# Harvard Round 6 Wiki

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### T

Topicality---

#### They violate almost every word in the resolution:

1. **“Increase” means to make greater.**

**Ortega 07** – Judge, Oregon Appeals Court, Oregon Supreme Court

Darleen Ortega, Papas v. Or. Liquor Control Comm'n, 213 Ore. App. 369, Court of Appeals of Oregon, June 2007, LexisNexis

We begin with whether OLCC's interpretation of the rule, as developed and applied in this case, is consistent with the rule's text. Certainly, OLCC's understanding that the rule applies to "competitions" is consistent with the rule's use of the term "contest." See Webster's Third New Int'l Dictionary 492 (unabridged ed 2002) (defining the noun "contest" as a "competition"). However, by its terms, the rule refers and applies to specific types of drinking contests: as pertinent here, ones that involve "increase[d] consumption \* \* \* in increased quantities" of alcoholic beverages. OLCC's interpretation and application in this case fail to account for that qualification or to yield any pertinent point of reference in that regard; that is, nothing in OLCC's interpretation or application of the rule here identifies the consumption or quantities **against which the required** "**increase**" **is to be**, or was, **measured**. See Webster's at 1145 (defining the transitive verb "**increase**" as "**to make greater** in some respect (as in bulk, quantity, extent, value, or amount) : **add to** : enhance" and defining the adjective "increased" as "made or become greater"). Thus, OLCC's proposed interpretation--that mere competition between participants constitutes conduct violating the rule--is inconsistent with the latter, qualifying aspects of the rule

#### “Prohibition” requires completely ending a practice

Feldman 86 – Member of Procopio's Native American Law practice

Glenn M. Feldman, On Appeal from the United States Court of Appeals for the Ninth Circuit, California v. Cabazon Band of Mission Indians, 1986 U.S. S. Ct. Briefs LEXIS 1221, Supreme Court of the United States, 1986, LexisNexis

In arguing that California's bingo laws are prohibitory rat ther than regulatory, the appeallants have simply misunderstood the fundamental distinction between "prohibition" and "regulation" of conduct. As succinctly put by the Supreme Court of Washington more than 50 years ago, after noting that the prohibition and regulation of the sale of liquor are entirely different things: "To prohibit the liquor traffic implies the putting a stop to its sale as a beverage, to end it fully, completely, and indefinitely." In contrast, regulation "implies that the sale of intoxicating liquor shall go on within the bounds of certain prescribed rules, restrictions, and limitations." Ajax v. Gregory, 32 P.2d 560, 563 (Wash. 1934). Because regulation of conduct involves prescribing limitations, regulation, by definition, necessarily involves some degree of prohibition. Blumenthal v. City of Cheyenne, 186 P.2d 556, 566 (Wyo. 1947). The two concepts, however, are analytically distinct. Therefore, when courts have been faced with statutory schemes similar to California's bingo laws, they have consistently held them to be regulatory and not prohibitory.

#### “Expand the scope” means broadening the range of claims that can be brought---the plan regulates, but doesn’t expand conduct illegal under Sherman

Barrera 96 – J.D., Wayne State University Law School

Lise A. Barrera, “Is the Courtroom the New Front for the Resolution of Publishing Disputes?,” The Wayne Law Review, Vol. 42, Summer 1996, LexisNexis

It is important to note the distinction between the expansion of the scope of section 43(a) and the standard that courts apply in granting relief to claims under this section. The scope of section 43(a) allows plaintiffs to claim the section provides them with protection and thus should grant them relief. The expansion of the scope allows a much broader range of claims to be brought legitimately under section 43(a). Once the scope of the statute allows the claim to be brought, the courts apply a standard to the claim in order to determine whether a plaintiff should be granted relief.22 The standard applied is also the product of years of judicial interpretation. While the scope of section 43(a) is expanding, however, the standard for relief seems to be becoming higher and harder to meet.

#### “At least” means at a minimum.

**Macmillan ND**, "AT LEAST (phrase) American English definition and synonyms”, https://www.macmillandictionary.com/us/dictionary/american/at-least

at least

PHRASE

DEFINITIONS4

not less than a particular amount or number, and possibly more

Mr. Gray will remain the director for three years at least.

The disease killed at least 120 people in New England last year.

We are expecting to at least double our money.

at the very least (=not less than and probably much more than): The trip will take a year, at the very least.

at the least: You should walk 30 minutes every day, at the least.

#### “Core antitrust laws” are Sherman and Clayton

The Antitrust Division 07 – Law enforcement agency that enforces the U.S. antitrust laws

“Antitrust Division Statement Regarding the Release of the Antitrust Modernization Commission Report,” The Antitrust Division, Department of Justice, April 2007, https://www.justice.gov/archive/atr/public/press\_releases/2007/222344.htm

The AMC has made many specific recommendations in its report, and the Division is in the process of reviewing all of them. The Division commends the AMC for its three primary conclusions:

Free-market competition should remain the touchstone of United States' economic policy. The Commission's conclusion in this regard is a fundamental starting point for policy makers. Over a century of experience has shown that robust competition among businesses, each striving to be increasingly successful, leads to better quality products and services, lower prices, and higher levels of innovation.

The core antitrust laws—Sherman Act sections 1 and 2 and Clayton Act section 7—and their application by the courts and federal enforcement agencies are sound and appropriately safeguard the competitiveness of the U.S. economy.

New or different rules are not needed for industries in which innovation, intellectual property, and technological innovation are central features. Unlike some other areas of the law, the core antitrust laws are general in nature and have been applied to many different industries to protect free-market competition successfully over a long period of time despite changes in the economy and the increasing pace of technological advancement. One of the great benefits of the Sherman and Clayton Acts is their adaptability to new economic conditions without sacrificing their ability to protect competition.

#### That’s a voter for limits and ground – allowing affirmative to just broadly make conduct outside anti-trust topical which explodes the amount of affirmatives and skews out of core DAs

#### If they say that we can ignore any part of the resolution there are two external impacts

#### Fairness – absent a predictable stasis, the aff can determine the scope of the debate using an infinite amount of literature bases or experiences. That makes the scope of negative research too broad and makes it too easy to be aff. Fairness outweighs any other impact because debate is a competitive activity, and a skewed debate undermines the value of the energy and research that teams put into winning the competition. It makes the debates determined by a coinflip not research.

#### Clash: defending your argument against a well-prepared opponent is key to any effective advocacy strategy or education obtained in debate – responding to negative arguments forced you to refine your arguments to the best possible version. Any other alternative means that we can’t improve our affirmatives after we break them which ruins the educational value of debate

### Legalize CP

#### Text: The United States federal government should legalize the cultivation, use, and sale of marijuana for recreational and pharmacological purposes, overturn and expunge all criminal convictions related to marijuana, and abolish private prisons. Solves every internal link without doing anti-trust

#### Ex-ante regulation creates clarity and deters violations before they occur---avoids enforcement proceedings

Posner 10 – Judge in the U.S. Court of Appeals for the Seventh Circuit, Senior Lecturer at the University of Chicago Law School

Richard A. Posner, “Regulation (Agencies) versus Litigation (Courts): An Analytical Framework,” Regulation vs. Litigation: Perspectives from Economics and Law, National Bureau of Economic Research, Inc., 2010, https://ideas.repec.org/h/nbr/nberch/11956.html

Ex ante regulation can, as I said, be judicial as well as administrative, as in preventive detention, injunctions, and regulatory decrees, and ex post regulation can be administered by agencies as well as courts, such as the Federal Trade Commission and the National Labor Relations Board, which operate mainly by trial-type proceedings conducted after a violation of the laws administered by the agency has occurred.

Ex ante: pros. The ex ante approach promotes clarity of legal obligation and therefore presumably better compliance (fewer inadvertent violations) by laying down rules in advance of the regulated activities. Ex ante regulation is activated before there is a loss, unlike a lawsuit; it can be centrally designed and imposed (for example, by a single agency such as the Food and Drug Administration, as opposed to a decentralized judicial system); and it is enforceable by means of light penalties, because the optimal penalty for creating a mere risk of injury is normally lighter than the optimal penalty for causing an actual injury. This means, however, that ex ante and ex post regulation actually are inseparable; because compliance with rules is never 100 percent, there must be a machinery for punishing violators, though the machinery may involve penalties meted out by the regulatory agency itself, with judicial involvement limited to judicial review of the penalty proceeding. But while rules involve heavy fixed costs (i.e., designing the rule in the first place), if they are very clear and carry heavy penalties compliance may be achieved without frequent enforcement proceedings, so marginal costs may be low. Rules are therefore attractive when the alternative would be vague standards, resulting in frequent actual or arguable violations and hence frequent enforcement proceedings.

As this discussion shows, ex ante regulation and rules have an affinity. Ex ante regulation enables exploitation of the economizing properties of rules as preventives. With vague standards, the regulatory emphasis shifts to seeking deterrence by proceedings to punish violators.

### Non-enforcement CP

#### The United States federal government, fifty states, and all relevant sub-federal entities should not enforce criminal penalties on marijuana-related drug offences.

### Innovation DA

#### Courts limit Biden enforcement – any squo antitrust actions won’t take effect until 2023

Christopher et. Al. 7/26 – Paul Christopher is the Head of Global Market Strategy for Wells Fargo Investment Institute (WFII), a subsidiary of Wells Fargo Bank, N.A., which is focused on delivering the highest quality investment expertise and advice to help investors manage risk and succeed financially.

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Antitrust laws are intended to help protect consumers from predatory corporate activity and promote fair competition in the open market. The intention of these laws and associated regulations is to help curb a range of business practices, including price fixing and monopolies. Without regulatory oversight, lawmakers' concern is that consumers would likely pay higher prices and have access to fewer choices of products and services.

Antitrust laws are comprised of three pieces of legislation enacted by Congress (see Sidebar 1). U.S. antitrust regulations are enforced by two federal agencies: the Federal Trade Commission (FTC) and the Department of Justice (DOJ). Yet, there are limits and potential delays to antitrust policy under current laws. At times, U.S. courts have struggled to interpret vague language and make rulings.

Biden acts

Earlier this month, President Biden signed an executive order (EO) initiating a broad-based approach to spur competition across sectors including Information Technology, Health Care, and agriculture. The EO includes 72 actions and recommendations across 12 federal agencies (see Sidebar 2).1 President Barack Obama issued a similar EO late in his second term, but few agencies responded to it. Recently appointed FTC Chair Lina Kahn appears poised to broaden oversight and enforcement of anti-competition laws. Yet, there are questions about the president’s authority over the FTC and the agency’s reach; certain measures will likely be blocked by courts.

In Congress, regulating Big Tech has garnered bipartisan support, but for different reasons. Democrats are focused on alleged anticompetitive practices while Republicans are concerned about the limitations on commentary and content on social media websites. Last September, Congress held hearings to investigate these allegations. In June, the House Judiciary Committee approved five of six proposed bills, mainly aimed at Big Tech platforms favoring proprietary products and services. Yet, even with bipartisan support, we believe the odds of passing meaningful antitrust legislation in the near term are slim as proposals for physical infrastructure and social spending take precedence. That said, we expect antitrust legislation to remain a priority for lawmakers ahead of midterms.

Investment implications

With the signing of the EO, we believe changes in regulatory oversight are likely. Successful antitrust litigation from lawmakers is a growing possibility, yet likely slow in coming. The DOJ suit filed last year is still scheduled for September 2023, demonstrating the snail-like pace of litigating antitrust cases.

We currently have a neutral tactical position on the Information Technology sector. This outlook aligns with our view that the path of regulation is unclear and will likely be delayed by court challenges. This trajectory may not affect the earnings of large firms with component businesses that could be flexible enough to maintain earnings growth as individual or spun-off companies. Thus, the cross-currents of regulation add uncertainty that balances against our view that the sector’s earnings will grow over the next 6 to 18 months.

**Regional bank consolidation is increasing now, but antitrust expansion chills activity**

**Nylen 21** – covers antitrust and investigations for Politico Pro

Leah Nylen, "Bank mergers come into Democrats’ antitrust crosshairs," Politico, 4-19-2021, https://www.politico.com/news/2021/04/19/progressives-biden-bank-merger-threat-483183

The last time the Justice Department challenged a bank merger was in 1985, around the time that compact discs and New Coke debuted.

In the 36 years since, the U.S. has shed roughly 10,000 banks — some from bank failures, but most through acquisitions that regulators and antitrust prosecutors at the Justice Department have blessed. Critics say that has led to higher fees for consumers, reduced access to banking services and increased concerns about risk to the financial system.

Now, as Democrats in Congress push for an antitrust overhaul to restrain corporate power in tech, health care and agriculture, progressive lawmakers and economists also want the Biden administration to crack down on mergers in the banking sector. It’s setting up a clash with the industry, which has been lobbying for even easier merger scrutiny.

The issue is taking on greater urgency as some of the country’s biggest regional banks — PNC of Pittsburgh, Huntington Bank of Columbus, Ohio and M&T Bank of Buffalo, New York — pursue major deals.

“Bank regulators are playing with matches while wrecking the fire department,” said Senate Banking Chair Sherrod Brown (D-Ohio). “The Wall Street megabanks are so large and powerful that banks across the country feel pressured to get bigger and riskier. These mergers are a symptom of a bigger problem — deregulation has left us with Wall Street banks that are too big and that take too many risks.”

The campaign is threatening to drag big banks into a high-stakes antitrust debate even as they warn they need help from Washington to compete with financial technology upstarts. It comes as progressives play an increasingly influential role in Biden’s economic policy.

“Regulators have served as a rubber stamp for bank mergers for too long,” said Rep. Chuy García (D-Ill.), who with Sen. Elizabeth Warren (D-Mass.) has proposed legislation to overhaul how bank deals are considered. “These mergers have negative consequences for our communities. They mean more Wells Fargos and fewer local bank branches.”

The regional bank mergers at issue accelerated after moderate Democrats joined forces with Republicans in 2018 to ease lending regulations that Congress enacted after the 2008 global financial crisis.

Wall Street analysts are now predicting a merger wave, particularly after SunTrust’s easy combination with BB&T in 2019 to form Truist, the nation’s sixth-largest commercial bank.

The deal boom was delayed by the pandemic. But an increasing number of regional lenders are now planning mergers to better position themselves against the biggest banks, like JPMorgan Chase and Bank of America, whose assets in the trillions of dollars will continue to dwarf the smaller competitors even after they consolidate.

The expected M&A rush may run into antitrust headwinds as top congressional Democrats turn their sights to industries like banking where many players are already considered “too big.”

**That’s key for regional banks to gain sufficient resources to invest in cyber-defenses**

**Mendelson 18** – U.S. president and CEO of Bank Leumi

Avner Mendelson, "Survival strategy: Cut the number of banks in half," American Banker, 1-30-2018, https://www.americanbanker.com/opinion/survival-strategy-cut-the-number-of-banks-in-half#:~:text=Consolidation%20can%20actually%20help%20smaller,regulatory%20burden%20that%20accompanies%20growth.&text=Thus%2C%20as%20banks%20expand%2C%20there,for%20profitable%20growth%20over%20time.

It’s no secret that the banking industry has been consolidating for the last 30 years — the number of bank charters has fallen from 14,000 in 1985, to close to 8,500 in 2000, to 4,938 at the end of 2017 — a remarkable 64% drop, most of which happened during the '90s and after the financial crisis. New bank formation also virtually stopped, from a rate of nearly 100 per year up until 2008 to fewer than two per year now.

But while that reduction is remarkable, it’s not necessarily a bad thing.

Some of the post-crisis decline can be attributed to bank failure and the lack of de novo banks, but a significant amount is due to an uptick in M&A activity — particularly among smaller banks — driven by increased regulatory and technology standards that incentivize scale.

Over the past few years, there have been well over 200 M&A deals per year among community banks, those with less than $10 billion in assets, almost double the amount of such activity in the crisis years of 2008 and 2009, according to the S&P Global Market Intelligence.

Going forward, the trend of consolidation is likely to continue, and it’s possible that a healthy 2,000 to 3,000 institutions would serve the U.S. even better than the current number. The goal should be to maintain competition without creating concentration.

Further consolidation makes sense because the bar at which a bank can remain profitable has risen. The fixed costs of running a bank, both opening it for business and maintaining it for the long haul, continue to grow: These costs run the gamut from keeping up with compliance, anti-money-laundering and other standards to having a program and resources in place to attract talent. Now more than ever, technology is a major cost center. Banks must invest in their tech infrastructure to meet customer expectations, keep up with competitors and steel themselves against cyberattacks.

Consolidation can actually help smaller banks stay profitable, while managing the increased regulatory burden that accompanies growth. The regulatory requirements for banks vary by asset size, and the vast majority of U.S. banks have less than $10 billion in assets, the first major regulatory threshold. What often happens is that smaller players — those under the $10 billion mark— join together to surpass that first threshold by a wide margin. Once these banks reach $20 billion or $30 billion in assets, they can become attractive acquisition targets for banks in the $100 to $250 billion range, well above the $50 billion threshold that triggers even greater oversight from regulators. Thus, as banks expand, there is even more incentive for consolidation and mergers to reach scale to allow for profitable growth over time.

This is not to say that small banks don’t have their place in the ecosystem. In rural areas, regional and community banks fill an important social and economic role by bringing banking services to otherwise underbanked communities. These institutions deliver a product offering that is relevant to their customers and beneficial to the entire local community. As long as these smaller banks have a business proposition that truly justifies their size, there will always be room for them. I would even advocate that the industry, as a whole, should ensure these banks are properly incentivized and encouraged to exist. But in large urban markets like New York, Chicago and Los Angeles — where bigger players abound and where there is no shortage of competition — consolidation is the most logical path forward.

At the same time, there is still room for new entrants — but these select few newcomers will need to innovate and fill gaps, not just replicate the status quo. A handful of new banking charters will likely come from fintech startups with banking capabilities. Yet these, too, will eventually be ripe for acquisition by larger banks that need to build out their technology. Thus, the trend toward further consolidation will continue.

Community bank executives, especially those heading the very smallest banks, must continue to explore ways to be more competitive and more resilient. In doing so, they can’t ignore the fact that selling to or merging with another bank may benefit shareholders and customers alike.

**Cyberattacks against small banks collapse the US financial system---they’re uniquely vulnerable**

**Harner et al. 20** – Chris Harner is managing director of the cyber risk solutions practice at Milliman, an actuarial and consulting firm; Chris Beck is an executive risk consultant within the practice; Blake Fleisher is a senior cyber risk analyst in the practice

Chris Harner, Chris Beck, and Blake Fleisher, "Cyberattacks Could Cripple Major U.S. Banks," CFO, 3-11-2020, https://www.cfo.com/cyber-security-technology/2020/03/cyberattacks-could-cripple-u-s-banking-system/

In the 21st century, first-order, single-point failures with profound second- and third-order effects are especially common in cyberattacks against complex systems. For one, the U.S. financial system is complex and highly interconnected, making it very vulnerable to a cyberattack.

The Federal Reserve Bank of New York (FRBNY) recently epitomized this interconnectivity in a report, arguing that a cyberattack could impair a bank’s ability to service creditors. More specifically, impairment of any of the five most active U.S. banks could result in significant spillovers to other banks, with 38% of the network affected on average.

Perhaps even more concerning, the FRBNY identified a subset of smaller banks that, if impaired, could threaten the solvency of a top-five institution. In particular, the FRBNY estimated it would take the financial distress of six small banks, each below $10 billion in assets, or just one institution with between $10 billion and $50 billion in assets.

More than 80 U.S. banks fall into the midsize bank category, with aggregate assets of approximately $1.8 trillion, while there are about 4,440 small banks, with cumulative assets of around $4.7 trillion. Combined, the midsize and small banks account for about 36% of all commercial banking assets. This indicates that the complexity of the U.S. banking system may not be driven solely by the “megabanks.”

A cyberattack on these banks, which appear benign in isolation and have simpler balance sheets, could ultimately cause a cascading failure of interbank funding, leading to a tipping point for a broader systemic liquidity crisis.

At a glance, when viewed with typical “first-order thinking,” this is deeply troubling, because larger banks tend to have more resources and invest more in building robust cybersecurity than smaller banks. Even if a large bank puts in place a proper cybersecurity policy with the right controls for its own protection, which it absolutely needs to do, it may not be enough.

The issue is not just building a bigger cybersecurity “moat and castle.” Instead, financial institutions need to understand the interconnectedness of their entire ecosystem, integrating cyber risk, vendors, liquidity sources, off-balance-sheet exposures, etc.

More thoughtful analysis, using second- and third-order thinking, indicates that cyberattacks by their very nature know no physical boundaries and can spread rapidly across the globe. We know this from the infamous NotPetya attack in 2017, when a worm planted in Ukrainian tax software managed to infect not just Ukrainian critical infrastructure, but also the largest global shipper, A.P. Moller-Maersk, and the big pharmaceutical company Merck as well as a chocolate factory in Australia.

In a system like banking that is already highly interconnected in its own right, one would expect the overall impact on the U.S. financial system to be even greater. The FRBNY’s paper is a very important illustration of how an operational risk can rapidly lead to grave financial risk.

#### That causes nuclear war

Tønnesson 15 - Stein Tønnesson 15, Research Professor, Peace Research Institute Oslo; Leader of East Asia Peace program, Uppsala University, 2015, “Deterrence, interdependence and Sino–US peace,” International Area Studies Review, Vol. 18, No. 3, p. 297-311

Several recent works on China and Sino–US relations have made substantial contributions to the current understanding of how and under what circumstances a combination of nuclear deterrence and economic interdependence may reduce the risk of war between major powers. At least four conclusions can be drawn from the review above: first, those who say that interdependence may **both inhibit and drive conflict** are right. Interdependence raises the cost of conflict for all sides but asymmetrical or unbalanced dependencies and **negative trade expectations** may generate tensions leading to trade wars among inter-dependent states that in turn increase the risk of military conflict (Copeland, 2015: 1, 14, 437; Roach, 2014). The risk may increase if one of the interdependent countries is governed by an inward-looking socio-economic coalition (Solingen, 2015); second, the risk of war between China and the US should not just be analysed bilaterally but include their allies and partners. Third party countries could drag China or the US into confrontation; third, in this context it is of some comfort that the three main economic powers in Northeast Asia (China, Japan and South Korea) are all deeply integrated economically through production networks within a global system of trade and finance (Ravenhill, 2014; Yoshimatsu, 2014: 576); and fourth, decisions for war and peace are taken by very few people, who act on the basis of their future expectations. International relations theory must be supplemented by foreign policy analysis in order to assess the value attributed by national decision-makers to economic development and their assessments of risks and opportunities. If leaders on either side of the Atlantic begin to seriously **fear or anticipate their own nation’s decline** then they may blame this on external dependence, appeal to anti-foreign sentiments, contemplate the use of force to gain respect or credibility, adopt protectionist policies, and ultimately **refuse to be deterred by** either **nuclear arms** or prospects of socioeconomic calamities. Such a dangerous shift could happen **abruptly**, i.e. under the instigation of actions by a third party – or against a third party. Yet as long as there is both nuclear deterrence and interdependence, the tensions in East Asia are unlikely to escalate to war. As Chan (2013) says, all states in the region are aware that they cannot count on support from either China or the US if they make provocative moves. The greatest risk is **not** that **a territorial dispute** leads to war under present circumstances but that **changes in the world economy** alter those circumstances in ways that render inter-state peace more precarious. If China and the US fail to rebalance their financial and trading relations (Roach, 2014) then a trade war could result, interrupting transnational production networks, provoking social distress, and exacerbating nationalist emotions. This could have unforeseen consequences in the field of security, with nuclear deterrence remaining the only factor to **protect the world from Armageddon**, and **unreliably so**. Deterrence could **lose its credibility**: one of the two great powers might gamble that the other yield in a cyber-war or conventional limited war, or third party countries might engage in conflict with each other, with a view to obliging Washington or Beijing to intervene.

### States CP

#### The fifty states and all relevant sub-federal entities in the United States should formally legalize recreational marijuana cultivation and use and release and expunge the records of those convicted for marijuana-related reasons.

#### States solves criminal justice policies better than the federal government

Blanks 16 - Research Associate in Cato's Project on Criminal Justice, testified before the U.S. Commission on Civil Rights on police accountability (Jonathan, “(Almost) All Criminal Justice Politics is Local,” *CATO*, <https://www.cato-unbound.org/2016/12/02/jonathan-blanks/almost-all-criminal-justice-politics-local)//BB>

As I mentioned in my first installment, criminal justice reform can be highly localized by installing and electing prosecutors who approach the position with a less punitive mindset than has been common in recent decades. Going a step further, it is important to note that there is more to state and local criminal justice apparatuses than prosecutors, and these other aspects too should be utilized if American criminal justice reform is to have a future. Given the prominence of the federal government in national media and the temptation to bring sweeping legislation to impose change in the face of gross injustice, the inclination to look toward Washington for meaningful reform is understandable. Where the federal government maintains and exercises the most power—such as regulation of international and interstate commerce, foreign policy, and immigration enforcement—national lobbying and reform efforts makes a great deal of sense. But the general police power remains with and within the states, and that necessarily limits how much good national reform can bring. Under an administration that putatively welcomes criminal justice reform, this local limitation appears to be a hindrance to progress. However, as we will soon find ourselves under an administration much more hostile to criminal defendants, the limited role the federal government has in American law enforcement almost seems like a blessing, if a small one. With the announcement that Senator Jeff Sessions is to be President-elect Trump’s nominee to head the Department of Justice, meaningful federal criminal justice reform becomes even less likely than it seemed just after the election. Ethan Nadelmann of the Drug Policy Alliance called the AG nominee “a Drug War dinosaur” for his anachronistic approach to marijuana and other drugs. Not only will a Sessions-led DOJ be less likely to support major federal reform efforts aimed at drug offenders, he may roll back guidance instituted during the Obama administration to tolerate marijuana businesses that operate within state laws where the drug’s medical or recreational use has been legalized. To fight back, and keeping in line with Professor Teles’s belief that the political Right can be a force for good in criminal justice reform, state and local areas should resist federal encroachment into their constitutionally protected powers.[i] Federalism has already been instrumental in marijuana legalization and marriage equality, and many on the Right have prided themselves in their dedication to our federalist system. In the coming years under a potentially energetic Sessions Justice Department, we may just see how dedicated to the federalist proposition Republicans really are. In addition, several municipalities that have previously been designated “sanctuary cities” for refusing to use local resources to proactively enforce federal immigration law have announced their intention to continue their policies under the next administration. Many city halls’ defiance of the incoming administration’s promise to crack down on immigration violations signals intergovernmental challenges ahead. Perhaps these municipal leaders of the political left may rediscover the utility of legal federalism and encourage allies to do the same. It’s difficult to be very optimistic about more humane criminal justice policies in the next four years. That said, state and local leaders who are committed to fairness and doing what is right for their own communities retain the power and ability to make the changes they deem necessary. Reformers on the Left and Right should not let these opportunities slip away at the local level the way it has at the federal one.

### Treaties DA

#### Legalization breaks US technical compliance with UN drug treaties – spills over

Haase 13 – consultant for International Drug Policy Consortium and the Harm Reduction Coalition

Heather, “The 2016 Drugs UNGASS: What does it mean for drug reform?” [http://drogasenmovimiento.files.wordpress.com/2014/01/13-10-14-the-2016-drugs-ungass-e28093what-does-it-mean-for-drug-reform\_.pdf] October 14 //

But why? With all of the progress made in reform around the world lately, many – especially in the US – are asking if the UN is even relevant to domestic drug reform at this point. With the recent marijuana laws passed in Colorado and Washington and the proposed legislation in Uruguay – not to mention decriminalization measures enacted in Portugal and a growing number of other countries – reform seems inevitable. At some point, the argument goes, the UN system will simply be overtaken by “real world” reform on the ground. Why even bother with advocacy at the UN?¶ This is not an easy question to answer; however, I truly believe that to be effective, reform efforts must be made at every level – locally, nationally, and globally.¶ It may be true that reform efforts in the US and around the world have made significant progress in the last 10 years. But there is still a long way to go – marijuana is still not completely legal anywhere in the world (despite state laws to the contrary, marijuana still remains illegal under federal law throughout the US), and many human rights abuses continue to be carried out against drug users throughout the world in the name of drug control. Meanwhile, the international drug control treaties – the 1961 Single Convention on Narcotic Drugs and its progeny – remain in place and, in fact, enjoy nearly universal adherence by 184 member states.¶ That so many countries comply – at least technically, if not in “spirit” – with the international drug treaty system, shows just how highly the international community regards the system. As well it should – the UN system is invaluable and even vital in many areas, including climate change, HIV/AIDS reduction, and, most recently, the Syrian chemical weapons crisis (and don’t forget that the international drug treaty system also governs the flow of licit medication). While it is not unheard of for a country to disregard a treaty, a system in which countries pick and choose which treaty provisions suit them and ignore the rest is, shall we say, less than ideal.

#### Wrecks the entire multilateral system

Koplow 13 – law professor @ Georgetown University

David, “Indisputable Violations: What Happens When the United States Unambiguously Breaches a Treaty?” [http://www.fletcherforum.org/wp-content/uploads/2013/02/Koplow\_37-1.pdf] Winter //

So what? Why does it matter that the United States violates treaties, and occasionally does so without a shred of legalcover? Perhaps that is the realpolitik privilege of the global hegemon: to be able to sustain hypocrisy, 69 asserting that its unique international responsibilities and its “exceptional” position in the world enable the United States explicitly to welch on its debts, fudge on its obligations, and adopt a “do as we say, not as we do” approach with other countries.¶ However, there is a cost when the world’s strongest state behaves this way. One potential danger is that other countries may mimic this disre - gard for legal commitments and justify their own cavalier attitudes toward international law by citing U.S. precedents. Reciprocity and mutuality are fundamental tenets of international practice; it is foolhardy to suppose that other parties will indefinitely continue with treaty compliance if they feel that the United States is taking advantage of them by unilateral avoidance of shared legal obligations**.**¶ So far, there has not been significant erosion of the treaties discussed in the three examples. The United States and Russia will fall years short of compliance with the CWC destruction obligations, but other parties, with the notable exception of Iran, have reacted with aplomb, comfort - able with the two giants’ unequivocal commitment to eventual compli - ance. Likewise, the VCCR is not unraveling, even if other states lament the asymmetry in consular access to detained foreigners. And while many states pay their UN dues late and build up substantial arrearages, that recal - citrance seems to stem more from penury than from a deliberate choice to follow the U.S. lead.¶ But that persistent flouting undermines the treaties—and by exten - sion, it jeopardizes the entire fabric of international law. Chronic noncom - pliance—especially ostentatious, unexcused, unjustified noncompli - ance—also sullies the nation’s repu - tation and degrades U.S. diplomats’ ability to drive other states to better conform with their obligations under the full array of treaties and other international law commitments from trade to human rights to the Law of the Sea. The United States depends upon the international legal structure more than anyone else: Americans have the biggest interest in promoting a stable, robust, reliable system for international exchange. It is shortsighted and self-defeating to publicly and unblushingly undercut the system that o # ers the United States so many bene " ts. It is especially damaging when, following an indisputable violation, the United States acknowledges its default, participates in an international dispute resolution procedure, and apologizes—but then continues to violate the treaty. ! e CWC imple - mentation bodies, the International Court of Justice, and even the UN General Assembly and Security Council are unable to e # ectively do much to sanction or penalize the mighty United States, but it is still terrible for U.S. interests to disregard those mechanisms.

#### Key to solve GPW and existential risks

Muller 2K

Dr. Harold Muller is the Director of the Peace Research Institute-Frankfurt and Professor of International Relations at Goethe University Compliance Politics: A Critical Analysis of Multilateral Arms Control Treaty Enforcement <http://cns.miis.edu/npr/pdfs/72muell.pdf>

In this author's view,3 at least four distinct missions continue to make arms control, disarmament, and non-proliferation agreements useful, even indispensable parts of a stable and reliable world security structure:

• As long as the risk of great power rivalry and competition exists—and it exists today—constructing barriers against a degeneration of this competition into major violence remains a pivotal task of global security policy. Things may be more complicated than during the bipolar age since asymmetries loom larger and more than one pair of competing major powers may exist. With overlapping rivalries among these powers, arms races are likely to be interconnected, and the stability of any one pair of rivals might be affected negatively by developments in other dyads. Because of this greater risk of instability, the increased political complexity of the post-bipolar world calls for more rather than less arms control. For these competitive relationships, stability or stabilization remains a key goal, and effectively verified agreements can contribute much to establish such stability. • Arms control also has a role to play in securing regional stability. At the regional level, arms control agreements can create balances of forces that reassure regional powers that their basic security is certain, and help build confidence in the basically non-aggressive policies of neighbors. Over time, a web of interlocking agreements may even create enough of a sense of security and confidence to overcome past confrontations and enable transitions towards more cooperative relationships. At the global level, arms limitation or prohibition agreements, notably in the field of weapons of mass destruction, are needed to ban existential dangers for global stability, ecological safety, and maybe the very survival of human life on earth. In an age of increasing interdependence and ensuing complex networks that support the satisfaction of basic needs, international cooperation is needed to secure the smooth working of these networks. Arms control can create underlying conditions of security and stability that reduce distrust and enable countries to commit them-selves to far-reaching cooperation in other sectors without perceiving undesirable risks to their national security. Global agreements also affect regional balances and help, if successful, to reduce the chances that regional conflicts will escalate. Under opportune circumstances, the normative frameworks that they enshrine may engender a feeling of community and shared security interests that help reduce the general level of conflict and assist in ushering in new relations of global cooperation. • Finally, one aspect that is rarely discussed in the arms control context is arms control among friends and partners. It takes the innocent form of military cooperation; joint staffs, commands, and units; common procurement planning; and broad and far-reaching transparency. While these relations serve at the surface to enhance a country's military capability by linking it with others, they are conducive as well to creating a sense of irreversibility in current friendly relations, by making unthinkable a return to previous, possibly more conflictual times. European defense cooperation is a case in point.1 Whatever the particular mission of a specific agreement, it will serve these worthwhile purposes only if it is implemented appropriately and, if not, means are available to ensure compliance. In other words, the enduring value of arms control rests very much on the ability to assure compliance.5 Despite the reasons given above for the continuing utility of arms control, the skeptics may still have the last word if agreements are made empty shells by repeated breaches and a lack of effective enforcement.

### FTC DA

#### The FTC is fundamentally constrained---priority changes drag resources away from current merger investigations

Rose ’19 - Department Head and Charles P. Kindleberger Professor of Applied Economics in the MIT Economics Department. She served as Deputy Assistant Attorney General for Economic Analysis in the Antitrust Division of the DOJ from 2014 to 2016, and was the director of the National Bureau of Economic Research Program in Industrial Organization from 1991 to 2014.

Nancy Rose, FTC Hearing #13: Merger Retrospectives, April 12, 2019, <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-14-merger-retrospectives>

So I want to start with the last question that was on the set that Dan and Bruce circulated for this panel. Should the FTC devote more resources to retrospectives, even at the cost of current enforcement? And I was delighted to see Commissioner Slaughter be so passionate in her defense of the need for more resources. This goes to what I feel is the most significant, and yet still largely invisible message, in the ongoing debate over competition policy, which is that antitrust enforcement in the United States is chronically and substantially underfunded.

For years, the appropriation requests have been modest in their increases. Oversight hearings and interactions with the Hill have too often featured the mantra, “when business picks up, our talented and hardworking staff just do more with less.” I will say I think the career staff at both the FTC and the DOJ Antitrust Division are among the most dedicated, highly-skilled, and hardest-working professionals.

It was my great privilege to work with a number of them at DOJ, and I know that colleagues who have worked at the FTC feel the same way. They deserve our greatest appreciation and applause and not just from those of us who work in antitrust policy, but from the entire American public, on whose behalf they tirelessly work.

But there is a limit to the number of hours in a day and the number of days in a week and the well below market compensation for the lawyers and economists who work in the agencies, which is another significant problem, is insufficient to demand that staff give up all rights to leave their buildings, occasionally see their families, or catch up on sleep.

So I think it’s inevitable that if we’re asking agencies to reflect on the effectiveness of their decision-making through programs like retrospective programs, it is going to come out of someplace else. And I fear that given the ongoing intensity of the merger wave, that’s going to come out of enforcement.

We are amid an ongoing sustained, what’s been called by some, tsunami of mergers. Each year there are thousands of mergers noticed to the agencies and thousands more below the HSR thresholds, that work by Thomas Wollmann at the University of Chicago suggests, skate through to consummation with practically no probability of review or action, the occasional consummated merger enforcement action notwithstanding.

The dollar volume of mergers is at historic levels and that suggests that there are a lot of mega mergers competing for enforcement resources. In addition, litigation costs continue to climb, both for challenging mergers or bringing Section actions, especially as parties with especially deep pockets escalate litigation defenses, correctly calculating that even adding some tens of millions of dollars in antitrust litigation costs would be just rounding error in their merger financing.

And, finally, I would say it’s inconceivable to me that there are not at least some counsel that are advising parties that a good time to bring marginal mergers forward is when the agencies are stretched thin by major investigations or multiple litigations.

#### Current resource allocation allows effective regulation of hospital mergers---plan decimates FTC success

Muris ’20 – Professor of Law at George Mason, former Chairman of FTC, Senior Counsel at Sidney Austin LLP, JD from UCLA,

Timothy Muris, “Response to Subcommittee on Antitrust, Commercial, and Administrative Law Committee on The Judiciary U. S. House of Representatives” April 17, 2020, <https://judiciary.house.gov/uploadedfiles/submission_from_tim_muris.pdf>

Finally, the Committee asks about agency resources and performance. The last section below briefly addresses the continual need for the antitrust agencies to address business practices as they evolve, as well as their own performance record. Such evaluation is necessary: ever a UCLA Bruin, I remain devoted to legendary coach John Wooden‘s maxim that “when you are through learning, you are through.” The section thus offers multiple examples of successful and bipartisan FTC efforts to improve enforcement to the benefit of consumers. In the key healthcare sector, American consumers continue to benefit from the FTC’s hard work. After losing seven consecutive hospital merger challenges before I arrived, upon my direction the FTC worked to devise a new enforcement plan by incorporating fresh economic thinking and issuing retrospective case studies showing that several hospital mergers had indeed harmed consumers. This plan resulted in a successful challenge to a consummated hospital merger that served as a template for future enforcement, leading to Obama administration victories in three separate courts of appeal endorsing the FTC’s approach. Such success did not require abandonment of the consumer welfare standard, nor a dramatic increase in agency resources. Indeed, as discussed below, my predecessor as FTC chairman, Bob Pitofsky, did much more for American consumers using the consumer welfare standard with just 1,000 staff than did the agency in the 1970s when it had far greater resources (1,800 staff by the turn of the decade), but was motivated by an antitrust policy that was, instead, at war with itself.

#### Maintaining competitive hospital markets are critical to avoid terminal budget overstretch---the alternative is a global confidence collapse in the US economic system

Evan Horowitz, Fivethirtyeight, January 11, 2018, The GOP Plan To Overhaul Entitlements Misses The Real Problem, <https://fivethirtyeight.com/features/to-cut-the-debt-the-gop-should-focus-on-health-care-costs/>

There is no wide-reaching entitlement funding crisis, no deep-rooted connection between runaway debts and the broad suite of pension and social welfare programs that usually get called entitlements. The problem is linked to entitlements, but it’s much narrower: If the U.S. budget collapses after hemorrhaging too much red ink, the main culprit will be rising health care costs.

Aside from health care, entitlement spending actually looks relatively manageable. Social Security will get a little more expensive over the next 30 years; welfare and anti-poverty programs will get a little cheaper. But costs for programs like Medicare and Medicaid are expected to climb from the merely unaffordable to truly catastrophic.

Part of that has to do with our aging population, but age isn’t the biggest issue. In a hypothetical world where the population of seniors citizens didn’t increase, entitlement-related health spending would still soar to unprecedented heights — thanks to the relentlessly accelerating cost of medical treatments for people of all ages.1

What’s needed, then, is something far more focused than entitlement reform: an aggressive effort to slow the growth of per-person health care costs. Or — if that’s not possible — some way to ensure that the economy grows at least as fast as the cost of health care does.

Diagnosing the debt: It’s not about demographics

America’s long-term budget problem is very real. Already, the federal government has a pile of publicly held debts amounting to around $15 trillion, or about 75 percent of the country’s entire gross domestic product. That’s the highest level since the 1940s, yet the debt burden is expected to double by 2047 and reach 150 percent of the GDP, according to the Congressional Budget Office.2

It makes sense to list entitlement spending among the culprits for the growing national debt, given that these programs have grown from costing less than 10 percent of the GDP in 2000 to a projected 18 percent in 2047. Part of this is simple demographics: As America ages, more of us become eligible for Social Security and Medicare, thus driving up expenses.3

But there’s a crack in this demographic explanation: It only makes sense for the next 10 to 15 years. That’s the period of rapid transition when graying baby boomers will boost the population of seniors from around 50 million to more than 70 million. A change like that should indeed produce a surge in entitlement spending as those millions submit their enrollment forms.

By 2030, however, this wave will start to ebb, leaving the elderly share of the population at a roughly stable 20 to 21 percent all the way through 2060, based on the size of the population following the boomers and slower-moving forces like lengthening lifespans.

But think what this should mean for entitlement spending. As the population of seniors levels out in those later years, costs should naturally stabilize — at least, if demographics were really the driving factor.

This is exactly what you see for Social Security. The CBO expects total Social Security spending to leap up over the next decade but then settle at just over 6 percent of the GDP, at which point it will cease to be a major contributor to rising entitlement spending or growing debts. Social Security is thus a minor player in our long-term budget drama; if you cut the program to the bone, shrinking future payouts so that they won’t add a penny to the deficit, the federal debt would still reach 111 percent of the GDP in 2047.4

Likewise, cuts to welfare and poverty-related entitlements like food stamps and unemployment insurance are unlikely to improve the debt forecast. In fact, spending on these entitlements has been dropping since the high-need years around the Great Recession and is expected to shrink further in the decades ahead — partly because payouts aren’t adjusted to keep up with economic growth, and partly because the birth rate has been falling and several programs are geared to families with children.5

But the scale of the problem is totally different when you turn to health care. Spending on entitlement-related health programs — including Medicare, Medicaid and subsidies required by the Affordable Care Act — will never shrink or stabilize, according to projections. The CBO predicts these costs will grow over 65 percent between now and 2047 — and then go right on growing after that, heedless of the fact that the percentage of the population that’s over 65 should no longer be increasing.

Why is health care eating the budget? Per-person costs

Demographics aren’t responsible for the projected explosion in health care costs. More important than the growing number of elderly Americans is the growing cost per patient — the rising expense of treating each individual

The CBO found that the lion’s share — 60 percent — of the projected increase in health spending comes from costs that would continue to increase even if our population weren’t getting older.

The reasons for this are many, including the rising cost of prescription drugs and the fact that hospital mergers have reduced competition. But since 2000, per capita health costs in the U.S. have, on average, grown faster than the GDP. And while these costs rose more slowly after the Great Recession and the implementation of the Affordable Care Act, analysis from the Centers for Medicare and Medicaid Services suggests this slower growth rate won’t last.

Which is bad news for these programs, because if the problem were demographic, it’d be easier to solve. By mixing the kind of program cuts Republicans generally support with targeted tax increases favored by some Democrats, you could meet the short-term challenge posed by retiring baby boomers and raise enough money to cover the larger — but stabilizing — population of eligible seniors. But with ever-rising costs, there is no stable future to prepare for. To keep these programs funded, you’d need a wholly different approach — indeed a whole new perspective on mounting federal debt and the role of entitlements.

The future is a race between rising health care costs and economic growth, a race that the economy is losing. Each time health costs outpace the GDP, it creates what the CBO calls “excess cost growth,” which feeds the federal debt. If the government could close this gap, the long-term budget outlook would be a lot rosier.

There are two ways to solve this issue: Either contain health care costs — say through price regulation or more competitive markets — or boost economic growth enough to pay for this expensive health care. Success on either front would make health care spending look more manageable over future decades and lighten the debt load.

Entitlement reform needs health care reform to work

Few of the proposals that commonly fall under the heading of entitlement reform target the health care cost problem, which limits their ability to reduce the long-term debt.

Even when they do address health care, often the result is to shift — rather than solve — the problem. Say lawmakers decide to dramatically cut Medicare. That would indeed ease the government’s debt problem. But the underlying dynamic — the race between health costs and the GDP — wouldn’t really change. Seniors would still need health care, and per-person costs would likely still grow (maybe even faster, since Medicare is a relatively efficient program).

On top of all this, there’s also a deep-seated political barrier: It’s no good if one party picks its favored solution only to watch the other party dismantle it when they next take over. You need political consensus to make changes stick, and America is notably short on consensus right now.

In the end, though, it won’t do to just throw up our hands. Absent some workable solution, spending on health care will sink the federal budget, generating levels of debt that would hold back the economy and potentially spark a global crisis of confidence in the United States’ ability to borrow.

#### Growth is critical to maintaining US posturing across the globe---failure risks nuclear conflict

Henricksen 17

Thomas H. Henricksen, emeritus senior fellow at the Hoover Institution, Post-American World Order, 23 March 2017, https://www.hoover.org/research/post-american-world-order

It is obvious that that our world has pivoted from the immediate post-Cold War order. Gone is yesterday’s unipolar dispensation with the United States sitting unchallenged atop other powers. It still possesses immense conventional and unconventional strength, but it is hardly unrivaled in various geographic corners. The big questions remain: What kind of global order is unfolding and how does America respond? President Donald J. Trump’s frequent voicing of isolationist sentiments during and after the election campaign has been blamed by some critics for this international transformation. Yet he alone is not responsible for the shift. The international order has been undergoing a transformation for years, and the signs of that change began to materialize soon after Barack Obama assumed office. Trump’s move into the White House is more a consequence of this altered global scene than its cause. Obama initiated America’s international pullback with the military withdrawal from Iraq and severe cutbacks in Afghanistan, as well as blinking when Syria crossed his red line while “leading from behind.” China’s Not So Peaceful Rise A series of dramatic events took place in response to Obama’s growing disengagement policies, as world powers noted Washington’s burgeoning inwardness. China switched from its “peaceful rise” policy to aggressively asserting and expanding its international presence. Xi Jinping, the all-powerful Chinese leader, moved to advance Beijing’s political and military suzerainty over the South China Sea (SCS) by seizing and reconstructing the disputed shoals into artificial islands with dredged ocean sands in 2014. Next, China militarized three micro-isles of the Spratly Islands (also claimed by the Philippines, Malaysia, and Vietnam) with runways, radars, and surface-to-air missile sites—actions that broke Beijing’s earlier promise not to militarize the waterway. Since then, Chinese officials have made it clear that the SCS is now their exclusive lake. Other states are expected to recognize China’s claims to most of the energy-rich waters, through which $5 trillion of trade passes annually, roughly half the world’s merchant fleet tonnage. China backs its assertions by modernizing the arsenals of its advanced warships, aircraft, missiles, and ground forces. Xi and company seem bent on restoring the ancient tribute system in which South Korea and Vietnam would become modern-day vassals, while more distant Asian states become supplicants in a Sinocentric sphere. In short, China has become a revisionist juggernaut. Along with its fortifying of these artificial islands, the world’s second largest economy and military spender has emerged as an economic, political, and ideological competitor of the United States not only in Southeast Asian maritime zones but globally. China is maneuvering to set up bases or harbors in Pakistan, Sri Lanka, and Greece—and is even extending its reach to the long U.S.-allied Portuguese Azores in the mid-Atlantic. In reaction to Beijing’s SCS actions, the Trump administration has stepped up America’s own show of force by sending warships, fighter jets, and submarines to the waters. To underline its not-too-subtle counter-signal to China, the United States also test-fired four Trident II submarine-launched ballistic missiles over 4,000 miles into the Pacific Ocean from the California coast last month, the first four-missile salvo in the post-Soviet era. The western Pacific is becoming a tinderbox. Russia’s Resurgence At the other end of the Asian continent, Russia longs to restore its lost prestige and political influence, forfeited with the breakup of the Soviet Union in 1991. Under Vladimir Putin, Russian forces backed the seizure of Crimea from Ukraine before taking over its eastern borderlands. Earlier, Moscow perfected its “frozen war” tactics against two provinces in the Republic of Georgia, thereby yanking them from Georgian sovereignty. Russia’s bullying and intimidation of its Baltic and Eastern European neighbors have become commonplace. Meanwhile, the Russian foreign minister, Sergei Lavrov, called for “a post-West world” at the Munich Security Conference in mid-February. What China and Russia have in common is that both are engaged in advancing their spheres of influence in their neighborhoods and beyond. Both also seek to crack the Western liberal world order. The United States, meanwhile, has become blasé about its former leadership position in the Western hemisphere, where China’s companies have entered into business deals, some with strategic implications. Washington, without a hint of nostalgia, treats the Monroe Doctrine as a relic of yesteryear’s Yankee imperialism in Latin America. These newly assertive major powers are not alone in shattering the post-Cold War order, which witnessed the unrivaled predominance of the United States—the “indispensable nation,” in the words of the Clinton administration. Trouble-making regional powers, such as Iran, Syria, and North Korea either spread terrorism, provoke instability, or arm themselves with longer-range missiles and nuclear weapons. While they were independent actors a few years ago, each of these pariah regimes increasingly aligns with the two chief U.S. adversaries. Iran and Syria cozy up to Russia, and North Korea depends for fuel and food on a China that hypocritically protests that it lacks influence over a nuclear-armed Pyongyang. Western Europe, once a powerful but independently minded U.S. ally, has faltered. Its slippage is evident in the refugee crisis, its sagging economies, its 20 percent youth unemployment rate, and its reluctance to fund an adequate military defense in the face of Russia’s continuing provocations, including cyber-attacks, disinformation campaigns, and fake news stories. Europe’s paltry defense reflects the continent’s lost belief in its own purpose—and even, some might say, its own civilization. Sino-Russian Partnering Little of this threatening world existed when the United States enjoyed its unipolar moment after the eclipse of its Soviet nemesis, and even after the 9/11 terrorist attacks. The emergent world, divided between the United States, China, and Russia, points to the new global order. Particularly worrisome are the warming relations between Beijing and Moscow, despite Chinese designs on Siberian lands and resources. Overcoming a centuries-old rivalry, the recent Sino-Russian rapprochement compounds Washington’s difficulties. Separating Russia from China, as Kissinger and Nixon did, would be a sensible goal for President Trump. It has always been a wise recourse to divide one’s adversaries. Besides, the United States and Russia have worked together in the past. During the World War II, they collaborated against the Third Reich. And during the Cold War, they cooperated in nuclear arms treaties and wheat deals, while mutually trying to skirt a flashpoint that could end in a nuclear war. Washington can work to steer the Kremlin, as it has done before, toward acceptable conduct with its neighbors before Russia can be more than a tactical ally in the great game with China. In the immediate future, the United States can adopt international and domestic approaches to cope with Russian and Chinese territorial expansionism. The tensions stoked by the assertive regimes in the Kremlin or Tiananmen Square could spark a political or military incident that might set off a chain reaction leading to a large-scale war. Historically, powerful rivalries nearly always lead to at least skirmishes, if not a full-blown war. The anomalous Cold War era spared the United States and Soviet Russia a direct conflict, largely from concerns that one would trigger a nuclear exchange destroying both states and much of the world. Such a repetition might reoccur in the unfolding three-cornered geopolitical world. It seems safe to acknowledge that an ascendant China and a resurgent Russia will persist in their geo-strategic ambitions. What Is To Be Done? The first marching order is to dodge any kind of perpetual war of the sort that George Orwell outlined in “1984,” which engulfed the three super states of Eastasia, Eurasia, and Oceania, and made possible the totalitarian Big Brother regime. A long-running Cold War-type confrontation would almost certainly take another form than the one that ran from 1945 until the downfall of the Soviet Union. What prescriptions can be offered in the face of the escalating competition among the three global powers? First, by staying militarily and economically strong, the United States will have the resources to deter its peers’ hawkish behavior that might otherwise trigger a major conflict. Judging by the history of the Cold War, the coming strategic chess match with Russia and China will prove tense and demanding—since all the countries boast nuclear arms and long-range ballistic missiles. Next, the United States should widen and sustain willing coalitions of partners, something at which America excels, and at which China and Russia fail conspicuously. There can be little room for error in fraught crises among nuclear-weaponized and hostile powers. Short- and long-term standoffs are likely, as they were during the Cold War. Thus, the playbook, in part, involves a waiting game in which each power looks to its rivals to suffer grievous internal problems which could entail a collapse, as happened to the Soviet Union. Some Chinese and Russian experts predict grave domestic problems for each other. They also entertain similar thoughts about the United States, which they view as terminally decadent and catastrophically polarized over politics, ethnicity, and the future direction of the country. So, the brewing three-way struggle also involves a systemic contest, which will test the competitors’ economic and political institutions. At this juncture, the world is entering a standoff among the three great and several not-so-great powers. Averting war, while defending our interests, will prove a challenge, calling for deft policy, political endurance, and economic growth, as well as sufficient military force to keep at bay aggressive states or prevail over them if ever a war breaks out.

### Case

#### Abstract moralizing is useless when trying to construct a political strategy – only by evaluating the consequences of political strategies can we actual do something about issues facing us today

David Runciman 17, Politics, Cambridge University, “Political Theory and Real Politics in the Age of the Internet,” The Journal of Political Philosophy, Volume 25, Issue 1, March 2017, Pages 3–21

Contemporary political realism carries echoes of this line of argument and of Bentham's shift from the weaker to the stronger version of it, even though Bentham's direct influence is rarely in evidence. Critics of the current ubiquity of the language of human rights often point out that in the absence of a robust account of the power relations that are needed to underpin any rights regime—in particular, an answer to the question of who does the enforcing—all such talk is a massive distraction from the real business of improving the situation on the ground to which human rights are meant to apply.9 But for more radical critics the emptiness of human rights talk is too convenient to be merely a confusion: it serves as the perfect cover for the sinister interests of those engaged in neo-colonial projects of exploitation and expropriation.10 However, these two poles of the Benthamite case against moralism—from inadvertent confusion to deliberate deception—do not exhaust the range of explanations for what is wrong with it. There is another answer, drawn from an alternative intellectual tradition, which appears more frequently in the current realist literature. This is the Weberian idea that moralism does not so much obscure what politicians are really up to, as conceal the truth about their personal motives from political actors themselves. In other words, political moralism is less a form of deception than of self-deception: it lets politicians avoid looking political reality squarely in the face because it allows them to believe they have their eyes set on something higher. Conviction politicians think they can transcend the messy reality of politics. That belief is dangerous because their response when they encounter the messy reality is to deny it, or to ignore it, or to insist they can mould it to their higher purposes, which only makes the mess worse. Weber's case against allowing an ethic of conviction to trump an ethic of responsibility in politics—which requires, among other things, that politicians face up to the unintended consequences of what they do—remains compelling.11 But it does not map onto any sharp distinctions between realism and moralism. That is because the convictions that can breed self-deception are not necessarily moralistic beliefs; they can be beliefs about anything, including beliefs about how contingency trumps moral certainty. On the Weberian account it is not what you believe but how you believe it that makes the difference. Realists, too, can be self-deceived, because the strength of their convictions against moralism produces its own self-deceptions and blind spots. This is the case that can be made against Bentham, who was so thoroughly dogmatic about the vapidity of all talk of rights that it served to blind him to what was missing from his own understanding of politics. Macaulay made the point in his celebrated takedown of the Benthamites published in the Edinburgh Review in 1829: ‘They surrender their understandings … to the meanest and most abject sophisms, provided these sophisms come before them disguised with the externals of demonstration. They do not seem to know that logic has its illusions as well as rhetoric—that a fallacy may lurk in a syllogism as well as a metaphor.’12 Bentham was insufficiently sensitive to the ways in which the attempt to ground political argument in the language of force neglects the capacity of other sorts of arguments to move people successfully. Conviction politics is not simply the preserve of the moralisers. Likewise, it is not the case that moral political philosophy is itself incapable of seeing the merit of arguments that point towards the unavoidability of unintended consequences. Just as realists can be blind to contingency, so moralists can be alive to it. Take the example of Robert Nozick, the most prominent early critic of Rawlsian political philosophy from within the discourse of rights. Nozick's ‘Wilt Chamberlain example’ was designed to highlight the inability of Rawlsian schemes of justice to accommodate the unintended consequences of cumulative instances of contingent rightful action on the part of individuals (in this case, their willingness to hand over small amounts of their own money to watch the best basketball player around ply his trade, which would generate unjustifiable inequalities of wealth—Chamberlain becomes very rich—unless the state intervenes to circumscribe their choices).13 The challenge to Rawls is to adapt his patterned view of justice to a world in which events inevitably take place that will break up the pattern. But this challenge does not come from a realist; it comes from a moralist (and a self-professed utopian to boot). There are many possible ways to push back against the apparent force of the Wilt Chamberlain example.14 A realist response would be to challenge the assumptions behind the case itself. We live in societies that enrich leading sportspeople on a scale that even Nozick might have found hard to imagine (Nozick envisages Chamberlain earning $250,000; his contemporary equivalent—LeBron James—earned more than $50,000,000 in 2015). But the players’ wealth is not simply the cumulative consequence of the unfettered choice of large numbers of people to hand over small amounts of money to watch them play. Any such relationship—between fans and performers—is mediated by vast institutional structures of commodification and exchange, which make it very hard to follow the money from individual consumers to the pockets of the superstars. It passes through the hands of many others—broadcasters, agents, advertisers, and administrators—such that the path of justice may be at best obscured and more likely undermined (recent revelations about how FIFA operates do not inspire confidence that this is a transparently just business). A further iteration of the realist response would indicate that an example drawn from the world of sports is itself a misleading one. Though polling evidence suggests that in our increasingly unequal societies it is sporting celebrities and their like who are widely believed to be reaping the most outsize rewards—on the assumption that there is at least some correlation between reward and measurable talent—most of the superrich in fact come from the financial services industry, where visible talent is much harder to identify.15 Tracing the just transfer of money in Nozick's terms from individual consumers to the pockets of bankers would be a thoroughly thankless task. In that sense, the Wilt Chamberlain example appears designed to play into our unwarranted presuppositions about the workings of the free market. It serves as a smokescreen. So realists can respond to Nozick's argument about contingency with some contingencies of their own. But so too can Rawlsians. It is possible to turn Nozick's argument on its head. He purports to grant Rawls his ideal society in order to show that no political ideal can survive eventualities for which it was not designed. But what if Nozick is granted his ideal society—his utopia—in which there is no political eventuality that cannot be justified in terms of the underlying individual rights that must remain un-breached for any social arrangement to count as just. That society will also be subject to unforeseen contingencies, including emergent monopolies and other market failures. Correcting for those failures will require breaches of rights in Nozick's terms; but sitting back and doing nothing will make the preservation of the conditions of justice—which includes the ability to track the distribution of wealth through a series of free exchanges—much more difficult. There is a real world variant of this argument that illustrates what can be at stake. Critics of the most urgent demands to address the threat of climate change tend to argue that pre-emptive responses will preclude the sort of market innovation that offers the best chance of finding a solution.16 In other words, patterned state intervention forecloses the opportunities provided by being open to unforeseen contingencies. But equally, openness to contingency can be its own form of limitation, if it forecloses the opportunities provided by state intervention in the face of failure. Putting one's faith in an unforeseen future to generate outcomes that will in due course solve the problems of the present rules out the possibility of an unforeseen future that requires action in the present to solve its looming problems. Those whose convictions blindly favour contingency and the free exchange of ideas can be as self-deceived in Weber's sense as those who want to intervene in the name of a better politics. All convictions, however adaptable, have an edge of fatalism to them.17

#### Ethical obligations are tautological- the only coherent rubric is to maximize lives

Greene 10 Associate Professor of the Social Sciences Department of Psychology Harvard University, Joshua, Moral Psychology: Historical and Contemporary Readings, “The Secret Joke of Kant’s Soul”, [www.fed.cuhk.edu.hk/~lchang/material/Evolutionary/Developmental/Greene-KantSoul.pdf](http://www.fed.cuhk.edu.hk/~lchang/material/Evolutionary/Developmental/Greene-KantSoul.pdf)

What turn-of-the-millennium science is telling us is that human moral judgment is not a pristine rational enterprise, that our moral judgments are driven by a hodgepodge of emotional dispositions, which themselves were shaped by a hodgepodge of evolutionary forces, both biological and cultural. Because of this, it is exceedingly unlikely that there is any rationally coherent normative moral theory that can accommodate our moral intuitions. Moreover, anyone who claims to have such a theory, or even part of one, almost certainly doesn't. Instead, what that person probably has is a moral rationalization. It seems then, that we have somehow crossed the infamous "is"-"ought" divide. How did this happen? Didn't Hume (Hume, 1978) and Moore (Moore, 1966) warn us against trying to derive an "ought" from and "is?" How did we go from descriptive scientific theories concerning moral psychology to skepticism about a whole class of normative moral theories? The answer is that we did not, as Hume and Moore anticipated, attempt to derive an "ought" from and "is." That is, our method has been inductive rather than deductive. We have inferred on the basis of the available evidence that the phenomenon of rationalist deontological philosophy is best explained as a rationalization of evolved emotional intuition (Harman, 1977). Missing the Deontological Point I suspect that rationalist deontologists will remain unmoved by the arguments presented here. Instead, I suspect, they will insist that I have simply misunderstood whatKant and like-minded deontologists are all about. Deontology, they will say, isn't about this intuition or that intuition. It's not defined by its normative differences with consequentialism. Rather, deontology is about taking humanity seriously. Above all else, it's about respect for persons. It's about treating others as fellow rational creatures rather than as mere objects, about acting for reasons rational beings can share. And so on (Korsgaard, 1996a; Korsgaard, 1996b).This is, no doubt, how many deontologists see deontology. But this insider's view, as I've suggested, may be misleading. The problem, more specifically, is that it defines deontology in terms of values that are not distinctively deontological, though they may appear to be from the inside. Consider the following analogy with religion. When one asks a religious person to explain the essence of his religion, one often gets an answer like this: "It's about love, really. It's about looking out for other people, looking beyond oneself. It's about community, being part of something larger than oneself." This sort of answer accurately captures the phenomenology of many people's religion, but it's nevertheless inadequate for distinguishing religion from other things. This is because many, if not most, non-religious people aspire to love deeply, look out for other people, avoid self-absorption, have a sense of a community, and be connected to things larger than themselves. In other words, secular humanists and atheists can assent to most of what many religious people think religion is all about. From a secular humanist's point of view, in contrast, what's distinctive about religion is its commitment to the existence of supernatural entities as well as formal religious institutions and doctrines. And they're right. These things really do distinguish religious from non-religious practices, though they may appear to be secondary to many people operating from within a religious point of view. In the same way, I believe that most of the standard deontological/Kantian self-characterizatons fail to distinguish deontology from other approaches to ethics. (See also Kagan (Kagan, 1997, pp. 70-78.) on the difficulty of defining deontology.) It seems to me that consequentialists, as much as anyone else, have respect for persons, are against treating people as mere objects, wish to act for reasons that rational creatures can share, etc. A consequentialist respects other persons, and refrains from treating them as mere objects, by counting every person's well-being in the decision-making process. Likewise, a consequentialist attempts to act according to reasons that rational creatures can share by acting according to principles that give equal weight to everyone's interests, i.e. that are impartial. This is not to say that consequentialists and deontologists don't differ. They do. It's just that the real differences may not be what deontologists often take them to be. What, then, distinguishes deontology from other kinds of moral thought? A good strategy for answering this question is to start with concrete disagreements between deontologists and others (such as consequentialists) and then work backward in search of deeper principles. This is what I've attempted to do with the trolley and footbridge cases, and other instances in which deontologists and consequentialists disagree. If you ask a deontologically-minded person why it's wrong to push someone in front of speeding trolley in order to save five others, you will getcharacteristically deontological answers. Some will be tautological: "Because it's murder!"Others will be more sophisticated: "The ends don't justify the means." "You have to respect people's rights." But, as we know, these answers don't really explain anything, because if you give the same people (on different occasions) the trolley case or the loop case (See above), they'll make the opposite judgment, even though their initial explanation concerning the footbridge case applies equally well to one or both of these cases. Talk about rights, respect for persons, and reasons we can share are natural attempts to explain, in "cognitive" terms, what we feel when we find ourselves having emotionally driven intuitions that are odds with the cold calculus of consequentialism. Although these explanations are inevitably incomplete, there seems to be "something deeply right" about them because they give voice to powerful moral emotions. But, as with many religious people's accounts of what's essential to religion, they don't really explain what's distinctive about the philosophy in question.

#### Death is the ultimate evil – it’s the least moral response to suffering because it ontologically destroys the subject

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Contrary to those accounts, I would argue that it is death per se that is really the objective evil for us, not because it deprives us of a prospective future of overall good judged better than the alter- native of non-being. It cannot be about harm to a former person who has ceased to exist, for no person actually suffers from the sub-sequent non-participation. Rather, death in itself is an evil to us because it ontologically destroys the current existent subject — it is the ultimate in metaphysical lightening strikes.80 The evil of death is truly an ontological evil borne by the person who already exists, independently of calculations about better or worse possible lives. Such an evil need not be consciously experienced in order to be an evil for the kind of being a human person is. Death is an evil because of the change in kind it brings about, a change that is destructive of the type of entity that we essentially are. Anything, whether caused naturally or caused by human intervention (intentional or unintentional) that drastically interferes in the process of maintaining the person in existence is an objective evil for the person. What is crucially at stake here, and is dialectically supportive of the self-evidency of the basic good of human life, is that death is a radical interference with the current life process of the kind of being that we are. In consequence, death itself can be credibly thought of as a ‘primitive evil’ for all persons, regardless of the extent to which they are currently or prospectively capable of participating in a full array of the goods of life.81 In conclusion, concerning willed human actions, it is justifiable to state that any intentional rejection of human life itself cannot therefore be warranted since it is an expression of an ultimate disvalue for the subject, namely, the destruction of the present person; a radical ontological good that we cannot begin to weigh objectively against the travails of life in a rational manner. To deal with the sources of disvalue (pain, suffering, etc.) we should not seek to irrationally destroy the person, the very source and condition of all human possibility.82

#### Extinction is a categorically distinct phenomenon that outweighs other considerations

Burke et al., Associate Professor of International and Political Studies @ UNSW, Australia, ‘16

(Anthony, Stefanie Fishel is Assistant Professor, Department of Gender and Race Studies at the University of Alabama, Audra Mitchell is CIGI Chair in Global Governance and Ethics at the Balsillie School of International Affairs, Simon Dalby is CIGI Chair in the Political Economy of Climate Change at the Balsillie School of International Affairs, and, Daniel J. Levine is Assistant Professor of Political Science at the University of Alabama, “Planet Politics: Manifesto from the End of IR,” Millennium: Journal of International Studies 1–25)

8. Global ethics must respond to mass extinction. In late 2014, the Worldwide Fund for Nature reported a startling statistic: according to their global study, 52% of species had gone extinct between 1970 and 2010.60 This is not news: for three decades, conservation biologists have been warning of a ‘sixth mass extinction’, which, by definition, could eliminate more than three quarters of currently existing life forms in just a few centuries.61 In other words, it could threaten the practical possibility of the survival of earthly life. Mass extinction is not simply extinction (or death) writ large: it is a qualitatively different phenomena that demands its own ethical categories. It cannot be grasped by aggregating species extinctions, let alone the deaths of individual organisms. Not only does it erase diverse, irreplaceable life forms, their unique histories and open-ended possibilities, but it threatens the ontological conditions of Earthly life.

IR is one of few disciplines that is explicitly devoted to the pursuit of survival, yet it has almost nothing to say in the face of a possible mass extinction event.62 It utterly lacks the conceptual and ethical frameworks necessary to foster diverse, meaningful responses to this phenomenon. As mentioned above, Cold-War era concepts such as ‘nuclear winter’ and ‘omnicide’ gesture towards harms massive in their scale and moral horror. However, they are asymptotic: they imagine nightmares of a severely denuded planet, yet they do not contemplate the comprehensive negation that a mass extinction event entails. In contemporary IR discourses, where it appears at all, extinction is treated as a problem of scientific management and biopolitical control aimed at securing existing human lifestyles.63 Once again, this approach fails to recognise the reality of extinction, which is a matter of being and nonbeing, not one of life and death processes.

Confronting the enormity of a possible mass extinction event requires a total overhaul of human perceptions of what is at stake in the disruption of the conditions of Earthly life. The question of what is ‘lost’ in extinction has, since the inception of the concept of ‘conservation’, been addressed in terms of financial cost and economic liabilities.64 Beyond reducing life to forms to capital, currencies and financial instruments, the dominant neoliberal political economy of conservation imposes a homogenising, Western secular worldview on a planetary phenomenon. Yet the enormity, complexity, and scale of mass extinction is so huge that humans need to draw on every possible resource in order to find ways of responding. This means that they need to mobilise multiple worldviews and lifeways – including those emerging from indigenous and marginalised cosmologies. Above all, it is crucial and urgent to realise that extinction is a matter of global ethics. It is not simply an issue of management or security, or even of particular visions of the good life. Instead, it is about staking a claim as to the goodness of life itself. If it does not fit within the existing parameters of global ethics, then it is these boundaries that need to change.

9. An Earth-worldly politics. Humans are worldly – that is, we are fundamentally worldforming and embedded in multiple worlds that traverse the Earth. However, the Earth is not ‘our’ world, as the grand theories of IR, and some accounts of the Anthropocene have it – an object and possession to be appropriated, circumnavigated, instrumentalised and englobed.65 Rather, it is a complex of worlds that we share, co-constitute, create, destroy and inhabit with countless other life forms and beings.

The formation of the Anthropocene reflects a particular type of worlding, one in which the Earth is treated as raw material for the creation of a world tailored to human needs. Heidegger famously framed ‘earth’ and ‘world’ as two countervailing, conflicting forces that constrain and shape one another. We contend that existing political, economic and social conditions have pushed human worlding so far to one extreme that it has become almost entirely detached from the conditions of the Earth. Planet Politics calls, instead, for a mode of worlding that is responsive to, and grounded in, the Earth. One of these ways of being Earth-worldly is to embrace the condition of being entangled. We can interpret this term in the way that Heidegger66 did, as the condition of being mired in everyday human concerns, worries, and anxiety, to prolong existence. But, in contrast, we can and should reframe it as authors like Karen Barad67 and Donna Haraway68 have done. To them and many others, ‘entanglement’ is a radical, indeed fundamental condition of being-with, or, as Jean-Luc Nancy puts it, ‘being singular plural’.69 This means that no being is truly autonomous or separate, whether at the scale of international politics or of quantum physics. World itself is singular plural: what humans tend to refer to as ‘the’ world is actually a multiplicity of worlds at various scales that intersect, overlap, conflict, emerge as they surge across the Earth. World emerges from the poetics of existence, the collision of energy and matter, the tumult of agencies, the fusion and diffusion of bonds.

Worlds erupt from, and consist in, the intersection of diverse forms of being – material and intangible, organic and inorganic, ‘living’ and ‘nonliving’. Because of the tumultuousness of the Earth with which they are entangled, ‘worlds’ are not static, rigid or permanent. They are permeable and fluid. They can be created, modified – and, of course, destroyed. Concepts of violence, harm and (in)security that focus only on humans ignore at their peril the destruction and severance of worlds,70 which undermines the conditions of plurality that enables life on Earth to thrive.

#### Prosecutors will ignore the abolishing of criminal penalties – they’ll prosecute drug crimes inevtiably

Juleyka Lantigua-Williams, 5-18-2016, [Juleyka Lantigua-Williams is a former staff writer at The Atlantic, where she covered criminal justice. "Why Prosecutors Hold the Key to Justice Reform", Atlantic https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/ //DMcD]

In New York City, “crime rates have a pretty big effect on mayoral popularity ratings and, therefore, on elections for executives,” Schleicher said. One of his findings is that in partisan executive races, voters follow the party line explicitly. An implication of this is that more-prominent executive races, such as for governor or mayor, have greater voter responsiveness than lower, down-ballot races. This kind of mindless voting at the DA level means that despite the appearance of being beholden to the electorate, district attorneys are not actually held responsible for their successes and failures. Schleicher argues that if district attorneys were appointed by mayors instead of being independently voted into office, it may have the ironic effect of making their role more accountable. Since the fate of the citywide executive would be directly tied to crime outcomes, district attorneys would be under serious top-down pressure to make smarter and less expedient decisions. That dovetails with the other advantage of a mayoral appointment: Resources could be reallocated for strategic crime-fighting. “If you actually cared about crime rates, you would think to yourself, ‘How should I allocate resources in order to reduce crime rates? That’s what’s going to get me reelected or not reelected,’” Schleicher said. “DAs have no incentives to do that.” District attorneys do, however, have an incentive to prosecute and send people to state prison—because state prisons do not spend local county resources, so district attorneys’ budgets stay intact. California is putting solutions to that problem to the test. In 2011, it passed what’s known as realignment legislation, which reassigned some types of crimes so that those convicted would be sent to county jails instead of to state prisons to serve out their sentences. What happened? “DAs started charging these crimes less because they were affecting county budgets,” Schleicher said. He’s so interested in the potential of this idea that his latest research project, with Elina Treyger at George Mason University Law School, is exploring what impact a more substantial realignment effort might have on incarceration rates, budgets, and other resources. “You could imagine that effect would be supersized if it was housed in one office; if it had a collective budget,” Schleicher said. Though he’s emphatic that his work is very preliminary, he was comfortable alluding to at least one working hypothesis: “I think we can say, in theory, that having a DA being an elected—versus being an appointed—official is going to [make him] more responsive on exclusively criminal-justice issues.” Even so, it would still be the case that prosecutors would have a lot of the powers they currently have—who they charge, why, for what offense—because state legislatures impose “a bunch of ridiculous laws,” according to Schleicher. What’s more, there is some evidence that prosecutors push back against reforms. An Urban Institute report analyzed South Dakota’s criminal-justice reforms and found that when certain low-level crimes were no longer eligible for lengthy sentences, prosecutions against crimes that were eligible for such sentences shot up. “They noticed that DAs actually started increasing their charging in an effort to get around reform,” Pfaff said. He said that if states make it difficult to charge offenders with one type of crime, DAs will choose another option and use it widely. Sometimes, that results in even tougher sentences than the DAs might have originally sought. “There is some evidence that DAs will, in the presence of reform laws, try to figure out ways” around those reforms, Pfaff said. “They often have the ability to find ways to circumvent efforts at reform if they really want to.” And district attorneys still have more than enough authority to prosecute offenders as they see fit. “They remain the only actor who is subject to almost no regulation at all,” Pfaff said. “They have tremendous amounts of power. In states without sentencing guidelines, there are no rules about what sort of sentences they can impose. They can choose who gets charged, and who doesn’t, with no review. They can choose what charges to file.”

#### Plan is insufficient – public will backlash and implement more racist restrictions on more drugs

**Miron 14**

Jeffrey Miron is Senior Lecturer and Director of Undergraduate Studies in the Department of Economics at Harvard and a Senior Fellow at the Cato Institute, Cato Institute, January 27, 2014, “Is the War on Drugs Over?”, http://object.cato.org/publications/commentary/war-drugs-over

Prohibition wastes criminal justice resources and prevents collection of taxes on the production or purchase of drugs, thus adversely impacting government budgets.

And abundant evidence from America’s experiment with Prohibition, from state decriminalizations, and medicaliziations; from comparisons across countries with weak versus strong prohibition regimes; and from experience with other prohibited commodities suggests that prohibitions generates only moderate reductions in drug use. Some of that reduction, moreover, is a cost of prohibition, not a benefit—since many people consume drugs without ill effects on themselves or others.

Prohibition is therefore a terrible policy, even if one endorses government attempts to reduce drug use. Prohibition has large costs with minimal “benefits” at best in terms of lower use.

So legalizers are right on the merits, and recent opinion polls show increasing public supportfor legalization (at least for marijuana). But the negatives of prohibitions have been widely understood at least since the 1933 repeal of alcohol prohibition, **yet this has not stopped the U.S. from pushing drug prohibition both at home and abroad.**

In addition, further progress toward legalization **faces serious impediments.**

The first is that **recent de-escalation of the Drug War addresses marijuana only**. Yet much prohibition-induced harm results from prohibitions of cocaine, heroin, and methamphetamine. **Public opinion is less open to legalizing these drugs.**

Even worse, **drug warriors might respond to marijuana legalization by ramping up hysteria toward still-prohibited drugs, increasing prohibition-induced ills in those markets.** The public would then observe increased drug-market violence in the wake of marijuana legalization, which would appear to show that legalization causes violence.

A different worry is that while public opinion currently swings toward legalizations, public opinion can change. And marijuana remains illegal under federal law, so a new president could undo President Obama’s “hands off” approach.

Perhaps the greatest threat to legalization is that many people—including some legalizers—believe policy can eliminate the black market and its negatives while maintaining strict control over legalized drugs. That is why recent legalizations include restrictions on production and purchase amounts, retail locations, exports, sales to tourists, high taxes, and more.

If these restrictions are so weak that they rarely constrain the legal market, they do little harm. But if these restrictions are serious, they re-create black markets.

Legalizers must accept that, under legalization, drug use will be more open and some people will misuse. The incidence of use and abuse might be no higher than now; indeed, outcomes like accidental overdoses should decline. But legalizers should not oversell, since that risks a backlash when negative outcomes occur.

None of this is meant to deny that recent policy changes constitute real progress. **But these gains will evaporate unless the case for legalization includes all drugs and is up front about the negatives as well as the positives.**

#### Using the tools of the state is an effective strategy – their demand for methodological purity is myopic

Choat, School of Economics, History and Politics, Faculty of Arts and Social Sciences, Kingston University London, ‘13

(Simon, “Politics, power and the state: a Marxist response to postanarchism,” Journal of Political Ideologies)

The fourth and final criticism of classical anarchism that postanarchism makes is that it has a naive view of politics: conflating politics with the state, it believes that politics itself can be abolished. For postanarchists, **this is mistaken**: politics is both **necessary and interminable**: necessary because even anarchists must have some level of political organization and strategizing, however minimal; interminable because there is no ‘natural’ social order, but only contingent and inherently political articulations of the social. This critique of classical anarchism’s naive understanding of politics is to a large extent anticipated by Marxism. Indeed, for classical Marxists this was the key disagreement: when Marx, Engels and Lenin attacked anarchists it was not so much for their faulty approach to the party or revolution but, much more broadly, **for their attitude towards politics.** For Marxists, the anarchist abstention from politics is ill-advised,hypocritical andultimately impossible. The classical anarchists believed that all forms of political action would necessarily entail compromise with the state and so could lead only to dictatorship or social-democratic reformism.74 As such, they ruled out all forms of political action: not merely the use of the state as a ‘dictatorship of the proletariat’, but also standing for or voting in government elections, lobbying the state for improved conditions (e.g. a shorter working day), and the formation of political parties. As the Russian anarchist Alexander Berkman put it: ‘so-called political “action” is, so far as the cause of the workers and of true progress is concerned, worse than inaction’.75 For Marxists, the anarchist rejection of political action is at once confused and naive. By dogmatically proscribing political action, anarchism **denies the oppressed classes the** most effective means of carrying out their struggle.76 Contrary to anarchist claims, political action does not entail acceptance of the status quo:‘It is said’, writes Engels in response to anarchist demands for political abstention, ‘that every political act implies recognition of the status quo. But when this status quo gives us the means of protesting against it, then to make use of these means is not to recognise the status quo’.77 To deny the working class the use of political action on the grounds that such action recognizes the state is, according to Marx, as foolish as claiming that a strike in the name of higher wages is illegitimate because it ‘recognises’ the wage system.78 In order to challenge the status quo, one must necessarily engage with it: to claim that all political action reinforces the dominant order is to slip into abstraction and to fail to discriminate between different types of political action.

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### CP Legalization

#### Their ev concludes that decriminalization is sufficient to solve the harm of racist drug enforcement

Gotsch and Basti 18(Kara Gotsch and Vinay Basti, Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons, The Sentencing Project, August 2, 2018, https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/)

Profiting from Incarceration For-profit prison companies exist to make money, and therefore the size and status of the country’s criminal justice system is of upmost importance to them. This connection was summed up in Corrections Corporation of America’s (now-Core Civic) 2010 Annual Report: Our growth is generally dependent upon our ability to obtain new contracts to develop and manage new correctional and detention facilities. This possible growth depends on a number of factors we cannot control, including crime rates and sentencing patterns in various jurisdictions and acceptance of privatization. The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws.31) In order to overcome these challenges, private prison companies at times have joined with lawmakers, corporations, and interest groups to advocate for privatization through the American Legislative Exchange Council (ALEC). This organization is a nonprofit membership association focused on advancing “the Jeffersonian principles of free markets, limited government, federalism, and individual liberty.” This is pursued in part by advocating for large-scale privatization of governmental functions. Core Civic paid between $7,000 and $25,000 per year as an association member before leaving the organization in 2010. The company contributed additional funds to sit on issue task forces and sponsor events hosting legislators.32) Core Civic and GEO Group were involved with ALEC at a time when it worked with members to draft model legislation impacting sentencing policy and prison privatization. These policies promoted mandatory minimum sentences, three strikes laws, and truth-in-sentencing, all of which contribute to higher prison populations. ALEC also helped draft legislation that could increase the number of people held in immigration detention facilities. While no longer a member of ALEC, Core Civic and GEO face the bottom line reality that a decline in incarceration is bad for business.

#### Their cards doom aff solvency because they explain that Marijuana consolidation happens through the criminalization of the drug NOT anticompetitive practices – legalizing it is sufficient to solve the entire 1AC

**Levin 17—**Sam Levin, April 3, 2017, “Big Pharma's anti-marijuana stance aims to squash the competition, activists say” <https://www.theguardian.com/us-news/2017/apr/03/big-pharma-marijuana-competition-insys-arizona>

As marijuana legalization [swept the US](https://www.theguardian.com/us-news/2016/nov/08/state-ballot-initiative-election-results-live-marijuana-death-penalty-healthcare) in November, Arizona was alone in its [rejection](http://www.azcentral.com/story/news/politics/elections/2016/11/09/arizona-voters-reject-proposition-205-night-sweeping-change-marijuana/93538346/) of legal weed. There, a pharmaceutical company called Insys was a major [backer](http://www.azcentral.com/story/news/politics/elections/2016/09/08/anti-marijuana-campaigns-biggest-donor-chandler-pharma-company/89981456/) of the successful campaign to stop the state’s recreational cannabis measure, publicly arguing that pot businesses would be bad for public health and endanger children. But to marijuana activists, the motive of Insys was clear – to squash the competition. Confirming those suspicions, Insys has now received [approval](http://investors.insysrx.com/phoenix.zhtml?c=115949&p=irol-newsArticle&ID=2256036) from the US Drug Enforcement Administration (DEA) to develop its own synthetic marijuana, the latest case of **Big Pharma battling small cannabis growers**. **With marijuana now legal in**[**more than half**](http://www.thecannabist.co/2016/11/08/election-2016-marijuana-results-states-recreational-medical/66994/)**of the US, the budding cannabis industry and longtime underground players have grown increasingly concerned about the threat posed by powerful pharmaceutical manufacturers, which have simultaneously helped fight legalization while seeking to develop their own synthetic cannabis**. “I really don’t have a lot of hope for the small guy in this country,” said Dr Gina Berman, medical director of the Giving Tree Wellness Center, a cannabis dispensary in Phoenix, [Arizona](https://www.theguardian.com/us-news/arizona). “Pharmaceuticals are going to run me down. We have a small business, and we can’t afford to fight Big Pharma.” The Insys case provides **a stark illustration of what cannabis leaders say is the unethical and harmful position of the pharmaceutical industry in marijuana – fighting to block a plant that in some cases has proven to be an effective, safer and cheaper alternative to addictive prescription drugs.** Big Pharma’s support of groups [opposing recreational weed](https://www.theguardian.com/sustainable-business/2016/oct/22/recreational-marijuana-legalization-big-business) have been [well documented](https://www.thenation.com/article/anti-pot-lobbys-big-bankroll/) in recent years. But Insys’s pursuit of synthetic cannabis signals the beginning of a different kind of threat and a potentially longer-term obstacle drug companies could pose if they seek to corner the market as weed laws [inevitably](http://www.usatoday.com/story/news/nation/2014/04/02/poll-marijuana-legalization-inevitable/7210215/) spread across the country. “We’ve got these pharmaceutical companies that are using their lobbying power to bring something to market that people can grow in their home,” said JP Holyoak, a marijuana dispensary owner and cultivator in Arizona, who chaired the state’s legalization campaign last year. “They recognize that the horse has left the barn regarding marijuana. They can’t beat it, so now they’re trying to just take it over.” Insys, which did not respond to multiple requests for comment, [donated $500,000](https://www.washingtonpost.com/news/wonk/wp/2016/09/09/a-maker-of-deadly-painkillers-is-bankrolling-the-opposition-to-legal-marijuana-in-arizona/?utm_campaign=buffer&utm_content=buffer98ef7&utm_medium=social&utm_source=twitter.com&utm_term=.a9c3f58ffed1) to the anti-legalization campaign in Arizona last year, marking one of the largest ever single contributions to a pot opposition campaign, according to the Washington Post. On 23 March, less than five months after Arizona’s pot measure failed, Insys announced that the DEA had given the green light for the launch of Syndros, its cannabinoid designed to treat chemotherapy patients struggling with nausea and Aids patients with anorexia. **The drug is a lab-made**[**liquid**](http://syndros.com/)**form of** tetrahydrocannabinol **(THC), a key chemical compound in cannabis. It’s different from the street synthetic marijuana** known as [K2 or Spice](https://www.theguardian.com/us-news/2016/aug/01/k2-synthetic-marijuana-legal-drug-dangerous), **which often involves chemicals**[**sprayed**](https://www.drugabuse.gov/drugs-abuse/synthetic-cannabinoids-k2spice)**on to plants and has been linked to**[**overdoses and deaths**](https://www.theguardian.com/science/2016/jul/14/k2-overdose-brooklyn-new-york-statewide-legislation). The approval has sparked fierce backlash from cannabis activists, who argue that Insys has helped prevent the very kind of treatment that it is now on track to market. “It’s a little bit disgusting when you think of the collateral damage for human beings,” said Berman. What’s more, Insys also manufacturers fentanyl, a [painkiller that is 50 times stronger than heroin](https://www.theguardian.com/global/2016/dec/11/pills-that-kill-why-are-thousands-dying-from-fentanyl-abuse-) and has a [deadly track record](https://www.wsj.com/articles/fentanyl-billionaire-comes-under-fire-as-death-toll-mounts-from-prescription-opioids-1479830968). In December, six former Insys executives were [arrested](http://fortune.com/2016/12/08/insys-execs-charged-bribing-doctors-fentanyl/) for allegedly bribing doctors to prescribe fentanyl to patients who didn’t need it. Insys’s association with the opiate crisis makes its efforts to thwart regulated marijuana use all the more alarming, critics said. “Fentanyl is a drug that is rapidly becoming the major pathway for opioid deaths in the US,” said W David Bradford, a University of Georgia professor whose research has [shown](https://news.uga.edu/releases/article/medical-marijuana-lowers-prescription-drug-use-0716/) that medical marijuana lowers prescription drug use. “There’s conclusive evidence that marijuana is effective for pain management. And nobody has ever died from inhaled cannabis use.” Over the years, donors associated with [drug rehab](https://www.thenation.com/article/gop-mogul-behind-drug-rehab-torture-centers-bankrolling-opposition-pot-legalization-colo/) and [treatment centers](http://www.thecannabist.co/2016/10/19/sheldon-adelson-fighting-nevada-pot-measure/65621/) have also backed [anti-cannabis measures](http://www.tampabay.com/blogs/the-buzz-florida-politics/mel-sembler-begins-fundraising-effort-to-kill-medical-marijuana-initiative/2274311), drawing similar **accusations of hypocrisy considering**[**marijuana’s potential to treat opioid addiction**](https://www.theguardian.com/science/2017/mar/09/opioid-addiction-marijuana-treatment-joe-schrank-high-sobriety)**.** With an [anti-marijuana conservative](https://www.theguardian.com/us-news/2016/nov/22/jeff-sessions-marijuana-legalization-race-colorado) leading the US Department of Justice, and the federal government continuing to [treat cannabis as an illegal drug](https://www.theguardian.com/society/2016/aug/11/marijuana-laws-dangerous-drug-designation-us-government) with [raids](https://www.theguardian.com/us-news/2016/jul/27/native-american-teen-faces-marijuana-prison-sentence) and [prosecutions](https://www.theguardian.com/us-news/2016/jul/27/native-american-teen-faces-marijuana-prison-sentence), researchers and cannabis producers say are blocked from uncovering marijuana’s ability to help curb the opioid epidemic. That means painkiller manufacturers such as Insys have financial incentives to support the slowdown of cannabis, especially when the delays give them time to manufacture their own government-approved synthetic drugs. “It’s pretty absurd that federal law considers marijuana to have no medical value, but allows for the development of synthetic versions of the same substance,” said Mason Tvert, of the Marijuana Policy Project, which has backed many state legalization measures. The existing legal grey area makes it hard for marijuana operations that [struggle with a wide range of hurdles](https://www.theguardian.com/world/2014/aug/03/us-marijuana-legalisation-experiment-growing-pains), such as [banking challenges](https://www.theguardian.com/us-news/2016/feb/16/medical-marijuana-dispensaries-california-tax-cash-only), [law enforcement conflicts](https://www.theguardian.com/society/2016/sep/28/charlo-greene-alaska-cannabis-club-reporter-marijuana) and [contradictory laws](https://www.theguardian.com/society/2016/jun/09/california-legal-marijuana-business-pot-dealers). But **current pot restrictions are good for pharmaceutical companies that have the resources and infrastructure to navigate Food and Drug Administration approvals**. In [one investor filing](https://theintercept.com/2016/09/12/pharma-opioid-marijuana/), Insys even directly [admitted](https://www.sec.gov/Archives/edgar/data/1409532/000119312507185285/ds1.htm) that marijuana legalization could “significantly limit the commercial success” of its cannabis-based products. “**All of these pharmaceutical companies rely upon the FDA for their monopolistic protections**,” said Holyoak. “**They’re going to continue to try to keep marijuana illegal except for that.” Existing dispensaries, meanwhile, are often “mom and pop shops”,** said Dr Frank LoVecchio, a medical director at an Arizona poison center, who has researched medical marijuana. **“They don’t have drug reps. They don’t have the budgets that these guys have.” Larger pharmaceutical companies may end up purchasing dispensaries in the future, he added.** But Michael Collins, deputy director of the Drug Policy Alliance, said he didn’t suspect that pharmaceutical companies would interfere with marijuana businesses given that the recreational market continues to grow and will remain distinct from drug corporations. Berman, however, said she struggled to understand **[why do] pharmaceutical companies needed to be involved in the first place. “Why are we trying to reconstruct the plant when we actually have a plant and it’s much less expensive for patients to access?”**

### Case

#### No public support

Jeffrey Miron, CATO fellow, “Why all drugs should be legal. (Yes, even heroin.),” July 28, ’14, http://theweek.com/article/index/265333/why-all-drugs-should-be-legal-yes-even-heroin

We've come a long way since Reefer Madness. Over the past two decades, 16 states have de-criminalized possession of small amounts of marijuana, and 22 have legalized it for medical purposes. In November 2012, Colorado and Washington went further, legalizing marijuana under state law for recreational purposes. Public attitudes toward marijuana have also changed; in a November 2013 Gallup Poll, 58 percent of Americans supported marijuana legalization. Yet **amidst these cultural** **and political shifts**, American attitudes and U.S. policy toward other drugs **have remained** static. **No state has decriminalized**, **medicalized**, **or legalized** **cocaine, heroin, or meth**amphetamine. And a recent poll suggests only about 10 percent **of Americans favor legalization of cocaine or heroin.** Many who advocate marijuana legalization draw a sharp distinction **between marijuana and "hard drugs."**

## 1NR

### M&A DA

**Healthcare consolidation is booming now and has momentum for the future**

**Diamond et al. 21** – Brandee Diamond is an M&A partner at Foley & Lardner LLP; Louis Lehot is an emerging growth company, venture capital, and M&A lawyer at Foley & Lardner; Eric Chow is an M&A lawyer with Foley & Lardner LLP

Brandee Diamond, Louis Lehot, and Eric Chow, "Healthcare Shines in M&A’s Major Comeback So Far In 2021," Healthcare Innovation, 4-12-2021, https://www.hcinnovationgroup.com/finance-revenue-cycle/mergers-acquisitions/article/21218175/healthcare-shines-in-mas-major-comeback-so-far-in-2021

In 2020, everything changed. Jobs were cut, businesses were shuttered, and too many people lost their lives. But the global pandemic also triggered a response that is creating new jobs, stimulating innovation, and **forging new business models**. The market for mergers and acquisitions has **weathered the storm** of COVID-19 and is **surging** into the second quarter of 2021 with **all pistons firing**, particularly in **healthcare**.

Today, there is so much more besides COVID testing and vaccinations happening behind the doors of healthcare providers worldwide. Think about it. Your town's family doctor's office down the street might now be part of a giant healthcare system. Or, your local urgent care center may be considering a merger with a leading healthcare corporation. These are unprecedented times in virtually every facet of the word in every nook and cranny on the planet, and **healthcare is at the forefront** when it comes to M&A.

In 2020, the healthcare industry was **beaten down** from the **overflowing** of COVID patients causing the **ripple effect** of non-emergency procedures' **postponements**. Looking forward, however, healthcare M&A activity is **set to increase** with the return of non-urgent **medical interventions** and healthcare companies **betting on growth** to get stronger and healthier.

The 2021 rebound

Early in 2020, there was a massive drop-off in M&A deals compared to the prior-year period, particularly for more significant transactions. However, the M&A market still had plenty of **potential for momentum**. Tragically, as the coronavirus's **full impact hit** by late March, most deal-making came to a screeching halt. Since companies put their resources into transitioning staff to working from home, reviewing finances, and maximizing dollars, many **paused** any pre-planned M&A deals and stopped filling the top of the funnel for a new pipeline.

As companies, investors and bankers adapted to virtual deal-making over the last year, M&A in sectors unaffected or boosted by the lockdown slowed. By summer 2020, transactions grew each month with key announcements in technology and **healthcare** corporate **consolidations**. Despite a slowdown for deals in the second quarter of 2020, activity increased in the second half, triggering an annual volume above $3 trillion for the seventh year in a row. And by winter, the pace of M&A deals **exceeded the historical average** with a fourth-quarter record of 1,250 global M&A transactions, equal to over $1 trillion.

This year, there is already **significant growth** on the horizon. In fact, 53 percent of U.S. executives said their companies plan to **increase M&A investment** in 2021. And, according to Morgan Stanley, “**All the elements** **are there** for an active M&A market in 2021, from corporations looking for **scale and growth** to private equity firms and SPACs looking to **invest capital**.” For some, growth will come from market leaders finding strength in a recovering economy. In contrast, others that have seen business models destroyed by the pandemic will explore how smaller deals in complimentary sectors can help innovate their businesses. Overall, targets will come from sellers, including businesses that have **struggled during the recession**, private investors, and companies that are reassessing assets.

M&A activity in healthcare to watch

As 2021 unfolds, there will an increase in **urgent care M&A activity**. We will likely see urgent care systems **buying smaller urgent care systems**, healthcare companies that don't have much to do with urgent care making **mergers and acquisitions**, and urgent care buying companies that complement their services. For example, retail chains like Walmart and CVS are opening more healthcare clinics. These days, urgent care clinics are not just used for emergency or immediate problems but are now also giving out vaccines and even doing annual physicals.

In healthcare, a merger's primary goal is to improve the quality of care while concurrently driving efficiencies that should lower costs. The reality is that today, it’s becoming more challenging to **stay in business** when your company is only known for one thing. Oftentimes, larger companies **offer more services**, which helps the patient and the provider’s pocket. Most of the time, consolidation happens because **customers prefer to combine trips**. The **fear of exposure** to the virus and **aiming to limit outings** will likely **push healthcare** companies to **make moves in M&A** as it relates to consolidation.

As of late, youth sports activities have become more sophisticated, with more businesses catering to them. As popularity grows, unfortunately, sports-related injuries grow too - creating **more opportunities** for healthcare companies. Ultimately, the pandemic is another reason for healthcare companies to offer **all-in-one** facilities. Despite the factors fueling deals, healthcare companies are going to see **more M&A activity** is due to the **growth vector** it can bring to a business.

M&A trends triggered by COVID-19

Several significant trends may characterize a robust M & M&A market for the rest of 2021 and beyond. First of all, we can expect **more megadeals** (transactions of at least $5 billion) in 2021, from pharma companies acquiring early-phase products and private equity acquisitions. With larger companies leading in this area, this activity will come even as company valuations have increased from their COVID-19 lows. The increase in megadeals in the second half of 2020 helped total U.S. deal value bounce back strongly going into 2021.

In addition, companies pursuing stock-for-stock mergers to gain scale comprised many of the largest corporate M&A transactions. Scale has always been important, and the pandemic has proven that you have to be **large enough** in order **to survive**. **Scale** and **more access** to capital markets have been a **considerable benefit** for larger companies. As the pandemic rages on, corporates remain focused on accessing capital, strengthening positions, and **investing in scale**, and consolidations **should continue** in sectors powered by technology and **healthcare**.

Private equity firms should continue to contribute to 2021 M&A volume meaningfully. In 2020, sponsor-backed transactions comprised 26 percent of M&A activity - the highest since before the financial crisis. In fact, by the end of 2020, financial sponsors had a record $2.9 trillion of capital. Last year, we saw many traditional private-equity funds investing across the capital structure to provide companies with cash during a challenging time.

Looking ahead

Looking later in 2021 and beyond, as vaccinations increase and business conditions in COVID-impacted sectors improve, companies will likely focus more on spending to accelerate growth, scale, and digitize their businesses.

As the global economic rebound aims for more growth this year, those **low-interest rates** will continue to make borrowing cheaper than ever before. This, along with the prospect for companies’ **renewed confidence** to spend, could create **more deals**, especially in **healthcare**-related business. So, M&A remains one of the most attractive ways to achieve growth, which should make 2021 a busy year…

**Consolidation is necessary to preserve rural hospitals, but antitrust expansion deters and prevents necessary mergers**

**Kaufman 20** – chair of Kaufman, Hall & Associates LLC

Ken Kaufman, "Removing Antitrust Barriers to Solve the Rural Health Care Crisis," Morning Consult, 1-2-2020, https://morningconsult.com/opinions/removing-antitrust-barriers-solve-rural-health-care-crisis/

Almost 120 rural hospitals have closed since 2010, and an estimated **21 percent** of rural hospitals are at **high risk of closure**.

The high number of financially stressed hospitals is creating a **crisis of access** for rural communities and a potential **crisis of quality** and patient safety, as these hospitals **struggle to secure** **sufficient** clinical and technological **resources**. These struggles can be even more difficult in towns that could once support two hospitals but can **no longer do so**.

A **solution** to the rural health crisis that promotes **partnerships** with larger health systems addresses two critical needs. First, it enables a **rational, equitable approach** to a fundamental restructuring of rural health care resources. Second, it provides **access to sufficient financial resources** to ensure that rural communities are able to benefit from the same resources available elsewhere.

Antitrust impediments to a system-based approach

Current **antitrust law makes it difficult** for individual hospitals or health systems to **collaborate on efforts** to restructure delivery of essential services within a rural health care market. These efforts can, however, be pursued among facilities owned by a **single health system**, enabling a rational and equitable distribution of services across the health system’s network of facilities and the communities they serve.

The Federal Trade Commission and Department of Justice have themselves acknowledged the **value** of a **system-based approach** to rural health. In their 1996 “Statements of Antitrust Enforcement Policy in Health Care,” the agencies created a **safe zone** for mergers of certain hospitals with a low bed size and low patient census with other hospitals.

The agencies recognized that these hospitals often “will be the only hospital in the relevant market” and that “mergers involving such hospitals are **unlikely** to **reduce competition substantially**.” They also recognized that “rural hospitals … are unlikely to achieve the efficiencies that larger hospitals enjoy. Some of these cost-saving **efficiencies** may be **realized** … **through a merger**.”

The situation becomes **more difficult** when a community has two hospitals that do not fall within the safe zone and it can **no longer support both**. Such markets will be considered highly concentrated, and an attempt to merge the hospitals **likely will be challenged** by the federal agencies.

Several states have tried to overcome the likelihood of an antitrust challenge by granting certificates of public advantage to health systems that want to come together to more effectively pool resources and rationalize services within a rural market. But these efforts also are being challenged by the federal agencies.

The **threat** of **antitrust enforcement** actions **throws a chill** over health system-led efforts to make the **rural health care** delivery system **more rational**, economically viable and equitable. For example, the systems that combined to form Ballad Health went through a two-year process to secure the COPA that ultimately allowed their merger.

They willingly accepted state oversight of their efforts to rationalize health care delivery. Yet, they now face an order by the FTC to provide extensive information for a study on the impact of COPAs, even though long-term benefits will not be apparent just a year after the merger. The effort and **ongoing scrutiny** these systems take on certainly might **dissuade other health systems** from pursuing a **similar route**.

Rethinking competition in rural health care markets

The FTC and DOJ must revisit an approach that prioritizes competition over access to care and the quality and financial sustainability of the rural health care delivery system. The agencies have themselves acknowledged that competition among hospitals may not be a **practical reality** in rural communities.

The rural health care crisis is **happening now**; there is not time for multiyear studies of the impact of efforts to rationalize and improve rural health care. Health systems that **understand** and **are willing** to take on the challenges of rural health care markets should be **given the opportunity** to do so.

**Rural hospital closures cause massive food spikes**

**Alemian 16** – President & CEO of Alemian & Associates

David Alemian, "Rural Healthcare Is a Matter of National Security," HCPLive, 11-8-2016, https://www.hcplive.com/view/rural-healthcare-is-a-matter-of-national-security

Rural health organizations are already struggling with enormous turnover rates and costs that run up into the millions of dollars each year. The additional financial burden of penalties from Medicare and Medicaid will put many rural health organizations at risk of going out of business. If **too many** rural health organizations go **out of business**, it then becomes a matter of **national security** and here’s why:

In most rural communities, the healthcare organization is the **largest employer**. When the largest employer goes out of business, the **community collapses** and **people move away**. What was once a thriving community then **becomes a ghost town**. Rural America **produces the food** that feeds the rest of the country.

What will happen when our **amber waves of grain turn to desert wastelands** because there is **no one to work our great farmlands**? As the source of food dries up, and store shelves empty, the price of food will go **through the roof**. As food prices go up, hyperinflation will become a reality, and our printed money will **become worthless**. Almost **overnight**, Americans will **begin to go hungry** because they won’t be able to afford to put food on the table.

**Food insecurity causes conflict and war---continued US leadership is key and no one fills the vacuum**

**Flowers**, director of the Global Food Security Project and the Humanitarian Agenda at the Center for Strategic and International Studies (CSIS), **‘18**

(Kimberly, “Keeping it Stable: The Connection Between Hunger and Conflict,” January 31, <https://www.georgetownjournalofinternationalaffairs.org/online-edition/2018/1/31/keeping-it-stable-the-connection-between-hunger-and-conflict)>

Although achieving this SDG’s targets in totality is unlikely, a global focus on reducing poverty, malnutrition, and hunger around the world **remains essential** both as a universal moral value in a world of inequalities, and as an important contributor to economic growth and **national security**. The United States has been a **global leader** in **addressing the root causes** of hunger and poverty through **agricultural development**, including President Obama’s leadership role in creating the L’Aquila Initiative at the 2009 G8 summit in Italy. The initiative emerged in **response to a food price crisis** and resulted in a promise by donors to provide $22 billion in agricultural development assistance over three years.

It is **more critical now than ever** for leaders within the Trump administration to continue to leverage that progress, starting with gaining a better understanding of the complexity of global food insecurity and its inherent connection with conflict. As food insecurity is both a cause and a consequence of conflict, addressing food insecurity goes well beyond a moral obligation; **it is a national security imperative.**

A lack of access to food can **spark unrest** among civilian populations, particularly when triggered by food **price spikes**. Hungry populations are more likely to express their discontent with unresponsive or corrupt leadership, perpetuating a **cycle of political instability** and further undermining long-term economic development. In addition, governments and non-state actors alike can **use food as a strategic instrument of war**, as witnessed in instances spanning from Sudan’s civil conflict in the 1990s to President Bashar al-Assad’s war-torn Syria today. In Syria, all sides have used food as a tool to **control** and **expel** populations. ISIS has used food resources as both a source of **funding** and a lure for **recruitment**. Food **weaponization** further **underscores the importance of United States** action to protect food security abroad and recognize strategies employed to transform a basic necessity into a military tool.

Today, between 1.2 and 1.5 billion people live in fragile, conflict-ridden states. These conflicts have pushed over 56 million people into crisis and emergency levels of food insecurity. The U.N. estimates that 65 million people are internally displaced within their own countries or are refugees in other countries. These numbers continue to rise as conflicts and violence **escalate across the world,** in countries like **Yemen**, South **Sudan**, and **Syria**, causing social and economic devastation. Meanwhile, the number of people dependent on humanitarian assistance has mushroomed. Projections indicate that by 2030, more than two-thirds of the world’s poor could be living in fragile countries.

The international community is increasingly recognizing the **linkages** between **food insecurity** and **political instability.** Sharp rises in global food prices in 2007 and 2008 sparked riots and street demonstrations in more than 40 countries across the world. Since political leaders started paying attention to this connection, there has been notable progress in increasing international attention and funding to address the root causes of hunger and poverty. The United States has dedicated roughly $1 billion to agricultural development since 2010 through its global food security programs. Thanks to the bipartisan Global Food Security Act that passed in July 2016, multiple U.S. agencies are implementing a global food security strategy that reduces poverty, bolsters resilience, and improves nutrition.

Even the U.S. intelligence community has noticed food security challenges. In November 2015, the National Intelligence Council released an assessment that linked food insecurity to political instability and conflict. The report states that the overall risk of food insecurity in many countries, **compounded** by demographic shifts and constraints on key resources such as land and water, **will increase** during the next decade. The assessment concludes that in some countries, declining food security will contribute to social disruptions and **large-scale political instability** or conflict. The intelligence community’s highlighting of the importance of food security as a diplomacy tool and security strategy broadens the number of stakeholders who are tracking, responding to, and mitigating food insecurity. It is no longer solely a focus for policymakers in the development space.

After nearly a decade of progress, global hunger is again on the rise. A U.N. report on food security and nutrition released last year estimates that 815 million people, or 11 percent of the global population, are chronically malnourished, an increase of nearly 40 million people over the previous year. Conflict and climate change are the two primary causes of this reversed trend. More than half of those experiencing extreme hunger live in countries affected by protracted conflict. Droughts and natural disasters also pose a serious threat to food security, particularly to smallholder farmers vulnerable to a volatile climate.

The 2017 State of Food and Agriculture report explains that conflict and climate change are responsible for rising global hunger levels. Smallholder farmers around the world will be forced to adjust to changing rainfall patterns and severe droughts and floods, which will directly impact their crops and incomes. Many weeds, pests, and pathogens are influenced by climate and thrive in warm conditions. Severe floods can wipe out fields and block market transportation routes, reducing smallholders’ abilities to maintain a sustainable income. Researchers, including those at the National Academies of Science, conclude that human-induced climate change and drought is one of the root causes of Syria’s conflict. Climate change thus places an added burden on countries with limited resources already struggling to feed their populations, as declining agricultural growth and incomes can create displacement and heighten hunger.

Food insecurity and climate change are not the sole cause of the conflict in Syria, but their contribution to the country’s instability cannot be ignored. Investing in international development programs and humanitarian **assistance** that fosters agricultural-led growth and **strengthens the resilience** of vulnerable people can **create peace**, improve lives, and **reduce conflict.** U.S. foreign policy priorities should include strengthening the health and prosperity of those less fortunate before a crisis occurs because our investments can help prevent a crisis in the first place. As Former Secretary of Defense Robert M. Gates said, “Development is a lot cheaper than sending soldiers.”

#### Bank mergers in particular are high now

**Sikander and Gull 21** – S&P Global Market Intelligence Contributors

Ali Shayan Sikander and Zuhaib Gull, "Bank M&A 2021 Deal Tracker: Fla. deals lead US in a hot August," S&P Global Market Intelligence, 8-24-2021, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/bank-m-a-2021-deal-tracker-june-hits-highest-monthly-total-since-2019-62489908

U.S. bank M&A activity kept up a torrid pace in August as 20 deals were announced, bringing total 2021 deal announcements to 132, compared to 103 over all of 2020.

Total deal value has also soared this year to $38.95 billion, compared to $27.75 billion for the full year 2020. Similarly, the median deal value-to-tangible common equity ratio for 2021 deals rose to 152.8%**,** up from 134.2% for the full year 2020.

#### L framing -- The threshold is small – lowered plaintiff burdens means tech companies like are subject to more treble damages – treble damages force companies to significantly limit investment in tech to avoid liability

Delrahim, JD, former Assistant Attorney General for the Antitrust Division of the United States Department of Justice, ‘20

(Makan, “Assistant Attorney General Makan Delrahim Delivers Remarks at IAM’s Patent Licensing Conference in San Francisco,” September 18, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-iam-s-patent-licensing>)

It can be a serious mistake for a court to allow either type of claim to proceed under the Sherman Act. To understand why that is the case, one should consider the policies underlying Section 2 of the Sherman Act.

One crucial element in establishing any claim of unlawful monopolization under Section 2 is a showing that a defendant acquired, enhanced, or maintained monopoly power in the relevant market through anticompetitive conduct that is “exclusionary” or “predatory” in nature. I will focus on so-called “exclusionary” conduct—the umbrella concept often invoked by licensees bringing Section 2 claims premised on FRAND violations.

The term exclusionary conduct in antitrust law is potentially misleading because there is a difference under the Sherman Act between “lawful” and “unlawful” conduct that results in exclusion of a competitive alternative. In market economies, every rational business wants to exclude and defeat its competitors, and indeed antitrust law encourages fierce competition among companies aiming for as high a market share as they can achieve. That is why courts applying Section 2 are careful not to condemn “exclusionary” conduct that is driven by competition on the merits such as innovation. Most obviously, legitimate competition on the merits can be “exclusionary” in the sense that consumers choose a superior product or service. That conduct does not violate Section 2. By comparison, conduct that “excludes” a competitor by hindering its ability to offer a superior product or service, without offering any benefit to competition, likely would constitute a Section 2 violation.

When courts police the line between lawful and unlawful “exclusionary” conduct, a few themes emerge.

First, courts have recognized that not every type of conduct that may enhance a business’s market power is actionable, such as when the application of Section 2 would impose a duty that contravenes the policies of the antitrust laws themselves. For example, in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, the plaintiff alleged that Verizon refused to deal with a rival in order to limit competitive entry, thereby enhancing its monopoly position. The Supreme Court held that the claim did not satisfy Section 2 as a matter of law. That is because the claim would condemn a monopolist’s refusal to share its resources and effectively would create an antitrust duty to help a competitor. Such a duty, the Court explained, is in “tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.” The Court applied a legal rule, rather than a fact-specific rule, to protect conduct that may have an exclusionary, monopoly-enhancing effect.

Second, the Supreme Court has cautioned against antitrust standards that would create an unacceptable risk of “false positives” or condemnations of lawful pro-competitive conduct. As the Court has explained, “Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’” Judge Robert Bork, in his famous Antitrust Paradox, highlighted the same risk in the application of Section 2 theories, explaining with respect to exclusive dealing that “[t]he real danger for the law is less that predation will be missed than that normal competitive behavior will be wrongly classified as predatory and suppressed.”

This backdrop helps frame the question whether a unilateral refusal to license a lawful patent on “FRAND” terms after committing to do so constitutes a form of unlawful exclusionary conduct. A unilateral violation of a FRAND commitment should not give rise to a cause of action under Section 2 of the Sherman Act, even if a patent holder is alleged to have misled or deceived a standard-setting organization with respect to its licensing intentions. Applying Section 2 to this sort of unilateral conduct would contravene the underlying policies of the antitrust laws. This conduct may warrant remedies under contract law, but the important difference is that contract remedies do not involve the threat of treble damages that can deter lawful, pro-competitive conduct.

In the context of legitimate standard setting, the collective decision to incorporate a patented technology into a standard necessarily involves the “exclusion” of rival technologies. Moreover, as a result of having its technology incorporated into a standard, a patent holder may gain incremental market power beyond any power that holding a patent would already convey. By voluntarily participating in the standard setting process, however, owners of rival technologies and prospective licensees assume the risk that the outcome of that process may have an exclusionary effect where there are patents covering the “winning” technology. Simply winning selection by a standard setting process does not constitute unlawful exclusionary conduct under the antitrust laws. This is because that selection, regardless the reason for it, contributes to unification around a single standard, which creates interoperability benefits for consumers that could not be achieved without unification.

This form of lawful and pro-competitive exclusionary conduct should not be condemned as unlawful under the Sherman Act when a licensee believes that a patent-holder opportunistically has reneged on its commitment to license on “FRAND” terms and engaged in so-called “hold-up.” That is also true even where a patent holder never allegedly intended to license on the terms that a court ultimately determines are “FRAND.” I will explain why.

There is no duty under the antitrust laws for a patent holder to license on FRAND terms, even after having committed to do so. A FRAND commitment is a contractual representation that a patent holder will license on “fair,” “reasonable,” and “non-discriminatory” terms. It is not the same as a promise to pay a specific price in a final contract. Indeed, commentators have noted that by failing to specify a specific price, a FRAND commitment is an incomplete contract term.

To be clear, a FRAND commitment may create a duty under contract law to fulfill that obligation, and courts may be tasked with determining the relevant FRAND rate where parties disagree over this contract term. Section 2, however, is agnostic to the price that a patent-holder seeks to charge after committing to such a term. Breaking down “FRAND” by its component terms makes clear why this is so.

First, the Sherman Act does not police “fair” prices or competition; it protects the competitive process. Judge Easterbrook once asked, “Who says that competition is supposed to be fair, that we judge the behavior of the marketplace by the ethics of the courtroom? . . . When economic pressure must give way to fair conduct . . . rivals will trim their sails”; introducing conceptions of “fairness” into the Sherman Act “is to turn antitrust law on its head.”

Second, having undertaken a contractual duty to charge “nondiscriminatory” rates, the Sherman Act does not compel a patent-holder to abide by this promise. The Sherman Act is indifferent to price discrimination; indeed, in some circumstances price discrimination may be pro-competitive.

Third, the Sherman Act does not authorize courts to determine “reasonable” licensing rates. The Supreme Court has emphasized repeatedly that antitrust law does not recognize a cause of action that would “require[] antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited.”

It, therefore, would be a mistake to infer that a contractual FRAND commitment somehow establishes a duty under the antitrust laws to license on terms demanded by a licensee or that violations of an ambiguous FRAND term become an antitrust violation. Transforming such a contract obligation into an antitrust duty would undermine the purpose of the antitrust laws and the patent laws themselves, both of which serve the same goal of increasing dynamic competition by fostering greater investment in research and development, and ultimately in innovation.

Making the duty to license on FRAND terms enforceable under the antitrust laws would contravene the policies of the Sherman Act. As the Supreme Court recognized in Trinko, a business has no antitrust duty to deal with another company, and only in limited circumstances will a refusal to deal give rise to a potential antitrust claim. As then-Tenth Circuit Judge Neil Gorsuch explained in Novell v. Microsoft, following Trinko, a monopolist’s refusal to license its intellectual property is actionable under the antitrust laws only if it terminates a “presumably profitable course of dealing between the monopolist and the rival” and that termination is “irrational but for its anticompetitive effect.”

I would note that then-Judge Gorsuch’s standard echoes what the United States and FTC advocated to the Supreme Court in its amicus brief in the Trinko case. The brief stated:

Where, as here, the plaintiff asserts that the defendant was under a duty to assist a rival, the inquiry into whether conduct is “exclusionary” or “predatory” requires a sharper focus. In that context, conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.

That narrow window for a refusal to deal claim is irreconcilable with the broader contention that Section 2 obligates an SEP-holder subject to a contractual FRAND commitment to license its technology to any comer—much less on FRAND terms. An antitrust duty to license on FRAND terms would also contravene the patent laws’ policy of promoting innovation by offering incentives for holders of valid patents to seek the greatest rewards possible for their inventions.

To be clear, contract law may very well require an SEP-holder to deal with any willing licensee, but the Sherman Act does not convert FRAND commitments into a compulsory licensing scheme. It logically follows that there is no antitrust liability for proposing to deal at terms that are above FRAND rates.

Nor should an antitrust duty spring into being if a patent holder allegedly “deceives” an SSO when it commits to license on FRAND terms and its participants rely on that representation in deciding to adopt the technology. That is because Section 2 should not condemn a patent holder’s profit-maximizing intentions or aspirations at the time it makes a FRAND commitment, particularly where remedies are already available to an unhappy licensee or SSO participant.

Suppose that, hypothetically, the holder of a standard-essential patent knew upfront precisely what price would satisfy the vague definition of “FRAND” and planned to demand a much higher price after the SSO incorporated its technology into a standard. By making a legally binding commitment, a patent-holder acknowledges that it will be required under contract law to license at a rate determined by a court if a disagreement over that rate arises later. A licensee, for its part, understands that it can bring suit if a price does not fit its own subjective understanding of “FRAND.” Because both patent-holders and licensees participating in a standard-setting process recognize that the proper “FRAND” rate will be determined after the fact—in court, if necessary—there is therefore no meaningful ex ante “deception” that should give rise to an antitrust claim.

To be sure, having one’s technology incorporated into a standard, in some circumstances, may increase a patent-holder’s market power. The same could be said, of course, about a monopolist’s refusal to deal with a rival who might gain market share if it had access to the monopolist’s inputs. Even if this occurs as a result of a patent holder’s so-called “deception” about its licensing obligations, this is not the sort of market-power-enhancing conduct that Section 2 should reach because a cause of action for treble damages would impede the policies underlying the Sherman Act. Even worse, such a cause of action would “require[] the court to assume the day-to-day controls characteristic of a regulatory agency.”

More fundamentally, recognizing a Section 2 cause of action for violations of a FRAND commitment would create an unacceptable risk of “false positive” condemnations of pro-competitive conduct by licensees. The prospect of antitrust liability and treble damages for breaching a potentially vague FRAND term—or allegedly “misrepresenting” one’s intentions to offer some FRAND rate—threatens to chill incentives for innovators

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to develop new technologies that fuel dynamic competition.

Where contract law remedies exist to remedy and deter breaches of a FRAND commitment, the additional deterrence that Sherman Act remedies offer could deter lawful, pro-competitive conduct—that is, research and development by innovators who make careful cost-benefit calculations as to how much to invest in technologies that may not pay off. Demanding a high price for one’s patented technology is permissible, and expected, conduct in a free market negotiation. A Section 2 cause of action would skew the patent licensing bargain away from the bargaining outcome that a free market dictates.

In particular, where the parties have a subjective disagreement over the meaning of an incomplete contract term, a Section 2 remedy threatens the patent holder with the risk of enormously costly litigation and a possible treble damages award. Bargaining in the shadow of litigation, a patent holder would be wary that a high license demand could be penalized by a significant damages award, whereas a prospective licensee’s low-ball offer would do no such thing. Such a remedy would bestow any putative licensee with disproportionate negotiating power. In turn, the cost-benefit calculation for innovators would change and the prospect of additional dynamic competition likely would decline.

#### Changing merger standards increases costs of beneficial mergers and affects every industry

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Jennifer Huddleston, "Implications of the Competition and Antitrust Law Enforcement Reform Act," American Action Forum, 2-10-2021, <https://www.americanactionforum.org/insight/implications-of-the-competition-and-antitrust-law-enforcement-reform-act/>

CALERA proposes to change both the standard and the burden for proving that the merger or acquisition would not cause harm. First, it would change the government’s requirement from proving that a merger would substantially lessen competition (and thereby reduce consumer options) to showing only that a merger would “create an appreciable risk of materially lessening competition.” Additionally, in many cases, it would shift the burden of proof from the government onto the merging or acquiring entities. The merger or acquisition could go through only if the private firms can prove that the deal would not hurt competition. Otherwise, regulators could prevent it.

Changing these standards would make mergers and acquisitions **more difficult**. This shift would be **particularly harmful in dynamic markets** such as the technology sector where it is unpredictable what disruption may gain popularity or fundamentally change the market. The current, higher standard for government intervention already prevents mergers and acquisitions that could improve competition and aid consumers. Misunderstanding the changing market or the impact of innovation can already lead to denying mergers that would actually benefit consumers or allow smaller players to pool resources in ways that make them more competitive. A lower standard for challenging mergers would also make such **beneficial deals less likely.**

Shifting the burden presumes that every deal involving companies of a certain size is harmful unless proven otherwise. The existing standard and burden already allow enforcers to successfully prevent and deter mergers they believe may harm consumers. Lowering the standard for action would make benign or **beneficial deals more costly**, **deterring** them and the potential benefits for consumers and competition. While most may be focused on the current antitrust action against large tech companies, legislative proposals such as CALERA could have a significant impact on markets well beyond technology. Changes to the burden for mergers to proceed would target large firms **regardless of industry**. The result could impact not only tech companies, but also large companies in the pharmaceutical and energy industries where such acquisitions often play an important role in promoting competition and boosting innovation.

#### Plan is one of the first major pro-plaintiff decisions in decades—that is magnified and affects every future case

Pale 04– R. Hewitt Pale, Former Assistant Attorney General, Antitrust Division @ US DOJ

(R. Hewitt Pale, “ANTITRUST LAW IN THE U.S. SUPREME COURT, Presented at British Institute of International and Comparative Law Conference, May 11, 2004, <https://www.justice.gov/atr/speech/antitrust-law-us-supreme-court>)

In considering my topic for a forum on comparative law, it occurred to me that it might be useful to focus on the special role of the United States Supreme Court in making American antitrust law. The topic is especially timely because our Supreme Court granted review in four antitrust cases this term, each of which is the object of intense study by U.S. antitrust practitioners. The Supreme Court, unlike the intermediate appellate courts of the federal system, has discretion to choose the cases it will hear, and its choices have a profound effect on the development of antitrust law.

Little has changed over the last century in terms of the wording of our antitrust statutes. The Sherman Act was enacted in 1890, and the Clayton Act in 1914, and the legislative amendments since that time have been minimal. Yet U.S. antitrust law has come a long way indeed in those years through judicial interpretations of the law. Congress chose not to enact detailed prescriptions for antitrust enforcement, relying instead on the courts to apply the broad statutory principles to particular fact situations. As former Assistant Attorney General William Baxter has observed, this "common law" approach may lack the certainty provided by a more detailed statute, but it "permits the law to adapt to new learning without the trauma of refashioning more general rules that afflict statutory law." (1) Our Supreme Court has described the antitrust laws as having "a generality and adaptability comparable to that found to be desirable in constitutional provisions."(2)

American antitrust law began to take shape only when the Supreme Court began to build the basic framework of antitrust analysis in its decisions. In 1911, it decided the landmark Standard Oil case, in which the United States sought to break up the famed oil conglomerate.(3) Observing that the standards of the antitrust law must be developed by the courts deciding each case "by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute,"(4) the Court announced the Rule of Reason, under which the Sherman Act is deemed to prohibit only "unreasonable" restraints of trade. In another decision that year, United States v. American Tobacco Co.,(5) involving a conglomerate in the tobacco industry, the Supreme Court emphasized the Rule of Reason's fundamental grounding in competition concerns. This standard proscribed "contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade . . . ."(6)

In 1918, Chicago Board of Trade v. United States(7) made clear that the Rule of Reason encompasses all the relevant circumstances. To determine whether a restraint is illegal, a court must "ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable" and the "history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained."(8)

Around the same time, the Court was also developing the doctrine of per se illegality, which provides bright-line guidance as to certain clearly anticompetitive practices. In United States v. Trenton Potteries Co., (9) the Court held that a price fixing agreement among competitors is an unreasonable restraint "without the necessity of minute inquiry whether a particular price is reasonable or unreasonable."(10) In 1940, in another landmark case brought by the United States in the oil industry, United States v. Socony-Vacuum Oil Co.,(11) the Supreme Court repeated that price-fixing agreements are illegal per se and that "no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense."(12) The per se rule underpins the Antitrust Division's criminal prosecution of collusion among competitors.

The Supreme Court's pre-1950 decisions set the stage for the late twentieth-century developments in antitrust law. They established the fundamental principle — consistent with the modern approach worldwide — that antitrust laws prohibit only conduct that unreasonably restricts competition, to the detriment of consumers. And the Court established that the type of inquiry required depended on the nature of the particular conduct at issue.

That auspicious beginning did not mean that the course of American antitrust analysis always ran smoothly through the last half of the century. A consequence of the common law approach is that when antitrust thinking veers from the path of promoting consumer welfare, the Supreme Court may follow. We experienced that effect in the 1960s and 1970s as our Supreme Court issued decisions emphasizing artificial presumptions not soundly grounded in economic reasoning. In Brown Shoe, Pabst, and Von's Grocery, the Court ruled that mergers could be found unlawful based on extremely small increases in market concentration.(13) In Schwinn,(14) it abandoned its formerly cautious approach to vertical practices,(15) holding exclusive dealer territories unlawful per se. Similarly, in Albrecht,(16) it held vertical maximum price fixing illegal per se.

As the sophistication of economic analysis increased, our Supreme Court began to reexamine some of these precedents and return to fundamental principles of competition and consumer welfare. In GTE Sylvania,(17) the Court overruled Schwinn, and in State Oil v. Khan,(18) it overruled Albrecht. The Court adopted a significantly different approach to mergers in General Dynamics,(19) refusing to find a violation, despite current high market shares, in a case where those market shares did not reflect a realistic threat to future competition. And in Matsushita,(20) the Court poured cold water on theories of liability that make little economic sense, and it expressed skepticism of liability theories based on price cutting, which is often "the very essence of competition."(21)

Of particular note is the Court's decision in Brunswick,(22) in which it rejected the theory that a private plaintiff could obtain treble damages as compensation for continued competition resulting from a merger that prevented a firm from leaving the market. This may be one of the Supreme Court's lesser-known decisions outside the United States, but it is of fundamental significance. Private treble damage litigation is an important tool in the U.S. antitrust enforcement scheme, and the Brunswick decision mandated that it, like government enforcement, be firmly anchored to pro-competition, pro-consumer principles. The Court emphasized that private damages must be based on conduct causing injury of the type that the antitrust laws were intended to prevent. Plaintiffs may not prevail unless they are harmed by anticompetitive consequences of a defendant's conduct, for the antitrust laws were enacted to protect competition, not competitors.

In the last quarter of the twentieth century, the Supreme Court began hearing fewer antitrust cases. In part this reflects a general trend in the Court's practices. In its 2002 term, it issued only 81 written opinions, having issued only 71 the year before.(23) In contrast, thirty years earlier, the Court issued 164 written opinions in its 1972 term and 151 in 1971, including full opinions in ten antitrust cases during those two terms.(24) A litigant's chance of obtaining review today is quite low. In the last complete term, 2002, the Supreme Court considered 8,340 petitions for review by writ of certiorari, but granted full review to only 91 cases, or 1.1%.(25) Even if the unpaid, in forma pauperis, petitions are left out of the calculation, the odds improve only to 4.5%.(26)

A change in the statute governing appeals in civil antitrust cases brought by the government has also had the effect of limiting the number of Supreme Court opinions in antitrust cases in recent years. Until 1974, appeals in these cases went directly to the Supreme Court under the Expediting Act. That statute was amended in 1974 to provide that these appeals go to the intermediate appellate courts unless the district court certifies that immediate Supreme Court review is of "general public importance in the administration of justice."(27) Even then, the Court retains discretion to remand the case to the court of appeals. District courts have certified only three such cases for direct appeal.(28) One of these was Microsoft, but the Supreme Court declined to hear the case and remanded it to the court of appeals.

Because there are so few Supreme Court antitrust decisions each year — and because each one sets precedent that will govern the application of the antitrust laws in the lower courts for decades to come — each decision is an event of major significance for antitrust enforcers and the antitrust bar. Every phrase is studied with care, and every future case is evaluated in terms of the Court's reasoning process.

#### It’s a distinctly powerful tool

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(Makan, Brief of The United States of America as Amicus Curiae in Support of Neither Party, City of Oakland v. Oakland Raiders, available at: <https://www.justice.gov/atr/case-document/file/1328216/download>)

The automatic treble damages provision of Section 4 is an uncommonly powerful tool, serving both to encourage private enforcement and to deter wrongdoers. Wielded indiscriminately, however, it can impose more harm than good: “Given the potential scope of antitrust violations and the availability of treble damages, an overbroad reading of § 4 could result in ‘overdeterrence,’ imposing ruinous costs on antitrust defendants, severely burdening the judicial system and possibly chilling economically efficient competitive behavior.” Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 394 (7th Cir. 1993). Section 4’s rigorous standing requirements are intended to mitigate this risk: “[B]y restricting the availability of private antitrust actions to certain parties, we ensure that suits inapposite to the goals of the antitrust laws are not litigated and that persons operating in the market do not restrict procompetitive behavior because of a fear of antitrust liability.” Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1449 (11th Cir. 1991).

Oakland’s claim for lost general tax revenues poses the very threat contemplated by these courts. If upheld, local governments could bring substantial Section 4 claims anytime anticompetitive conduct was found to reduce economic activity in their jurisdictions. Congress did not intend this result. Though “it could have . . . required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations . . . [,] this remedy was not selected.” Hawaii, 405 U.S. at 262. To reverse the district court and award antitrust standing to Oakland for its lost tax revenues would expand antitrust liability beyond the intended scope of the Clayton Act and threaten to deter the very competition it was

designed to protect.

#### And it drives more litigation across sectors

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(Thomas C., Amitai Aviram, University of Illinois Jodi S. Balsam, Brooklyn Law School Jorge L. Contreras, University of Utah Anthony Dukes, University of Southern California Vivek Ghosal, Rensselaer Polytechnic Institute Michael S. Jacobs, DePaul University Jordan Kobritz, SUNY Cortland Alexander Volokh, Emory University, Brief of Amici Curiae Antitrust Law and Business School Professors in Support of Petitioners, NCAA v. Alston, available at: <https://www.supremecourt.gov/DocketPDF/20/20-512/168408/20210208135430804_20-512%2020-520%20tsacAntitrustLawAndBusinessSchoolProfessors.pdf>)

Second, requiring a defendant to prove that a restraint is the least restrictive means of achieving its goal makes it nearly impossible for the defendant to succeed. This rule not only would impose on antitrust defendants the titanic burden of proving a universal negative,3 it also would empower antitrust plaintiffs to invalidate virtually all collaborations, no matter how procompetitive, merely by dreaming up marginal ways to make them slightly more competitive. See Smith v. Pro Football, 593 F.2d 1173, 1215 (D.D.C. 1978) (MacKinnon, J., concurring in part, dissenting in part) (“In evaluating less restrictive alternatives as a matter of law, it is difficult to imagine what kind of draft would be valid if the existence of a less restrictive alternative would automatically render the present draft unreasonable. Some less restrictive alternative can always be imagined.”) Indeed, “[a] skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements.” Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 1913b (4th ed. 2018). And a skilled plaintiffs’ lawyer would have little difficulty finding attorneys’ fees and treble damages to be sufficient incentive to challenge virtually all such collaborations, thus ensuring that the most direct consequence of the Ninth Circuit’s application of the Rule of Reason would be a flood of antitrust litigation, followed by a reduction in collaborative enterprises and the negative effects of that reduction.

This consequence follows from the fact that the Ninth Circuit’s ruling is not limited to the NCAA’s “amateurism” rules. Instead, the Ninth Circuit’s opinion as written applies to all forms of joint ventures and procompetitive collaborations and thus is likely to disincentivize those arrangements. See, e.g., U.S. Dep’t of Justice & FTC, supra, at 1 (2000) (warning that making it too easy to condemn “agreements among actual or potential competitors may deter the development of procompetitive collaborations”).

The Ninth Circuit’s decision has sweeping implications for antitrust enforcement and may call into question collaborations and joint ventures across a host of areas including healthcare, pharmaceutical development, information technology, consumer electronics, and manufacturing. According to the Ninth Circuit’s approach, any court is empowered to re-write the rules of any industry before it so long as the plaintiff can conjure a slightly less restrictive alternative to the conduct being challenged, including, for example, asserting that a joint venture’s product is priced too high. But see Texaco Inc. v. Dagher, 547 U.S. 1, 6–7 (2006) (“As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price.”). The potential exposure to treble damages for such conduct is likely to chill otherwise procompetitive arrangements, thus contradicting the ultimate goal of the antitrust laws: promoting competition.