic of health needs.

Ironically, since the Mexico City Policy is cutting off access to family planning services, including contraception, it might actually be increasing demand for abortions. Since its most recent implementation, the Mexico City Policy has already resulted in tens of millions of dollars in [funding cuts](https://www.washingtonpost.com/graphics/2018/world/how-a-change-in-us-abortion-policy-reverberated-around-the-globe/?utm_term=.9c3fe386b27f). At the same time, there has been a [40% increase in abortions](https://www.theguardian.com/global-development/2019/jun/27/global-gag-rule-africa-abortion-study) in some African countries. Looking ahead, some experts are [estimating](https://www.vox.com/policy-and-politics/2017/5/24/15681216/trump-budget-cuts-funding-global-family-planning-famine-relief) this policy could [lead](https://www.vox.com/policy-and-politics/2017/5/24/15681216/trump-budget-cuts-funding-global-family-planning-famine-relief) to 15,000 maternal deaths, 8 million unwanted pregnancies, and up to 26 million fewer women and families with access to contraception and family planning services.

While the Mexico City Policy does not change the total amount of health-related aid appropriated by Congress, the policy considerably weakens the ability that local health providers have to effectively serve their communities. The on-again/off-again nature of the policy causes [extreme instability](https://reliefweb.int/report/world/donor-conditions-and-their-implications-humanitarian-response) among local healthcare providers, many of which are the sole location for such services in a region. This instability [leads to](https://reliefweb.int/report/world/donor-conditions-and-their-implications-humanitarian-response) staff layoffs, higher transaction costs, and confusion about access to care. It also prevents healthcare providers from conducting any long-term planning to better meet the needs of a community.

No matter the intention of its supporters, the Mexico City Policy damages the health care infrastructure in the countries that rely on American aid the most. This, in turn, increases the likelihood of conflict in these communities and severely undermines American soft power.

Soft power efforts — like the promotion of freedom, democracy, and human rights — have been a hallmark of the US foreign policy strategy for the [last 70 years](https://fas.org/sgp/crs/row/R44891.pdf).

One of the primary ways the United States has historically strengthened national security, promoted US values abroad, and improved its global influence is through investments in global development, including public health. In Fiscal Year 2019, the US contributed [$11 billion](https://www.kff.org/global-health-policy/fact-sheet/breaking-down-the-u-s-global-health-budget-by-program-area/) to global health funding through the US Agency for International Development (USAID) — more than any other contributor in the world. That funding is now entangled with the Mexico City Policy, directly undermining the goals of USAID. Further, in the developing world, the United States is now in constant competition with growing Chinese influence. By enacting policies that negate the reach of US soft power, the Trump Administration is actually weakening US security.

The US House of Representatives has made a move to end this dangerous policy. In the FY20 funding bill for the Department of State, Foreign Operations, and Related Programs (SFOPS), the House Appropriations Committee included a [permanent repeal](https://www.kff.org/news-summary/house-appropriations-committee-approves-fy-2020-state-foreign-operations-sfops-appropriations-bill/) of the Mexico City Policy, which was ultimately passed by the entire chamber. This repeal is sure to be a point of contention between the House and the Senate when coming to an agreement on a final funding package.

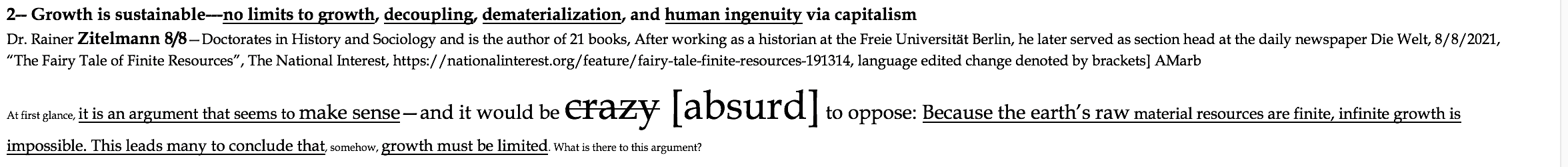
No matter what happens in Congress, the most heavily affected health care providers stay optimistic that they will eventually find the funding they need to operate in the interest of their communities. Even if they do, the damage to US influence is likely to last.

Advocates of the Mexico City Policy have clearly not thought through the implications of their policies or are not interested in the instability the policy has unleashed. Personal ideologies that are not even the law of the land in the United States should not take precedence over American security. There is no room for debate — comprehensive global health assistance is a fundamental factor in conflict prevention and stability. It is in the security interest of the US government to empower local health providers, allowing them to decide how best to serve their fragile communities. It’s time for the Mexico City Policy to be repealed and never replaced.

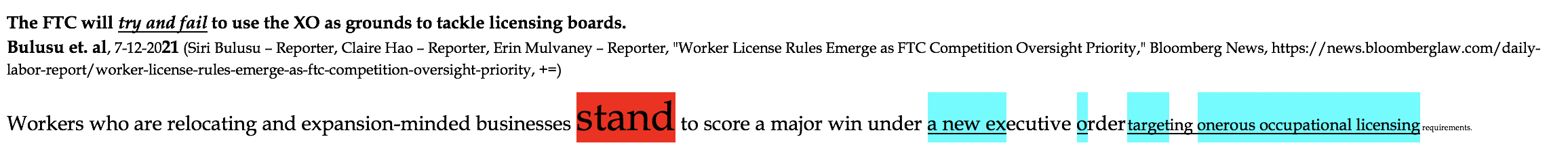
### 1NC---OFF

#### Reject the aff for the 1AC’s ableist evidence practices

#### While they decided to sanitize Zitelmann’s ableist language



#### They tacitly approved of Bulusu’s ableist metaphor



#### Metaphors that associate wins for workers with standing serve to reinforce ableist culture

McNary 10 (Oscar, Oscar’s blog, spoken word poet, This is What a Man Sounds Like, is a vindication of the rights of genderqueers, “Left of the Body Hatred”, January 24, http://thisiswhatamanlookslike.wordpress.com/tag/ableism/)

Students with disabilities are under attack. What do we do? Stand up fight back! This was one of many chants I heard the other day at a rally to end a local university’s budget cuts and support students’ and workers’ needs. Another chant mentioned standing with workers. So, here’s the problem: not everyone stands. The phrase “Stand up fight back” implies that standing, which normatively abled people like me are able to do, is a necessary part of resistance. Associating being courageous and working against oppression with standing is exclusionary, and it reinforces ableist cultural devaluation of people with disabilities and their centrality to liberation struggles. Here’s how the chant works: it goes through a series of different groups or needs that are “under attack.” So, the opening phrase started off, “workers’ rights are under attack,” then progressed through each issue or group of people. When the chant progressed to “students with disabilities are under attack,” I thought, “There’s no way they’re going to follow that up with a call to stand up.” And I was wrong. In this instance, the chant claims anti-ableism while using a normatively abled slogan. What does it mean to “stand up fight back” for people with disabilities? That the walk people (not necessarily all normatively abled) will stand up and fight for disabled people, while those who can’t stand will remain gratefully in the background? It implies that people who can’t stand are not capable of fighting for their own liberation. Now, I like the rhythm of this particular chant, but the word stand could probably be replaced with something less oppressive (act?) without doing much damage to the meaning or sound. I believe that with this particular set of organizations, I can probably communicate with them about this problem and they’ll work to make their chants less ableist. If ableism within leftist circles was limited to this one set of organizations, it could be corrected easily, but this shit is so much bigger than that. Across the continent, leftist cultures tend to take body issues less seriously than other issues of oppression and privilege. In the same way that a ubiquitous chant would incite folks to “stand up fight back,” can you imagine if folks yelled, “Be a man! Fight back!” or “Grow a pair! Fight back!” at protests? No? Oh, because sexism is taken seriously, and overt misogyny is not (usually, I hope) tolerated in leftist culture. Would we yell “Don’t be a fag! Fight back!”? Oh, no, we wouldn’t, because leftist culture values homophobia as a valid issue. How about “Act American! Fight Back!”? Right, we wouldn’t, because we think racism and xenophobia are for real. If leftists took ableism as seriously as we take sexism, homophobia, racism, and xenophobia, it would never cross our minds to shout about standing as an act of empowerment. If we took ableism seriously, we would never make our speeches from stages only accessible by stairs. We would not use step up/step back as a community norm.

## Adv---Econ

### 1NC---Econ Turn

#### Robust economic growth now---multiple indicators.

Lane ’10/20 [Sylvan; October 20, 2021; The Hill, “Labor shortage, inflation pose political obstacles for Biden,” https://thehill.com/policy/finance/577492-labor-shortage-inflation-pose-political-obstacles-for-biden]

Economists expected labor force participation to jump up notably over the summer and early autumn as vaccination rates improved, federal jobless aid programs expired and schools reopened for full-time in-person learning. More than 10 million jobs remained unfilled in August, and the high demand for workers has pushed wages 0.6 percent higher since September.

Even so, the emergence of the delta variant in late July, a month when the U.S. added more than 1 million jobs, upended that progress. The U.S. added just 366,000 jobs in August and 194,000 in September as the labor force participation rate also stalled out at 61.6 percent, 1.7 percent below its pre-pandemic level.

“The whole economy was set up for a huge fraction of our employment to be in services, and within two years we’ve had this massive shift that hasn’t unwound yet, said Claudia Sahm, senior fellow at the Jain Family Institute and former Federal Reserve research director.

“We have a very uneven movement back to normal and it’s taking some time to work it out.”

At the same time, consumers shifted their spending from the recovering services sector to already booming goods producers, but with far more money to spend than in earlier days of the pandemic. Retail sales rose 0.7 percent in September after jumping 0.8 percent in August, led by 5.7 percent increase in sales by retailers without physical locations.

Sahm, like other left-leaning economists and Biden administration officials, highlighted the sharp rise in wages, intense demand for workers and rising corporate earnings as a stark contrast to the sluggish recovery from the 2008 recession. Biden himself has also touted a steep decline in jobless claims and steady growth in retail sales as proof of progress under his watch.

“The signs are clear that, despite the global challenges caused by the delta variant, our economy is on the right track,” Biden said in a Friday statement, crediting his recent vaccine mandate push for some of the improvement.

And even some right-leaning economists agree that the quicker rebound from the pandemic-driven recession is far better for the economy than the languid recovery from 2008, even with higher inflation.

“Frankly, I’m much happier having these sorts of problems than the really slow recovery of the 2010s,” said Alan Cole, former chief economist for Republicans on the Joint Economic Committee. “Even when we are complaining about slower months, the slow months are usually followed by faster months, and even the slow ones are faster than the pace of the 2010s.”

But the uneven pace of the recovery, along with a stimulus-fueled return to pre-vaccination spending habits, has kept up pressure on inflation and overloaded supply lines as headline job growth stalls.

“Elevated goods spending is just delaying the reallocation of the economy to where it needs to go,” said Adam Ozimek, chief economist at Upwork.

“Service-providing companies can expand employment to get back to their prior capacity levels,” he continued.

“Goods-providing companies are not really going to expand and invest because they understand that this is temporary. No one’s out there building lots of brand new bicycle factories because they think we’re in a new era of bicycle demand. They understand that this is pandemic related.”

#### Curtailing labor certification leads to widespread wage depression---prefer our ev because theirs is complicit in an industrial bias to unconditionally oppose any regulation

Wedemeyer 6 – JD @ Iowa (Jacob, Of Policies, Procedures, and Packing Sheds: Agricultural Incidents of Employer Abuse of the H-2B Nonagricultural Guestworker Visa, *10 J. Gender Race & Just. 143*, Lexis)

Employers have always sought less red tape in the importation of labor. 308 The proposed USCIS and DOL regulations are just the latest example in the debate between those who advocate more specific guidelines and those who advocate fewer requirements. When Congress finally institutionalized the Bracero program in 1951 after nine years of renewed bilateral accords with Mexico, Congress gave the DOL a vague mandate: certify that a labor shortage exists and that labor importation will not adversely affect U.S. farmworkers. 309 Pro-labor opponents of the legislation demanded more specific guidelines, as recommended by the President's Commission on Migratory Labor, to ensure that the employer abuses of the previous nine years would not be repeated. 310 In criticizing the abstract requirements, one commentator remarked: If Congress passed a law repealing the law of gravity, we might reasonably expect it to include some indication of how this difficult form of repeal was to be carried out. Having passed a law which repeals the law of supply and demand (the supply of labor is to be increased without effect upon the price of labor), it is incumbent upon Congress to demonstrate how this equally difficult form of repeal is to be administered. 311 The American Farm Bureau applauded the new bill and even suggested that growers could certify labor shortages and determine adverse wages without the DOL. 312 In its nine-page rationale for the proposed 2005 regulation, USCIS [\*183] repeatedly advances the benefits of the proposed rule to employers. 313 The agency does not explain how the attestations would protect U.S. workers better than labor certifications. Instead, it states: historically, the consultation requirement has been accomplished by receiving a labor certification from DOL; however, the nature of the consultation is not defined in the statute… . DHS [Department of Homeland Security] and DOL have consulted and have jointly determined that the proposed attestation developed by DOL satisfies the consultation mandate of section 214(c) of the Act. 314 Thus, USCIS is exploiting the vague congressional delegation of power to promulgate pro-employer regulations - a result foreshadowed by opponents of the vague Bracero bill half a century ago. Although the DHS and DOL have "jointly determined" that the proposed rules would satisfy congressional intent to protect U.S. workers, a court might not reach the same conclusion in the event of a future challenge given the radical elimination of decades of labor certification. Nevertheless, a court might uphold the proposed regulation using the Chevron standard of rational interpretation. 315 The less deferential standard in Jefferson University would not apply because the court would not be reviewing an agency interpretation of its own regulation but rather a regulation subjected to notice and comment. 316 An incident from the Bracero era illustrates the danger in relying on agricultural employers' good faith in the proposed attestations. 317 In response to growers paying less than the minimum wage to Braceros in the Rio Grande Valley, the INS required employers to sign "pledges" not to commit future violations, thereby allowing the employers to continue using Braceros despite regulations which mandated the denial of Braceros to lawbreaking employers. 318 The INS then "warned" other Bracero employers in the Rio Grande Valley that they too would be subject to signing pledges if they were found to have violated the law. 319 One scholar described the warnings as "meaningless" and "counterproductive," presumably because the pledges, a minor consequence, probably encouraged rather than deterred [\*184] violations. 320 Like the pledges and warnings, employer attestations are equally meaningless and counterproductive because they encourage fraud and fail to implement the congressional mandate of protecting U.S. workers. As a matter of general rulemaking policy, it is ill-advised to require good faith when it is in conflict with self-interest, especially when a party has a demonstrated history of bad faith. Such a rule will be less effective and require more active enforcement and supervision. One must question whether the benefits of adding the element of good faith - such as increased employer convenience, use, and utility and increased administrative savings - outweigh the costs, namely increased employer fraud. Fraud would undermine general compliance with employment laws and undercut wages, conditions and U.S. worker recruitment, increased enforcement burden, decreased use of domestic workers, and depressed wages. Such a balancing test involves complex empirical questions, many of which can only be answered by studying the effects of the proposed changes after promulgation.

#### State immunity is key to local cooperatives---those democratize economic growth and offset market power abuses for small businesses.

Vaheesan ’19 [Sandeep and Nathan Schneider; 2019; Legal Director of the Open Markets Institute; Assistant Professor, Department of Media Studies, University of Colorado Boulder; “Cooperative Enterprise as an Antimonopoly Strategy,” https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1000&context=pslr]

States can use the state action doctrine to promote the growth of democratically accountable cooperatives. They can pass laws authorizing cooperatives to engage in collaborative activities and subject this joint conduct to active state supervision. By doing so, states can limit the application of federal antitrust laws to cooperatives. Because every state already has a statute for chartering cooperatives,294 states would principally have to work toward establishing regulatory oversight. This oversight could be provided through the executive branch, courts, or regulatory agencies, but importantly not through a state agency “dominated by market participants.”295 Provided they are acting pursuant to state authorization and supervision, cooperatives would have greater freedom to operate. While cooperatives would not enjoy legal carte blanche, they would be free to engage in joint action that may otherwise run afoul of the federal antitrust laws. For instance, a bargaining cooperative composed of small businesses would be immune from federal antitrust law so long as it acts pursuant to state authority and is actively supervised by a state agency. State law and regulation can account for the distinctive needs and objectives of cooperatives, which may not always conform to the prevailing strictures of antitrust law.

VI. CONCLUSION

When Congress saw fit, as Senator Capper put it, “to give to the farmer the same right to bargain collectively that is already enjoyed by corporations,”296 it affirmed the principle that distributed, competitive, and democratic activity ought to have a place in the economy alongside investor-owned corporations. The constituency most endangered by corporate power in 1922, and best organized to counter it, were farmers. For decades they formed cooperative enterprises as a means of counteracting the concentrated market power of bankers, suppliers, and railroads.297 The Capper-Volstead Act was a means of affirming the value of those cooperative enterprises, and the kind of business they enabled, by ensuring that antitrust law did not mistake cooperation between powerless actors for collusion among corporations.

Today, the concerns that motivated Capper-Volstead have spread far beyond just farmers. Throughout the United States economy, especially in the emerging online economy, consolidation has become the norm. Small businesses face growing barriers to market entry and the growing ranks of independent workers find themselves at the mercy of the overwhelming market power of large corporations. As they did a century ago, people are now looking to cooperative ownership designs as a strategy for leveling the playing field with investor-owned corporations, but cooperative firms can face undue barriers and inadequate recognition for their contributions to ensuring a diverse and democratic economy.

### 1NC---AT: Regulatory Capture

#### No regulatory capture---and antitrust is worse

Melamed ’20 [A. Douglas Melamed, Professor of Law at Stanford, “Antitrust Law and its Critics,” 83 ANTITRUST L.J. (2020), https://lisboncouncil.net/wp-content/uploads/2020/11/MELAMED-Antitrust-Law-and-Its-Critics.pdf]

But that dichotomy between crafting the rules and applying them does not work for antitrust law because, as explained above, the law cannot sensibly be fully codified and depends on a commonlaw like evolution of legal doctrine and standards. Sound antitrust law is made by judges on a case-bycase basis. Even in jury cases, it is judges who develop legal doctrine, resolve legal questions, and craft jury instructions. The lawmakers—the judges—must have a coherent objective so their decisions, and thus the law, are not arbitrary. Non-economic objectives cannot be snuck in the back door by distinguishing creation of antitrust law from its application. B. REGULATION Antitrust law has long been thought of as an alternative to—or, in a more forceful articulation, a means of obviating—regulation.95 The idea is that market competition most efficiently allocates resources and maximizes economic welfare and that interference with competition, whether by private market power or government regulation, is inferior to the preservation of competition by enforcement of the antitrust laws. From this perspective, regulation is appropriate only to constrain natural monopolies, which competition cannot effectively discipline, or to achieve non-economic objectives. At the very least, effective antitrust enforcement can reduce the need for regulation. It is perhaps surprising, therefore, that regulation seems to be very much on the minds of even members of the mainstream antitrust communities. In recent months, expert reports commissioned by competition law enforcement agencies in the United Kingdom, the European Union, and Australia have recommended the creation of sectoral regulators to deal with, among other things, competition problems raised by the big digital platforms.96 In the United States, a multidisciplinary expert group proposed more modestly that “the establishment of a sectoral regulator should be seriously considered.”97 These recommendations might seem odd in a context that has traditionally seen antitrust law as a preferred alternative to regulation.98 A serious argument, however, can be made that the economicwelfare objective of antitrust law would be best served by establishing a sectoral regulator to address competition issues in certain contexts, such as those raised by the large digital platforms. The argument is based on two premises. The first is that antitrust law is a law of general application and decentralized enforcement; the second is a judgment that large digital platforms, for example, present competition issues that cannot be adequately addressed by antitrust rules suitable for all industries or a decentralized enforcement regime and require instead specialized rules and centralized enforcement. For example, a digital platform might be barred from owning businesses that use the platform and compete against third parties that also use the platform if it were thought that harm to competition in the markets in which the businesses and the third parties compete cannot be adequately prevented by application of general antitrust rules restricting dealing with rivals, that the risk of harm is great, and that the risk of lost efficiencies from the prohibition is small.99 Certain kinds of above-cost price predation might be prohibited when platforms are willing to sacrifice profits to exclude rivals, even if a profit sacrifice or no economic sense test were not thought suitable for predatory pricing law in general. And more aggressive standards, unsuitable for antitrust law in general, might be adopted for required portability or licensing of data or interoperation among platforms in order to reduce entry barriers to new competition. A regulator might be better able than an antitrust court to fashion such a requirement that takes account of both the competition interests at stake and the privacy risks that such a requirement might create.

### 1NC---AT: Decline

#### Economic decline doesn’t cause war.

Walt ’20 [Stephen; May 13; International Relations Professor at Harvard University; Foreign Policy, “Will a Global Depression Trigger Another World War?” https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/]

On balance, however, I do not think that even the extraordinary economic conditions we are witnessing today are going to have much impact on the likelihood of war. Why? First of all, if depressions were a powerful cause of war, there would be a lot more of the latter. To take one example, the United States has suffered 40 or more recessions since the country was founded, yet it has fought perhaps 20 interstate wars, most of them unrelated to the state of the economy. To paraphrase the economist Paul Samuelson’s famous quip about the stock market, if recessions were a powerful cause of war, they would have predicted “nine out of the last five (or fewer).”

Second, states do not start wars unless they believe they will win a quick and relatively cheap victory. As John Mearsheimer showed in his classic book Conventional Deterrence, national leaders avoid war when they are convinced it will be long, bloody, costly, and uncertain. To choose war, political leaders have to convince themselves they can either win a quick, cheap, and decisive victory or achieve some limited objective at low cost. Europe went to war in 1914 with each side believing it would win a rapid and easy victory, and Nazi Germany developed the strategy of blitzkrieg in order to subdue its foes as quickly and cheaply as possible. Iraq attacked Iran in 1980 because Saddam believed the Islamic Republic was in disarray and would be easy to defeat, and George W. Bush invaded Iraq in 2003 convinced the war would be short, successful, and pay for itself.

The fact that each of these leaders miscalculated badly does not alter the main point: No matter what a country’s economic condition might be, its leaders will not go to war unless they think they can do so quickly, cheaply, and with a reasonable probability of success.

Third, and most important, the primary motivation for most wars is the desire for security, not economic gain. For this reason, the odds of war increase when states believe the long-term balance of power may be shifting against them, when they are convinced that adversaries are unalterably hostile and cannot be accommodated, and when they are confident they can reverse the unfavorable trends and establish a secure position if they act now. The historian A.J.P. Taylor once observed that “every war between Great Powers [between 1848 and 1918] … started as a preventive war, not as a war of conquest,” and that remains true of most wars fought since then.

The bottom line: Economic conditions (i.e., a depression) may affect the broader political environment in which decisions for war or peace are made, but they are only one factor among many and rarely the most significant. Even if the COVID-19 pandemic has large, lasting, and negative effects on the world economy—as seems quite likely—it is not likely to affect the probability of war very much, especially in the short term.

## Adv---Federalism

### 1NC---AT: Grid

#### Limiting Parker immunity undermines state sovereignty.

Franklin ’14 [Jonathan; 2014; Counsel of Record for National Council of Examiners for Engineering and Surveying; “Brief for Amicus Curiae National Council of Examiners for Engineering and Surveying in Support of Petitioner,” 4th circuit Court of Appeals docket number No 13-534]

State action immunity is too integral to the States’ regulation of the professions to make it subject to second-guessing by the FTC or the courts. Licensing boards are state actors, and inclusion of market participants as members does not require the boards to clear an additional hurdle of “supervision” in order to retain immunity from antitrust liability. The Fourth Circuit concluded that subjecting a state regulatory agency to liability under the Sherman Act presents “no federalism issue” because of its “conclusion that the Board is a private actor under the antitrust laws.” Pet. App. 28a. However, the court’s determination that a state agency is a private actor raises federalism concerns by itself because it coerces States into altering their chosen means of governance in order to suit the preferences of a federal agency. This Court has explained that, given the rationale of Parker and our “national commitment to federalism \* \* \* the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators.” Omni, 499 U.S. at 374. Although the Constitution grants Congress broad powers, “federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governane of the Nation.” Alden v. Maine, 527 U.S. 706, 748 (1999). See also United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). The Constitution contemplates that a State’s government will represent and remain accountable to its own citizens. See New York v. United States, 505 U.S. 144, 168-169 (1992); Lopez, 514 U.S. at 576-577 (Kennedy, J., concurring). It is fundamental that the people of a State “may alter and change their form of government at their own pleasure.” Luther v. Borden, 48 U.S. (7 How.) 1, 47 (1849). A State is accorded respect for its choices about “the character of those who exercise government authority” and “the structure of its government,” and those choices are integral to how “a State defines itself as a sovereign.” Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). And “essential” to States’ independence is “‘their power to prescribe the qualifications of their own officers.’” Id. (internal quotation omitted). This is vitally true in the manner in which state legislatures exercise their authority to protect the public through the regulation of professions. See, e.g., Barsky v. Bd. of Regents, 347 U.S. 442, 449 (1954) (explaining that the “broad power to establish and enforce standards of conduct within its borders relative to the health of everyone” is “a vital part of a state’s police power”).

The Court has therefore cautioned against interpreting the antitrust laws so as to encroach on the States’ internal governance decisions. The dual system of government makes States sovereign, and “an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.” Parker, 317 U.S. at 351; Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412 (1978). In Parker, the Court held that “nothing in the language of the Sherman Act or in its history” indicated that Congress intended to restrict the sovereign capacity of the States to regulate their economies. 317 U.S. at 350. The state-action antitrust exemption is intended to protect “principles of federalism and state sovereignty” out of a recognition of the “the role of sovereign States in a federal system.” Omni, 499 U.S. at 370. Licensing boards embody their respective States’ chosen form of governance. The States’ decisions to use market participants on their boards reflects a democratically-considered decision to regulate professions (and with it, the population’s safety and economic welfare) in a certain manner. The Sherman Act is not intended to “nullify a state’s control over its officers and agents in activities directed by the legislature.” Hallie, 471 U.S. at 38 (quoting Parker, 317 U.S. at 351). Indeed, the state immunity doctrine is designed to “protect the result of the state’s political process even if that result is fundamentally at odds with federal antitrust policy.” C. Douglas Floyd, Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies, 41 B.C. L. Rev. 1059, 1067 (2000). “Parker contains no hint that the Court intended to prescribe the forms of state government, or to pick and choose among anticompetitive policies validly adopted by the state as a whole for an authorized representative of state government.” Id. at 1104.

#### Current state antitrust enforcement’s crucial to grid resilience.

Christiansen ’21 [Matthew and Joshua C. Macey; February; Legal Advisor to FERC Commissioner and Assistant Professor at University of Chicago Law School; Harvard Law Review, “Long Live the Federal Power Act’s Bright Line,” 134 Harv. L. Rev. 1361, 1385-1422]

First, they recognized the enduring presence of separate spheres of exclusive federal and state jurisdiction. 139Those spheres are divided by the bright line that, as discussed above, has characterized courts' discussion of the FPA since the law was passed. Any coherent theory of the FPA's jurisdictional divide must start from that foundation.

Second, they recognized that one sovereign's actions will inevitably affect matters within the other's sphere of exclusive jurisdiction. 140Recognizing [\*1386] that fact, the Court concluded that, if cross-jurisdictional effects alone could invalidate a federal or state law, then the FPA's jurisdictional line would prevent both federal and state regulators from overseeing parts of the electricity sector that fall within their exclusive jurisdiction.

Those two observations -- the enduring importance of the bright line and the inevitability of cross-jurisdictional effects -- are the foundation of our approach to applying the FPA's jurisdictional divide to the modern electricity sector. But before explaining that theory, we need to start with each leg of the Court's energy law trio.

1. The Supreme Court's Energy Law Trio. --

(a) Oneok. -- The first case in the Court's energy law trio, Oneok, Inc. v. Learjet, Inc., involved an antitrust dispute between natural gas pipelines and their customers. Though Oneok considered the Natural Gas Act 141(NGA), not the FPA, the two statutes divide jurisdiction between FERC and the states in virtually identical ways. 142For that reason, courts have always regarded cases involving NGA jurisdiction as binding precedent in FPA disputes and vice versa. 143

The customers contended that the rates charged by the pipelines were inflated by market manipulation and therefore violated various states' antitrust statutes. 144The pipelines responded by arguing that the customers' lawsuits contravened the bright line that divides federal and state authority under the NGA. 145They claimed that the state antitrust claims were field preempted because they addressed "anticompetitive activities that affected wholesale (as well as retail) rates." 146In addition, they noted that FERC also had sought to address the market manipulation underlying those claims and that state antitrust cases potentially could "reach conclusions about that conduct that differ from those that FERC might reach or has already reached." 147In short, the pipelines' preemption argument boiled down to the theory that the state law claims overstepped the bright line because of their potential to affect matters on FERC's side and interfere with its ability to regulate those matters.

[\*1387] The Court disagreed. Recognizing that the NGA "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way," 148the Court observed that it "must proceed cautiously" when considering a NGA preemption claim, lest it overturn the carefully balanced jurisdictional scheme that Congress put in place. 149It then explained that the Supreme Court's energy law precedents have long emphasized "the target at which the state law aims in determining whether that law is pre-empted." 150Where the aim of a state law was a "matter firmly on the States' side of [the jurisdictional] dividing line," 151that law was not field preempted, "even though [it] might have affected the costs of and the prices of interstate wholesale sales." 152By contrast, a state law that was "unmistakably and unambiguously directed at" matters within FERC's jurisdiction was field preempted because it sought to regulate matters on FERC's side of the bright line. 153

Turning to the specifics of the customers' claims, the Court explained that state antitrust laws do not aim at wholesale sales of natural gas or natural gas companies. 154They seek to prevent market power abuses across all industries and, therefore, their application to retail sales of natural gas did not indicate an effort to regulate the wholesale natural gas sector, even though they might affect such sales. 155As a result, the Court concluded that the laws were not field preempted, regardless of their potential effects on wholesale rates. 156

Justice Scalia dissented. He argued that the states' application of antitrust law to retail sales would amount to a regulation of wholesale conduct insofar as that is where the alleged manipulation occurred. 157In other words, he took the position that addressing manipulative conduct through regulation of retail sales would, in that case, inevitably [\*1388] affect FERC's regulation of manipulative conduct in the wholesale market, which he deemed sufficient to preempt the application of those state laws. 158

In dismissing those arguments, the Court relied on an extensive history of the natural gas sector's evolution, 159explaining that, largely as a result of that evolution, the "Platonic ideal" of a "clear division between areas of state and federal authority" no longer exists. 160Whatever the state does -- or does not do -- to address the effects of manipulation on the retail rate would inevitably affect the wholesale rate in the manner that, according to Justice Scalia, indicated that the law was preempted. The Court explained that if those inevitable effects were sufficient to preempt a state law, it would prevent states from exercising their exclusive jurisdiction and undo "the careful balance between federal and state regulation that Congress struck when it passed the Natural Gas Act." 161

#### That undermines grid adaptation to renewables, and prevents extinction from climate change --- antitrust law spills over to the energy sector

Welton ’21 [Shelley; February; Assistant Professor, University of South Carolina School of Law; California Law Review, “Rethinking Grid Governance for the Climate Change Era,” 109 Calif. L. Rev. 209, 235-275]

Intellectual currents shifted in the second half of the twentieth century, such that "bigness" no longer reigned as a concern in antitrust law. 167These changes in antitrust theories are not typically connected with RTOs or the energy sector because regulated utilities are largely insulated from antitrust challenges. 168But the movement has nevertheless had dramatic impacts upon the electricity industry, since the same intellectual trend manifested itself in public utility law through the demise of PUHCA. Once "bigness" was no longer a concern, the 1935 prohibition on non-contiguous utility mergers lost merit. 169In a 1995 report, the Securities and Exchange Commission found that "the conduct that gave rise to the Act had all but disappeared," and that PUHCA had become a [\*236] "barrier to innovation and competition in the utility industry." 170In 2005, Congress did away with PUHCA in its entirety, lifting the substantive prohibitions on holding companies' ownership of utilities and other businesses. 171

The repeal resulted in an explosion in utility-sector mergers. 172As of 2016, there were fifty remaining utility systems, down from hundreds a few decades earlier. 173In theory, the fact that FERC still must approve utility mergers could serve as a check on consolidation. But FERC evaluates utility mergers under Federal Power Act section 203, whose "public interest" standard has been interpreted to require the agency to ensure only that the merger will do "no harm" to competition within the industry. 174FERC applies this standard in a piecemeal and lenient fashion, refusing to examine broader industry impacts in deciding individual applications. 175

Consequently, utility mega-holding companies have returned. 176There is a certain irony in the fact that deregulatory theories led FERC to turn increasingly to competition as the basis for ensuring "just and reasonable" rates, while also leading Congress to lift the prohibitions that had ensured robust competition in the industry over the previous eighty years. 177To be sure, some utility mergers create efficiencies through economies of scale or complementary business ventures. 178But they also create challenges by concentrating economic and [\*237] political power in a small number of companies - not least for theories of RTO governance, which rely upon internal industry checks to legitimate RTO decision-making. 179These internal checks presume opposing interests that do not exist because holding companies have consolidated across demand-and supply-side affiliates.

The holding company resurgence appears even more problematic when one looks at patterns of infrastructure investment. In 2018, independent power producers owned 87% of solar and wind energy developments in the United States, whereas regulated utilities owned only 13%. 180Post-PUHCA, holding companies can own both these categories of business. But they have increasingly concentrated their interests within the regulated utility space: at the end of 2018, independent power entities made up less than 12% of their overall portfolios, whereas regulated utilities comprised nearly 69%. 181That means that the largest utility holding companies have interests predominantly opposed to renewable energy development. Moreover, many companies focused on independent power production concentrate their fossil fuel holdings within certain RTOs, giving them a vested interest in shaping particular regions' market rules. 182

Part IV will consider in more detail how merger activity undercuts the theories behind RTOs' governance design. First, it is time to examine how RTOs' privatized stakeholder model of governance - expanded over time to include market administration and resource adequacy under shrinking doctrinal oversight - plays out on matters of substantive import in modern grid governance.

III. RTOs Confront the Climate Imperative

Perhaps it is just dumb bad luck - but it may be less coincidental - that the formation of RTOs and mounting policy concern over anthropogenic climate [\*238] change share a similar timeline. 183Consequently, RTOs have had to adapt to an energy law landscape that has embraced a shifting set of priorities since the early 2000s. As described in this Section, RTO governance has increasingly resisted these changed priorities, especially when they threaten incumbent members of the energy sector. However, not all RTOs have struggled equally, suggesting that certain governance models may be better suited to the climate change era. 184

A. The Link Between Grid Governance and Climate Change

The electricity sector has been appropriately called the "linchpin of efforts to reduce greenhouse gas (GHG) emissions," central to "virtually all credible pathways to climate stabilization." 185For decarbonization to succeed, the U.S. transportation and heating sectors will need to electrify - creating both opportunities and pressure for the electricity sector to scale up and clean up at the same time. 186Most experts agree that the United States' electricity sector needs to run on 100 percent clean energy by 2050, if not earlier, to achieve internationally established climate change goals. 187Despite renewables' recent growth, there is a long way to go to reach these kinds of numbers. 188In 2019, fossil fuels produced 63% of U.S. electricity (with coal at 23.5% and natural gas at 38.5%) - while nuclear energy produced 19.7%, hydropower and wind each produced around 7%, and solar energy produced only 1.8%. 189

As grid managers, RTOs play a key role in enabling sectoral transformation. This role is complicated, however, by the fact that neither FERC [\*239] nor RTOs have an independent mandate to decarbonize. 190Moreover, the Federal Power Act explicitly leaves decisions over the electric generation mix to the states. 191For this reason, those within RTOs often describe these organizations as policy-takers, not policy-makers, in charge of making the markets and grid function well in light of whatever policies their member states adopt. 192

Adopt they have: in the last two decades, twenty-nine states have required their utilities to secure an increasing percentage of their electricity from renewable energy sources; 193every state has put in place laws to encourage efficiency and conservation; 194and many states have adopted a range of tax incentives, special pricing arrangements, and other laws to help promote rooftop solar, energy storage, electric vehicles, offshore wind, and other promising decarbonization technologies. 195More recently, a spate of states has upped the ambition of their renewable targets, aiming to reach 100 percent clean electricity generation by 2040-2050 - with many more considering similar legislation. 196

To reach these goals will require the affirmative support of "policy-taking" RTOs. 197RTOs will have to adjust their markets and dispatch to accommodate the expected influx of renewable energy. Wind and solar are variable resources - they only produce energy when the wind is blowing or the sun is shining. 198To integrate these resources, RTOs will have to reform their systems to better model renewable energy's output; reward other sources for being [\*240] available to act as flexible, fast-ramping backups; and better integrate demand-side technologies to smooth fluctuations in energy supply. 199

At the same time, RTOs will have to support decreased reliance on natural gas to power the U.S. electricity sector. This objective is politically fraught, given that companies are building long-lived infrastructure in the natural gas sector at a rapid clip. 200These companies will not easily relinquish the value of these assets, yet this infrastructure cannot be used for its useful life if we are to confront the climate imperative (at least not without substantial advancements in carbon capture and storage, which is not yet adequately commercialized). 201

The expansion of renewable energy will also require construction of a lot more transmission infrastructure to connect remote solar and wind resources to population centers. 202In their role as regional transmission planning coordinators, 203RTOs' willingness to enable maximum transmission expansion will help determine the viability of a renewables-heavy electricity sector.

In sum, if the United States is to have any chance at decarbonizing at the rate necessary to avoid catastrophic climate change, 204then RTOs must play a pivotal role. The remainder of this section explores how RTOs have responded as putative "policy-takers" to the climate change priorities established by state and federal entities.

#### That’s key to grid stability.

Johnston ’15 [Victoria; 2015; “Storage Portfolio Standards: Incentivising Green Energy Storage,” 20 J. Envtl. & Sustainability L. 25]

In addition to the limitations discussed above in bringing renewable energy online, the **intermittent nature** of renewable energy faces a large infrastructure challenge. One large limitation in the current electrical system, no matter what the generating source is, is the electrical grid's **susceptibility to power failures**. Grid failure occurs either when **insufficient electricity is available** for consumers to use or when energy suppliers put **more electricity on the grid than consumers demand**. 10 4 This imbalance can **lead to blackouts**, which can be costly and take time to mend. Because the **balance** of the system is **so central** to avoiding blackouts, the intermittent nature of renewable energy makes those sources **more complicated to manage**.

In the normal course of use, generators inevitably fail on occasion. When one generator fails, the electrical grid operator will compensate for that failure by pulling power from other sources. 10 5 Electrical engineers rely on "spinning reserves" when this occurs. 10 6 Spinning reserves are "the extra generating capacity that is available by increasing the power output of generators that are already connected to the power system."' 0 7 This extra generating capacity is "ready to instantaneously respond to control signals from the system operator in order to maintain transmission system integrity."' 1 0 8 However, when grid operators pull too much energy from compensating sources, they can cause the generators providing the extra generating capacity to fail, which in turn causes the grid operator to over-tax different power generators, which may also fail, creating what is known as a "**cascading failure**."' 10 9 Cascading failures can **eventually lead to blackouts**.'10

One of the largest cascading failures resulting in a blackout in North America occurred on August 14, 2003.' That blackout affected an estimated fifty million people in eight U.S. states and Ontario, Canada for up to a week.'1 2 The blackout cost the United States between $4 billion and $10 billion, 113 and in Canada, "gross domestic product was down 0.7% in August, there was a net loss of 18.9 million work hours, and manufacturing shipments in Ontario were down $2.3 billion (Canadian dollars)."' "14 To avoid blackouts, the electrical grid requires the balancing of supply and demand to a near-perfect degree. In the United States, operators maintain the electrical grid at 60 hertz ("Hz")." 5 Ideally, this means that "the transmission grid would always operate precisely at 60 Hz ...even as its millions of consumers impose varying loads at tens of thousands of substations.' ' I 1 A demonstrative case of electrical grid balancing occurs in England, in what is known as the "TV pick-up."' " 7 After a popular television show or sporting event ends, "[m]illions of lights and kettles are simultaneously switched on" while "[t]he National Grid . . . must keep the frequency at 50hz.""' 8 This often requires turning additional peak load generators online specifically to combat the power surge. 19 To combat the threat of blackouts, electrical operators 'have to forecast [energy demand] second by second, minute by minute."' 1 0 They base predictions on what customers required on a similar day with 'exactly the same weather." 2 '

Maintaining the grid at an exact frequency is **nearly impossible**. Electrical grid operators must not only balance supply with changing power demands, but also compensate for equipment failure. To make the task even more difficult, the electrical grid operator needs to take into account the "finite response time of each generator."' 22 That is, some generators react more quickly to commands than others-some generators can come online at the flip of a switch (i.e. natural gas), while others take some time to warm up. 123 Because an electrical operator cannot predict demand with perfect accuracy, operators set limits that define a range of frequencies within which they must maintain operations. "Operators of the grid maintain its reliability by ensuring that deviations [from the ideal 60 Hz] never grow to **catastrophic size**."' 124 These limits give operators a **minimal amount of wiggle room** to balance the grid, but if the electrical grid operator allows the frequency to go outside of the outer bounds, the grid can **fail** and **cause blackouts**.

Time-intermittent wind and photovoltaic power create **even more challenges** for grid operators. As the demand for renewable energy sources increases, the shortcomings of the electrical grid will become **more problematic**. "The changes will lead to grids that are more stochastic and exhibit dynamics requiring new stability criteria that address emerging problems and can be evaluated faster, closer to real time.' 125 In Germany, where renewable energy sources have priority over traditional power plants, transmission companies send excess renewable energy to other counties because of the grid's inability to store electricity efficiently.1 26 In the United States, the Bonneville Power Administration, based in the Pacific Northwest, has taken another approach, which includes booting wind energy supplies off line in favor of hydroelectric power when too much supply exists, allowing clean energy to go unused. 127 While grid operators make these decisions based on the necessity to balance the grid, decisions like Bonneville's can make investments in clean energy superfluous.

### 1NC---AT: Warming

#### Warming doesn’t cause extinction---new studies.

Nordhaus 20 Ted Nordhaus, an American author, environmental policy expert, and the director of research at The Breakthrough Institute, citing new climate change forecasts. [Ignore the Fake Climate Debate, 1-23-2020, https://www.wsj.com/articles/ignore-the-fake-climate-debate-11579795816]//BPS

Beyond the headlines and social media, where Greta Thunberg, Donald Trump and the online armies of climate “alarmists” and “deniers” do battle, there is a real climate debate bubbling along in scientific journals, conferences and, occasionally, even in the halls of Congress. It gets a lot less attention than the boisterous and fake debate that dominates our public discourse, but it is much more relevant to how the world might actually address the problem. In the real climate debate, no one denies the relationship between human emissions of greenhouse gases and a warming climate. Instead, the disagreement comes down to different views of climate risk in the face of multiple, cascading uncertainties. On one side of the debate are optimists, who believe that, with improving technology and greater affluence, our societies will prove quite adaptable to a changing climate. On the other side are pessimists, who are more concerned about the risks associated with rapid, large-scale and poorly understood transformations of the climate system. But most pessimists do not believe that runaway climate change or a hothouse earth are plausible scenarios, much less that human extinction is imminent. And most optimists recognize a need for policies to address climate change, even if they don’t support the radical measures that Ms. Thunberg and others have demanded. In the fake climate debate, both sides agree that economic growth and reduced emissions vary inversely; it’s a zero-sum game. In the real debate, the relationship is much more complicated. Long-term economic growth is associated with both rising per capita energy consumption and slower population growth. For this reason, as the world continues to get richer, higher per capita energy consumption is likely to be offset by a lower population. A richer world will also likely be more technologically advanced, which means that energy consumption should be less carbon-intensive than it would be in a poorer, less technologically advanced future. In fact, a number of the high-emissions scenarios produced by the United Nations Intergovernmental Panel on Climate Change involve futures in which the world is relatively poor and populous and less technologically advanced. Affluent, developed societies are also much better equipped to respond to climate extremes and natural disasters. That’s why natural disasters kill and displace many more people in poor societies than in rich ones. It’s not just seawalls and flood channels that make us resilient; it’s air conditioning and refrigeration, modern transportation and communications networks, early warning systems, first responders and public health bureaucracies. New research published in the journal Global Environmental Change finds that global economic growth over the last decade has reduced climate mortality by a factor of five, with the greatest benefits documented in the poorest nations. In low-lying Bangladesh, 300,000 people died in Cyclone Bhola in 1970, when 80% of the population lived in extreme poverty. In 2019, with less than 20% of the population living in extreme poverty, Cyclone Fani killed just five people. “Poor nations are most vulnerable to a changing climate. The fastest way to reduce that vulnerability is through economic development.” So while it is true that poor nations are most vulnerable to a changing climate, it is also true that the fastest way to reduce that vulnerability is through economic development, which requires infrastructure and industrialization. Those activities, in turn, require cement, steel, process heat and chemical inputs, all of which are impossible to produce today without fossil fuels. For this and other reasons, the world is unlikely to cut emissions fast enough to stabilize global temperatures at less than 2 degrees above pre-industrial levels, the long-standing international target, much less 1.5 degrees, as many activists now demand. But recent forecasts also suggest that many of the worst-case climate scenarios produced in the last decade, which assumed unbounded economic growth and fossil-fuel development, are also very unlikely. There is still substantial uncertainty about how sensitive global temperatures will be to higher emissions over the long-term. But the best estimates now suggest that the world is on track for 3 degrees of warming by the end of this century, not 4 or 5 degrees as was once feared. That is due in part to slower economic growth in the wake of the global financial crisis, but also to decades of technology policy and energy-modernization efforts. “We have better and cleaner technologies available today because policy-makers in the U.S. and elsewhere set out to develop those technologies.” The energy intensity of the global economy continues to fall. Lower-carbon natural gas has displaced coal as the primary source of new fossil energy. The falling cost of wind and solar energy has begun to have an effect on the growth of fossil fuels. Even nuclear energy has made a modest comeback in Asia.

# 2NC

## T---Per Se

### 2NC---AT: W/M

#### Supervision is determined by a quantification fo the competitive effects

**1AC 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 , 10-28-2016, accessed on 8-26-2021, Scholarship@Vanderbilt Law, "The New Antitrust Federalism", https://scholarship.law.vanderbilt.edu/faculty-publications/15/) //gene

IV. THE FUTURE OF ANTITRUST FEDERALISM: ACTIVE SUPERVISION

The new antitrust federalism may be able to curb excessively anticompetitive state regulation while preserving the federalism envisioned in Parker. But as always, the devil is in the details, and the recent cases are light on those, especially in defining "active state supervision." The success of the Court's new path-which reviews state activity more deeply than the boundary-drawing method allowed, yet stops short of substantive federal review of state regulation-depends on developing a set of state regulatory procedures that promote genuine jurisdictional diversity without dealing industry a carte blanche. "Active state supervision" should be found only where a politically accountable branch of the state, acting as supervisor, has identified and attempted to quantify the competitive effects of the regulatory action.

#### Has the courts balance interstate effects with state powers

1AC Sack 21 (NOTE INTERSTATE BURDENS AND ANTITRUST FEDERALISM: A REEXAMINATION OF PARKER IMMUNITY JOHN SACK, J.D., Duke Law School, Class of 2022, B.S. University of Michigan, 2019. I want to express thanks to Professor Neil Siegel, Professor Barak Richman, and all those who contributed to helping me write this piece, 2021] ANTITRUST, STATE ACTION, & PARKER DOCTRINE REFORM 93, 94 DUKE JOURNAL OF CONSTITUTIONAL LAW & PUBLIC POLICY SIDEBAR [VOL. 16, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1196&context=djclpp_sidebar>, +=)

The Sherman Act has been described as the “Magna Carta” of the American economic system.1 Since 1890, it has been used to punish individuals and corporations that engage in unreasonable restraints of trade.2 The Act has been described as the Bill of Rights for American economic liberties.3 And as the Constitution sought to build a Union of States, the Sherman Act should seek to build a unified national economy. Although the Sherman Act has been successful in policing the U.S. economy, it has not been without its critics.4 Specifically, the per se immunity for certain state-created monopolies has been widely criticized.5

Despite the criticism, the doctrine has remained largely unchanged since its inception in Parker v. Brown nearly eighty years ago.6 One of the Parker doctrine’s most common critiques is its failure to consider the interstate burdens state-implemented restraints can create.7 Although the U.S. federal system must permit states to regulate within a wide berth, state-created restraints erect the same barriers that the Sherman Act sought to eliminate.8 Despite the Parker doctrine’s faults, it still serves a valuable purpose in respecting the federal balance, and it “embod[ies] in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution.”9 Even though the Court has declined to revisit the doctrine, the development of the Court’s commerce clause jurisprudence and its new understanding of federalism require a revision of the Parker doctrine.10

Specifically, courts should balance the interstate effects and potential for collective action problems with the state’s interest in the regulation. Although states should have the authority to regulate conduct inside their boundaries, this authority should not be extended to create economic conditions that burden neighbor states or the nation as a whole. Once the federalism motivations behind the Parker doctrine disappear, all that is left is a restraint on trade. A state wishing to create interstate friction and promote economic insularism should not receive immunity to do so.

Part I will first outline the doctrine, from its beginnings in Parker v. Brown to its modern doctrinal framework. Part II will then discuss the rationale behind the doctrine, ranging from Congress’s understanding of the Commerce Clause and federalism in 1890 to the modern justifications. The state’s role in regulation plays a large part in why the doctrine survives, because holding a state liable for all of its regulation, as the Sherman Act would otherwise require, would effectively destroy the state’s power to regulate altogether.11 Part III will expound critiques of the doctrine. Scholars have long voiced concerns about the doctrine and whether it comports with the principles of federalism. Furthermore, Part IV will propose solutions, along with their respective costs and benefits. Namely, this paper will argue that the best solution is to allow the Sherman Act to preempt state action when state action creates excessive interstate conflict. It is a constitutional goal to promote harmony among the states, minimize interstate burdens, and discourage isolationism and favoritism.12 The Constitution strives to create a more perfect political union, and in that same spirit the Sherman Act should strive to create a more perfect economic union as well.13

#### All they do is create a rule, allowing its use for case-by-case evaluation---until that rule is applied, this prohibits nothing at all!

Andriani Kalintiri 20, Lecturer in Competition Law at King's College London, “Analytical Shortcuts in EU Competition Enforcement: Proxies, Premises, and Presumptions,” Jnl of Competition Law & Economics (2020) 16(3): 392-433, Lexis

Firstly, normative assertions and economic propositions are what gives shape to the otherwise vague letter of the antitrust and merger provisions. Arguably, those provisions do not immediately reveal what is prohibited and are in need of elaboration to become operational. In this process, varying perceptions about the goals of the discipline may completely shift the focus of the analysis. 45 For example, if competition law is to be enforced with a view to protecting small- and medium-sized enterprises or employment-as opposed or in addition to, say, promoting consumer welfare-then different effects in the market may become relevant. 46 On the other hand, economic premises about the procompetitive or anticompetitive nature of the conduct at hand typically inform the choice between the application of a 'rule' or a 'standard'. 47 The prohibition, for instance, of cartels as 'by object' violations of antitrust law rests on the economic premise that conduct of this kind lacks any efficiency justification and thus a rule of prima facie illegality is not liable to chill procompetitive behaviour. 48 Conversely, the treatment of quantity rebates as prima facie lawful is grounded in the idea that this type of discount reflects the cost savings achieved by the undertaking in question. 49 In the same vein, the 'by effect' analysis of exclusive dealing under Article 101(1) TFEU is explained by the economic insight that behaviour of this kind may entail efficiencies. 50 Accordingly, normative and economic premises are instrumental in the construction of competition law.

### 2NC---AT: Pre-existing

#### Increase’ means adding extent.

Phillips ’2 [Louis M; May 1; Judge on the Bankruptcy Court of M.D. Maryland; Westlaw, “In re Goldberg,” 277 B.R. 251]

In determining the plain meaning of the phrase “increases the obligor's insolvency,” the Court initially notes that this phrase makes no reference whatsoever to a “reasonably equivalent value” test26 or even to the “fair consideration” test of the Section 3 of the UFCA.27 Instead, Article 2036 of the Civil Code merely uses the word “increases,” and the absence of “reasonably equivalent value” language or “fair consideration” language rings loudly in the Court's judicial ear. Accordingly, the Court will focus on the plain meaning of the term “increases.” Taking note from one of the dictionaries of choice of the United States Supreme Court,28 the Court finds that the definition of the word “increase” in Webster's Ninth New Collegiate Dictionary reads as follows:

\*270 [T]o become progressively greater (as in size, amount, number, or intensity) .... to make greater: AUGMENT .... INCREASE, ENLARGE, AUGMENT, MULTIPLY mean to make or become greater. INCREASE used intransitively implies progressive growth in size, amount, intensity; used transitively it may imply simple not necessarily progressive addition ... the act or process of increasing: as ... addition or enlargement in size, extent, quantity.

Webster's Ninth New Collegiate Dictionary 611 (1990) (emphasis added).

### 2NC---AT: Predictability

#### ‘ANTICOMPETITIVE’---deeming a practice anticompetitive under antitrust law means declaring it per se illegal

Lewis Franklin Powell Jr., 77, US Supreme Court Justice, delivered the opinion of the Court. Cont'l T.V. v. GTE Sylvania, 433 U.S. 36. Argued February 28, 1977 ; June 23, 1977; as amended No. 76-15

[\*\*\*\*23] LEdHN[3] [3]LEdHN[4] [4]LEdHN[5A] [5A]LEdHN[6A] [6A]The traditional framework of analysis under § 1 of the Sherman Act is familiar and does not require extended discussion. Section [\*\*\*580] 1 HN1 prohibits "[e]ery contract, combination…, or conspiracy, in restraint of trade or commerce." Since the early years of this century a judicial gloss on this statutory language has established the "rule of reason" as the prevailing standard of analysis. Standard Oil Co. v. United States, 221 U. S. 1 (1911).Under this rule, the fact-finding weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. 15 [\*\*\*\*25] HN2 Per se rules of [\*50] illegality [\*\*\*\*24] are appropriate only when they relate to conduct that is manifestly anticompetitive. As the Court explained in Northern Pac. R. Co. v. United States, 356 U. S. 1, 5 (1958), "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." 16 [Note 16 HN3 Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, per se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials, see Northern Pac. R. Co. v. United States, 356 U.S. 1, 5; United States v. Topco Associates, Inc., 405 U.S. 596, 609-610 (1972), but those advantages are not sufficient in themselves to justify the creation of per se rules. If it were otherwise, all of antitrust law would be reduced to per se rules, thus introducing an unintended and undesirable rigidity in the law.]

In [\*\*\*\*26] essence, the issue before us is whether Schwinn's per se rule can be justified under the demanding standards of Northern Pac. R. Co. The Court's refusal to endorse a per se rule in White Motor Co. was based on its uncertainty as to whether vertical restrictions satisfied those standards. Addressing this question for the first time, the Court stated: S

"We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on [\*\*2558] competition and lack… any redeeming virtue' ( Northern Pac. R. Co. v. United States, supra, p. 5) and therefore should [\*51] be classified as per se violations of the Sherman Act." 372 U. S., at 263.I

Only four years later the Court in Schwinn announced its sweeping per se rule without even a reference to Northern Pac. R. Co. and with no explanation of its sudden change in position. 17 We turn now to consider Schwinn in light of Northern Pac. R. Co.

[\*\*\*\*27] The market impact of vertical restrictions 18 is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition. [\*52] 19 Significantly, the Court in Schwinn did not distinguish among the challenged restrictions on the basis of their individual potential for intrabrand harm or interbrand benefit. Restrictions that completely eliminated intrabrand competition among Schwinn distributors were analyzed no differently from those that merely moderated intrabrand competition among retailers. The pivotal factor was the passage of title: All restrictions were held to be per se illegal where title had passed, and all were evaluated and sustained under the rule of reason where it had not. The location restriction at issue here would be subject [\*\*\*582] to the same pattern of analysis under Schwinn.

[\*\*\*\*28] It appears that this distinction between sale and nonsale transactions resulted from the Court's effort to accommodate the perceived intrabrand harm and interbrand benefit of vertical restrictions. The per se rule for sale transactions reflected the view that vertical restrictions are "so obviously destructive" [\*\*2559] of intrabrand competition 20 that their use would "open the door to exclusivity of outlets and limitation of territory [\*53] further than prudence permits." 388 U. S., at 379-380.21 Conversely, the continued adherence to the traditional rule of reason for nonsale transactions reflected the view that the restrictions have too great a potential for the promotion of interbrand competition to justify complete prohibition. 22 [\*54] The Court's opinion provides no analytical support for these contrasting positions. Nor is there even an assertion in the opinion that the competitive impact of vertical restrictions [\*\*\*583] is significantly affected by the form of the transaction. Nonsale transactions appear to be excluded from the per se rule, not because of a greater danger of intrabrand harm or a greater promise of interbrand benefit, [\*\*\*\*29] but rather because of the Court's unexplained belief that a complete per se prohibition would be too "inflexibl[e]." Id., at 379.

#### ‘SUBSTANTIAL’---it means per se illegal

Philip C. Kissam 83, Professor of Law, University of Kansas. B.A. 1963, Amherst College; LL.B. 1968, Yale University. "Antitrust Law and Professional Behavior", 62 Tex. L. Rev. 1

A federal district court in Florida adopted this view in Feminist Women's Health Center, Inc. v. Mohammad, 415 F. Supp. 1258 (N.D. Fla. 1976), rev'd on other grounds, 586 F.2d 530 (5th Cir. 1978). A group of fee-for-service obstetricians allegedly conspired against a low fee, outpatient abortion clinic by discouraging physicians from working at the clinic and by refusing to provide requested backup services at the obstetricians' hospital. The defendants claimed that their actions were motivated by a concern that the clinic was providing inferior quality services. Id. at 1269-70. On a motion for a preliminary injunction, the district court rejected this defense because there was no evidence of inferior quality and because there was a substantial difference between the fees charged by the clinic and those charged by the fee-for-service physicians for the same services. Id. The court in effect held that the defendants had acted with an anticompetitive purpose and that the plaintiff properly relied on a per se theory. See id. at 1263, 1270.

Commentators have noted other cases in which fee-for-service physicians have denied hospital staff privileges to physicians who were associated with prepaid medical practices (HMOs) that threatened to compete with the fee-for-service physicians. See, e.g., Goldberg & Greenberg, supra note 36, at 59-62; Havighurst, Health Maintenance Organizations and the Market for Health Services, 35 LAW & CONTEMP. PROBS. 716, 777-81 (1970). There is no reason why an antitrust court should not apply the per se rule summarily in these cases if there are substantial anticompetitive purposes behind the exclusionary act. See Kissam, supra note 188, at 503.

### 2NC---AT: Aff Ground

#### Current proposals disagree on this issue, with some advocating prohibitions, and others advocating altered standards---that proves this is a real debate.

Brumfield et al. 21, Kevin C. Adam, Jaclyn Phillips & Chenuan Fu, 7/30/21. Antitrust Division, White & Case, LLP. "Technology Industry Should Watch Closely as the Executive Branch and Lawmakers Set Their Sights on Antitrust" https://www.whitecase.com/publications/alert/technology-industry-should-watch-closely-executive-branch-and-lawmakers-set

Separately, federal lawmakers were already taking aim at similar 'initiatives' through proposed legislation. On June 11, 2021, lawmakers from both parties in the House Judiciary Committee, led by Antitrust Subcommittee Chair David Cicilline (D-RI) and Ranking Member Ken Buck (R-CO), introduced five bills calling for substantial changes to existing antitrust law, such as: introducing new forms of prohibited conduct (i.e., self-preferencing); targeting acquisitions by technology companies that meet a defined size threshold; shifting burdens of proof; and mandating data portability and interoperability.

## CP---Adv

### 2NC---Solvency---Innovation

#### A national innovation policy catalyzes moonshot reforms and stimulates rapid competition in all sectors.

Sadat ’20 [Mir; November 22; former Policy Director leading interagency coordination on defense and space policy issues, including at the Department of Defense and National Security Council, Ph.D. from Claremont Graduate University; The Hill, “Why innovation is so important to America's global leadership,” <https://thehill.com/opinion/technology/526535-why-innovation-is-so-important-to-americas-global-leadership>]

Before America’s stature as a global innovation leader declines further, the White House and Congress can:

* Create a bipartisan innovation task force to leverage whole-of-nation insights from all economic sectors to promulgate a national innovation policy that forecasts opportunities, requirements, improvement areas and threats over the next decade.
* Establish a national innovation council, chaired by the vice president, by consolidating the Office of American Innovation, the Presidential Innovation Fellows, the Office of Trade and Manufacturing Policy, and the National Security Commission on Artificial Intelligence — to build off the task force’s work. In addition to this staff, its interagency council members should have a vested interest in critical and disruptive technologies.
* The innovation council should leverage existing authorities and be given new ones to convene a volunteer innovation advisory group of non-federal representatives of industries and others involved in R&D and science and technology innovation. They should focus on “What’s next?” and “How do we maneuver so that we can be first to arrive at the next stage?”

The innovation council would coordinate with the Office of Science and Technology Policy, the Office of Management and Budget, the National Space Council and the National Security Council to challenge science and technology and R&D programs. Their measure of success should be based on how effectively and timely they identify areas for innovation investment shortages, opportunities for modernization, and implementation. This requires mapping, aligning and streamlining disparate yet interdependent policies, strategies and practices across the public and private sectors.

The innovation council also could synchronize efforts with the National Economic Council and the Domestic Policy Council to ensure consistency with administration social and economic policies. A visionary, whole-of-government policy could improve coordination, decrease adoption delays, and potentially restore the federal budget balance by reducing stovepipes and waste.

The technological innovations of the past 10 years have been exponentially greater than those that have been achieved over the previous 2,000 years combined. While even more innovation is expected over the next 10 to 15 years, [America is projected](https://www.bloomberg.com/graphics/2020-global-economic-forecast-2050/) to lose its innovation ecosystem and political leadership to China. In such a scenario, our national policies no longer would set agendas for democratic norms and values, ethical business practices, human rights, environmental and social impacts, or financial transparency.

America’s innovators need a bipartisan national innovation policy, steered by a top-down coordinating body that advocates innovative moonshot policies and reforms. In doing so, the government and private sector could execute robust strategies to unleash our innovative base, modernize procurement and financing mechanisms, bolster public-private partnerships, ensure the comforts of our way of life, increase the growth of our economy, and finally strengthen our national security for many decades to come.

### 2NC---Solvency---Trees

#### Tress solve---funding is the only barrier

**McFarland 16** [Matt McFarland, January 12, 2016, “Could artificial trees be part of the climate change solution?,” The Guardian, https://www.theguardian.com/environment/2016/jan/12/artificial-trees-fight-climate-change]

In the fight against climate change, trees are an ally. They suck in carbon dioxide, reducing the harmful greenhouse gases. But there’s a problem: we’re asking them to work overtime.

Trees can’t absorb enough of the carbon dioxide humanity is throwing at them unless we turn every inch of available land into a dense forest, according to Christophe Jospe, chief strategist at Arizona State’s Center for Negative Carbon Emissions.

But what if trees – or machines modelled after them – had superpowers? Artificial trees with otherworldly abilities are a great hope against climate change, since environmental experts say it’s not realistic to expect humanity to release significantly less carbon into the atmosphere. Our best bet might be to capture the excess carbon and store it or convert it into something useful, such as fuel.

Five years ago, a Boston group recruited two designers to develop artificial city trees. The trees they envisioned offered shade and would absorb carbon dioxide. The thinking was to place the trees where soil was too shallow to host traditional trees.

The group delivered great mock-ups, but little else has come from it so far. Finding funding is a challenge.

“You don’t want to be the first person to pay,” said Kimberly Poliquin, the director of ShiftBoston. “Scientists have figures, but you don’t know if that’s going to be the reality.”

Capturing and storing carbon isn’t yet the type of expense local governments and organisations can slide into their budgets. The cost of the technology is dropping, but not to a point where it’s affordable to install “forests” of these systems. Poliquin estimates an upfront cost of $350,000 for an artificial tree, but she expects prices to come down considerably. She hopes to develop a prototype of such a tree in one or two years.

There’s plenty of interest in removing carbon from the air. One method is to capture carbon directly from the smokestacks of power plants. Another method – which the Boston project targeted – is pulling carbon out of the open air, Swhere it isn’t present in as much density. In theory, one square kilometre of artificial trees could remove 4m tons of carbon a year, according to the Center for Negative Carbon Emissions, which is developing a technology to work in open spaces.

Seven large-scale projects to capture and store carbon at power plants will arrive in 2016 and 20-17. Most are in the US and Canada. But more growth is needed before carbon capture and storage makes an impact on climate change. According to the Global Carbon Capture and Storage Institute, the 15 large-scale projects operating around the world can capture 28m tonnes of carbon dioxide per year. To keep climate change in check, we’ll need to process 4bn tonnes in 2040 and 6bn in 2050.

The Center for Negative Carbon Emissions is developing technology that it says is 1,000 times as effective as trees, per unit of biomass. The group is located in the desert because its technology responds well to warm, dry air and requires less energy in that environment.

Operating in cooler climates, such as Boston, would add expenses.

Once the technology is fully built out, the group estimates it will be removing carbon dioxide for about $100 a tonne. As is, there’s no resemblance to a tree as scientists – including those at Arizona State – focus on making the carbon-removal process effective and affordable rather than beautiful to look at.

## CP---Common Law

### 2NC---Solvency---AT: Sherman Key

#### It’s identically solvent to the plan---all antitrust policy’s interpreted and enforced through a common-law-like legislative delegation to the judiciary.

--yes, this article says that is a bad interpretation of the Sherman Act, but it is nevertheless the dominant one and what would be used for the plan

Daniel A. Crane 21, Frederick Paul Furth, Sr. Professor of Law, University of Michigan, “Antitrust Antitextualism,” 96 Notre Dame L. Rev. 1205, https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4952&context=ndlrScholars and judges widely agree that the U.S. antitrust statutes are open-textured, vague, indeterminate, and textually unilluminating.1 [FOOTNOTE 1 BEGINS] 1 ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 372–75, 409 (1978) (describing antitrust statutes as “open-textured”); WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 4 (Random House 1965) (1954) (“From the beginning many men have criticized the [Sherman] Act as vague, its meaning as elusive, its commands as ambiguous.”); Roger D. Blair & John E. Lopatka, Albrecht Overruled—At Last, 66 ANTITRUST L.J. 537, 552 (1998) (critiquing the Sherman Act’s “indefinite language” and “elusive meaning”); Douglas H. Ginsburg, An Introduction to Bork (1966), COMPETITION POL’Y INT’L, Spring 2006, at 225, 225 (“The open textured nature of the [Sherman] Act—not unlike a general principle of common law— vests the judiciary with considerable responsibility . . . to choose among competing values.”); William H. Page, Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation, 1987 DUKE L.J. 618, 659 (“[T]he Sherman Act is so open textured and the legislative history so vague, that any standard the Court adopts is ultimately a judicial creation.”). [FOOTNOTE 1 ENDS] They further agree that little use can be made of the statutes’ legislative histories.2 [FOOTNOTE 2 BEGINS] 2 Nat’l Soc’y of Pro. Eng’rs v. United States, 435 U.S. 679, 688 (1978) (“Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations.”); THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS 20–160 (E. Thomas Sullivan ed., 1991); George E. Garvey, The Sherman Act and the Vicious Will: Developing Standards for Criminal Intent in Sherman Act Prosecutions, 29 CATH. U. L. REV. 389, 390, 417 (1980) (noting that the Sherman Act’s legislative history demonstrates that the Sherman Act “was deliberately intended to be indefinite with specificity to be provided by the judiciary”); Michael S. Jacobs, An Essay on the Normative Foundations of Antitrust Economics, 74 N.C. L. REV. 219, 232 (1995) (describing prevailing views that the Sherman Act’s legislative history is “confused” (quoting From Von’s to Schwinn to the Chicago School: Interview with Judge Richard Posner, Seventh Circuit Court of Appeals, ANTITRUST, Spring 1992, at 4, 4)). [FOOTNOTE 2 ENDS] It follows that the antitrust statutes are best understood as a legislative delegation to the courts to create an evolutionary and dynamic common law of competition.3 [FOOTNOTE 3 BEGINS] 3 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, 1 ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 62 (3d ed. 2006) (stating that the Sherman Act “invest[ed] the federal courts with a jurisdiction to create and develop an ‘antitrust law’ in the manner of the common law courts”); William F. Baxter, Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law, 60 TEX. L. REV. 661, 663 (1982) (“Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions.”); Frank H. Easterbrook, Statutes’ Domains, 50 U. CHI. L. REV. 533, 544 (1983) (“The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law.”); Frank H. Easterbrook, Workable Antitrust Policy, 84 MICH. L. REV. 1696, 1705 (1986) (“The Sherman Act set up a common law system in antitrust.”); Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. CHI. L. REV. 1, 44–45 (1985) (describing antitrust statutes as delegating to courts power to develop common law of antitrust). [FOOTNOTE 3 ENDS] As the Supreme Court explained in its landmark Leegin decision on resale price maintenance, “From the beginning the Court has treated the Sherman Act as a common-law statute. . . . Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act’s prohibition on ‘restraint[s] of trade’ evolve to meet the dynamics of present economic conditions.” 4 In other words, the statutory texts disclose little of importance; the action is all in dynamic judicial interpretation.

#### It’s optically identical

Jonathan B. Baker 19, Research Professor of Law, American University Washington College of Law, “Accommodating Competition: Harmonizing National Economic Commitments,” 60 Wm. & Mary L. Rev. 1149, March 2019, WestLaw

Were the courts to seek to interpret the Constitution to assure competition, moreover, that would be unlikely to make much practical difference to the way the competition commitment is enforced. The resulting constitutional jurisprudence would probably look like the judicial elaboration of the antitrust laws. If so, judicial \*1173 enforcement of a constitutional mandate for competitive markets would turn out to be no more protective of the competition commitment than is the interpretation and enforcement of the antitrust statutes. The national economic commitment to assuring competitive markets must be protected, and antitrust enforcement needs to be strengthened, but we should look to the political branches and judicial interpretation of the antitrust statutes as the vehicle for doing so, not to the Constitution.

#### Revitalizing non-statutory common law as binding spurs quick climate mitigation

Mark P. Nevitt & Robert V. Percival 19, Mark P. Nevitt is the George Sharswood Fellow at the University of Pennsylvania Law School and a former active duty Navy Judge Advocate General (JAG) officer who served in the rank of commander; Robert V. Percival is the Robert F. Stanton Professor of Law & Director of the Environmental Law Program, University of Maryland Francis King Carey School of Law, “Could Official Climate Denial Revive the Common Law as a Regulatory Backstop?,” Washington University Law Review, Vol. 96, No. 3, pp 441-494

“Global warming may be a ‘crisis,’ even ‘the most pressing environmental problem of our time.’ Indeed, it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it. It is not a problem, however, that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government, who continue to consider regulatory, legislative, and treaty-based means of addressing global climate change.”

— Chief Justice John Roberts, dissenting in Massachusetts v. EPA (2007)1

“The concept of global warming was created by and for the Chinese in order to make U.S. manufacturing non-competitive.”

— Donald J. Trump, Nov. 6, 20122

INTRODUCTION

Prior to the advent of comprehensive regulatory programs to protect the environment, the common law served as the primary vehicle for redressing environmental harm. More than a century ago, states used the common law of interstate nuisance to seek redress for the most serious transboundary pollution problems.3 Exercising its original jurisdiction over disputes between states, the U.S. Supreme Court issued injunctions limiting smelter emissions4 and requiring cities to build sewage treatment plants5 and garbage incinerators.6

Today the common law has been eclipsed by the enactment of federal legislation requiring agencies to regulate sources of pollution. These statutes have been interpreted broadly to give agencies great power to respond to emerging problems. For example, in Massachusetts v. EPA the U.S. Supreme Court held that the Clean Air Act (CAA) gives the U.S. Environmental Protection Agency (EPA) the authority to regulate greenhouse gas (GHG) emissions if they “endanger public health or welfare”7 by contributing to global warming and climate change.8 The Court rejected not only the claim that EPA lacked such authority, but also the agency’s other rationales for refusing to take action. 9 Following the ruling, EPA had to decide “whether sufficient information exist[ed] to make an endangerment finding.”10 It made the endangerment finding two years later.11

In a series of cases beginning in the 1970s, the Court has held that the comprehensive regulatory programs erected by the Clean Water Act (CWA) and the CAA displace federal common law nuisance claims.12 When states sought to use public nuisance law to address the threats posed by climate change, industry groups urged the Court to bar such actions on constitutional grounds. 13 Instead, in June 2011 the Court held in American Electric Power Co., Inc. v. Connecticut (AEP) that the CAA displaced federal common law nuisance claims in the context of regulating GHG emissions. At the time of the ruling, the Obama Administration EPA was moving aggressively to regulate GHG emissions. But, writing for a unanimous Court, Justice Ginsburg warned that a decision by the EPA not to regulate greenhouse gas emissions would invite litigation and would be subject to judicial review.14

With the election of President Trump, federal environmental policy has sharply shifted. The President has announced his intent to withdraw the U.S. from the Paris Agreement that every other country in the world has accepted as a global response to climate change.15 EPA is moving aggressively to repeal the Obama Administration’s Clean Power Plan, 16 roll back Corporate Average Fuel Economy (CAFE) standards, and attempt to preempt state programs to reduce GHG emissions. 17 Many Trump supporters want EPA to reverse its finding that GHG emissions endanger public health and welfare by contributing to climate change.18

If the Trump EPA reverses the 2009 endangerment finding, this would foreclose the EPA’s ability to use the CAA to regulate GHG emissions. This Article considers whether such an action unwittingly could revive the federal common law of nuisance as a regulatory backstop. While the Supreme Court ruled in AEP that the CAA displaces any federal common law right to seek abatement of carbon-dioxide emissions from fossil fuelfired power plants, this was predicated on EPA actually making a reasoned and informed judgment of GHG emission dangers—not jettisoning agency expertise in favor of politics.19 This litigation, particularly if brought by states as quasi-sovereigns against EPA, could serve as a powerful prod to force federal action on climate change. After all, states have the “last word as to whether [their] mountains shall be stripped of their forests and [their] inhabitants shall breathe pure air.”20

In light of the Trump EPA’s current stance on environmental regulations, the Court’s decision in AEP, and other nuisance cases decided by federal appellate courts, 21 this is a propitious time to reconsider the use of public nuisance law to redress environmental problems. This Article focuses on what we call “the common law of interstate nuisance”—a body of law developed when states, acting in a parens patriae capacity, sought to protect their citizens from environmental harm originating in other states through public nuisance actions under either federal or state common law.22

### 2NC---Solvency---AT: Clarity

#### Uncertainty is inevitable, BUT common law is predictable and sufficiently certain

David McGowan 1, Associate Professor of Law, University of Minnesota Law School, “Innovation, Uncertainty, and Stability in Antitrust Law,” 16 Berkeley Tech. L.J. 729, Lexis

3. Antitrust and Common-Law Adjudication

Debates over the origins and original meaning of the Sherman Act are a notorious quagmire; debates over the congressional purposes behind the Cellar-Kefauver Amendments are a little clearer, 65 but the grammatical change in the original section 7 language left the statute as open-ended as it had been before. 66 That left it to the courts to discern which mergers threatened to limit competition substantially. The highlights of legislative history we have seen in the last two sections illustrate a problem for courts interpreting the antitrust laws. The statutes emerged from political struggles involving conflicting economic interests, but the statutory language does not resolve the conflicts. This lack of direction in the statutory language has both by congressional design and by default given considerable power and responsibility to courts to choose among a range of interests. The upshot is that neither the statutory language nor the legislative history provides courts with a clear rule of decision for evaluating innovation claims or weighing innovation as against other considerations.

[\*753] Judges have long concluded that the Sherman Act gives them common-law authority to interpret the statute in a dynamic manner, taking changes in economic practices and understanding into account. Chief Justice Hughes's famous dictum that "as a charter of freedom, the [Sherman] act has a generality and adaptability comparable to that found to be desirable in constitutional provisions" is a strong, but representative statement. 67 In the modern era, the Court has said that "the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition,'" and that "the term "restraint of trade,' as used in 1, also "invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.'" 68

Antitrust scholars have tended to agree with this assessment. Judge Posner has written that "the body of antitrust doctrine is largely the product of judicial interpretation of the vague provisions of the antitrust laws and thus can be changed by the courts within the very broad limits set by the language and what we know of the intent behind it." 69 Judge Easterbrook gave the Sherman Act as an example of a law that "effectively authorizes courts to create new lines of common law" 70 and has elsewhere said that the statute "does not contain a program; it is a blank check." 71 Professor Baxter analogized antitrust courts to Congress; 72 and Professor Hovenkamp has suggested that we regard the Sherman Act as ""enabling' legislation - an invitation to the federal courts to learn how businesses and markets work and formulate a set of rules that will make them work in socially efficient ways." 73 This position is reasonable, 74 particularly because the statute adopted common-law terminology and its [\*754] leading proponent insisted that the bill merely enacted into federal law the existing common law of each state.

Most commentators who note the common-law nature of Sherman Act interpretation emphasize the flexibility of the common-law approach, as does the Court. 75 From the judicial perspective, this emphasis is useful to explain to readers why opinions in a field resting nominally on statutes spend so little time on the statutory language. Where the statutory command is to engage in common-law analysis, that analysis is itself a proper form of statutory interpretation.

But the common-law method is not about flexibility alone. A reasonable degree of stability and a high degree of reasoned evolution are at least as important as flexibility, though any serious participant in common-law adjudication will acknowledge that perfect certainty is neither achievable nor required. 76 Lawyers cannot advise clients, and clients cannot obey the law, if the "dynamic potential" of common-law antitrust decisionmaking is not balanced by constraints that render the decisions reasonably predictable.

Reasonable predictability requires that each decision rest on reasons that identify the purposes the law seeks to advance, orders them to resolve conflicts, and classifies the behavior at issue relative to those purposes in an analytically rigorous manner that can be understood and replicated by attorneys advising clients. The clarity with which purposes are identified and ranked and the rigor of the analysis of behavior relative to those purposes are what allow lawyers operating in the real world to advise clients with a degree of confidence that, while not reaching certainty, allows business to get done.

#### Statute-independent common law changes are actually clearer than the plan

Milton Handler 82, Professor Emeritus of Law, Columbia University, A.B. 1924, L.L.B. 1926, Columbia University; L.L.D. (honoris causa) 1965 Hebrew University Senior Partner, Kaye, Scholer, Fierman, Hays & Handler, New York, New York, “Reforming the Antitrust Laws,” November 1982, 82 Colum. L. Rev. 1287, Lexis

A. Background

The in pari delicto defense -- from the Latin maxim "in pari delicto potior est conditio defendentis" 445 -- arose at English common law as an expression of a moral judgment that a party should not be permitted to profit from his own misconduct. One cannot understand in pari delicto without relating it to the defenses of illegality and unclean hands. In wholly executory contract situations, where a party sues to enforce an illegal contract, illegality is a complete defense -- the courts will not enforce the illegal bargain. 446 Where the illegal contract has been executed and where one party sues for rescission or for damages, that party may recover if he is not in pari delicto; if he is in pari delicto, his suit is barred. 447 In other words, in pari delicto is the name given to the illegality defense to actions for rescission or damages in executed contract situations.

In pari delicto is distinct from the equitable doctrine of "unclean hands." The doctrine of unclean hands -- a defense in equity only -- looks not only to plaintiff's involvement in the transaction comprising plaintiff's claim, but also to misconduct by plaintiff generally relating to plaintiff's allegations in suit. If the misconduct by plaintiff is sufficiently relating to plaintiff's allegations in suit. If the misconduct by plaintiff is sufficiently related to the relief that plaintiff seeks, plaintiff will be denied equitable relief. 448 Unclean hands merely requires [\*1360] a nexus between plaintiff's misconduct and the relief that plaintiff seeks; it does not go so far as in pari delicto and require that plaintiff have equally participated with defendant in the very illegality which is the subject of plaintiff's suit.

The in pari delicto defense was recognized in the United States from the earliest days of the Republic. 449 It was applied in the antitrust context beginning in 1900 in Bishop v. American Preservers Co. 450 Over the years, however, the courts began to stray from the common law ambit of the defense. Many courts were confused by the distinction at common law between in pari delicto and unclean hands. 451 Another troubling application (or misapplication) of the in pari delicto defense arose in cases where the courts did not fully analyze the respective fault of the parties regarding the illegality or the coercive circumstances involved in plaintiff's participation in the specific challenged conduct. 452

B. The Perma Life Case

The Supreme Court was faced with a confusing disarray of decisions misconstruing and misapplying the in pari delicto defense when it granted certiorari to review the Seventh Circuit's decision in Perma Life. Given the common law limitations on that doctrine and the facts of that case, 453 it is small wonder that the Supreme Court unanimously reversed. What is baffling is that the Court spoke with so many voices, thus dissipating a golden opportunity to give proper guidance to the lower courts.

It is difficult to ferret out a true majority holding from the five opinions in Perma Life. 454 Despite Justice Black's clear language rejecting in pari [\*1361] delicto as an antitrust defense, the fact that a plaintiff equally and voluntarily participated in the challenged misconduct remained an antitrust defense under Perma Life. Five of the Justices were explicit on this score, 455 and the remaining four Justices did not close the door to such a defense. 456 In other related areas, the full Court was in agreement. All of the Justices agreed that the lower courts had incorrectly applied the common law standards for an in pari delicto defense; 457 and that a defense did not properly lie where the plaintiff was as responsible as the defendant for the challenged illegality or where the plaintiff had been coerced (literally or under concepts of economic coercion, unequal bargaining power, or business necessity) into participating in the illegality. 458

C. The Legacy of Perma Life

What is the legacy of Perma Life? In part, the problems generated by the Perma Life opinions have been semantic. Courts have struggled with a label for the "equal fault" defense in view of Justice Black's absolute repudiation of in pari delicto. 459 In addition, at least one court has correctly rejected the defense as a matter of law in a situation where economic coercion was practiced; 460 it failed, however, to explain that the result was not a matter of [\*1362] the total inapplicability of in pari delicto, but simply of the nonexistence of equal fault in cases where plaintiff has been subject to economic coercion. 461

The problems go deeper than semantics, however. Courts in the Ninth Circuit (followed by the Eighth Circuit) permit suit against co-conspirators where the plaintiff, a free and equal participant, was not a party to the initial creation of the conspiracy. 462 Courts have continued to confuse in pari delicto and unclean hands and to suggest that in pari delicto (under that or any other label) is no longer a defense in antitrust cases. 463 Finally, courts in several circuits have expended considerable effort speculating on the deterrent effect of applying or rejecting in pari delicto in various categories of securities cases. 464

D. Reconciling Antitrust and In Pari Delicto

An effort to reconcile the competing policies of the antitrust laws and the in pari delicto doctrine is long overdue. The rejection of in pari delicto as a defense subverts the very goals of the antitrust laws. Justice Black's formulation, if applied literally, would require a court to grant a plaintiff treble damages where both parties are equal participants in an unlawful scheme without even compelling plaintiff to cease the very illegality of which he is complaining. If one assumes, for example, that the provisions in a franchise agreement beneficial to the franchisee were unlawful, the franchisee could obtain treble damages and an injunction against the restraints upon his freedom of action while continuing those restraints affecting the franchisor. Moreover, Justice Black also encouraged illegal conduct by plaintiff, by offering a "heads-I-win, tails-you-lose" protection if plaintiff violated the antitrust laws -- if the conspiracy is successful, plaintiff profits from the illegality; if it is unsuccessful, it sues for treble damages. The policies of the antitrust laws and the in pari delicto doctrine are thus not entirely inconsistent.

[\*1363] Moreover, to the extent that the policies of the antitrust laws do conflict somewhat with those of the in pari delicto doctrine, the two sets of policies can be accommodated. Courts have not found it difficult to accommodate competing policies in other antitrust contexts. For example, in Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 465 the Supreme Court reconciled the patent and antitrust laws by declaring that misrepresentations in patent applications could give rise to a section 2 violation of the Sherman Act only if the patent was "procured by intentional fraud" and if all of the other elements of a section 2 violation were shown. 466 Limiting antitrust recovery to instances of intentional fraud was required, according to the Court, because exposing a broader classification of misstatements to potential antitrust liability "might well chill the disclosure of inventions through the obtaining of a patent because of fear of the vexations or punitive consequences of treble-damage suits." 467 But if intentional fraud resulted in obtaining monopoly power (or a dangerous probability of monopoly power) in a property defined relevant market, the full panoply of antitrust sanctions might be invoked against the recreant patentee. Similarly, in the patent misuse area, if a patent holder is guilty of misuse, he cannot recover damages from an infringer. If, however, the patent holder purges his misuse, he may enforce his patent against infringers in the future. 468 In that manner, antitrust policy is fostered by penalizing the patent misuse; and the policy of the patent laws is furthered by allowing an inventor to continue to reap the rewards resulting from the disclosure of his invention after he purges the misuse.

The key to situations where two competing policies collide is not to engage in absolutes and entirely sacrifice one policy in favor of another. It is, rather, to reconcile the demands of both policies to the maximum extent possible -- in the case of antitrust and in pari delicto, to promote free and open competition while preventing a wrongdoer from benefiting from his own misconduct. That can be accomplished by paying strict attention to the common law scope of the in pari delicto doctrine and by holding that the in pari delicto defense can bar treble-damage actions in instances of equal fault but should not preclude suits for injunctive relief against the defendant's continued wrongdoing where the plaintiff has voluntarily ceased to participate in the challenged arrangement. 469 It is one thing to bar a plaintiff's damage recovery [\*1364] because the law does not reward wrongdoers for their own voluntary wrong-doings. It is entirely another to deny the plaintiff a right to bring the illegal scheme to an end. A rule limiting the in pari delicto defense to suits for damages would effectuate the purposes of the antitrust laws while preserving the fundamental notions of fairness that underlie the in pari delicto defense. The court, by conditioning rejection of the defense to injunctive claims on a voluntary cessation by plaintiff of his own part in the challenged conduct, 470 and by enjoining continued wrongdoing by defendant, would in one fell swoop bring the violations of both parties to a halt, thus advancing the cause of antitrust that the negative philosophy of Perma Life does not accomplish.

CONCLUSION

Most of the changes that I have advocated can be accomplished by the courts without the enactment of new legislative revision were kept to a minimum, lest the simplicity of the Sherman law be replaced by superseding amendments in the modern pattern of a complex tax code. We now have an excellent body of antitrust doctrines that, over all, have worked extremely well for almost a century. There has been no diminution in the nation's solid support of the salutary objectives of antitrust or in sound and effective methods of enforcement. It would be tragic if we were to weaken the rules pertaining to the hard core antitrust offenses by amendments that are not faithful to our antitrust traditions. What I propose is of modest dimension. It amounts to little more than a correction of some serious aberrations and would not alter the fundamental purposes and scope of our existing jurisprudence. There are in the wind many other reform proposals, many of which merit the most careful consideration. There unhappily are some that are inspired by special interest purposes and that are antithetical to sound antitrust policy. In my view, all serious proposals should be publicly debated. Out of such a debate should emerge a constructive program of antitrust reform.

### 2NC---Perm---AT: Do Both

#### The perm is ‘statutory gap filling’---it does NOT expand the scope of federal common law.

Abbe R. Gluck 11, Associate Professor of Law, Columbia Law School, “Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine,” 120 Yale L.J. 1898, Lexis

Consider how well the Court's typical arguments justifying federal common-lawmaking apply to statutory interpretation methodology. There is a uniquely federal interest involved (the meaning of federal statutes); it is grounded in a federal source (federal statutes); 45 [FOOTNOTE 45 BEGINS] See Bradley et al., supra note 18, at 879 ("There is widespread agreement that federal common law must be grounded in a federal law source."); see also Field, supra note 18, at 887 (arguing for a broad understanding of federal common-lawmaking authority but still acknowledging that the "limitation … is that the court must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule"). [FOOTNOTE 45 ENDS] and there is a clear need for federal-law uniformity. As with other types of approved federal common-lawmaking, this type also would be restrained: it would be limited to filling interstitial gaps in a statutory scheme. 46 [FOOTNOTE 46 BEGINS] See Tex. Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) ("The Court has recognized the need and authority in some limited areas to formulate what has come to be known as "federal common law.' These instances … fall into essentially two categories: those in which a federal rule of decision is "necessary to protect uniquely federal interests,' and those in which Congress has given the courts the power to develop substantive law." (citations omitted)); Bradley et al., supra note 18, at 921 ("This sort of statutory gap-filling, guided by congressional intent, is probably the most common (and uncontroversial) type of federal common law."). [FOOTNOTE 46 ENDS] And, similar to arguments made for [\*1915] common-law authority in other areas, the source of federal judicial authority to create these interpretive principles derives from the power - given to the federal courts by the jurisdictional statutes and Article III - to adjudicate statutory cases. 47 In fact, this same kind of inherent authority is used to justify the Court's methodological work in the constitutional law context.

#### DOESN’T SOLVE---even if the perm retains a claim of statute-independent common law---that claim won’t set precedent

Michael B. Abramowicz & Maxwell L. Stearns 5, Abramowicz is Associate Professor, George Washington University Law School; Stearns is Professor, George Mason University School of Law, “Defining Dicta,” 2005, 57 Stan. L. Rev. 953, https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1201&context=faculty\_publications

A judge’s failure to delineate the scope of the holding within an opinion might not be a disservice to the judicial process. Even punctilious judges arguably should not be allowed the final word on the extent of their authority to resolve legal issues, and even a judge’s claim to have produced a holding on a particular issue should perhaps be open to challenge when the issue seems distant from the central concerns of the case. The failure of a judicial opinion to supply reliable guidance distinguishing its holdings from its dicta, moreover, poses little difficulty to the extent that legal actors agree upon the definitions of holding and dicta. With shared understandings, future courts could be expected to follow a case’s holdings and consider its dicta only to the extent that such discussions prove helpful.

Although judges and scholars share intuitions that frequently lead them to the same conclusions in particular case settings, our analysis will reveal the absence of a shared conceptual foundation for analyzing even modestly complex cases.4 This deficiency might reflect the tendency in recent decades of scholars interested in precedent to focus significant attention on the nature of stare decisis. A considerable literature studies the emergence, scope, and limits of stare decisis,5 the doctrine through which courts use opinions not merely to resolve cases, but also to make law in the form of at least presumptively binding precedents.6 [FOOTNOTE 6 BEGINS] 6 See, e.g., Thomas Merrill, Judicial Opinions as Binding Law and as Explanations for Judgments, 15 CARDOZO L. REV. 43, 65 (1993) (“Although horizontal stare decisis creates a strong presumption that prior judicial articulations of the law are correct and should generally be followed by the rendering court, the rule is far from absolute.”); Abner Mikva, The Shifting Sands of Legal Topography, 96 HARV. L. REV. 534 (1982) (reviewing GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982)) (positing that “such common law doctrines as stare decisis would presumably constrain courts applying statutes to the same extent that they constrain courts making common law decisions”); Rafael Gely, Of Sinking and Escalating: A (Somewhat) New Look at Stare Decisis, 60 U. PITT. L. REV. 89, 109 (2003) (observing that “common law precedents enjoy a presumption of correctness stronger than applied to constitutional cases, but not as constraining as that enjoyed by statutory precedents”). In his famous Commentaries on American Law, James Kent provided a similar early account of stare decisis. See 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 475 (O.,W. Holmes, Jr. ed., 14th ed. Boston, Little Brown, & Co. 1896) (explaining that “[i]f a decision has been made upon solemn argument and mature deliberation, the presumption is in favor it its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it”). [FOOTNOTE 6 ENDS] Stare decisis plays a central role in our common law system, whether in horizontal form, for example within the Supreme Court and across federal circuit court panels, or in vertical form, for example from the Supreme Court to lower federal courts and from circuit courts to district courts.7 This scholarly attention is thus warranted.

As a practical matter, however, judicial analyses of precedent rarely require that courts test the contours of stare decisis doctrine directly. When stare decisis applies, a court rarely needs to consider the relatively narrow exceptions to stare decisis. Vertical stare decisis is generally considered absolute,8 and in the federal appellate system, en banc rehearing is required before a circuit court can overturn the precedent of a panel or an earlier en banc court. Even the Supreme Court overturns its precedents only rarely, and it debates the scope of stare decisis even more rarely.9 In contrast, evaluating a claimed precedent to determine whether an identified proposition is holding or dicta occupies a great deal of judicial attention. Indeed, before a court can decide whether to apply the doctrine of stare decisis to a given case, it must first determine just what that case purports to establish. Because holdings in prior cases are at least presumptively binding, while dicta is not, this task requires an understanding of these terms.10

While the literature on stare decisis is broad, despite the growing need for a clear distinction to accommodate increasingly complex opinions, in recent decades the literature on the distinction between holding and dicta has been comparatively tiny.11 An earlier generation of scholars, in contrast, devoted considerable attention to the holding-dicta distinction.12 While no satisfactory definition has yet to emerge, legal scholars have largely turned their attention elsewhere. The questions whether to apply precedent, and how to construe a particular precedent in a given case, are intertwined. But they are not the same inquiry. Even an opinion without precedential value contains a holding. If anything, the more relevant inquiry in most cases is the one that has been given scant attention among the current generation of legal scholars. Courts themselves have not filled the theoretical void, and so the American judicial system lacks clearly defined rules on an important aspect of the process through which judges resolve cases and make law. Through a loose set of practices that vary considerably from jurisdiction to jurisdiction, and, perhaps more problematically, from court to court and case to case, judges define such terms as needed to assist in the task of resolving particular cases entirely on their own.

Despite the absence of any single governing source or universal agreement on how to define dicta, the legal system does not threaten to devolve into chaos or general incoherence. Rather, disagreements as to whether a claimed proposition is part of a court’s holding, or is instead merely dicta, surface in discrete disagreements over particular cases without unraveling the fabric of the law. There is no denying, however, the importance of understanding—both as a matter of theory and at the level of practice—how to approach such a central task as sorting holding and dicta. This query goes to the heart of the business of judging, which itself goes to the essence of the Anglo-American system of interpreting and making positive law. Even if there is broad agreement on a range of issues related to decoding dicta and holdings, it should not be surprising that in the cases in which these issues matter most, the conceptual uncertainties that result from a lack of rigor in categorizing holding and dicta give rise to the greatest practical difficulties.

One difficulty in developing theoretically satisfying, and operational, understandings of the terms holding and dicta is that the most commonplace—and frequently cited—definitions of these terms are problematic in profound ways. Appreciating both why these definitions emerged and what is problematic about them is essential to our project. Consider, as perhaps the most prominent illustration, the definition of “Obiter dictum” in Black’s Law Dictionary: “[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.”13 We will argue that the definition is indefensible,14 and at least inconsistent with the general understanding that alternative holdings in a case all count as holdings.15 In fact, we will demonstrate that as a core element in the definition of holding, necessity, is itself not necessary,16 and might not even be sufficient to ensure holding status to a given proposition.17 The intuition that underlies the definition, however, is easy to appreciate, because the definition works well for simple cases. In a case in which there is just one issue, and just one logical argument that can take a court from the facts to the judgment, discussions that do not lie along that path are unnecessary to the decision and are therefore dicta.

### 2NC---Perm---AT: Do CP

#### The CP proscribes behavior based on antitrust LAW, NOT by expanding the CORE antitrust LAWS.

Robert R. Gasaway & Ashley C. Parrish 13, Partner, Kirkland & Ellis LLP; Partner, King & Spalding LLP, “IN PRAISE OF ERIE--AND ITS EVENTUAL DEMISE,” 10 J.L. Econ. & Pol'y 225, Lexis

Interpreting the Federal Rules of Decision Act in Swift, Justice Story relied on the statute's plain meaning, emphasizing that its reference to the "laws of the several states" in the plural was meant to refer to the "positive statutes of the state, and the construction thereof adopted by local tribunals." 46 According to Swift, the Rules of Decision Act did not apply to "questions of a more general nature, . . . especially to questions of general commercial law." 47 Significantly, Justice Brandeis's Erie decision offers no response to Swift's textual analysis. And, as noted above, Justice Friendly abandons any defense of Erie on statutory grounds.

Part of the reason Justice Brandeis failed to engage in meaningful textual analysis of the Rules of Decision Act lies hidden in the Erie opinion itself. In a portion of the opinion criticizing Swift, Justice Brandeis cites John Chipman Gray's classic, The Nature and Sources of Law. 48 But Gray's book provides a fascinating kernel of support for Swift's statutory interpretation as against Erie's. Gray recognized that the "meaning of 'Law,' when preceded by the indefinite, is to be distinguished from that which it bears when preceded by the definite, article." As Gray explained, "A law ordinarily means a statute passed by the legislature of a State." In contrast, "'The Law' is the whole system of rules applied by the courts." 49 This same distinction was recognized in a slightly different form by the Supreme Court in Sprietsma v. Mercury Marine. 50 There, the Court interpreted the express preemption provision in the Federal Boat Safety Act of [\*235] 1971, which applied to "a [state or local] law or regulation." 51 The Court held that the provision did not encompass common law claims because "the article 'a' before 'law or regulation' implies a discreteness--which is embodied in statutes and regulations--that is not present in the common law." 52

These principles are also relevant to interpreting the Constitution's Supremacy Clause, which refers, in the plural, to "the Laws of the United States." 53 By referring to "laws" (plural), the Supremacy Clause refers to the group of positive Congressional enactments, not to the singular and integrated body of general common law. As scholars have recognized, before Erie, the common law applied by federal courts sitting in diversity under the Swift regime did not preempt state law because a federal judicial decision was not a "federal law"; it was "merely the federal judge's interpretation of the principles constituting the distinct field of common law." 54 In other words, before Erie, the general common law was subordinate to state statutory law, 55 a result grounded ultimately in the plural usage ("the Laws of the United States") found in the Supremacy Clause.

Justice Brandeis's Erie decision overlooks this interpretive evidence drawn from Swift, Gray, and the Constitution. But even more significantly, Justice Brandeis's opinion is forced by the logic of its argument to recast--slightly but tellingly--the language of the Rules of Decision Act. The Rules of Decision Act states as follows:

The laws of the several States, except where the Constitution, treaties, or statute of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply. 56

[\*236] As recast by Justice Brandeis, however, this statutory text becomes the following:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. 57

Almost through an absence of mind (or perhaps a sleight of hand), Justice Brandeis's formulation importantly alters the meaning of the statutory text it paraphrases. First, the Brandeis formulation transmutes the word "laws" (plural) of the statute into "law" (singular) for purposes of the opinion. But as Justice Brandeis ought to have recognized, whereas the plural statutory language--"laws of the several states"--is most naturally read to refer to the collective group of each state's positive laws, it is awkward and unnatural to read the statutory term "laws" as referring to and encompassing a unitary body of "common law." 58 To be sure, the general common law was typically received into state law via a statute or constitutional provision. But such positive enactments, while they might provide rules of decision for state courts, could not be read constitutionally or by their terms to apply to cases in federal court. Put in terms of the Rules of Decision Act, federal court cases would not have been "cases where" such state incorporation statutes would properly "apply." It is difficult to see how, especially after Swift, Gray, and the Supremacy Clause, Justice Brandeis could have overlooked this important interpretive evidence.

#### Courts are T, but only insofar as they’re interpreting statutory commands.

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Part III focuses on the last three words of the EPC, emphasizing the meaning of the word "laws" that was firmly established as of 1868. Lawyers understood the word "laws" (plural) to exclude the decisions of courts, except insofar as courts construe positive laws. The deliberate choice of the words "of the laws," instead of the narrower language "of its laws," envisioned a pivotal role for laws made by Congress.

#### The CP’s distinct---it does NOT affect the ‘laws’---instead, it has judges create new liability under common law without reference to statute.

Alexander Volokh 17, Assistant Professor, Emory Law School, “Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law,” 66 Emory L.J. 1391, Lexis

On the other hand, Oldham writes, the statute would violate the non-delegation doctrine "even if the Sherman Act means what modern interpreters assert." 384 He grants that a standard like promoting consumer welfare would qualify as an intelligible principle under the delegation standards that apply to the executive branch, but argues (as I do) that judicial delegations should be policed more tightly. 385 Perhaps that's true; maybe there would be a violation of the non-delegation doctrine if Congress had truly written a statute providing that "courts shall ban any economic transactions or business practices that do not promote consumer welfare." And perhaps some judges really do think about antitrust that way. For instance, Judge Posner has written that "the modern rationale for antitrust law … is that cartelizing and other anticompetitive practices reduce welfare"; this judgment is supported by "simple cost-benefit analysis" and "provides an uncontroversial basis for modern antitrust law." 386 Judge Easterbrook, too, argues that antitrust law should promote efficiency, 387 though he counsels that judges should be appropriately humble as to how much they can understand about practices that appear to be anticompetitive. 388

But there's another possibility - one that the Supreme Court itself has repeatedly endorsed: Congress meant to refer to the prior restraint-of-trade caselaw; that caselaw is determinate enough to guide us; and we continue to develop that caselaw. But because the statute bans a result, not particular practices, antitrust rules can legitimately change with new understanding.

[\*1456] This is crucial for determining what, if anything, has been violated if judges have it wrong. Suppose the Court is wrong that the Sherman Act is about economic efficiency and consumer welfare; 389 perhaps we should give more credence to other principles present in both the legislative history and the common law, like "fairness and economic independence," 390 protecting competitors (even less efficient ones) from being forced from the business, 391 and preventing undue concentrations of political influence. 392 Perhaps modern-day doctrine can't really be justified as a series of steps since 1890 developing the original common-law standard. 393

But if so, that's the courts' fault, not Congress's. It's a problem of judges acting ultra vires, not of Congress delegating away its legislative power. Congress gave the courts a coherent common-law standard; at that point, the non-delegation doctrine was satisfied. Any later misapplication of that standard by others implicates different norms.

#### AND, the ‘core antitrust laws’ are statutory

Kendall Kuntz 21, J.D. Candidate at The University of Maryland Francis King Carey School of Law, “Can the Courts and New Antitrust Laws Break Up Big Tech?,” 2/23/21, https://www.law.umaryland.edu/Programs-and-Impact/Business-Law/JBTLOnline/Break-Up-Big-Tech/

There are three core antitrust laws in effect today: the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. These three antitrust laws attempt to protect market competition for the benefit of consumers. The Sherman Act outlaws monopolies and contracts that unreasonably restrain trade. The Clayton Act prohibits mergers and acquisitions that substantially lessen competition or create a monopoly. Lastly, the Federal Trade Commission Act bans “unfair methods of competition” and “unfair or deceptive acts or practices.” Antitrust laws are not established to punish success, but are focused on preventing anticompetitive effects, exclusionary practices, reduced consumer choice, and hindered innovation.

# 1NR

## federalism

### grid

#### Federalism’s been broadly revitalized.

Konisky ’20 [David M.; Summer; Associate Professor in the School of Public and Environmental Affairs at Indiana University; Publius, “The State of American Federalism, 2020–2021: Deepening Partisanship amid Tumultuous Times,” 51(3), p. 327-364]

Much of the contemporary regulatory state relies upon “cooperative” federalism, but as polarization grows, so does “uncooperative federalism” and states’ use of their granted regulatory authority to challenge and resist federal policy (Bulman-Pozen and Gerken 2008). States increasingly engage in “variable speed” federalism in which states take increasingly diverse approaches to implementation of federal programs (Conlan and Posner 2016). While not an entirely new issue, the continued polarization among political and cultural lines raises questions about how sustainable this model will be. Can the United States continue to rely on “cooperative” models of national policy to address national-scale issues such as the environment, immigration, health care, and pandemic response when the states are more “uncooperative” both with the federal government and with each other? How does American federalism best persist in this era of increasing polarization over uncompromising issues of culture and identity?

One answer may be to try to reverse the trend towards greater polarization. This was a theme of President Biden’s, who entered office vowing to address partisanship. To overcome challenges of COVID-19, threats to racial justice, and political extremism, Biden said in his inaugural address, “it requires that most elusive of things in a democracy: unity” (White House 2021i). The theme reappeared in other Biden speeches, including his prime-time speech on the anniversary of the pandemic shutdown in the United States (White House 2021j). Biden’s early policy focus has included issues that have tended to achieve strong bipartisan support at least among the broader electorate, including the direct COVID-19 relief checks, a plan to address infrastructure, and raising the minimum wage. In sharp contrast with his predecessor, Biden has largely deflected attention away from himself in what may be a strategic effort to tamp down political passions (Nicholas 2021).

Given that increasing partisanship has been a feature of American politics for quite some time, however, achieving depolarization faces a difficult road ahead. Indeed, the first major piece of legislation enacted in 2021, the COVID-19 relief bill, passed both houses of Congress on party-line votes. By the end of March, the Biden Administration had already been sued a dozen times by Republican state attorneys general over Biden’s actions concerning immigration, the environment, the Census, and taxation. And as noted earlier, states with increasingly dominant single-party control have continued taking divergent paths on contested issues of identity and cultural values. These early actions suggest that sharp polarization across the American political landscape remains strong during a tumultuous period in American history.

The events of the past year, particularly with respect to the pandemic, also suggest at least a partial success story. As the federal government (i.e., the White House) abdicated its own responsibility for seeing the country through the pandemic, governors, mayors, and local public health officials, picked up a large part of the governance “slack.” Although varying in their strategies and commitments, state and local officials made difficult decisions, often in the face of fierce criticism from President Trump and large segments of the public, to address the public health crisis. In so doing, they collectively reinvigorated attention to federalism, and demonstrated the possibilities (and limits) of shared power and authority in the United States

#### Cooperative federalism’s solidified now across a range of policy areas

Dinan ’20 [John; April 29; Professor of Politics at Wake Forest University; “Federalism and Polarization,” [https://lawliberty.org/book-review/federalism-and-polarization](https://lawliberty.org/book-review/federalism-and-polarization/)]

States have always had considerable freedom to make their own policy on a wide range of issues. When crafting policies to reduce air and water pollution, for instance, Congress has generally followed a cooperative federalism model—setting national standards and letting states figure out how to meet them. Congress has even made special allowance for California to apply for waivers from federal rules and require auto makers to meet higher fuel-economy standards than in other states. Meanwhile, a number of states have responded to Congress’ failure in recent years to enact climate-change legislation by passing laws intended to achieve, to some degree on the state level, what has proved unattainable in Washington, D.C. This has resulted in “significant differences between the states in environmental performance,” as “some states have raced either to the top. . . or toward the bottom.”

State discretion and policy variation are also prominent in health policy, especially in the Medicaid program that provides health coverage for low-income persons. In contrast with Medicare, a purely federal program targeted to senior citizens, Medicaid is a joint federal-state program with decision making and costs shared by federal and state governments. In fact, states are not even required to participate in the Medicaid program. Arizona did not sign on until 1982, 17 years after the program began. States choosing to participate must cover certain persons and services, but they retain significant discretion to determine eligibility beyond minimum federal requirements. In high-income states, the costs of Medicaid are split evenly between the federal government and the states. In low-income states, the federal government picks up much more of the bill, up to three-fourths of the costs in certain states.

Even after the passage of the Affordable Care Act (ACA), states retain significant policy and administrative discretion over various aspects of health policy. The ACA requires an insurance exchange (marketplace) to be established in each state where individuals can shop for insurance and, depending on their income, qualify for federal subsidies. But states have a choice of running these exchanges themselves, letting the federal government operate them, or sharing responsibility for them. Even more important, the ACA sought to bring about more uniformity in Medicaid coverage by requiring states to cover all non-elderly persons making up to 138 percent of the federal poverty level, with the federal government now picking up 90 percent of the added costs.

The Supreme Court, however, held that Congress could not penalize states for declining to expand Medicaid by withholding the entirety of their federal Medicaid funds. This ensured that states have a meaningful choice about signing on to Medicaid expansion. Over time, three-fourths of the states have signed on, but many states, including Texas, Florida, and North Carolina, have declined. Meanwhile, the Trump administration has followed prior administrations in issuing waivers permitting states to deviate, in occasionally significant ways, from federal Medicaid policy, such as by imposing work requirements or monthly premium payments.

#### The plan grants the federal government the ability to preempt “anticompetitive state and local regulation” via the FTC

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

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

#### That spills over to all other state immunity doctrines, wrecking state sovereignty.

Bowman ’14 [Everett; May 30; attorney with Robinson Bradshaw, has received the Antitrust Section's Distinguished Service Award from the North Carolina Bar; Amicus Brief in support of petitioner on writ of certiorari to the US Court of Appeals for the Fourth Circuit, No 13-534]

There can be no dispute that the General Assembly, as state sovereign, has chosen to make the Dental Board the state agency with broad and specific power to regulate the practice of dentistry and to constitute the Dental Board with members who are active, practicing dentists. Yet even had the General Assembly expressly required the Dental Board to send cease-and-desist letters with the very wording the Dental Board used, the opinion below would still deny the Board state action immunity.

The choice to treat a state regulatory body created by and acting pursuant to state statute as a private actor is inconsistent with this Court’s rulings on federalism in antitrust cases. “The Sherman Act . . . gives no hint that it was intended to restrain state action or official action directed by a state.” Parker, 317 U.S. at 351; see also Omni, 499 U.S. at 374 (“The rationale of Parker was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators.”).3 Furthermore, the Fourth Circuit’s suggestion that municipalities (which are entitled to state action immunity without having to show active supervision, N.C. State Bd. of Dental Exam’rs, 717 F.3d at 367) should be afforded a greater degree of deference than should a state body is in conflict with this Court’s decisions in Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) and Omni. The Fourth Circuit misreads Town of Hallie, especially footnote 10, which states:

In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here Treating a state agency as a “private actor” would not only potentially deprive state agencies and their officials of state action immunity, but would also cast doubt on the availability of other immunities, such as immunity under the Eleventh Amendment. A clear benefit of the state action doctrine is to avoid sending antitrust litigation, complex as it is, into the thicket of other official immunity doctrines. decide that issue. Where state or municipal regulation by a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists.

471 U.S. at 46 n.10 (citing S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 62 (1985)). Footnote 10 contrasted state regulation by a private party (such as the rate bureaus in Southern Motor Carriers, which were “private associations,” 471 U.S. at 52), with arrangements in cases—such as this one—where “the actor is a state agency,” Town of Hallie, 471 U.S. at 46 n.10 (emphasis added). The Fourth Circuit apparently takes this Court’s distinction as being without a difference, and declares a State agency to be a private party—even if that agency is exercising its core regulatory function pursuant to sovereign State law.

This case deals with the core regulatory function of the Dental Board’s policing of the practice of dentistry. It is not for the federal courts to employ the Sherman Act to second-guess the regulatory activities of the states, even if they believe those activities to be misguided or not in complete compliance with state law. As this Court explained with regard to municipal zoning rulings found by a jury to have been the product of a conspiracy, if regulatory decisions are “made subject to ex post facto judicial assessment of ‘the public interest,’ with personal liability of city officials a possible consequence, we will have gone far to ‘compromise the States’ ability to regulate their domestic commerce.’” Omni, 499 U.S. at 377 (quoting S. Motor Carriers, 471 U.S. at 56).

In Hoover v. Ronwin, 466 U.S. 558, 580 (1984), this Court explained precisely how the principles of federalism on which Parker is founded would be undermined if state entities (there, Arizona’s bar examination committee) were subjected to antitrust liability:

The reasoning adopted by the dissent [in Hoover] would allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign. Such a holding would emasculate the Parker v. Brown doctrine. For example, if a state legislature enacted a law based on studies performed, or advice given, by an advisory committee, the dissent would find the State exempt from Sherman Act liability but not the committee. A party dissatisfied with the new law could circumvent the state-action doctrine by alleging that the committee’s advice reflected an undisclosed collective desire to restrain trade without the knowledge of the legislature. The plaintiff certainly would survive a motion to dismiss—or even summary judgment— despite the fact that the suit falls squarely within the class of cases found exempt from Sherman Act liability in Parker.

The Fourth Circuit’s decision will cause exactly the harms this Court warned against in Hoover. The decision displaces a state’s sovereign authority to determine how best to regulate professionals who practice in the state, and undermines the state’s judgment that boards composed primarily of licensed professionals, elected by fellow professionals, are, because of their expertise, best qualified and able to exercise the state’s regulatory authority. The decision also intrudes on state sovereignty by essentially compelling states, against their experience, will, and judgment, to impose on professional regulatory boards an unwieldy, intrusive, and unnecessary administrative mechanism to “actively supervise” the boards’ actions, so that the boards will qualify for state action immunity and thus remain able to attract qualified professionals to serve on them.

#### State antitrust authority will expand---that enables RTO reform that solves grid stability

Welton ’21 [Shelley; February; Assistant Professor, University of South Carolina School of Law; California Law Review, “Rethinking Grid Governance for the Climate Change Era,” 109 Calif. L. Rev. 209, 235-275]

Alternatively, if Congress and the executive branch prove unwilling, the courts may present an increasingly plausible avenue for reigning in utility power. To date, electricity corporations have largely been immunized from antitrust challenges due to FERC oversight and regulation. 374The theory animating this [\*272] immunization is that FERC's review of utilities' filed rates obviates the need for judicial antitrust scrutiny. 375However, in light of the significant changes in the industry, scholars have questioned whether courts should continue to allow the filed rate doctrine to stand as a bar to claims of industry collusion, 376and the Supreme Court recently reaffirmed the applicability of state antitrust laws to FERC-regulated natural gas pipelines. 377Similarly, the D.C. Circuit recently found that another public-private boundary entity - Amtrak - violated the Due Process Clause through its dual roles as competitor and regulator of train operations. 378In that opinion, the court signaled a growing skepticism of such arrangements, observing that "government's increasing reliance on public-private partnerships portends an even more ill-fitting accommodation between the exercise of regulatory power and concerns about fairness and accountability." 379Although there is no rock-solid case under current precedent to assert that RTOs' self-interested rulemakings create either an antitrust or due process challenge, continued display of an incumbency bias could push courts towards accepting a theory crafted along these lines.

#### Broad antitrust authority’s key to utility reform that enables effective grid management

Wara ’17 [Michael; 2017; Associate Professor and Justin M. Roach, Jr. Faculty Scholar, Stanford Law School; New York University Environmental Law Review,” COMPETITION AT THE GRID EDGE: INNOVATION AND ANTITRUST LAW IN THE ELECTRICITY SECTOR,” 25 N.Y.U. Envtl. L.J. 176, 184-222]

This Article: has shown how utilities are responding to the challenge presented by distributed energy to their traditional business model. Numerous utilities both in states with extensive distributed energy already deployed and in states with virtually none deployed are taking action to forestall competition. These firms have already modified or are attempting to modify rate structures in order to reallocate the costs of their infrastructure and forestall competitive entry by DER providers. All of this creates the potential for substantial antitrust claims against the utility industry by its new competitors. Utilities' anticompetitive actions may be shielded from antitrust liability, or they may not be, depending on courts' view of states' level of authorization of these activities and the degree to which public utility commissions are actually overseeing the electric utilities' responses to DERs. Utilities, the public utility commissions that regulate them, and state legislatures have ample opportunity, particularly at this early juncture, to tailor their actions in ways that might mitigate this antitrust risk and would increase the transparency and democratic accountability of the transition from regulated monopoly at the grid edge to competition.

#### Political will---rescinding legal norms supporting state sovereignty causes federal preemption of state energy markets.

Feldman ’21 [Noah; February 23; professor of law at Harvard; Bloomberg, “Are you a robot?,” https://www.bloomberg.com/opinion/articles/2021-02-23/vaccine-rollout-and-texas-disaster-show-limits-of-federalism]

New Deal federalism was itself continuing the compromise between the federal government and the states. Core issues of national competency were moved to the federal level. Yet states retained a tremendous amount of regulatory capacity, including in areas that overlapped with federal regulatory control.

Thus, to take the example of energy, both the federal government and the states regulate different aspects of the power grid. In this respect, today’s federalism isn’t radically different from the federalism of the New Deal. Texas actually made a conscious choice not to connect its power grid to that of other states, partly in order to retain state regulatory control.

Under the Constitution as it has been interpreted since the New Deal, Congress would have the power to pass laws that impose regulatory controls even on in-state power grids. If Congress wanted to, it could enact laws empowering federal regulators to require state-based power plants to be capable of functioning even in very cold temperatures, thereby reducing the risk of the kind of temperature-based breakdowns that caused the recent Texas power disaster.

Similarly, Congress has the authority to do much more than it does to control or regulate health care at the state level. Even a nationalized health-care system would be within the constitutional reach of Congress.

Education is yet another area where states exercise near total authority, even though the issue is of obvious national importance.

The problem, therefore, doesn’t lie in the Constitution, at least not primarily. It lies in the deeply established political norms and customs that still confer enormous power on states, even regarding national infrastructure problems that span state boundaries.

Those customs and norms continue to shape the distribution of power and responsibility as between the states and the federal government. True, the constitutional design of the Senate, as well as the continued sovereign existence of the states, help shape the ongoing political reality. But as the New Deal federalism overhaul shows, those structural features of our federal system can be overcome when crisis demands it.

### warming

#### Warming doesn’t cause extinction---new studies.

Nordhaus 20 Ted Nordhaus, an American author, environmental policy expert, and the director of research at The Breakthrough Institute, citing new climate change forecasts. [Ignore the Fake Climate Debate, 1-23-2020, https://www.wsj.com/articles/ignore-the-fake-climate-debate-11579795816]//BPS

Beyond the headlines and social media, where Greta Thunberg, Donald Trump and the online armies of climate “alarmists” and “deniers” do battle, there is a real climate debate bubbling along in scientific journals, conferences and, occasionally, even in the halls of Congress. It gets a lot less attention than the boisterous and fake debate that dominates our public discourse, but it is much more relevant to how the world might actually address the problem. In the real climate debate, no one denies the relationship between human emissions of greenhouse gases and a warming climate. Instead, the disagreement comes down to different views of climate risk in the face of multiple, cascading uncertainties. On one side of the debate are optimists, who believe that, with improving technology and greater affluence, our societies will prove quite adaptable to a changing climate. On the other side are pessimists, who are more concerned about the risks associated with rapid, large-scale and poorly understood transformations of the climate system. But most pessimists do not believe that runaway climate change or a hothouse earth are plausible scenarios, much less that human extinction is imminent. And most optimists recognize a need for policies to address climate change, even if they don’t support the radical measures that Ms. Thunberg and others have demanded. In the fake climate debate, both sides agree that economic growth and reduced emissions vary inversely; it’s a zero-sum game. In the real debate, the relationship is much more complicated. Long-term economic growth is associated with both rising per capita energy consumption and slower population growth. For this reason, as the world continues to get richer, higher per capita energy consumption is likely to be offset by a lower population. A richer world will also likely be more technologically advanced, which means that energy consumption should be less carbon-intensive than it would be in a poorer, less technologically advanced future. In fact, a number of the high-emissions scenarios produced by the United Nations Intergovernmental Panel on Climate Change involve futures in which the world is relatively poor and populous and less technologically advanced. Affluent, developed societies are also much better equipped to respond to climate extremes and natural disasters. That’s why natural disasters kill and displace many more people in poor societies than in rich ones. It’s not just seawalls and flood channels that make us resilient; it’s air conditioning and refrigeration, modern transportation and communications networks, early warning systems, first responders and public health bureaucracies. New research published in the journal Global Environmental Change finds that global economic growth over the last decade has reduced climate mortality by a factor of five, with the greatest benefits documented in the poorest nations. In low-lying Bangladesh, 300,000 people died in Cyclone Bhola in 1970, when 80% of the population lived in extreme poverty. In 2019, with less than 20% of the population living in extreme poverty, Cyclone Fani killed just five people. “Poor nations are most vulnerable to a changing climate. The fastest way to reduce that vulnerability is through economic development.” So while it is true that poor nations are most vulnerable to a changing climate, it is also true that the fastest way to reduce that vulnerability is through economic development, which requires infrastructure and industrialization. Those activities, in turn, require cement, steel, process heat and chemical inputs, all of which are impossible to produce today without fossil fuels. For this and other reasons, the world is unlikely to cut emissions fast enough to stabilize global temperatures at less than 2 degrees above pre-industrial levels, the long-standing international target, much less 1.5 degrees, as many activists now demand. But recent forecasts also suggest that many of the worst-case climate scenarios produced in the last decade, which assumed unbounded economic growth and fossil-fuel development, are also very unlikely. There is still substantial uncertainty about how sensitive global temperatures will be to higher emissions over the long-term. But the best estimates now suggest that the world is on track for 3 degrees of warming by the end of this century, not 4 or 5 degrees as was once feared. That is due in part to slower economic growth in the wake of the global financial crisis, but also to decades of technology policy and energy-modernization efforts. “We have better and cleaner technologies available today because policy-makers in the U.S. and elsewhere set out to develop those technologies.” The energy intensity of the global economy continues to fall. Lower-carbon natural gas has displaced coal as the primary source of new fossil energy. The falling cost of wind and solar energy has begun to have an effect on the growth of fossil fuels. Even nuclear energy has made a modest comeback in Asia.

## economy

### uq

#### Recovery is strong on all indices. Only our evidence assumes revised data AND prices in every downturn.

Das ’11-8 [Nalak; November 8; Finance analyst; Yahoo News, “Three Encouraging News on U.S. Economic Recovery: 5 Top Picks,” <https://www.yahoo.com/now/three-encouraging-news-u-economic-120412188.html>]

On Nov 5, Wall Street rejoiced on three impressive news related to U.S. economic recovery. These are the October job data from the Department of Labor, a new set of data on COVID-19 vaccine and development on a government infrastructure bill.

Market participants immediately welcomed these developments. Consequently, the three major stock indexes — the Dow, the S&P 500 and the Nasdaq Composite — ended the first week of November gaining 1.4%, 2% and 3.1%, respectively.

The robust pace of U.S. economic recovery was reconfirmed despite the pandemic, higher inflationary pressure, prolonged supply-chain disruptions and acute labor shortage. On Nov 3, Fed Chairman Jerome Powell also mentioned strong U.S. economic recovery while initiating the tapering of the central’s bank’s quantitative easing program.

Robust Job Additions in October

The U.S. economy added 571,000 jobs in October, exceeding the consensus estimate of 442,000. Moreover, September’s job additions were revised upward to 312,000 from a disappointing 194,000 reported earlier. August’s data was also revised upward to 483,000 from 366,000 reported earlier.

Total private payrolls rose 604,000 in October, partially offset by 73,000 declines in government jobs. The unemployment rate came down to 4.6% in October from 4.8% in September. The consensus estimate was 4.7%.

In October, the leisure and hospitality sector, which is directly related to the reopening of the economy added the maximum 1jobs of h64,000 — reflecting a sharp reduction in new cases of the Delta variant of coronavirus. The manufacturing sector added 60,000, doubling the consensus mark. Notably, manufacturing accounts for 12% of U.S. GDP.

Hourly wage rate dropped to 0.4% in October from 0.6% in September. However, the year-over-year, wage rate increased 4.9% in October from 4.6% in September. The average workweek fell marginally to 34.7 in October from 34.8% in September.

Good News on Covid-19 Treatment

On Nov 5, Pfizer Inc. PFE reported that the clinical trial data of its COVID-19 pill when used in combination with a widely used HIV drug, reduce the risk of hospitalization or death by 89% in high-risk adults. The company will submit the data to the FDA before Thanksgiving.

Aside from Merck & Co. Inc. MRK, Pfizer is the second company to demonstrate the strong effectiveness of easy-to-administer COVID-19 pills in clinical trials. In an interview with CNBC, Pfizer board member Dr. Scott Gottlieb said, “The Covid-19 pandemic could be over in the U.S. by the time President Joe Biden’s workplace vaccine mandates take effect in early January.”

Progress on Infrastructure Bill

On Nov 5, in a majority voting of 228-206, the House of Representative passed a $1.2 trillion bipartisan infrastructure bill. The bill, cleared by the Senate in August, will go to White House for President Joe Biden’s approval.

The bill includes transport, drinking-water, broadband, manufacturing and construction infrastructure developments. Segments like basic materials, industrials, telecommunications and utilities will benefit immensely with more job creation for the economy.

Our Top Picks

We have narrowed down our search to five large-cap stocks (market capital > $10 billion) that have strong growth potential for the rest of 2021. These stocks have seen positive earnings estimate revisions within the last 30 days. Each of our picks carries a Zacks Rank #1 (Strong Buy) and has a Growth Score A or B. You can see the complete list of today’s Zacks #1 Rank stocks here.

#### Inflation is temporary and no threat to the economy.

Lane ’11-10 [Sylvan, Morgan Chalfant, and Amie Parnes; November 10; Reporters; The Hill, “Biden gets inflation gut punch,” <https://thehill.com/policy/finance/581060-biden-gets-inflation-gut-punch>]

Biden has presided over growth in the job market, increased consumer spending, greater household savings and rising stocks. But people in polls seem more focused on rising prices, shortages and other setbacks in the recovery.

Most economists still believe that inflation will begin to cool as pandemic-related bottlenecks ease, sidelined workers come back to the labor force, and consumers shift their spending back toward services and away from the overloaded goods sector.

“There's plenty of evidence that what we're seeing is an economy that to some considerable extent just can't handle what would otherwise be a very rapid real recovery,” said George Selgin, director emeritus of the libertarian Cato Institute’s Center for Monetary and Financial Alternatives.

“It's a temporary problem that's lasting a lot longer than anybody wants it to,” he continued. “What's unfortunate is the public is getting the inflation kicked in its teeth.”

Biden officials and allies, who had largely brushed off the threat of inflation this spring, are now bracing for deeper political backlash. Republicans have spent months blaming Biden’s economic agenda for high inflation and have pledged to make it a deciding issue in the midterm elections.

### turn

#### State immunity is good for competition – even if some take advantage, it’s a less risky alternative to outright cartelization with less economic damage, so it acts as a safety valve for economic malpractice

Galeza 19 [DOROTA GALEZA, The University of Manchester for the degree of PhD in the Faculty of Humanities, School of Law. "AMERICAN AND EU ANTITRUST FEDERALISM: BARRIERS TO INTEGRATION AND THEIR CONSEQUENCES FOR ALLOCATIVE EFFICIENCY AND CONSTITUTIONAL SOLUTIONS." https://www.escholar.manchester.ac.uk/api/datastream?publicationPid=uk-ac-man-scw:318077&datastreamId=FULL-TEXT.PDF]

The history of state action has examples of this. Until the 1980s, there was a state law requirement (anti-competitive conduct must have been actually mandated by state law). This was lifted in Southern Motor Carriers Rate Conference v United States115 where it was clarified that it was sufficient that it was authorized. This occurred mainly due to the fact that many states passed vaguely worded ‘permissive’ statutes that left private parties free to decide for themselves whether to block competition.116 It is apparent that some form of it is necessary. The most difficult part is to devise state action so that the best results are achieved.

Some regulation might be detrimental but it is difficult to design the best regulation ex ante. 117 Currently, the Parker doctrine enables firms to benefit from firms’ second preferred option after a monopoly protected by the state, which is a cartel enforced by a state agency. On the whole, this option may not be so troublesome in terms of its impact on competition and it is unlikely to result in a law that amends the antitrust laws as this option may not be beneficial for cartelists affected by the cheating of other cartelists. In this context, the more extensive regulation may result in more orms of cheating by the cartel. Easterbrook acknowledges that ‘[h]eavy supervision is conducive to graft and other offences against the governmental process. It reduces the flow of information generated by the market and so increases the chance of error’.118

#### It causes self-regulation that magnifies the chilling effect

Emery & Burgoyne 15 [Robert Burgoyne leads complex civil litigation in federal and state courts across the country, at the trial and appellate levels. ark Emery is a partner in the Washington DC office of Norton Rose Fulbright US LLP. He specializes in appellate law, with a practice in the U.S. Supreme Court and federal and state appellate courts across the country. Emery received his J.D. from Notre Dame Law School and obtained a Ph.D. in political philosophy from Yale University. "State-Action Antitrust Immunity in the Wake of North Carolina State Board of Dental Examiners v. Federal Trade Commission: What Does It Mean for State Bars and Bar Examiners?" https://thebarexaminer.org/article/june-2015/state-action-antitrust-immunity-in-the-wake-of-north-carolina-state-board-of-dental-examiners-v-federal-trade-commission-what-does-it-mean-for-state-bars-and-bar-examiners/]

States can begin to address these concerns by ensuring that adequate mechanisms are in place to satisfy the “active supervision” requirement. But as discussed, the extent of the necessary supervision is unclear and may come at a cost to the effectiveness and efficiency that state bars—and other similar regulatory agencies—previously enjoyed. Now, every decision involving potentially anticompetitive conduct may theoretically need to pass through an additional layer of bureaucracy, consuming an unknown amount of time. In addition to reducing the efficiency of state bars, this additional layer of bureaucracy could serve as another deterrent to professionals who might not be receptive to being second-guessed by non-expert bureaucrats. State bars fearful of damages suits—and unsure of what “active supervision” entails—might decide to exchange the practice of issuing cease-and-desist letters for the less cost-effective and less conciliatory tactic of filing a lawsuit against any party engaged in what is believed to be the unauthorized practice of law, because doing so would immediately raise the substantive issue, rather than awaiting FTC action.89 Boards of law examiners may be wary of making some difficult decisions on admissions or testing policies. Otherwise, these entities, already handling thousands of grievances and disciplinary matters, may add to their litigation workload, compelling additional expenditure of state funds.

#### No regulatory capture---and antitrust is worse

Melamed ’20 [A. Douglas Melamed, Professor of Law at Stanford, “Antitrust Law and its Critics,” 83 ANTITRUST L.J. (2020), https://lisboncouncil.net/wp-content/uploads/2020/11/MELAMED-Antitrust-Law-and-Its-Critics.pdf]

But that dichotomy between crafting the rules and applying them does not work for antitrust law because, as explained above, the law cannot sensibly be fully codified and depends on a commonlaw like evolution of legal doctrine and standards. Sound antitrust law is made by judges on a case-bycase basis. Even in jury cases, it is judges who develop legal doctrine, resolve legal questions, and craft jury instructions. The lawmakers—the judges—must have a coherent objective so their decisions, and thus the law, are not arbitrary. Non-economic objectives cannot be snuck in the back door by distinguishing creation of antitrust law from its application. B. REGULATION Antitrust law has long been thought of as an alternative to—or, in a more forceful articulation, a means of obviating—regulation.95 The idea is that market competition most efficiently allocates resources and maximizes economic welfare and that interference with competition, whether by private market power or government regulation, is inferior to the preservation of competition by enforcement of the antitrust laws. From this perspective, regulation is appropriate only to constrain natural monopolies, which competition cannot effectively discipline, or to achieve non-economic objectives. At the very least, effective antitrust enforcement can reduce the need for regulation. It is perhaps surprising, therefore, that regulation seems to be very much on the minds of even members of the mainstream antitrust communities. In recent months, expert reports commissioned by competition law enforcement agencies in the United Kingdom, the European Union, and Australia have recommended the creation of sectoral regulators to deal with, among other things, competition problems raised by the big digital platforms.96 In the United States, a multidisciplinary expert group proposed more modestly that “the establishment of a sectoral regulator should be seriously considered.”97 These recommendations might seem odd in a context that has traditionally seen antitrust law as a preferred alternative to regulation.98 A serious argument, however, can be made that the economicwelfare objective of antitrust law would be best served by establishing a sectoral regulator to address competition issues in certain contexts, such as those raised by the large digital platforms. The argument is based on two premises. The first is that antitrust law is a law of general application and decentralized enforcement; the second is a judgment that large digital platforms, for example, present competition issues that cannot be adequately addressed by antitrust rules suitable for all industries or a decentralized enforcement regime and require instead specialized rules and centralized enforcement. For example, a digital platform might be barred from owning businesses that use the platform and compete against third parties that also use the platform if it were thought that harm to competition in the markets in which the businesses and the third parties compete cannot be adequately prevented by application of general antitrust rules restricting dealing with rivals, that the risk of harm is great, and that the risk of lost efficiencies from the prohibition is small.99 Certain kinds of above-cost price predation might be prohibited when platforms are willing to sacrifice profits to exclude rivals, even if a profit sacrifice or no economic sense test were not thought suitable for predatory pricing law in general. And more aggressive standards, unsuitable for antitrust law in general, might be adopted for required portability or licensing of data or interoperation among platforms in order to reduce entry barriers to new competition. A regulator might be better able than an antitrust court to fashion such a requirement that takes account of both the competition interests at stake and the privacy risks that such a requirement might create.

#### They’re more efficient but don’t exploit market power.

Vaheesan ’19 [Sandeep and Nathan Schneider; 2019; Legal Director of the Open Markets Institute; Assistant Professor, Department of Media Studies, University of Colorado Boulder; “Cooperative Enterprise as an Antimonopoly Strategy,” https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1000&context=pslr]

One significant difference between cooperatives and investor-owned businesses lies in how they tend to achieve scale: through federation rather than conglomeration. Large cooperatives are usually composed of, and accountable to, smaller co-ops or other kinds of businesses. Thus, large co-ops incline toward supporting diverse, competitive, smaller enterprises, rather than seeking to undercut, eliminate, or absorb them. For instance, the regional component co-ops of Coop Italia are not subsidiaries of the national company; instead, they own it.113 Most United States electric coops do something similar. On a regional basis, they have formed larger “generation and transmission” co-ops, owned by the smaller ones, to undertake major capital investments like power plants and high-voltage transmission lines.114 Nationally, electric co-ops have formed cooperatives for shared financing and technology needs.115 Regional grocery and agricultural co-ops likewise achieve national economies of scale through such federations.

Although federations can create market power, they are not likely to seek and exercise market power in the same way that investor-owned corporations do. Accountability in a cooperative federation flows downward, toward participant enterprises or individuals rather than to outside investors. In some cases the constituent members are noncompetitive natural monopolies, such as the electric utility co-ops. In other cases, cooperative arrangements enable and support member businesses that compete with one another. Neighboring farmers, retail stores, or service contractors may belong to the same co-op in order to achieve economies of scale in discrete activities and, at the same time, continue competing for employees, customers, and productivity.116 Thus, cooperative federation can present lower risk of anticompetitive and other unfair conduct than corporate conglomeration. Evidence also suggests that cooperatives can reach higher rates of productivity and efficiency than investor-owned competitors,117 and thereby create savings that are designed to be passed on to their members.

#### State spillovers shut down by the plan are crucial to policy experimentation rapid enough to discover effective emerging tech regs.

Gerken ’15 [Heather; Spring; Professor of Law at Yale; Democracy, “Living Under Someone Else’s Law,” no. 36]

Spillovers don’t just get issues on the national agenda; they also help break through Washington gridlock. Minorities in Congress often use procedural tools to block reforms that they oppose. When the states are doing nothing on an issue, filibustering is a no-brainer—it prevents the enactment of a nationwide policy and thus ensures a total victory to the minority. But when spillovers do exist, the calculus in Washington becomes more complicated. Even if opponents of change successfully filibuster a bill in Congress, an unchecked spillover may have regional or even national effects. The states, in effect, allow for backdoor national policy-making. As a result, the interests blocking change at the national level suddenly have an incentive to come to the bargaining table. Pure obstructionism in Congress doesn’t reap the same rewards, and a compromise solution becomes more likely.

Spillovers also limit the power of special interests. Although interest groups are often able to block legislation in Congress, they have a harder time blocking legislation in all 50 states. Environmentalists, stymied in Congress by big business, convinced California to adopt carbon-emissions standards. Opponents of drones, thwarted in Congress by Boeing and Amazon, have convinced nine states to ban drone flights over private property. To be sure, the special interests that control Congress can pass legislation at the state level, too. But these state outlets matter much more to groups that don’t have Congress in their pocket and thus help level the playing field. By creating a spillover, a single innovative state can put an item on the national agenda even if nearly everyone else—Congress, interest groups, and other states—would prefer that the issue go away. State spillovers at least push self-interested politicians to take a position on a question they’d rather duck, which is a democratic good unto itself.

Spillovers further ensure that policy debates are practical rather than speculative. It’s always helpful to pass a reform at the state level because it proves a policy can work in practice. By forcing automakers to limit emissions in the 1970s, for example, California proved to the world that cars could be both efficient and affordable. That’s precisely why Justice Louis Brandeis likened the states to policy-making laboratories for the rest of the country. Spillovers add a new twist to this analogy. Since spillovers often have regional effects, they create much bigger laboratories. Experiments yield more data in less time. Successful experiments quickly become models for national reform. Unsuccessful experiments get shut down, becoming a cautionary tale in future policy debates.

#### Spillovers solve partisan polarization.

Gerken ’15 [Heather; Spring; Professor of Law at Yale; Democracy, “Living Under Someone Else’s Law,” no. 36]

SPILLOVERS AND THE HABITS OF CITIZENSHIP

Spillovers matter even at democracy’s most granular level: the habits of everyday citizens. Political enclaves are an easy solution for political elites, but they’re also too easy for the rest of us. When we sort ourselves into comfortable right- or left-thinking communities, it’s all but inevitable that we’ll ignore those with different views. Enclaves encase us in a protective policy-making bubble, shielded from laws with which we disagree. Opportunities for democratic engagement are reduced. More importantly, incentives for democratic engagement are weakened.

Spillovers enlist everyday citizens in the practice of pluralism. At the very least, they prevent us from being oblivious. Indeed, spillovers ensure that those least likely to be receptive to an idea—those nestled in enclaves with the opposite policy—confront that idea directly. The progressives who decry social conservatism might actually have to read the Texas school board’s preferred texts and reflect on why other Americans think these issues are important. Opponents of same-sex marriage might find themselves living next door to a same-sex couple who got married in another state. People who insist that environmental regulations cost consumers too much might find themselves driving inexpensive cars that meet California’s low-emissions standards.

Spillovers also help us identify where compromise can be found. In politics, we usually ask voters what they want rather than what they can live with. But the second is a far more important question. Spillovers elicit the answer to that question by forcing us to live under someone else’s law. We must drive a more fuel-efficient car. Or teach from a textbook more conservative than we’d prefer. Or live next to someone who owns guns that would be difficult to purchase in-state.

These real-world experiences matter. It’s always easy to oppose something in the abstract, but reality tends to be more complicated. In many instances, spillovers will convince us that the policy isn’t as bad as we thought.

Sometimes engaging directly with a policy will cement our view that it’s a mistake, and that matters as well. In our highly polarized system, it sometimes seems like we disagree about everything. Spillovers help us sort out annoying differences that prompt little more than a collective shrug from genuinely deep disagreements that require our collective attention. They help us distinguish the policies we’d reject in a poll and those we’d actually work to overturn. Spillovers can thus tell us a great deal more than polling or voting about whether a modus vivendi can be had. In other words, in an era defined by polarization, spillovers can be a powerful mechanism to mitigate the “big sort”-ing of America.

#### Polarization causes extinction.

Rice ’18 [Susan; January 25; Research Fellow at the School of International Service at American University, senior fellow at the Harvard Kennedy School’s Belfer Center for Science and International Affairs, D.Phil. and M.Phil. in International Relations from New College Oxford, former national security adviser to President Obama and United States ambassador to the United Nations; New York Times, “We Have Met the Enemy, and He Is Us,” https://www.nytimes.com/2018/01/25/opinion/national-security-polarization.html; RP]

It is well documented that Americans are ever more divided: along party, ideological, socio-economic and cultural lines; by geographic, demographic, racial and religious differences. Our political polarization hampers our ability to tackle important national issues, whether immigration, infrastructure, timely budgeting or closing Guantánamo. The recent government shutdown and the looming threat of another underscore this problem.

The same policy stagnation afflicts our ability to confront the most pressing threats to our security, from North Korea to the risk of terrorists acquiring weapons of mass destruction, from pandemic disease to Russian aggression. Our ability to counter such outside menaces is increasingly undermined by our collective failure to work together. Indeed, the most significant, long-term threat to our security may be our domestic political polarization.

America’s adversaries exploit the vulnerability created by our dysfunctional democracy. Today, in contrast to Sept. 11, a terrorist attack is more likely to divide than unite us, as we saw after Benghazi, San Bernardino, Calif., and, most recently, Niger. This makes us an even more attractive target, as our enemies benefit not only from the initial attack but also from the lasting consequences of a more fractious, fragmented America.

Similarly, the Iranians know that our resolve to prevent them from acquiring a nuclear weapon may crumble under partisan pressure. China is pursuing its economic and strategic ambitions in Asia unconstrained by an America so divided that we jettisoned the Trans-Pacific Partnership agreement we negotiated, while its signatories reap its rewards without us.

The Russians, too, have preyed on our divisions, interfering in the 2016 presidential election; they reportedly continue to amplify false news stories on social media that stoke fear of “the other.” This is how Russia reached and likely influenced voters with messages that magnify mutual hostility and favor particular candidates.

Our divisions impede our ability to defend against foreign adversaries. Two of the three congressional investigations into Russian meddling in the 2016 election are foundering over partisan efforts to distract from mounting evidence supporting the intelligence community’s high confidence that such meddling occurred. The special counsel, Robert Mueller, and the F.B.I. have also been subjected to outrageous and dishonest assaults on their integrity and professionalism.

### impact

#### Economic decline doesn’t cause war.

Walt ’20 [Stephen; May 13; International Relations Professor at Harvard University; Foreign Policy, “Will a Global Depression Trigger Another World War?” https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/]

On balance, however, I do not think that even the extraordinary economic conditions we are witnessing today are going to have much impact on the likelihood of war. Why? First of all, if depressions were a powerful cause of war, there would be a lot more of the latter. To take one example, the United States has suffered 40 or more recessions since the country was founded, yet it has fought perhaps 20 interstate wars, most of them unrelated to the state of the economy. To paraphrase the economist Paul Samuelson’s famous quip about the stock market, if recessions were a powerful cause of war, they would have predicted “nine out of the last five (or fewer).”

Second, states do not start wars unless they believe they will win a quick and relatively cheap victory. As John Mearsheimer showed in his classic book Conventional Deterrence, national leaders avoid war when they are convinced it will be long, bloody, costly, and uncertain. To choose war, political leaders have to convince themselves they can either win a quick, cheap, and decisive victory or achieve some limited objective at low cost. Europe went to war in 1914 with each side believing it would win a rapid and easy victory, and Nazi Germany developed the strategy of blitzkrieg in order to subdue its foes as quickly and cheaply as possible. Iraq attacked Iran in 1980 because Saddam believed the Islamic Republic was in disarray and would be easy to defeat, and George W. Bush invaded Iraq in 2003 convinced the war would be short, successful, and pay for itself.

The fact that each of these leaders miscalculated badly does not alter the main point: No matter what a country’s economic condition might be, its leaders will not go to war unless they think they can do so quickly, cheaply, and with a reasonable probability of success.

Third, and most important, the primary motivation for most wars is the desire for security, not economic gain. For this reason, the odds of war increase when states believe the long-term balance of power may be shifting against them, when they are convinced that adversaries are unalterably hostile and cannot be accommodated, and when they are confident they can reverse the unfavorable trends and establish a secure position if they act now. The historian A.J.P. Taylor once observed that “every war between Great Powers [between 1848 and 1918] … started as a preventive war, not as a war of conquest,” and that remains true of most wars fought since then.

The bottom line: Economic conditions (i.e., a depression) may affect the broader political environment in which decisions for war or peace are made, but they are only one factor among many and rarely the most significant. Even if the COVID-19 pandemic has large, lasting, and negative effects on the world economy—as seems quite likely—it is not likely to affect the probability of war very much, especially in the short term.