# 1nc

## offcase

**T - prohibit**

#### Prohibitions must forbid --- Governing standards are distinct

Chanell 90 --- William Chanell, Associate Justice, California Court of Appeals, “CITY OF REDWOOD CITY v. DALTON CONSTRUCTION COMPANY”, Dec 1990, https://caselaw.findlaw.com/ca-court-of-appeal/1769184.html

We agree with the trial court's conclusion. By its plain language, section 35704 exempts certain contractors from the application of an ordinance [221 Cal. App. 3d 1573] adopted pursuant to section 35701. Section 35701 permits cities to prohibit the use of city streets by heavy trucks. (See § 35701, subd. (a).) However, the portion of the city's hauling ordinance at issue in this case does not prohibit street use; it regulates users by requiring them to obtain a permit and pay a fee in order to lawfully drive their heavy trucks over city streets. (See Redwood City Code, §§ 20.62-20.74.) To determine the legislative intent behind a statute, courts look first to the words of the statute themselves. In so doing, we must give effect to the statute according to the usual, ordinary import of its language. (Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal. 3d 222, 230 [110 Cal. Rptr. 144, 514 P.2d 1224].) To construe section 35704, which specifically creates an exemption from prohibition of use, to exempt the regulation of that use would violate these cardinal rules of statutory construction. [2] The distinction between a regulation and a prohibition is well understood in municipal law. (See San Diego T. Assn. v. East San Diego (1921) 186 Cal. 252, 254 [200 P. 393, 17 A.L.R. 513].) The term "prohibit" means "[t]o forbid by law; to prevent;-not synonymous with 'regulate.' " (Black's Law Dict. (5th ed. 1979) p. 1091, col. 1.) The term "regulate" means "to adjust by rule, method, or established mode; to direct by rule or restriction; to subject something to governing principles of law. It does not include a power to suppress or prohibit [citation]." (In re McCoy (1909) 10 Cal. App. 116, 137 [101 P. 419].) [1b] Therefore, we are satisfied that section 35704 was not intended to apply to ordinances regulating street use, but only to those prohibiting such use.

**Only per se rules bans a PRACTICE --- rule of reason regulate anticompetitive effects for individual acts**

**Stucke 09** --- Maurice E. Stucke, Associate Professor, University of Tennessee College of Law, “Does the Rule of Reason Violate the Rule of Law?”, University of California, Davis [Vol. 42:1375 2009], https://lawreview.law.ucdavis.edu/issues/42/5/articles/42-5\_Stucke.pdf

But who has created this predicament? The Supreme Court. Over the past ninety years, the Court has supplied the Sherman Antitrust Act’s legal standards. In determining the legality of restraints of trade, the Supreme Court generally employs either a per se or rule-of-reason standard.10 Under the Court’s per se illegal rule, certain restraints of trade are deemed illegal without consideration of any defenses. These restraints are so likely to harm competition and to lack significant procompetitive benefits that, in the Court’s estimation, “they do not warrant the time and expense required for particularized inquiry into their effects.”11 Under the per se rule, once a plaintiff proves an agreement among competitors to engage in the prohibited conduct, the plaintiff wins.12 But the Court evaluates all other restraints under the rule of reason. This standard involves a **flexible** factual **inquiry** into a restraint’s overall competitive effect and “the facts **peculiar to the business**, the history of the restraint, and the reasons why it was imposed.”13 The rule of reason also “**varies in focus and detail** depending on the nature of the agreement and market circumstances.”14 “Under this rule the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”15 Despite its label, the rule of reason is not a **directive defined ex ante (such as a speeding limit).**16 Instead, the term embraces antitrust’s most **vague and open-ended principles**, making prospective compliance with its requirements exceedingly difficult.

**Vote neg for GROUND and LIMITS --- Other standards dodge topic uniqueness and links and they can pick something that’s broader but more permissive --- creating a bidirectional topic. Standard prolif makes the topic unmanageable**

### CP – Packing

#### Congress ought to pass a law that mandates an expansion of the Supreme Court from 8 to 14 associate justices if the United States federal government does not expand the scope of its core antitrust laws to empower private antitrust by at least substantially increasing its prohibitions on anticompetitive business practices by the private sector that impose procedural barriers on private antitrust.

#### . The President ought to nominate, and the Senate ought to confirm, persons to fill any vacancies on the Supreme Court.

#### Court packing solves extinction

Cooper 16 --- Ryan Cooper is a national correspondent at TheWeek.com. His work has appeared in the Washington Monthly, The New Republic, and the Washington Post, “How to save the world from the Supreme Court”, The Week, Feb 12th 2016, https://theweek.com/articles/605314/how-save-world-from-supreme-court

The pressing need for court-packing is all about climate change. The most serious U.S. policy effort against this humanity-threatening problem is President Obama's Clean Power Plan, a complex EPA initiative to begin reducing the carbon emissions from America's power generation. It's also a keystone in the far-reaching international accord to tackle climate change, reached in Paris in December. The world is finally mounting a fairly aggressive attack on carbon pollution, and U.S. leadership is an indispensable part of the whole system.

But in an extremely unusual step, the Supreme Court recently halted the enforcement of Obama's EPA rule until various legal challenges have been worked out — which could take years. This severely threatens the entire structure of the Paris agreement, which depends critically on every nation, especially the United States, doing their fair share to reduce emissions.

As Coral Davenport reports, other nations are alarmed:

"If the U.S. Supreme Court actually declares the coal power plant rules stillborn, the chances of nurturing trust between countries would all but vanish," said Navroz K. Dubash, a senior fellow at the Center for Policy Research in New Delhi. "This could be the proverbial string which causes Paris to unravel." [The New York Times]

This is potentially as big as big deals get. Why shouldn't America's president flood the Supreme Court with his cronies if that's what it takes to ensure that the world aggressively fights climate change?

Climate change is the most serious problem in the world by a considerable margin, and time is very short. The world is already not moving nearly fast enough. A delay of the Clean Power Plan by some years is inexcusable — and an overthrow, which this decision may signal, would be an emergency. It is quite literally not an exaggeration to say that the Supreme Court is threatening human civilization as it now exists. Moreover, their reasoning is virtually certain to be some bogus technicality — Chief Justice John Roberts' recent attack on USDA price support programs, for example, was blatantly self-contradictory.

Furthermore, it's completely constitutional to add more justices to the Supreme Court. Nowhere in the Constitution does it stipulate there should be a specific number of Supreme Court justices. We began with six, and that figure has shifted several times between seven and 10. The current number (nine) is the result of the Judiciary Act of 1869, and mere convention has kept it there.

The next president, if he or she is a Democrat, ought to be prepared to load up the Supreme Court with climate-fighting cronies who will work hard to save the world from John Roberts and Co. If America's next president is a Republican, then climate policy is hosed anyway, so he wouldn't have to bother. And yes, I know that advocating this idea means a Republican president could theoretically engage in the same court-packing to advance his or her own favored cause. But that is already true — the current system is just one more wobbly convention, which a President-for-life Trump is unlikely to respect should it become inconvenient. In any case, saving the world from climate change is worth that price.

### DA – PTX

#### Biden’s PC is likely to pass climate spending this week – BUT sustaining focus and continuing to avoid tough votes for Manchin and Sinema is key

Cadelago et al 10-19 (Christopher Cadelago, White House Correspondent at POLITICO; Marianne LeVine, reporter at POLITICO, and Nicholas Wu, reporter at POLITICO; **internally citing White House aides, Sen. Jon Tester (D-Mont.), Rep. Pramila Jayapal, chair of the Congressional Progressive Caucus, John Podesta, top aide to former Presidents Barack Obama and Bill Clinton, and Louisa Terrell, director of the White House Office of Legislative Affairs**; “Biden bets his agenda on the inside game,” POLITICO, 10-19-2021, <https://www.politico.com/news/2021/10/19/biden-agenda-inside-game-516239>)

Before Joe Biden can fully pitch the public on his solutions to a lingering pandemic and economic rockiness, he’s got to finish the sale to his own party’s lawmakers. As Democrats on Capitol Hill brace in anticipation of a brutal midterm, Biden is spending an extraordinary amount of time and political capital behind the scenes to convince them to rally around a common framework for social and climate spending. His congressional huddles have accelerated, from phone calls on the White House veranda to one-on-one and group meetings — including two high-stakes Tuesday sit downs with moderates and progressives. He’s dialing up old friends to take their temperature about how his presidency is really fairing far beyond the Beltway. White House aides, in their own recent conversations with nervous allies, have repeatedly cited the flurry of presidential calls as a sign itself of Biden's commitment to getting the bills over the finish line, at times bristling at claims that he hasn't been involved enough. But Biden’s hours and hours of meetings don’t just reflect the precarious moment in which his presidency finds itself. They underscore the heavy reliance his White House has placed on an inside game, rather than the bully pulpit, to dislodge recalcitrant holdouts and move their agenda. "The president is a longtime policy guy and relationship guy. So he brings both kinds of skills to his work" to corral his party behind a trillion-dollar-plus package of progressive priorities, said Biden's former primary rival Sen. Elizabeth Warren (D-Mass.). Warren acknowledged, however, that Biden's level of influence over Sens. Joe Manchin (D-W.Va.) and Kyrsten Sinema (D-Ariz.) — both of whom met with Biden on Tuesday — remains to be seen: "We'll know the answer to that when we make it across the finish line and assess what we’ve got." Biden met Tuesday afternoon with Sens. Jon Tester (D-Mont.), Catherine Cortez Masto (D-Nev.) and Mark Warner (D-Va.), along with House progressives and moderates. "We just need to get to a number," Tester said after returning from the White House. "I think that he likes all the programs but I think everybody's negotiable at this point." Biden told progressives that tuition-free community college would likely be cut from the final package and the child tax credit may only be extended for a single year, according to a source familiar with the meeting. Rep. Pramila Jayapal, chair of the Congressional Progressive Caucus, said after the meeting that tuition-free college is "probably going to be out," and certain climate priorities were "challenging." "At this point we don't have a certainty on the final thing, but what we're hearing is good," Jayapal said. "We feel like the vast majority, if not all, of our priorities are in there, in some way, shape or form.” As Biden has worked on lawmakers in private — sometimes not putting a hard stop on his schedule so as not to stifle progress — he’s largely, though not entirely, resisted riskier public pressure campaigns that could backfire and are viewed as against his nature. Often, Biden has had just a single public event each day. Occasionally, there’s been no public interfacing at all. Eight times since Labor Day, the daily guidance issued by the White House has included only private meetings with Biden. A planned barnstorming of the country to sell the Build Back Better platform this summer was overshadowed by the chaotic U.S. withdrawal from Afghanistan. And congressional uncertainty amid infighting among Democrats on opposite poles of the party has overshadowed continuing trips by Cabinet officials and commandeered the media narrative in Washington. While Biden has held public events around the agenda, he has not done a formal press interview on it since Labor Day. On Wednesday, he will take a trip to his hometown of Scranton, Pa., to discuss the benefits of the legislative proposals, and on Thursday he will participate in a town hall broadcast on CNN. “The President won the most votes in history running on his Build Back Better agenda, unveiled the formal proposal in his first address to a joint session of Congress, and has made his case across the country ever since – along with his cabinet – which is deeply resonating with the American middle class," White House spokesman Andrew Bates said. Over the weekend, Biden called Sen. Bob Casey (D-Pa.) to discuss the upcoming trip, according to the senator, who is working on expanding care for older people and people with disabilities. “He wanted to get some suggestions about issues we should focus on, while we’re there,” Casey said. Still, inside the White House, the lower-key strategy has been seen as a necessity: Democrats have such slim congressional majorities that Biden, Senate Majority Leader Chuck Schumer and Speaker Nancy Pelosi have essentially no margin for error. That has put far more of the president’s focus on convincing a relatively small number of lawmakers to agree to details of the package, rather than using his time to sell policies that the general public supports. Chief among that small number of lawmakers are Manchin and Sinema, who remain resistant to the range of $1.9 trillion to $2.2 trillion that Biden and progressive lawmakers have discussed as a compromise top line for the social spending bill. "I'm told that they've given signs on the parking spaces for these two senators at the White House, that they're there so often,” Senate Majority Whip Dick Durbin (D-Ill.) said of Manchin and Sinema. “This president has been engaged from the start, in working with all the leaders, and particularly with those two senators." As he does that, Biden has labored to project a sense of optimism about his progress. White House officials say they’re encouraged by what they described as the accelerated pace of the talks, even as the Oct. 31 timetable appears exceedingly ambitious. Another explanation for the approach was baked in long ago. Biden is a 36-year veteran of the Senate with a heightened sense of his own negotiating instincts and abilities to move major legislation through the chamber. A self-admitted schmoozer, he has avoided doing much to shame Manchin and Sinema, preventing many details from their conversations and about his own preferences from spilling into public view. “There’s a lot of complaining about what the message has been on this package, but when you’re trying to fight for every vote, the coverage inevitably becomes about the process and numbers,” said John Podesta, a top aide to former Presidents Barack Obama and Bill Clinton and a major climate activist. “When you are inside talking one-on-one to members trying to convince people to stay with you or come on board it’s very hard to create a press environment which is different from what they’ve got.” Biden has resumed his in-person meetings with Congress’ return to Washington, including Tuesday sit-downs that involved Vice President Kamala Harris and Treasury Secretary Janet Yellen. There's a deepening acknowledgment that he has to hurry. “They really are now in a circumstance where they will take on more and more water unless they can close the framework,” Podesta added. “I think they’ll do it. But it’s not like they have forever. We’re talking about this week or next week.” In his meetings, Biden has spent a considerable amount of time on the party’s collective sense of urgency, aides and allies said, telling members of his party that they simply have to deliver. The conversations have at times been crisp, with Biden telling some Democratic skeptics that in order to be part of the negotiating process, they need to articulate policies that they are for and not just what they oppose — a message similar to the one Sen. Bernie Sanders (I-Vt.) has delivered to Manchin and Sinema. Biden’s goal has been to help establish broad areas of agreement before filling in the specifics. At the same time, Biden has repeatedly cautioned his senior aides and officials not to rely on generalizations, and to prepare recommendations based on data and input from the lawmakers about their states and districts. He has stolen bits of face time with lawmakers wherever he can, keeping members back after bill signings, for example, to sound them out, and gathering with them in their districts when he’s been on the road. Moving beyond sticking points has been a challenge, and Biden is known to implore lawmakers to step back and ignore a particular area and to temporarily focus on others where they might be able to make progress. “When you see him artfully and deftly manage these hard conversations with members and guide them into a productive place, it helps remind you there is room for optimism and there is a pathway here,” said Louisa Terrell, director of the White House Office of Legislative Affairs.

#### Plan necessarily drains PC – trading off with unrelated agenda items.

Carstensen 21 Peter C. Carstensen - Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School, M.A., Yale University; LL.B., Yale Law School; former attorney at the Antitrust Division of the United States Department of Justice, where one of his primary areas of work was on questions of relating competition policy and law to regulated industries. He is a Senior Fellow of the American Antitrust Institute – “THE “OUGHT” AND “IS LIKELY” OF BIDEN ANTITRUST” – Concurrences – #1 - Feb 15, 2021 - #E&F - https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#carstensen

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities. 15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate! 16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Delivering climate spending at Glasgow’s the only way to avoid existential climate change

--NDC = “nationally determined contributions” (to net zero global emissions by 2050) = the “ratchet mechanism” where NDCs should increase each conference

--broadly, yes political will among developed countries, esp. China, already on board net zero

--political will in developing countries is explicitly conditional on Biden’s ability to pass climate finance provisions in the social infrastructure bill

--Biden’s ability to showcase credible policies to achieve an ambitious NDC + financing drives up everyone else’s NDCs sufficient to achieve 1.5 deg track

--1.5 deg key – each incremental increase above that exponentially increases existential risk – IPCC report

--not too late, Glasgow specifically is the last chance – IPCC report

Åberg et al 10-5 (Anna Åberg, research analyst in the Environment and Society Programme of Chatham House, formerly served as desk officer at the Swedish Ministry for Foreign Affairs, MSc Development Studies, London School of Economics and Political Science, BSc Business and Economics, and Politics and Economics, Lund University; Antony Froggatt, deputy director and senior research fellow in the Environment and Society Programme of Chatham House; and Rebecca Peters, Queen Elizabeth II Academy Fellow in the Environment and Society Programme of Chatham House, doctoral candidate at the University of Oxford with the UK Foreign, Commonwealth and Development Office REACH Water Security programme, MSc Development Economics, MSc Water Science and Policy, Marshall Scholar; “Raising climate ambition at COP26,” Chatham House (the Royal Institute of International Affairs, London) Research Paper, October 2021, https://www.chathamhouse.org/sites/default/files/2021-10/2021-10-05-raising-climate-ambition-at-cop26-aberg-et-al-pdf.pdf)

01

Introduction COP26 is the most important climate summit since COP21 in Paris in 2015. Over the past year, the global politics of climate change have shifted, with the election of President Joe Biden and the announcement of China’s carbon neutrality target. Addressing climate change is the defining challenge of our time. Around the globe – and across the suite of UN organizations – there is widespread recognition of the urgency to reduce greenhouse gas (GHG) emissions and to prepare for a world that is, and will continue to be, severely impacted by climate change. The foundational treaty of the international climate change regime – the United Nations Framework Convention on Climate Change (UNFCCC) – was adopted at the Rio Earth Summit in 1992.1 Its signatories agreed to ‘achieve… stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’.2 The states that have ratified the UNFCCC meet annually at the ‘Conference of the Parties’ (COP) to assess and review the implementation of the convention.3 The COP has negotiated two separate treaties since the formation of the UNFCCC: the Kyoto Protocol in 1997, and the Paris Agreement in 2015.4 The Paris Agreement was adopted by 196 parties at COP21 in 2015 and entered into force less than a year later.5 The goals of the treaty are to keep the rise in the global average temperature to ‘well below 2°C above pre-industrial levels’, ideally 1.5°C; enhance the ability to adapt to climate change and build resilience; and make ‘finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development’.6 The agreement adopts a ‘bottom-up’ and non-standardized approach, where parties themselves set their national emission reduction targets and communicate these to the UNFCCC in the form of nationally determined contributions (NDCs).7 As things stand, the targets8 that were submitted in the run-up to COP21 are not sufficient, even if fully implemented, to limit global warming to 2°C, much less 1.5°C.9 The Paris Agreement was designed, however, to generate increased ambition over time via two components: a collective ‘global stocktake’ during which progress towards Paris Agreement goals is assessed based on country reporting,10 and the ‘ratchet mechanism’, which encourages countries to communicate new or updated NDCs every five years, with the expectation that ambition will increase over time.11 The results of the stocktake are scheduled to be released two years before NDC revisions are made.12 This sequencing is designed to allow national plans to account for the global context of the climate assessment. The first global stocktake is to be conducted between 2021 and 2023, and will be repeated every five years thereafter.13 The results of the first stocktake are due to be published around COP28. We really are out of time. We must act now to prevent further irreversible damage. COP26 this November must mark that turning point.14 UN Secretary-General António Guterres, 16 September 2021 The 26th Session of the Conference of the Parties (COP26) to the UNFCCC is to be hosted by the UK, in partnership with Italy. After a year-long delay, the conference is now scheduled to take place in Glasgow, Scotland, between 31 October and 12 November 2021.15 Organizing an in-person event during a pandemic presents a substantial challenge. The UK government is providing vaccines to accredited delegations, but doses only started to be delivered at the beginning of September 2021 and restrictions, such as quarantine requirements,16 pose further obstacles to participation.17 An alliance of 1,500 civil society organizations are among those calling for a second postponement of the COP, citing concerns about a lack of plans to enable safe and inclusive participation of delegates from, not least, the Global South.18 The UK government is, however, adamant that it will proceed with the conference as planned.19 The pandemic has changed understandings of global risks, the interconnected nature of economies and the role of governments in preparing for and responding to existential threats. This may provide impetus for accelerated climate action. The postponement of COP26 itself has been of considerable significance. Over the past year, the global politics of climate change have shifted, with the election of President Joe Biden and the announcement of China’s climate neutrality target being particularly important. Moreover, the economic recovery packages that are being rolled out to counter the economic consequences of the pandemic present an opportunity to accelerate the green transition.20 To date, however, the members of the G20 have prioritized investments in fossil fuels above those in clean energy,21 and only 10 per cent of the global expenditure is estimated to have been allocated to projects with a net positive effect on the environment.22 COP26 is the most important climate summit since COP21 in Paris, and it differs from earlier COPs in several ways: it is the first test of the ambition-raising ratchet mechanism and marks a shift from negotiation to implementation. An ambitious outcome at COP26 requires substantial action to be taken before the summit – and outside the remits of the UNFCCC process – as well as at the actual conference. Human activity has already caused the global average temperature to rise by around 1.1°C above pre-industrial levels, and every additional increase in warming raises the risks for people, communities and ecosystems. To avoid the most catastrophic climate change impacts, it is essential world leaders make every effort to limit warming to 1.5°C. Working group I of the Sixth Assessment Report of the IPCC shows it is still possible to keep warming to this critical threshold, but that unprecedented action must be taken now.23 As John Kerry, special presidential envoy for climate, stated, ‘[t]his test is now as acute and as existential as any previous one’.24 COP26 has a critical role in getting the world on track for a 1.5°C pathway, and in supporting those most affected by climate change impacts. It also constitutes a key test for the credibility of the Paris Agreement and the UNFCCC process overall. But what can and should the Glasgow summit achieve more specifically? The objective of this paper is to discuss what a positive outcome at COP26 would entail, with the dual aims of encouraging increased ambition and contributing to an informed public debate. The main argument put forth is that substantial progress must be made in three main areas, namely on increasing the ambition of NDCs; enhancing support to and addressing concerns of climate-vulnerable developing countries; and advancing the Paris Rulebook to help operationalize the Paris Agreement. COP26 is undoubtedly hugely significant and national government pledges in the run-up to Glasgow will contribute to shaping the level of future GHG emissions. However, the event is not only critical in terms of reaching an ambitious outcome on climate, it is also an important opportunity to judge the level of confidence in the international process and the UNFCCC. 02 Increasing the ambition of the NDCs A key element of COP26 will be the level of ambition of the revised NDCs put forward by governments to the UNFCCC and the extent to which these keep the 1.5°C global warming target agreed in Paris within reach. According to the United Nations Environment Programme (UNEP), greenhouse gases (GHGs) in 2019 totalled 52.4 gigatonnes of CO₂ equivalent (GtCO₂e)25 of which the majority was CO₂ (38 Gt), then methane (9.8 Gt), nitrous oxide (2.8 Gt) and F-gases (1.7 Gt).26 The same year, GHG emissions were approximately 59 per cent higher than in 1990 and 44 per cent higher than in 2000.The six largest emitters – together accounting for 62 per cent of the global total – were China (26.7 per cent), the US (13 per cent), the EU (8 per cent), India (7 per cent), Russia (5 per cent) and Japan (3 per cent) (see Figure 1).27 **[FIGURE 1 OMITTED]** According to UNEP, the implementation of the first round of NDCs would result in an average global temperature increase of 3°C above pre-industrial levels by the end of the century, with further warming taking place thereafter. If these NDC’s were fully implemented, emission levels are expected to be in the range of 56 GtCO2e (with unconditional NDCs) to 53 GtCO₂e (with conditional NDCs) by 2030.28 To align with a 2°C pathway, the ambition of the second round of NDCs would need to triple relative to the original targets, leading to emissions levels of around 41 GtCO₂e in 2030. Alignment with the 1.5°C target would require a fivefold increase in ambition, leading to emission levels around 25 CO₂e in 2030 (see Figure 2).29 **[FIGURE 2 OMITTED]** The Paris Agreement states that parties shall communicate an NDC every five years,30 and that each submission shall constitute a progression in terms of ambition.31 Parties conveyed their first round of targets prior to COP21, and were due to submit new or updated plans in 2020.32 COP26, originally scheduled for November 2020, would then take stock of the collective level of ambition of these plans vis-à-vis the temperature targets of the Paris Agreement. The postponement of the COP by one year has in practice (albeit not formally) extended the deadline for submitting NDCs to ‘ahead of COP26’. Where do we stand? The delay of COP26 has given countries more time to put forward NDCs and longer-term decarbonization targets. This effort gained significant traction when China pledged to achieve carbon neutrality by 2060 and peak its emissions before 2030, during the general debate of the 75th Session of the UN General Assembly (UNGA) in September 2020.33 Then, in November 2020, the UK submitted its NDC, pledging a 68 per cent reduction in emissions by 2030 (based on 1990 levels)34 and later added a 2035 target of 78 per cent.35 The EU has, moreover, put forward a 55 per cent reduction target relative to 1990 levels,36 with some countries within the bloc going even further, including Germany, which agreed on a 65 per cent reduction target.37 The election of President Biden has fundamentally changed the US’s position on climate change, leading to, among other things, the country re-joining the Paris Agreement.38 At a specially convened Leaders Summit on Climate – hosted by the US – the Biden administration presented an NDC with an emission reduction target of 50–52 per cent39 (based on 2005 levels, which is equivalent to 40–43 per cent below 1990 levels40). During the summit, countries including Canada, Japan and others pledged more ambitious NDC targets.41 While there is more pressure on governments to act on climate change, due to its increasingly devastating impacts, there are also more opportunities for carbon mitigation through available alternative technologies and systems, as well as falling renewable energy costs (see Box 2). Table 1 details the NDC targets put forward by G20 countries prior to COP21 in Paris and the extent to which these have since been revised. The updated NDCs have been assessed by the independent body, Climate Action Tracker, which has analysed to what extent the NDCs align with the 1.5°C pathway. The analysis also looks at domestic policies and actions, which are important as they provide an indication of whether governments are following through on their promises. **[TABLE 1 OMITTED]** As of September 2021, 85 countries and the EU27 had submitted new or updated NDCs, covering around half of global GHG emissions. Some parties, like China and Japan, have proposed new targets but not yet submitted them formally while around 70 parties – including G20 countries like India, Saudi Arabia and Turkey – have neither proposed nor communicated a revised NDC target. Several parties have, moreover, submitted new NDCs without increasing ambition. These include Australia, Brazil, Indonesia, Mexico, New Zealand, Russia, Singapore, Switzerland and Vietnam.42 In some of these cases, adjustments in baselines mean that ambition has de facto decreased (Brazil and Mexico).43 Analysis published by Climate Action Tracker in September 2021 shows that the NDC updates only narrow the gap to 1.5°C by, at best, 15 per cent (4 GtCO₂e). This leaves a large gap of 20–23 GtCO₂e.44 Similar analysis from the UN underscores the need for further NDC enhancements.45 If all current NDCs are implemented, total GHG emissions (not including emissions associated with land use) in 2030 are projected to be 16.3 per cent higher than in 2010, and 5 per cent higher than in 2019. The emissions of the parties that have submitted new or updated NDCs are, however, expected to fall by around 12 per cent by the end of the decade, compared to 2010 levels. The UN report also highlights the importance of providing support to developing countries, as many of these have submitted NDCs that are – at least in part – conditional on the receipt of additional financial resources, capacity-building support, and technology transfer, among other things. If such support is forthcoming, global emissions could peak before 2030, with emission levels at the end of this decade being 1.4 per cent lower than in 2019. However, even the full implementation of both the unconditional and conditional elements of the NDCs would lead to an overshoot of the targets of the Paris Agreement – as alignment with 1.5°C and 2°C require cuts of 45 per cent and 25 per cent, respectively, by 2030 (relative to 2010 levels).46 A large number of countries are also making more long-term net zero emissions or carbon neutrality pledges. As of September 2021, just over 130 countries had made such commitments, but not all of them have formally presented them to the UNFCCC.47 Examples include large economies like China, Japan, Brazil, the US, South Africa, South Korea, and the EU, as well as climate-vulnerable developing countries like the Marshall Islands, Barbados, Kiribati and Bangladesh.48 Climate Action Tracker estimates that if these long-term targets – and the NDCs – are fully implemented, global warming could be limited to 2°C.49 Most of the net zero pledges are, however, formulated in vague terms that are not consistent with good practice. The long-term targets are, moreover, only credible if they are backed up by ambitious and robust 2030 NDCs,50 given that substantial cuts in emissions must occur this decade. An additional concern that has been raised when it comes to net zero pledges is that they may encourage reliance on negative emissions technologies, such as bioenergy with carbon capture and storage (BECCS), which have still to be tested at scale to assess land requirement, efficiency and economic viability.51 **[BOX 1 OMITTED]** The challenge of closing the gap Bridging the gap between current NDCs and targets that would keep warming to 1.5°C is a defining challenge for governments ahead of COP26. As mentioned, UNEP estimates that the ambition of 2030 targets would need to be enhanced fivefold vis-à-vis pledges made in 2015 to align with a 1.5°C pathway.53 Several large emitters – including the US and the EU – have now submitted their new or updated NDCs. According to Climate Action Tracker, the UK’s target is considered to be compatible with a 1.5°C pathway, while those of the US, EU, Japan and Canada are classified as ‘almost sufficient’.54 It is critical that all countries that have not yet submitted a new or updated NDC do so, and that these pledges are aligned with 1.5°C. It is equally important that countries that have submitted unambitious NDCs revisit their targets. The Paris Agreement states that parties may revise existing NDCs at any time, if the purpose is to enhance ambition.55 The G20 countries have a particularly important role to play. In July 2021, the Italian G20 presidency hosted the first ever G20 Climate and Energy Ministerial meeting. In the final communique the countries in the G20 stated that they ‘intend to update or communicate ambitious NDCs by COP26’.56 The importance of action from all members of the G20 is clear, as they collectively account for 80 per cent of global emissions and as UN Secretary-General António Guterres said, ‘there is no pathway to this [1.5°C] goal without the leadership of the G20’.57 With only a few weeks to go it is, however, unlikely that the 20–23 GtCO₂e gap in targets will be closed by COP26. At the UK-hosted COP26 ministerial in July, a number of ministers stressed that parties would need to respond to any gap remaining by the Glasgow conference. Some suggested that such a response could include a ‘clear political commitment’ to keep 1.5°C within reach, a recognition of the gap, and a plan to bridge it. More specific proposals of actions that could be taken, as part of the response, to keep the 1.5°C pathway alive were also discussed. Suggestions included, but were not limited to, encouraging countries whose NDCs are not consistent with 1.5°C to bring their 2030 targets in line before 2025 (when the third round of NDCs are due); calling for parties to submit concrete long-term strategies for reaching net zero; and/or sending clear signals to markets through actions like phasing out unabated coal, carbon pricing, fossil fuel subsidy reform, nature-based solutions, and decarbonizing transport.58 Achieving a positive COP26 outcome The ultimate benchmark for a high ambition outcome at COP26 is whether the new or updated NDCs are ambitious enough to align with a 1.5°C pathway. For many communities and ecosystems, the threat of different climate impacts between 1.5°C and 2°C – not to mention 3°C, 4°C or 5°C – is existential. Each increment of warming is anticipated to drive increasingly devastating and costly impacts, including extreme heatwaves, rising sea levels, biodiversity loss, reductions in crop yields, and widespread ecosystems damage including to coral reefs and fisheries.59 Keeping the goal of 1.5°C within reach will require substantial action this decade. Long-term targets to achieve net zero emissions or carbon neutrality have the potential to be powerful drivers of decarbonization but need to be supported by ambitious NDCs as well as concrete policies and sufficient investment. Should we reach COP26 without sufficient ambition on NDCs, parties would need to present a plan for how ambition will be raised in the early 2020s. This could include a COP decision or a political statement underscoring the need to keep warming to 1.5°C and inviting parties to revisit their NDCs earlier than the Paris timetable dictates (for instance in 2023 instead of 2025).60 To support more ambitious action, countries should look to expand international collaboration and accelerate decarbonization in key sectors. At COP26, parties can help boost the credibility of their pledges by showcasing policies, measures and sector initiatives that will accelerate decarbonization, including on the phase out of unabated coal and the increased use of electric vehicles (see Box 3). **[BOX 2 OMITTED] [FIGURE 3 OMITTED]** In the run-up to COP26, the UK government is mobilizing its counterparts and non-state actors to drive accelerated action on phasing out the use of unabated coal,65 accelerating the deployment of electric vehicles,66 protecting and restoring nature (nature-based solutions67), and aligning financial flows with the goals of the Paris Agreement.68 The role of the private sector is crucial in the transition to net zero economies and is recognized within the framework of the UNFCCC, as they can deliver funding, innovation and technology deployment at a pace and scale beyond that of most governments (see Box 1). It is hoped that some of these initiatives will lead to plurilateral agreements at or ahead of COP26, which could enhance the credibility of mitigation pledges and help keep the 1.5°C target within reach. Being able to showcase a package consisting of ambitious NDCs, plurilateral deals, and national policies at COP26 could generate positive momentum and create a sense of inevitability around the transition to net zero societies. **[BOX 3 OMITTED]** 03 Support to climate-vulnerable developing countries Increased action on climate finance, adaptation, and loss and damage is critical for supporting climate-vulnerable developing countries, strengthening trust and raising ambition on mitigation. The year 2020 was one of the warmest on record.80 As COVID-19 ravaged the world, extreme weather events continued to cause severe devastation. In Bangladesh, torrential rains submerged a quarter of the country,81 resulting in hundreds of deaths, mass displacement and damage to more than a million homes.82 Record-breaking floods in Sudan83 and Uganda84 also displaced hundreds of thousands, while super cyclone Amphan raged across South Asia.85 Extreme weather events were also a defining feature of the summer of 2021. An unprecedented heatwave may have killed almost 500 people in British Columbia,86 as well as a billion marine animals along the Canadian coastline.87 In the Chinese province of Henan people drowned in the subway after a year’s worth of rain fell in just three days.88 Germany and Belgium also experienced death and destruction as a result of severe flooding,89 while villages in Greece burned.90 The impacts of climate change are striking even harder than many anticipated,91 and as temperatures continue to rise extreme weather events are increasing in both frequency and intensity. Limiting global warming to 1.5°C is key to avoiding the most catastrophic events, but substantial measures must also be undertaken to adapt to climate change impacts and build resilience. As the summer of 2021 shows, no country is spared. It is, however, those who have emitted the least that are most at risk,92 and in many countries that are disproportionately affected by climate change – such as the least developed countries (LDCs)93 – financial constraints impede their ability to invest in adaptation, build resilience and deal with loss and damage.94 COVID-19 has aggravated this challenge: while industrialized countries have implemented unprecedented stimulus measures to support their economies – and vaccinated large parts of their populations – many developing countries remain in the midst of a health and economic catastrophe. Scaled up action on climate finance, adaptation and loss and damage are – in addition to increased ambition on mitigation – key priorities for climate-vulnerable nations ahead of COP26. Raised ambition and concrete delivery in these areas are critical for supporting those at the frontline of climate change, key to building trust, and could encourage some parties to raise the ambition of their NDC pledges. The implementation of many NDCs is, in addition, at least partly conditional upon receiving increased levels of finance, as well as other types of support.95 Honouring the $100 billion goal In 2009, developed countries committed to mobilizing $100 billion per year by 2020 for climate mitigation and adaptation in developing countries.96 This pledge was subsequently formalized in the Cancun Agreements in 201097 and reaffirmed in the Paris Agreement in 2015. The resources provided were to be ‘new and additional’98 and come from a variety of public and private sources.99 The $100 billion goal is a core element of the bargain underpinning the Paris Agreement.100 While achieving the mitigation and adaptation goals of the agreement will require trillions of dollars in investment – of which most will need to come from the private sector – the delivery of the $100 billion is critical to building trust between developed and developing countries,101 and is important for raising ambition on mitigation.102 The OECD estimates that $79.6 billion was mobilized in 2019, which is the most recent year for which official figures are available.103 In 2018, the figure was $78.9 billion, and in 2017 it was $71.2 billion.104 Though the verified figures for 2020 will not be available until 2022, it is clear the target was missed.105 Developed countries have, moreover, not yet been able to show that the pledge will be honoured in 2021, nor demonstrate conclusively how it will be met in the 2022–24 period.106 The pledge by developed nations to mobilize $100 billion to developing nations by 2020 is a commitment made in the UNFCCC process more than a decade ago. It’s time to deliver. How can we expect nations to make more ambitious climate commitments for tomorrow if today’s have not yet been met?107 Patricia Espinosa, 23 July 2021 How the goal is achieved matters. Only around one-fifth of bilateral climate finance is allocated to the LDCs,108 and locally led projects receive low priority.109 There are also concerns related to overreporting and lack of additionality. Oxfam estimates, for instance, that 80 per cent of public climate finance provided over the 2017–18 period took the form of loans or other non-grant instruments, and that the actual grant equivalent only accounted for around half of the total amount of finance reported.110 Furthermore, the Center for Global Development has found that almost half of the climate finance reported between 2009 and 2019 cannot be considered ‘new and additional’.111 There is, finally, an urgent need to close the adaptation finance gap (see next section),112 and facilitate access to finance.113 It is widely recognized that honouring the $100 billion goal is a prerequisite for success at COP26.114 The hitherto failure of developed countries to provide clarity on the issue is creating mistrust between countries,115 with the director of the International Centre for Climate Change and Development (who is also an adviser to the climate-vulnerable countries) conveying that, ‘if the money is not delivered before November, then there is little point in climate-vulnerable nations showing up in Glasgow to do business with governments that break their promises’.116 The chair of the LDC Group has also made it clear that, ‘[t]here will be no COP26 deal without a finance deal’. 117 The G7 countries play a critical role in mobilizing the $100 billion,118 and there was a hope that G7 leaders would increase their bilateral commitments substantially – and provide clarity on the $100 billion119 – when they convened in Cornwall in June 2021. Some new pledges were made. Canada, for instance, committed to doubling its climate finance through to 2025 (to CAD $5.3 billion), and Germany pledged to increase its annual commitments from €4 billion to €6 billion by 2025 at the latest.120 The G7 members collectively also committed to ‘each increase and improve’ their public climate finance contributions, and announced they would develop a new international initiative – ‘Build Back Better for the World’121 – the details of which have yet to be fleshed out. However, many developing country officials – and many observers worldwide – expressed disappointment with the summit outcome, with the climate minister of Pakistan describing the G7 commitments as ‘peanuts’.122 Several announcements on climate finance were also made during the 76th Session of the UNGA in September 2021. Most importantly, President Joe Biden pledged to double US climate finance (again) from the previously committed $5.7 billion to $11.4 billion per year by 2024. Actual delivery is, however, contingent on congressional approval.123 The EU – which already contributes around $25 billion in climate finance per year – also stepped up, announcing an additional €4 billion until 2027,124 while Italian Prime Minister Mario Draghi conveyed that Italy would shortly be announcing a new climate finance commitment.125 Though the US pledge in particular has been described as a critical step forward that ‘puts the $100 billion within reach’,126 more will need to be done.127 $100 billion is a bare minimum. But the agreement has not been kept. A clear plan to fulfil this pledge is not just about the economics of climate change; it is about establishing trust in the multilateral system.128 António Guterres, 9 July 2021

### CP – States

**The 50 states should ban the use of mandatory procedural barriers on private antitrust agreements and pass laws that procedural barriers that restrict public injunctive relief are preempted by antitrust laws.**

**Banning mandatory arbitration agreements circumvents the FAA**

**Vedder Price 21** --- Law Firm, “Ninth Circuit Ruling On AB 51 Means That Mandatory Arbitration Agreements Are Now Prohibited In California”, September 22, 2021, https://www.vedderprice.com/ninth-circuit-ruling-on--ab-51-means-that-mandatory-arbitration-agreements-are-now-prohibited-in-california

On September 15, 2021, the Ninth Circuit Court of Appeals held in Chamber of Commerce v. Bonta that the Federal Arbitration Act (“FAA”) does not fully **preempt** California Assembly Bill 51 (“AB 51”), reversing a lower court ruling holding that AB 51 was preempted by the FAA. As a result, employers are now **prohibited from requiring** applicants and employees in California to enter into **mandatory arbitration agreements** as a condition of employment.

AB 51—which added Section 432.6 to the California Labor Code—**prohibits employers** from **requiring** employees and applicants to waive any right, forum, or procedure, including the right to file a civil action or complaint, as a condition of employment or continued employment. Requiring an employee to opt out of arbitration is also deemed an **impermissible condition** of employment. A violation of Section 432.6 is a criminal misdemeanor under the Labor Code that can subject an employer to potential civil and **criminal penalties,** including up to six months in jail. AB 51 was first passed in October 2019 and was to become effective on January 1, 2020. However, U.S. District Court judge Kimberly Mueller issued a TRO on December 28, 2019, followed by a Preliminary Injunction on January 31, 2020 against the State of California, enjoining the State from enforcing AB 51 on the grounds the California statute was preempted by the FAA (as previously reported by Vedder here).

In a 2-1 decision, however, the Ninth Circuit in Bonta reversed in part and lifted the stay on enforcement. The two judges in the majority concluded that because AB 51 was focused on the conduct of the employer **prior to entering into an arbitration agreement**, the statute did not conflict with the FAA and the State was free to regulate that conduct and prohibit employers from requiring mandatory arbitration as a condition of employment. Accordingly, pursuant to Labor Code Section 432.6, employers cannot seek to require California applicants and employees to enter into mandatory arbitration agreements as a condition of employment. However, AB 51 does not void any arbitration agreements previously entered into under the FAA, does not prohibit employers from offering arbitration on a voluntary basis and, strangely, does not void or render unenforceable an arbitration agreement signed by any person going forward under the FAA, even if the agreement had been required as a condition of employment.

### DA – Court PTX

#### SCOTUS will narrow Chevron in AHA v. Becerra but they will decline to overrule Chevron in its entirety

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The Supreme Court recently granted certiorari in American Hospital Association v. Becerra, a case that presents a question relating to so-called Chevron deference. Chevron USA v. NRDC was a 1984 case in which the Court held that an administrative agency’s interpretation of an ambiguous statute was entitled to judicial deference. But this controversial precedent has come under attack in recent years, with some Justices suggesting that the Court scrap Chevron.

Plenty of good arguments exist for overturning Chevron, but to do so in American Hospital Association, the Court will need to clear a few hurdles. American Hospital Association concerns the Department of Health and Human Services’ (HHS) interpretation of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. The law sets forth certain formulas for drug reimbursement rates; in 2018, HHS cut reimbursement rates to hospitals that participate in the 340B program based on an interpretation of the statute. The American Hospital Association has challenged the interpretation, while HHS claims that its interpretation is entitled to judicial deference under Chevron.

Chevron has become the target of intense criticism over the years. Some argue that deferring to an agency’s interpretation of a statute that it is charged with administering scrambles the separation of powers. Others point out that Chevron runs counter to the Administrative Procedure Act, which instructs courts to “decide all relevant questions of law” and “interpret constitutional and statutory provisions.” And still others urge that Chevron offends due process, given the systemic advantage it confers upon the government in regulatory litigation.

But is American Hospital Association the proper vehicle for overturning Chevron? Three main obstacles block the way toward the overturning of Chevron in the case. The first is the Court’s resolution of an additional question that it asked the parties to brief, concerning the reviewability of HHS’s interpretation. The second is the Court’s potential interest in a sort of Chevron exceptionalism for interpretations about appropriations provisions. And the third is the possibility that the Court itself is just not ready to overturn Chevron, instead preferring an alternate path even if it reaches the question.

For starters, the Court could stop short of the Chevron question altogether if it finds that the agency action at issue in the case is unreviewable. The Court has long held that administrative action embodies a presumption of reviewability. Essentially, the Court assumes that a given agency action is reviewable unless a statute precludes judicial review or the court has “no law to apply” in evaluating the agency’s action. The presumption of reviewability may also be a check against broad agency discretion; some judges find such discretion—as the recent revival of interest in the nondelegation doctrine evinces—constitutionally dubious.

But Professor Nicholas Bagley has called the presumption of reviewability itself into question. In a recent Harvard Law Review article, Professor Bagley argued that the presumption has no basis in history, positive law, the Constitution, or sound policy considerations. Professor Chris Walker has made the point that because of the longstanding nature of the presumption, the Court is unlikely to shift gears in American Hospital Association. Still, the Court has asked the parties for briefing on the question whether HHS’s action is reviewable. This presents the Court with the opportunity to (1) find that the statute at issue in this case falls into one of the clearly established exceptions to the presumption of reviewability, (2) cabin the presumption somewhat, or (3) draw on Professor Bagley’s work to eschew the presumption altogether. Any of these three options would allow the Court to resolve the case on non-Chevron grounds.

Next, the Court might decline to apply Chevron deference for a reason that is particular to the facts of this case. While jurists and commentators often speak of Chevron in general terms, some have posited that certain areas of public administration should obtain a sort of Chevron exceptionalism. As it pertains to American Hospital Association, Professor Matthew Lawrence has written that “[c]ourts should adopt a bifurcated approach to the application of Chevron for appropriations that disfavors deference for permanent appropriations provisions, but not for annual appropriations provisions.” Because Medicare payment flows from a permanent appropriation of federal money, the argument goes, Chevron deference would be especially inappropriate for HHS’s interpretation of a Medicare appropriations provision. This is because, according to Professor Lawrence, deferring to agency interpretations of permanent appropriations provisions may do significant violence to the separation of powers and seriously encroach on Congress’s domain. The Court could resolve the case on these grounds, or even take a slightly broader view and find that Chevron is inapplicable in the appropriations realm as a general matter. Either way, such a result would likely produce a narrow holding applicable only to a subset of administrative action.

Finally, the Court could squarely answer the Chevron question and still refuse to overrule its precedent. The Court might (1) declare that the statute is clear and, therefore, Chevron deference does not apply; (2) issue a Kisor-esque decision that cabins Chevron’s general applicability but keeps the precedent on life support; or (3) simply reaffirm Chevron on stare decisis grounds and apply it to the present case. There is some overlap among these three doctrinal paths.

Beginning with the first option, Chevron itself set forth a two-step approach. At the first step, if Congress’s intent is clear, the Court must give effect to the clear statutory text. This part of Chevron is uncontroversial—if, for example, a statute commands that an agency “shall” do something, that agency’s interpretation that it “may” (and, by corollary, may not) do the thing would not be entitled to deference, because it conflicts with the clear language of the law. As such, if the Court finds the provision at issue unambiguous, it could answer the question presented in the negative without wading into the deference debate.

The second option laid out above uses the term “Kisor-esque” to refer to the Court’s recent decision in Kisor v. Wilkie. There, the Court was faced with the question whether to overturn Auer v. Robbins, which stands for the principle that courts must defer to agencies’ interpretations of their own ambiguous regulations. In Kisor, the Court upheld Auer, but significantly cabined its application. Writing for the Court, Justice Kagan explained that Auer deference is only proper when a regulation is “genuinely ambiguous,” determined after rigorous deployment of the full set of the canons of statutory interpretation. Moreover, the Court delineated a set of situations in which Auer deference would not come into play, even if the regulation was genuinely ambiguous—these include interpretations that create unfair surprise to regulated parties, interpretations that do not implicate the agency’s substantive expertise, and interpretations that do not reflect fair and considered agency judgment.

In a concurrence, Chief Justice Roberts supplied the key fifth vote for the Kisor majority. To be sure, he wrote that “[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress,” citing Chevron. But in recent years, the Court has narrowed the set of situations in which Chevron applies, establishing what Professor Cass Sunstein once termed a “Chevron step zero.” Given what the Court did in Kisor, it would not be unheard of for the Court to come out a similar way in American Hospital Association, summarizing the step zero doctrine and declining to apply Chevron deference for any one of a host of reasons (perhaps because of the permanent appropriations issue, as described above), while leaving Chevron on the books.

#### The plan causes institutional balancing – SCOTUS couple’s the plan’s regulation with an equal and opposite pro-business ruling in AHA

Masters 20 (Brooke Masters, FT’s Chief Business Commentator and an Associate Editor, US Supreme Court adjusts to new tilt to the right, 12-10, <https://www.ft.com/content/16489a50-e828-4cc6-8d0d-a261c1f1f9d8>)

The US Supreme Court is having adjustment problems. The addition of three conservative appointees by President Donald Trump in four years has disturbed the balance and possibly destroyed the comity of America’s highest court. The arrival of Amy Coney Barrett in October, replacing the late Ruth Bader Ginsburg, gives the court a 6-3 conservative majority after decades of a 5-4 split or control by a moderate block.

A court that has been reliably pro-business for years will stay that way at a time when incoming president Joe Biden is expected to favour stricter regulation and labour rights. The court also appears poised to invalidate or sharply narrow social reforms and government programmes that are popular with the majority of Americans, including abortion rights, gay marriage and Obamacare.

Some of the justices cannot wait. Samuel Alito, long one of the most conservative, recently complained in a speech that the court’s landmark 2015 gay rights decision in Obergefell vs Hodges had made traditional views unacceptable. “You can’t say marriage is a union between one man and one woman,” he said. “Until very recently, that’s what the vast majority of Americans thought. Now it’s considered bigotry.”

The significance of Ms Barrett’s arrival was underscored last month when the court blocked New York’s Covid-19 related restrictions on public religious services, saying they violated the freedom to worship. Before Ginsburg’s death, the court had upheld similar rules in California and Nevada, holding that they were necessary to control the pandemic and did not treat religious gatherings differently from secular ones.

The New York ruling was also notable for its many sharply worded opinions. Trump appointee Neil Gorsuch declared bitterly it was “past time” to strike down such restrictions, writing: “Even if the constitution has taken a holiday during this pandemic, it cannot become a sabbatical.”

The question now is not whether the court will move to the right, but how far. History shows that even though the justices are required to base their decisions on the constitution and legal precedent, popular opinion plays a role. After all, the court has no enforcement mechanism — it de­pends on the rest of government and the respect accorded to its rulings.

In the past, when Supreme Court rulings departed too far from public consensus, it has ended up adjusting. The best known instance is often described as the “switch in time that saved nine”.

In the 1935-36 terms, the justices capped a 40-year period of conservative rulings by striking down several New Deal statutes by 5-4 votes, drawing public opprobrium and a threat from then president Franklin Roosevelt to pack the court with additional liberals. While the bill was still pending, Owen Roberts changed sides — “switched” — and voted to uphold a Washington state minimum wage bill and continued to support regulation of business.

But liberals have seen the court shy away from confrontation as well. In 1954, in Brown vs Board of Education, the court invalidated segregated schools but put off immediate implementation, saying in Brown II a year later that states and school boards merely needed to act with “all deliberate speed”.

Chief Justice John Roberts has already shown he is deeply concerned with maintaining the Supreme Court’s institutional strength. For years, he has sometimes provided the liberals with a fifth vote on questions where he felt the court’s credibility could be at stake, including a 2012 ruling that turned back the first major challenge to the Affordable Care Act (ACA) that established Obamacare, and on cases regarding abortion rights and young immigrants last spring.

Supreme Court watchers observe that its history can place a powerful weight on members

#### Overruling Chevron wrecks emerging-tech regulation

Masur 7 – Jonathan Masur, Bigelow Fellow and Lecturer in Law, University of Chicago Law School, “Judicial Deference and the Credibility of Agency Commitments”, Vanderbilt Law Review, May, 60 Vand. L. Rev. 1021, Lexis

I. Administrative Flexibility: Temporal Adjustments and Judicial Entrenchment

Administrative agencies cannot function effectively if they do not possess substantial discretion to set agency policy. Agencies exist in large degree as institutional mechanisms for solving policy questions whose intricacies and difficulties exceeded the capacities of Congress itself. An agency that lacked the freedom to choose between competing policy solutions or the flexibility to adjust its regulations in the face of scientific or economic progress would be little more than a rigid executor of Congress's will, stripped of the expertise that made it an attractive repository of policy-making authority in the first instance. Consequently, a growing consensus of administrative law scholars has long favored granting agencies ever-greater authority to enact policy changes in concert with developments in the relevant markets and technologies. n8

Pursuant to this rationale, the Supreme Court has afforded agencies broad authority to alter extant regulations or select new policy courses. Under well-established law, an agency may discard a long-standing policy in favor of a novel one, provided that it offers a coherent rationale for its decision. n9 And if an agency's current interpretation of its empowering statute is not sufficiently capacious to permit the agency to pursue this new policy, the agency may adopt a reasonable new interpretation of an old statute without relinquishing the deference that it is due under Chevron's famous two-step formulation. n10

Yet, in the two decades after Chevron, one significant obstacle remained to an agency's ability to re-interpret ambiguous statutes and adapt to changing circumstances. Until 2005, the Supreme Court treated its statutory interpretation precedents - no matter the context and regardless of whether they had involved an agency interpretation and a judicial grant of Chevron deference - as absolute and decisive. Once a court had interpreted a statute, regardless of whether the agency had already had the opportunity to proffer its own interpretation, stare decisis controlled. An agency could only re-interpret if a court had never passed on the original interpretation, or if the agency could convince the court that the court had erred in its original interpretation, without reference to Chevron.

In 2005, the Supreme Court eliminated this final impediment. While deciding an otherwise mundane issue of statutory [\*1027] interpretation in National Cable & Telecommunications Ass'n v. Brand X Internet Services, the Court announced that Chevron henceforth would trump stare decisis: an interpretation of an ambiguous statute that ordinarily would be entitled to deference under Chevron would still receive that deference - and an agency would be permitted to revise a prior statutory interpretation - irrespective of anything that a court had ever said on the subject. Ambiguous statutes had become forever ambiguous; no court could settle their meaning. n11

A. Temporal Flexibility

Congress delegates power to agencies for a wide variety of reasons. Congress may find it politically infeasible to make some necessary decision because of significant negative political ramifications, and as a result it might seek to foist responsibility off on some other actor. Alternatively, there may be a faction within Congress that hopes to accomplish via the executive branch what it cannot achieve legislatively. n12

But Congress may also delegate power in order to harness the superior expertise of an agency actor and to bring to bear on a problem a set of scientific and technological knowledge and a breadth of experience that Congress does not possess. n13 In order for this delegation to be successful - indeed, in order for it to be meaningfully a "delegation" - it must afford the recipient agency some degree of "substantive flexibility": the agency must have the freedom, when analyzing the subject matter at the heart of the delegation, to choose from among a range of acceptable policies the one that it believes is best. Accordingly, the Supreme Court has granted administrative agencies wide substantive leeway to select among competing statutory interpretations - and thus among competing policies - via the familiar two-step process set forth in Chevron, pursuant to which courts must defer to reasonable agency interpretations of ambiguous statutes. n14

Moreover, courts and commentators have long realized that agencies possess comparative institutional advantages over Congress that surpass the mere application of expertise. By shifting policymaking responsibility outside of the legislative branch, Congress is also able to avail itself of the greater agility of administrative agencies in responding to changed circumstances or adapting to new [\*1028] policy concerns. Legislation is costly and time-consuming to enact, and Congress cannot always rapidly change course when confronted with novel problems or the imminent obsolescence of old solutions. n15 Agencies are more willing and able than Congress to tweak their policy agendas. Especially in the high-technology areas, this alacrity is invaluable to agencies' ability to act in the public interest.

In order to act effectively, then, agencies must possess flexibility not only in the substantive sense described above, but also in the "temporal" sense: They must be free to alter policies over time and adapt to changes in relevant technologies and markets. n16 Much like substantive flexibility (deference, really), temporal flexibility (which I will refer to simply as "flexibility") is the lifeblood of successful agency operation. Even minor changes in technology or markets can obsolete pre-existing regulatory regimes, and it likely would be prohibitively costly for Congress to respond to every minor circumstance by amending an agency's authorizing legislation. n17 Agencies need the authority to adjust policies in order to maintain their currency and efficacy, n18 and unwise judicial doctrines that deny agencies all significant policy flexibility would undoubtedly lead to regulatory stagnation. n19

#### Extinction

Tate 15 – Jitendra S. Tate, Associate Professor of Manufacturing Engineering at the Ingram School of Engineering, Texas State University, et al., “Military And National Security Implications Of Nanotechnology”, The Journal of Technology Studies, Volume 41, Number 1, Spring, https://scholar.lib.vt.edu/ejournals/JOTS/v41/v41n1/tate.html

All branches of the U.S. military are currently conducting nanotechnology research, including the Defense Advanced Research Projects Agency (DARPA), Office of Naval Research (ONR), Army Research Office (ARO), and Air Force Office of Scientific Research (AFOSR). The United States is currently the leader of the development of nanotechnologybased applications for military and national defense. Advancements in nanotechnology are intended to revolutionize modern warfare with the development of applications such as nano-sensors, artificial intelligence, nanomanufacturing, and nanorobotics. Capabilities of this technology include providing soldiers with stronger and lighter battle suits, using nano-enabled medicines for curing field wounds, and producing silver-packed foods with decreased spoiling rate ( Tiwari, A., Military Nanotechnology, 2004 ). Although the improvements in nanotechnology hold great promise, this technology has the potential to pose some risks. This article addresses a few of the more recent, rapidly evolving, and cutting edge developments for defense purposes. To prevent irreversible damages, regulatory measures must be taken in the advancement of dangerous technological developments implementing nanotechnology. The article introduces recent efforts in awareness of the societal implications of military and national security nanotechnology as well as recommendations for national leaders.

Keywords: Nanotechnology, Implications, modern warfare

INTRODUCTION

Advances in nano-science and nanotechnology promise to have major implications for advances in the scientific field as well as peace for the upcoming decades. This will lead to dramatic changes in the way that material, medicine, surveillance, and sustainable energy technology are understood and created. Significant breakthroughs are expected in human organ engineering, assembly of atoms and molecules, and the emergence of a new era of physics and chemistry. Tomorrow’s soldiers will have many challenges such as carrying self-guided missiles, jumping over large obstacles, monitoring vital signs, and working longer periods with sleep deprivation. ( Altmann & Gubrud, Anticipating military nanotechnology, 2004 ). This will be achieved by controlling matter at the nanoscale (1-100nm). A nanometer is one-billionth of a meter. This article considers the social impact of nanotechnology (NT) from the point of view of the possible military applications and their implications for national defense and arms control. This technological evolution may become disruptive; meaning that it will come out of mainstream. Ideas that are coming forth through nanotechnology are becoming very popular and the possibilities will in practice have profound implications for military affairs as well as relations between nations and thinking about war and national security ( Altmann J. , Military Uses of Nanotechnology: Perspectives and Concerns, 2004 ). In this article some of the potential applicability uses of recent nanotechnology driven applications within the military are introduced. This article also discusses how the impact of a rapid technological evolution in the military will have implications on society.

POTENTIAL MILITARY TECHNOLOGIES

Magneto rheological Fluid (MR Fluid)

A magneto-rheological-fluid is a fluid where colloidal ferrofluids experience a body force on the entire material that is proportional to the magnetic field strength ( Ashour, Rogers, & Kordonsky, 1996 ). This allows the status of the fluid to change reversibly from a liquid to solid state. Thus, the fluid becomes intelligently controllable using the magnetic field. MR fluid consists of a basic fluid, ferromagnetic particles, and stabilizing additives ( Olabi & Grunwald, 2007 ). The ferromagnetic particles are typically 20-50μm in diameter whereas in the presence of the magnetic field, the particles align and form linear chains parallel to the field ( Ahmadian & Norris, 2008 ). Response times 21 that require impressively low voltages are being developed. Recently, ( Ahmadian & Norris, 2008 ) has shown the ability of MR fluids to handle impulse loads and an adaptable fixing for blast resistant and structural membranes. For military applications, the strength of the armor will depend on the composition of the fluid. Researchers propose wiring the armor with tiny circuits. While current is applied through the wires, the armor would stiffen, and while the current is turned off, the armor would revert to its liquid, flexible state. Depending on the type of particles used, a variety of armor technology can be developed to adapt for soldiers in different types of battle conditions. Nanotechnology could increase the agility of soldiers. This could be accomplished by increasing mechanical properties as well as the flexibility for battle suit technology.

Nano Robotics

Nanorobotics is a new emerging field in which machines and robotic components are created at a scale at or close to that of a nanometer. The term has been heavily publicized through science fiction movies, especially the film industry, and has been growing in popularity. In the movie Spiderman , Peter Parker and Norman Osborn briefly talk about Norman’s research which involves nanotechnology that is later used in the Green Goblin suit. Nanorobotics specifically refers to the nanotechnology engineering discipline or designing and building nano robots that are expected to be used in a military and space applications. The terms nanobots, nanoids, nanites, nanomachines or nanomites have been used to describe these devices but do not accurately represent the discipline. Nanorobotics includes a system at or below the micrometer range and is made of assemblies of nanoscale components with dimensions ranging from 1 to 100nm ( Weir, Sierra, & Jones, 2005 ). Nanorobotics can generally be divided into two fields. The first area deals with the overall design and control of the robots at the nanoscale. Much of the research in this area is theoretical. The second area deals with the manipulation and/or assembly of nanoscale components with macroscale manipulators ( Weir, Sierra, & Jones, 2005 ). Nanomanipulation and nanoassembly may play a critical role in the development and deployment of artificial robots that could be used for combat.

According to Mavroidis et al. ( 2013 ), nanorobots should have the following three characteristic abilities at the nano scale and in presence of a large number in a remote environment. First they should have swarm intelligence. Second the ability to self-assemble and replicate at the nanoscale. Third is the ability to have a nano to macro world interface architecture enabling instant access to the nanorobots with control and maintenance. ( Mavroidis & Ferreira, 2013 ) also states that collaborative efforts between a variety of educational backgrounds will need to work together to achieve this common objective. Autonomous nanorobots for the battlefield will be able to move in all media such as water, air, and ground using propulsion principles known for larger systems. These systems include wheels, tracks, rotor blades, wings, and jets ( Altmann & Gubrud, Military, arms control, and security aspects of nanotechnology, 2004 ). These robots will also be designed for specific military tasks such as reconnaissance, communication, target destination, and sensing capabilities. Self-assembling nanorobots could possibly act together in high numbers, blocking windows, putting abrasives into motors and other machines, and other unique tasks.

Artificial Intelligence

Artificial intelligence (AI) is a vast emerging field that can be very thought provoking. AI has been seen recently in a number of movies and television shows that have predicted what the possibility of an advanced intelligence could do to our society. This intellect could possibly outperform human capabilities in practically every field from scientific research to social interactions. Aspirations to surpass human capabilities include tennis, baseball, and other daily tasks demanding motion and common sense reasoning (Kurzweil, 2005). Examples where AI could be seen include chess playing, theorem proving, face and speech recognition, and natural language understanding. AI has been an active and dynamic field of research and development since its establishment in 1956 at the Dartmouth Conference in the United States ( Cantu-Ortiz, 2014 ). In past decades, this has led to the development of smart systems, including phones, laptops, medical instruments, and navigation software.

One problem with AI is that people are coming to a conclusion about its capabilities too soon. Thus, people are becoming afraid of the probability that an artificial intelligent system could possibly expand and turn on the human race. True artificial intelligence is still very far from becoming “alive” due to our current technology. Nanotechnology might advance AI research and development. In nanotechnology, there is a combination of physics, chemistry and engineering. AI relies most heavily on biological influence as seen genetic algorithm mutations, rather than chemistry or engineering. Bringing together nanosciences and AI can boost a whole new generation of information and communication technologies that will impact our society. This could be accomplished by successful convergences between technology and biology ( Sacha & P., 2013 ). Computational power could be exponentially increased in current successful AI based military decision behavior models as seen in the following examples.

Expert Systems

Artificial intelligence is currently being used and evolving in expert systems (ES). An ES is an “intelligent computer program that uses knowledge and interference procedures to solve problems that are difficult enough to require significant human expertize to their solution” ( Mellit & Kalogirou, 2008 ). Results early on in its development have shown that this technology can play a significant impact in military applications. Weapon systems, surveillance, and complex information have created numerous complications for military personnel. AI and ES can aid commanders in making decisions faster than before in spite of limitations on manpower and training. The field of expert systems in the military is still a long way from solving the most persistent problems, but early on research demonstrated that this technology could offer great hope and promise ( Franklin, Carmody, Keller, Levitt, & Buteau, 1988 ). Mellit et al. argues that an ES is not a program but a system. This is because the program contains a variety of different components such as a knowledge base, interference mechanisms, and explanation facilities. Therefore they have been built to solve a range of problems that can be beneficial to military applications. This includes the prediction of a given situation, planning which can aid in devising a sequence of actions that will achieve a set goal, and debugging and repair-prescribing remedies for malfunctions.

Genetic Algorithms

Artificial intelligence with genetic algorithms (GA) can tackle complex problems through the process of initialization, selection, crossover, and mutation. A GA repeatedly modifies a population of artificial structures in order to adjust for a specific problem (Prelipcean et al., 2010). In this population, chromosomes evolve over a number of generations through the application of genetic operations. This evolution process of the GA allows for the most elite chromosomes to survive and mate from one generation to the next. Generally, the GA will include three genetic operations of selection, crossover, and mutation. This is currently being applied to solving problems in military vehicle scheduling at logistic distribution centers.

Nanomanufacturing

Nanomanufacturing is the production of materials and components with nanoscale features that can span a wide range of unique capabilities. At the nanoscale, matter is manufactured at lengthscales of 1-100nm with precise size and control. The manufacturing of parts can be done with the “bottom up” from nano sized materials or “top down” process for high precision. Manufacturing at the nanoscale could produce new features, functional capabilities, and multi-functional properties. Nanomanufacturing is distinguished from nanoprocessing, and nanofabrication, whereas nanomanufacturing must address scalability, reliability and cost effectiveness ( Cooper & Ralph, 2011 ). Military applications will need to be very tough and sturdy but at the same time very reliable for use in harsh environments with the extreme temperatures, pressure, humidity, radiation, etc. The use of nano enabled materials and components increase the military’s in-mission success. Eventually, these new nanotechnologies will be transferred for commercial and public use. Cooper et al. makes known how nanomanufacuring is a multi-disciplinary effort that involves synthesis, processing and fabrication. There are however a great number of challenges that as well as opportunities in nanomanufacturing R&D such as;

Predictions from first principles of the progress and kinetics of nanosynthesis and nano-assembly processes.

23 Understand and control the nucleation and growth of nanomaterial and nanostructures and asses the effects of catalysts, crystal orientation, chemistry, etc. on growth rates and morphologies.

R&D IN THE USA

The USA is proving to have a lead in military research and development in nanotechnology. Research spans under umbrella of applications related to defense capabilities. NNI has provided funds in which one quarter to one third goes to the department of defense – in 2003, $ 243 million of $774 million. This is far more than any country and the US expenditure would be five times the sum of all the rest of the world ( Altmann & Gubrud, Military, arms control, and security aspects of nanotechnology, 2004 ).

INITIATIVES

The National Nanotechnology Initiative

The National Nanotechnology Initiative (NNI) was unveiled by President Clinton in a speech that he gave on science and technology policy in January of 2000 where he called for an initiative with funding levels around 500 million dollars ( Roco & Bainbridge, 2001 ). The initiative had five elements. The first was to increase support for fundamental research. The second was to pursue a set of grand challenges. The third was to support a series of centers of excellence. The fourth was to increase support for research infrastructure. The fifth is to think about the ethical, economic, legal and social implications and to address the education and training of nanotechnology workforce ( Roco & Bainbridge, 2001 ). NNI brings together the expertise needed to advance the potential of nanotechnology across the nation.

ISN at MIT

The Institute for Soldier Nanotechnologies (ISN) initiated at the Massachusetts Institute of Technology in 2002 ( Bennet-Woods, 2008 ). The mission of ISN is to develop battlesuit technology that will increase soldier survivability, protection, and create new methods of detecting toxic agents, enhancing situational awareness, while decreasing battle suit weight and increasing flexibility.

ISN research is organized into five strategic areas (SRA) designed to address broad strategic challenges facing soldiers. The first is developing lightweight, multifunctional nanostructured materials. Here nanotechnology is being used to develop soldier protective capabilities such as sensing, night vision, communication, and visible management. Second is soldier medicine – prevention, diagnostics, and far-forward care. This SRA will focus on research that would enable devices to aid casualty care for soldiers on the battle field. Devices would be activated by qualified personnel, the soldier, or autonomous. Eventually, these devices will find applications in medical hospitals as well. Third is blast and ballistic threats – materials damage, injury mechanisms, and lightweight protection. This research will focus on the development of materials that will provide for better protection against many forms of mechanical energy in the battle field. New protective material design will decrease the soldier’s risk of trauma, casualty, and other related injuries. The fourth SRA is hazardous substances sensing. This research will focus on exploring advanced methods of molecularly complicated hazardous substances that could be dangerous to soldiers. This would include food-borne pathogens, explosives, viruses and bacteria. The fifth and final is nanosystems integration –flexible capabilities in complex environments. This research focuses on the integration of nano-enabled materials and devices into systems that will give the soldier agility to operate in different environments. This will be through capabilities to sense toxic chemicals, pressure, and temperature, and allow groups of soldiers to communicate undetected (Institute for Soldier Nanotechnologies).

SOCIAL IMPLICATIONS

The purpose of country’s armed forces is to provide protection from foreign threats and from internal conflict. On the other hand, they may also harm a society by engaging in counter- productive warfare or serving as an economic burden. Expenditures on science and technology to develop weapons and systems sometimes produces side benefits, such as new medicines, technologies, or materials. Being ahead in military technology provides an important advantage in armed conflict. Thus, all potential opponents have a strong motive for military research and development. From the perspective of international security and arms control it appears that in depth studies of the social science of these implications has hardly begun. Warnings about this emerging technology have been sounded against excessive promises made too soon. The public may be too caught up with a “nanohype” ( Gubrud & Altmann, 2002 ). It is essential to address questions of possible dangers arising from military use of nanotechnology and its impacts on national security. Their consequences need to be analyzed.

NT and Preventative Arms Control

Background

The goal of preventive arms control is to limit how the development of future weapons could create horrific situations, as seen in the past world wars. A qualitative method here is to design boundaries which could limit the creation of new military technologies before they are ever deployed or even thought of. One criterion regards arms control and how the development of military and surveillance technologies could go beyond the limits of international law warfare and control agreements. This could include autonomous fighting war machines failing to define combatants of either side and Biological weapons could possibly give terrorist circumvention over existing treaties ( Altmann & Gubrud, Military, arms control, and security aspects of nanotechnology, 2004 ). The second criterion is to prevent destabilization of the military situation which emerging technologies could make response times in battle much faster. Who will strike first? The third criterion, according to Altman & Gubrud, is how to consider unintended hazards to humans, the environment, and society. Nanoscience is paving the way for smaller more efficient systems which could leak into civilian sectors that could bring risks to human health and personal data. Concrete data on how this will affect humans or the environment is still uncertain.

Arms Control Agreements

The development of smaller chemical or biological weapons that may contain less to no metal could potentially violate existing international laws of warfare by becoming virtually undetectable. Smaller weapons could fall into categories that would undermine peace treaties. The manipulation of these weapons by terrorist could give a better opportunity to select specific targets for assassination. Anti- satellite attacks by smaller more autonomous satellites could potentially destabilize the space situation. Therefore a comprehensive ban on space weapons should be established ( Altmann & Gubrud, 2002 ). Autonomous robots with a degree of artificial intelligence will potentially bring great problems. The ability to identify a soldiers current situation such as a plea for surrender, a call for medical attention, or illness is a a very complicated tasks that to an extent requires human intelligence. This could potentially violate humanitarian law.

Stability

New weapons could pressure the military to prevent attacks by pursuing the development of new technologies faster. This could lead to an arms race with other nations trying to attain the same goal. Destabilization may occur through faster action, and more available nano systems. Vehicles will become much lighter and will be used for surveillance. This will significantly reduce time to acquire a targets location. Medical devices implanted in soldiers’ bodies will enable the release of drugs that influence mood and response times. For example, an implant that attaches to the brains nervous system could give the possibility to reduce reaction time by processing information much faster than usual ( Altmann & Gubrud, Anticipating military nanotechnology, 2004 ). [AI] Artificial intelligence based genetic algorithms could make tactical decisions much faster through computational power by adapting to a situations decision. Nano robots could eavesdrop, manipulate or even destroy targets while at the same time being undetected ( Altmann J. , Military Uses of Nanotechnology: Perspectives and Concerns, 2004 ).

Environment Society & Humans

Human beings have always been exposed to natural reoccurring nanomaterials in nature. These particles may enter the human body through respiration, and ingestion ( Bennet- Woods, 2008 ). Little been known about how manufactured nanoscale materials will have an impact to the environment. Jerome (2005) argues that nanomaterials used for military uniforms could break of and enter the body and environment. New materials could destroy species of plants and animal. Fumes from fuel additives could be inhaled by military personnel. Contaminant due to weapon blasts could lead to diseases such as cancer or leukemia due to absorption through the skin or inhalation. Improper disposal of batteries using nano particles could also affect a wide variety of species. An increase in nanoparticle release into the environment could be aided by waste streams from military research facilities. Advanced nuclear weapons that are miniaturized may leave large areas of soil contaminated with radioactive materials. There is an increase in toxicity as the particle size decrease which could cause unknown environmental changes. Bennet-woods ( 2008 ) argues that there is great uncertainty in which the way nano materials will degrade under natural conditions and interact with local organisms in the environment.

Danger to society could greatly be affected due to self-replicating, mutating, mechanical or biological plagues. In the event that these intelligent nano systems were to be unleashed, they could potentially attack the physical world. There are a number of applications that will be developed with nanotechnology that could potentially crossover from the military to national security that can harm the civilian sector ( Bennet-Woods, 2008 ). There is a heightened awareness that new technologies will allow for a more efficient access to personal privacy and autonomy ( Roco & Bainbridge, 2005 ). Concerns regarding artificial intelligence acquiring a vast amount of personal data, voice recognition, and financial data will also arise. Implantable brain devices, intended for communication, raise concerns for actually observing and manipulating thoughts. Some of the most feared risks due to nanotechnology in the society are the loss of privacy ( Flagg, 2005 ). Nano sensors developed for the battlefield could be used for eavesdropping and tracking of citizens by state agencies. This could lead to improvised warfare or terrorism. Bennet-Woods ( 2008 ) argues that there should be an outright ban on nanoenabled tracking and surveillance devices for any purpose.

Nanotechnology in combination with biotechnology and medicine raise concerns regarding human safety. This includes nanoscale drugs that may allow for improvements in terrorism alongside more efficient soldiers for combat. Bioterrorism could greatly be improved through nano-engineered drugs and chemicals ( Milleson, 2013 ). Body implants could be used by soldiers to provide for better fighting efficiency but in the society, the extent in which the availability of body manipulation will have to be debated at large ( Altmann J. , Nanotechnology and preventive arms control, 2005 ). Brain implanted stimulates could become addictive and lead to health defects. The availability of body and brain implants could have negative effects during peace time. Milleson ( 2013 ) argues that there is fear that this technology could destabilize the human race, society, and family. Thus, the use in society should be delayed for at least a decade.

CONCLUSIONS

Nanoscience will lead to a revolutionary development of new materials, medicine, surveillance, and sustainable energy. Many applications could arrive in the next decade. The US is currently in the lead in nanoscience research and development. This equates to roughly five times the sum of all the rest of world. It is essential to address the potential risks that cutting edge military applications will have on warfare and civilian sector. There is a potential for mistrust in areas where revolutionary changes are expected. There are many initiatives by federal agencies, industry, and academic institutions pertaining to nanotechnology applications in military and national security. Preventive measures should be coordinated early on among national leaders. Scientists propose for national leaders to follow general guidelines. There shall be no circumvention of existing treaties as well as a ban on space weapons. Autonomous robots should be greatly restricted. Due to rapidly advancing capabilities, a technological arms race should be prevented at all costs. Nanomaterials could greatly harm humans and their environment therefore nations should work together to address safety protocols. The national nanotechnology of different nations should build confidence in addressing the social implications and preventive arms control from this technological revolution.

### CP – Section 5

#### The FTC should issue clear enforcement guidance that the presently-existent phrase “unfair methods of competition in or affecting commerce” in Section 5 of the FTCA includes anticompetitive business practices by the private sector that impose procedural barriers on private antitrust. The FTC should release a policy statement and data sets that reflects this and enforce accordingly.

#### The counterplan solves and competes---the FTC interprets current authority without creating new prohibitions.

Kahn 21 et al; This is a recent joint statement released by the five Federal Trade Commissioners. The Chair of the Federal Trade Commission is Lina Khan - an Associate Professor of Law at Columbia Law School. Also on the Commission is Rohit Chopra – who was previously The Assistant Director of the Consumer Financial Protection Bureau, as well as Rebecca Slaughter - an American attorney who was previously the acting chair of the Federal Trade Commission. Two others also sit on the Commission. “STATEMENT OF THE COMMISSION On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act” - July 9, 2021 - #E&F – modified for language that may offend - https://www.ftc.gov/system/files/documents/public\_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition in or affecting commerce.”1 In 2015, the Federal Trade Commission under Chairwoman Edith Ramirez published the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (hereinafter “2015 Statement”), which established principles to guide the agency’s exercise of its “standalone” Section 5 authority.2 Although presented as a way to reaffirm the Commission’s preexisting approach to Section 5 and preserve doctrinal flexibility,3 the 2015 Statement contravenes the text, structure, and history of Section 5 and largely writes the FTC’s standalone authority out of existence. In our ~~view~~ (perspective), the 2015 Statement abrogates the Commission’s congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute. Accordingly, because the Commission intends to restore the agency to this critical mission, the agency withdraws the 2015 Statement.

I. Background

On August 13, 2015, the Federal Trade Commission issued the 2015 Statement, which announced that the Commission would apply Section 5 using “a framework similar to the rule of reason,” by only challenging actions that “cause, or [are] likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications[.]”4 The 2015 Statement advised that the Commission is “less likely” to raise a standalone Section 5 claim “if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm.”5

In a statement accompanying the issuance of these principles, the Commission explained that its enforcement of Section 5 would be “aligned with” the Sherman and Clayton Acts and thus subject to “the ‘rule of reason’ framework developed under the antitrust laws[.]”6 In a speech announcing the statement, Chairwoman Ramirez noted that she favored a “common-law approach” to Section 5 rather than “a prescriptive codification of precisely what conduct is prohibited.”7 She also acknowledged that the Commission’s policy statement was codifying an interpretation of Section 5 that is more restrictive than the Commission’s historic approach and more constraining than the prevailing case law.8 She added, “[W]e now exercise our standalone Section 5 authority in a far narrower class of cases than we did throughout most of the twentieth century.”9

With the exception of certain administrative complaints involving invitations to collude, the agency has pled a standalone Section 5 violation just once in the more than five years since it published the statement. 10

II. The Text, Structure, and History of Section 5 Reflect a Clear Legislative Mandate Broader than the Sherman and Clayton Acts

By tethering Section 5 to the Sherman and Clayton Acts, the 2015 Statement negates the Commission’s core legislative mandate, as reflected in the statutory text, the structure of the law, and the legislative history, and undermines the Commission’s institutional strengths.

In 1914, Congress enacted the Federal Trade Commission Act to reach beyond the Sherman Act and to provide an alternative institutional framework for enforcing the antitrust laws. 11 After the Supreme Court announced in Standard Oil that it would subject restraints of trade to an open-ended “standard of reason” under the Sherman Act, lawmakers were concerned that this approach to antitrust delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts.12 For instance, Senator Newlands complained that Standard Oil left antitrust regulation “to the varying judgments of different courts upon the facts and the law”; he thus sought to create an “administrative tribunal … with powers of recommendation, with powers of condemnation, [and] with powers of correction.”13 Likewise, a 1913 Senate committee report lamented that the rule of reason had made it “impossible to predict” whether courts would condemn many “practices that seriously interfere with competition, and are plainly opposed to the public welfare,” and thus called for legislation “establishing a commission for the better administration of the law and to aid in its enforcement.”14 These concerns spurred the passage of the FTC Act, which created an administrative body that could police unlawful business practices with greater expertise and democratic accountability than courts provided.15

At the heart of the statute was Section 5, which declares “unfair methods of competition” unlawful.16 By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law. The structure of Section 5 also supports a reading that is not limited to an extension of the Sherman Act. Notably, the FTC Act’s remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of “unfair methods of competition,” and Section 5 provides no private right of action, shielding violators from private lawsuits and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act, but provides a more limited set of remedies.17

The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to leave it to the Commission to determine which practices fell into the category of “unfair methods of competition” rather than attempt to define through statute the various unlawful practices, given that “there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”18 Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws. 19 For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was “to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law.”20

The Supreme Court has repeatedly affirmed this view of the agency’s Section 5 authority, holding that the statute, by its plain text, does not limit unfair methods of competition to practices that violate other antitrust laws. 21 The Court, recognizing the Commission’s expertise in competition matters, has given “deference”22 and “great weight”23 to the Commission’s determination that a practice is unfair and should be condemned.

#### Our planks about *clear statements* and *data sets* mean CP avoids politics and rollback.

* Assumes rollback efforts from either Political and Judicial actors.
* Empirical examples of FTC rollback go *Neg* – those episodes DID NOT include policy statements or data sets.

Kovacic 15 et al; William E. Kovacic - Global Competition Professor of Law and Policy, George Washington University Law School; Non-Executive Director, United Kingdom Competition and Markets Authority. From January 2006 to October 2011, he was a member of the Federal Trade Commission and chaired the agency from March 2008 to March 2009. - “The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness” - 100 Iowa L. Rev. 2085 (2015) - #E&F - https://ilr.law.uiowa.edu/print/volume-100-issue-5/the-federal-trade-commission-as-an-independent-agency-autonomy-legitimacy-and-effectiveness/

Longevity for its own sake is hardly a worthy aim. There is little evident value in preserving a competition agency that ensures its survival by committing itself to unobtrusive law enforcement and declining to confront important and potentially controversial market failures. If a competition agency is to retain an economically significant enforcement role, one must ask how the agency is to perform that role without: (a) succumbing to pressure that undermines its capacity to make merits-based decisions about how to exercise its power to bring and resolve cases or use other instruments in its policy-making portfolio; and (b) losing the accountability and effectiveness that requires some connection to and engagement with the political process. What measures might enable a competition agency to resist suggestions that it undertake fundamentally flawed initiatives? How can one protect meritorious enforcement programs from political attack and intervention by political branches of government as such programs come to fruition? Presented below are some possible solutions. A. Greater Specification of Authority One approach is to avoid extremely open-ended grants of authority which application invites objections that the agency has overreached its mandate or inspires political demands that it use seemingly elastic powers to address all perceived economic problems. A fuller specification of powers and elaboration of factors to be considered in applying the agency’s mandate can supply a more confident basis for the authority’s exercise of power and a stronger means to resist arguments that it enjoys unbounded power. B. More Transparency, Including Reliance on Policy Statements and Guidelines Greater transparency in operations can increase the agency’s perceived legitimacy and supply a useful barrier to destructive political intervention. The foundations of a strong transparency regime include the compilation and presentation of complete data sets that document agency activity and matter-specific transparency devices, such as the preparation of statements that explain why the agency closed a specific investigation. Competition agencies can usefully rely extensively upon policy statements and guidelines to communicate their enforcement intentions and delimit the intended application of their powers. One purpose of such statements is to suggest how the agency defines the bounds of the more open-ended and inevitably ambiguous grants of authority its enabling statutes. For example, the FTC’s policy statements in the early 1980s concerning consumer unfairness and deception were important steps towards defining how the agency intended to apply its generic consumer protection powers. By articulating the bases upon which it would challenge unfair or deceptive conduct, the Commission strengthened external perceptions (within the business community and within Congress) that it would exercise its powers within structured, principled boundaries, and it increased, as well, its credibility before courts. The FTC has never issued a policy statement concerning its authority to ban unfair methods of competition, and the failure to do so has impeded the effective application of this power. A second important use of policy statements is to introduce plans for innovative enforcement programs. Before embarking upon a new series of initiatives, the competition agency would issue a policy statement that identifies conduct it intends to examine and, in stated circumstances, proscribe. Here, again, the FTC’s experience provides a useful illustration. Policy statements would be useful when the agency seeks to use section 5 of the FTC Act to reach beyond existing interpretations of the Sherman and Clayton Acts, or to apply conventional antitrust principles to classes of activity previously undisturbed by antitrust intervention. By issuing a policy statement before commencing lawsuits, the FTC would give affected parties an opportunity to comment upon the wisdom of the agency’s proposed course of action and to adjust their conduct. Such an approach would likely increase confidence within industry and within Congress that the Commission is acting fairly and responsibly, and it could well make courts more receptive to the FTC’s application of section 5 as well.

### DA – FTC

#### Antitrust enforcement resources determine commitment to ongoing GAFA litigation – plan’s broadened agenda fatally overstretches

Kantrowitz 20 (Alex Kantrowitz, journalist covering Big Tech, Founder at Big Technology, independent newsletter and podcast, former Senior Technology Reporter at BuzzFeed, BA Industrial and Labor Relations, Cornell University, Special Student, Political Science and International Relations, Boğaziçi University, Istanbul; **internally citing former DOJ and FTC employees**; “‘It’s Ridiculous.’ Underfunded FTC and DOJ Can’t Keep Fighting the Tech Giants Like This,” Big Technology, 9-17-2020, - #E&F - https://bigtechnology.substack.com/p/its-ridiculous-underfunded-us-regulators)

“The agencies are severely resource-constrained,” Michael Kades, an-ex FTC trial lawyer who spent 11 years at the agency, told Big Technology.

The Federal Trade Commission and Department of Justice’s antitrust division have a combined annual budget below what Facebook makes in three days. The FTC runs on less than $350 million per year, the DOJ’s antitrust division on less than $200 million. Facebook made $18 billion last quarter alone.

The funding disparity between the tech giants and their regulators leads to an unbalanced fight, current and ex-staffers said: The agencies can’t investigate the tech giants to the extent they’d like. They might shy away from complex cases fearing a resource-draining battle. And when they investigate the tech giants, they often see former colleagues with intricate knowledge of their strategy and ability to act (or lack thereof) representing these companies. Without significant budget increases, the tech giants may well continue to act unrestrained with little fear of repercussions.

“DOJ is under-resourced, FTC it’s ridiculous,” one ex DOJ-staffer told Big Technology.

This doesn’t mean these agencies are entirely hamstrung; they can typically marshall the resources to bring a clear-cut case. “They want to win,” one ex-FTC official said. “If it's really egregious, and they find that in discovery, the attorneys are going to put a case together and go after it.” But when you can only take up a limited number of cases due to resource constraints, things inevitably slip through.

“When I was there, the privacy wing had maybe 50 people, and that's probably generous. That's lawyers, support staff, everyone,” Justin Brookman, the former policy director at the FTC’s office of technology research and investigation, told Big Technology. “If they were to bring a case, that would tie up half the resources of the group. And they had two litigations ongoing and that took up most of everyone's time.” The agency’s budget has barely increased since Brookman left in 2017, while the tech giants have added trillions of dollars to their market caps.

Inside the FTC and DOJ, employees are aware of the tech giants’ ability to fight, and the corporations’ budgets tend to live inside their heads. “Facebook will have the ability to raise every single issue, if they want to,” Kades said. “It doesn't have to be a winner, doesn't have to be close to winner. If they wanted to take this position in litigation, they can make every procedural maneuver difficult, they can not cooperate on discovery, they can fight on scheduling, they don't have to win even half of those, but it would just suck up resources.” The ability to do this, not even the action itself, can impact regulators’ thinking.

Agency staffers are typically mission-driven and knowingly work for salaries below private-sector rates, but the resource-rich tech giants are now poaching directly from agencies at a rate remarkable even for Washington’s revolving door between the private and public sector.

Kate Patchen, a DOJ antitrust chief, went directly to Facebook in 2018. Bryson Bachman, a high-ranking attorney in the DOJ's antitrust division, became a senior counsel at Amazon in 2018. Scott Fitzgerald, who worked in the DOJ’s antitrust division for nearly 13 years, became a corporate counsel working on regulation for Amazon this May. At the FTC, senior attorney Laura Berger moved to Microsoft in 2018 to become a privacy director for LinkedIn. And Nithan Sannappa, a well-regarded attorney in the agency’s division of privacy and identity protection left for Twitter in 2017 and is now a lawyer for Google.

The FTC declined to comment. The DOJ did not respond to an inquiry.

Hiring this type of talent gives the tech giants a major advantage in their effort to fend off regulation. Ashkan Soltani, a former chief technologist at the FTC, recalled agency lawyers hugging a former colleague who was working for the tech giants as an outside counsel as they prepared to face off in court. “They would have a really personal relationship with staff, which is kind of awkward,” he said. “And they'd know, in detail, all of the cases that the agency has currently and would be able to advise their clients whether to push hard on an issue or not.”

#### Winning GAFA breakups is key to transatlantic tech alliance

Muscolo et al 21 (Gabriella Muscolo, Commissioner, Italian Competition Authority, Rome, Fellow of the Centre of European Law of King's College London, lecturer of Company Law at the School of Specialization for Legal Professionals at the University of Rome – La Sapienza; and Alessandro Massolo, Economic advisor of Commissioner Gabriella Muscolo, Italian Competition Authority, Rome, teaching assistant at Luiss University of Rome, PhD Law and Economics, Luiss University, MA European Law and Economic Analysis, College of Europe; “WILL THE BIDEN PRESIDENCY FORGE A DIGITAL TRANSATLANTIC ALLIANCE ON ANTITRUST?“ Concurrences, #1, February 2021, - #E&F - https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#muscolo)

1. After the Trump era and in the midst of the Covid-19 pandemic, the Biden presidency will inherit a country that—as the recent riot on the US Capitol building harshly demonstrated—is politically divided, weakening and, most importantly and consequently, in danger of losing its global leadership to China.

2. Indeed, the international community expects the Biden administration to re-establish the USA’s political and economic global leadership, especially in international fora such as the World Health Organization or the Paris Climate Agreement, as it did after the Second World War.

3. The pillars of Biden’s foreign policy can be summed up by three Ds: Domestic, Deterrence and Democracy. [246] As to the first, in order to revive the US economy and catch up on high technology, Biden’s policy cannot deviate much from that of Trump’s “America First.” Thus, massive investment is also expected in infrastructure, innovation, technology and education.

4. At the same time, US foreign policy will be guided by the principle of deterrence which characterized the Cold War period. This policy will have to be adapted to the new context and, especially, to the strategies adopted by the United States’ main counterparts such as China, Russia, North Korea and Iran, which no longer rely on missiles but on the information and communication technologies (ICTs).

5. Finally, the deterrence principle will catalyse the third pillar. Democracy will in fact be the main criterion for choosing US partners in order to consolidate the West against the expansion of the East.

6. Within this context, the digital economy represents an extremely important battlefield for the US to regain world leadership. The USA is well placed when it comes to digital competition—indeed, almost all the prominent Western online platforms are American.

7. However, over the last decade, Google, Amazon, Facebook, Apple and Microsoft (hereinafter “GAFAM”) have come under severe antitrust and regulatory scrutiny, starting in the European Union and ending in the United States. A “break-up” sentiment is spreading on both sides of the Atlantic and this will certainly represent one of the main issues on Biden’s agenda. Indeed, GAFAM’s huge market power is perceived as a threat to Western democracies and has been accused of hampering competition and innovation. Both the USA and the EU know that it is fundamental to shape global standards in order to face security and privacy concerns posed by the rise of Eastern tech giants. [247] Moreover, there is a growing feeling that the growth of big tech, combined with non-democratic governments, could lead to “techno-authoritarianism.” [248]

8. Therefore, will there be a transatlantic unity when clamping down on online giants in the name of protecting and strengthening Western “techno-democracies?” A digital transatlantic alliance shall not be taken for granted.

9. Indeed, over the last decade, the EU has markedly shaped its own way of building a European data market and of facilitating the emergence of European tech companies.

10. The White Paper on Artificial Intelligence and the Communication on data strategy have made it clear that the EU has put its own digital infrastructure and assets in place, catching up with international competition in order to become one of the leaders in the digital realm. This aim is the result of a long stream of actions which started in the second half of the 1990s with the need to tackle more specific and disparate needs, such as guaranteeing that consumer data is processed fairly, lawfully and with a specific purpose [249]; providing legal protection to databases, such as copyright protection and sui generis rights. [250]

11. Furthermore, at the beginning of the new century, the European Union issued the e-Commerce Directive [251] with the aim of removing obstacles to cross-border online services in the EU. Indeed, since 2010, there has been a significant change of pac e; due to the evolution of the digital paradigm, the European Union started to adopt a more strategic view. In that year, the European Commission launched its Digital Agenda, which, among other things, gave birth to the creation of a Digital Single Market that aimed primarily to promote e-commerce within the EU.

12. In 2015, the EU made it clear that the EU Digital Single Market was a priority and released a new strategy aiming at improving access to digital goods and services, building an environment where online networks and services could prosper, exploiting it as a driver for growth.

13. A well-functioning and dynamic data economy requires the flow of data in the internal market to be enabled and protected. This is why the European Union issued the 2016 General Data Protection Regulation and developed the “European data economy strategy.” Through the latter, the European Commission proposed a series of policies and legislative initiatives to unlock the potential for re-use of different types of data and create a common European data space. In particular, it adopted the measures put forward in the European Commission’s 2018 communication Towards a common European data space, in which it proposed: (i) a review of the Directive on the re-use of public sector information (PSI Directive); (ii) an update of the 2012 Recommendation on access to and preservation of scientific information; (iii) guidance on sharing private sector data in B2B and B2G contexts. A new EU Regulation on the free flow of non-personal data was also adopted.

14. Moreover, in 2019, in order to foster the growth of the EU Digital Single Market, the European Union published another regulation in order to promote fairness and transparency for business users of online intermediation services. [252]

15. The long European legislative excursus described above concluded with the latest new regulatory package published by the European Commission at the end of 2020. The package included the Data Governance Act (DGA), [253] the Digital Services Act (DSA) [254] and the Digital Markets Act (DMA). [255] Regarding the former, the European Commission aims to provide a legal framework in order to unlock unused data, increase data accessibility and share data. The DSA builds on the e-Commerce Directive and provides a set of rules for digital service providers in order to guarantee transparency and accountability and advocates for effective obligations to tackle illegal content online. As for the DMA, it is the result of a decade of EU antitrust public enforcement and EU studies on the digital economy.

16. Indeed, the European Commission has launched several cases against online giants. Suffice it now to mention the Google saga (i.e., Google Shopping, Android and AdSense cases) and the ongoing Amazon ones. These lawsuits were all abuses of dominant positions characterized mainly by self-preferencing conducts. Despite the high sanctions imposed, the Google cases were criticized because of the lengthy and complex investigations and ineffective remedies imposed. [256]

17. This contributed to fuelling scepticism that competition law alone would not be sufficient to restore competition within digital markets. [257] As a matter of fact, the European Commission issued the DMA in order to restore contestability and fair play in EU digital markets .

18. In a nutshell, the DMA identifies a list of “core platform services” which are characterized, among other things, by extreme economies of scale, strong network and lock-in effects, almost zero marginal costs and lack of multi-homing. For instance, online search engines and social networking services can be considered core platform services.

19. The DMA defines “gatekeepers” as large online platforms which provide these kinds of services and other specific criteria. Due to their strong economic and/or intermediation position, which is entrenched and durable, gatekeepers must comply with a list of “dos” and “don’ts.” For instance, gatekeepers shall “allow third parties to inter-operate with the gatekeeper’s own services in certain specific situations” and “their business users to access the data that they generate in their use of the gatekeeper’s platform.” If the gatekeepers do not comply with these obligations, they may incur fines (up to 10% of the worldwide turnover) or periodic fines (up to 5% of the average daily turnover). In case of systematic infringement, additional remedies may be imposed. If necessary and as a last resort, non-financial penalties can be imposed, which may include behavioural and structural measures, e.g., the divestiture of (parts of) a business.

20. Thus, following these new regulations, it seems that GAFAM—who are, indeed, the main providers of core platform services in the EU digital markets—will most likely be under the European spotlight in the coming years.

21. Besides antitrust and regulations, the EU has also demonstrated its strong desire for digital independency by taking the decisive step of setting its own agenda for transatlantic cooperation, even before Biden has been sworn in. [258] Indeed, the agenda proposes a tech alliance to shape technologies, their use and their regulatory environment. In particular, on data governance, the European Union advocates cooperation “to promote regulatory convergence and facilitate free data flow with trust on the basis of high standards and safeguards.” [259] Furthermore, as for online platforms, the European Union suggests strengthening cooperation between competent authorities for antitrust enforcement in digital markets, particularly, by setting common views in market distortions. Therefore, the European Union seems to be putting itself forward as a “worldwide factory of digital rules.” [260]

22. However, this may not necessarily mean a strengthening of the digital industry in Europe. For instance, Europe’s financial system appears to be biased towards bank lending rather than equity capital, which should be more suitable for risky tech start-ups. [261

23. Moreover, the “Brussels’ effect” should not be taken for granted either. Indeed, even if the European Union confirms its new regulatory proposal, especially the DMA, GAFAM still earn 51% of their revenues in America versus 25% in Europe. Therefore, they may most likely prefer to run their European branches under local rules instead of adopting EU rules globally. [262]

24. On the other side of the Atlantic, the strategy against online behemoths seems narrower and backwards-looking. [263] Indeed, as we have introduced, in the USA we are witnessing a “Sherman Act momentum” [264] strongly advocated by the new Brandeis movement. [265]

25. During the Trump administration, GAFAM were scrutinized by American antitrust authorities. Indeed, the Department of Justice (DoJ) filed a civil antitrust lawsuit in the US District Court for the District of Columbia to prevent Google from unlawfully maintaining monopolies through anticompetitive and exclusionary practices in the internet searches and search advertising markets and to remedy competitive harm. Furthermore, the Federal Trade Commission (FTC) has also filed a lawsuit against Facebook accusing it of engaging in a systematic strategy to eliminate threats to its monopoly. [266]

26. In both cases, reference is made to possible “break-ups.” In particular, in the DoJ’s case, the deputy attorney general made specific reference to historic antitrust cases such as Standard Oil (1911) and AT&T (1982), and in the FTC’s case, permanent injunctions are explicitly advanced which require, inter alia, the divestiture of Facebook’s assets, including Instagram and WhatsApp.

27. Most recently, the Texas attorney general filed a lawsuit, accusing Google of entering into an unlawful agreement that gave Facebook special privileges in exchange for promising not to support a competing ad system in the online advertising markets. [267]

#### Only way to avoid existential risks from hegemonic competition, democratic backsliding from BOTH techno-authoritarianism AND racial capitalism, failing multilateral coop, splinternet, and unregulated AI and quantum computing

Kop 21 (Mauritz Kop, Stanford Law School TTLF Fellow, Managing Partner at AIRecht, technology consultancy firm, studied intellectual property law, labor law, and contract law at Stanford Law School, Maastricht University and VU University Amsterdam, “Democratic Countries Should Form a Strategic Tech Alliance,” Stanford - Vienna Transatlantic Technology Law Forum, Transatlantic Antitrust and IPR Developments, Stanford University, Issue No.1, 2021, https://www-cdn.law.stanford.edu/wp-content/uploads/2021/04/Mauritz-Kop\_Democratic-Countries-Should-Form-a-Strategic-Tech-Alliance\_Stanford.pdf)

Just like we embed our own values in our hi-tech systems, the authoritarian regimes do the same. With authoritarianism I mean autocratic governments that have a culture with less political participation, less checks and balances and less civil liberties.15 Societies with social norms, democratic standards and ethical priorities that are incompatible with our own system.

Subsequently, the regimes export their undemocratic ideology to our society through the construction, dissemination and functionality of their technology. 16 Main contributors to this spread of culture and ideology through technology are the Belt & Road Initiative, Confucius Institutes and Chinese multinationals. 17 I am referring here to central 4IR technologies such as 5G infrastructures, AI, big data and quantum computing. 18 Excesses involve automated social profiling systems that monitor and hinder online dissidence. This process of exporting an incompatible political ideology through technology holds the danger of permanently weakening the health of our democracy, including the rights and freedoms we care so deeply about. We should prevent that from happening.

It is important to note that we do not intend to exclude the people who are living in authoritarian or even totalitarian regimes such as China, Russia, Iran and North Korea, nor the companies that are willing to abide to democratic technological standards. Instead, our strategy should be to avoid the ideas of the regimes that are incorporated in their technology, which is never neutral.

3. The Response

What needs to be done and who should do it?

Democratic Countries Should Form a Strategic Tech Alliance. That’s the first, foundational step. The US and its democratic allies should establish a strong, broadly scoped Strategic Tech Alliance with countries that share our digital DNA. An Alliance built on strategic autonomy, mutual economic interests and shared democratic & constitutional values. Main purpose of the Strategic Tech Alliance is to win the race / stay ahead of the competition.

Multilateral cooperation with any country that has matched concerns about the outcome of the race for AI & quantum dominance in view of democratic values, is paramount. A natural starting point for a geopolitical dialogue on disruptive technology that is also in the focus of President Biden, is Transatlantic cooperation.19 In addition to the US, EU, UK & Canada, countries such as India, Israel, Japan, South-Korea, Taiwan and Australia would be great candidates to join the cause. The Strategic Tech Alliance could also connect with existing structures such as NATO.

Moreover, it is crucial and urgent that democratic countries set worldwide technology standards together. This includes the development of globally accepted benchmarks and certification. Standards based on safety, security and interoperability, with respect for our common Humanist moral values.20 Values in which the rule of law and human dignity play a leading part.

Consequently, AI & quantum products and services made within the territory of the Strategic Tech Alliance or elsewhere in the world, should adhere to specific safety and security benchmarks, before they qualify for market authorization. These should follow the high technical, legal and ethical standards that reflect Responsible, Trustworthy AI & quantum technology core values. Ex ante certification comparable to the USA Compliance Marking or the European CE-marking should be mandatory before AI and quantum infused products and services are eligible to enter the Transatlantic markets.21

In this vision, the Strategic Tech Alliance should regulate transformative technology in a harmonized way across member countries. Using a risk-based approach that incentivises sustainable innovation. For example, the Strategic Tech Alliance would share core horizontal rules that govern the production and distribution of transformative tech systems. Think of universal, overarching guiding principles of Trustworthy and Responsible AI & quantum technology that are in line with the distinctive physical characteristics of quantum mechanics.22 Technology that gained the trust of the general public has significant marketing advantages.

To preserve pre-pandemic life as we knew it, we must bake our norms, standards, principles and values into the design of our advanced hi-tech-systems.23 From the first line of code. We can accomplish this by pursuing responsible, Trustworthy tech: by actually building socially & ethically aligned AI and quantum architectures and infrastructures. 24 We should incorporate our values en bloc and make our uniform design standards and (inter)operational requirements mandatory by law. A Strategic Tech Alliance could be the engine.

4. Political Feasibility

Let us discuss arguments against the formation of a democratic, value-based Strategic Tech Alliance that will set global technology standards. First, is establishing an Alliance that opposes the authoritarian tech agenda a realistic, politically feasible scenario or mere naive utopian thinking? Will the ambition of harmonized, global technology standards be limited by a cold shorter-term sum of costs and benefits? Will Realpolitik make it fade away in beauty?

Let’s start with the United States. After the Democrats recently recaptured Senate majority, progressive policies might regain momentum. But still, forming an Alliance and setting joint tech governance goals would require a bipartisan, bicameral effort. It would require large majorities to prevent legislative filibusters. Moreover, President Biden’s primary policy objectives are battling COVID-19 together with relief measures, Medicare for All, rebuilding the country’s infrastructure and fighting climate change. Regulating Big Tech and its impact on society might have less priority. However, winning the race for AI & quantum ascendancy should be high on any president’s agenda.25

Then the EU. In recent years, the European Commission has been very active and progressive in the field of legal-ethical frameworks for emerging tech, including the conception of responsible AI and data governance models. Since it has become clear that MAGA (Make America Great Again) will no longer be the leading ideology in America for the next 4 years, Ursula von der Leyen’s Team has not missed a single opportunity to strengthen transatlantic ties and inject political momentum into the relationship. With the main goal of implementing a mutual tech governance agenda, and jointly managing the geopolitics of exponential technology.

An exception to this rule was the recent EU-China deal, which raised quite a few eyebrows in Washington.26 This trade deal makes clear that economic interests of Western democratic countries in China, in this case prompted by commercial interests of the German car industry and the Silk Road Initiative, may stand in the way of the targeted team effort needed to achieve the envisaged Strategic Tech Alliance.27 As of 2020, the EU has surpassed the US as China's largest trading partner (numbers). The economic interests are gigantic and vary widely from one Member State to another.28 For example, the Netherlands, a country of 17 million people, has an annual trade deficit with China of no less than 70 billion euros. Therefore, one might think that the EU will be less likely to ‘turn away’ from China and choose sides.

It is to be hoped that Europe has not been lulled into blissful sleep by the Chinese Siren Song of smart partnerships, better working conditions, respect for intellectual property and fair trade & investment opportunities.29 The idea that the Chinese Party apparatus will allow more openness is a strategic misconception.30 The opposite of openness, reliability, honesty and a fair level playing field happens every day before our eyes in Hong Kong.31 And it doesn't get any better. Entirely in line with the autocratic paradigms of systematic repression, inequality, arbitrariness, state surveillance and control. 32 It is not expected that the political situation and civil liberties & human rights in China will change in the short or medium term. We are competing with a political ideology that is fundamentally at odds with our own system.33

In addition, internal divisions within the EU Member States may delay the rollout of progressive political initiatives.34 Facing the portrayed challenges, Europe should speak with one voice. Further, it is to be hoped that European ambitions towards strategic autonomy and data sovereignty will not stand in the way of transatlantic partnerships in the field of AI and quantum computing, quantum sensing and the quantum internet.

Second, is there sufficient political will, enough common ground between the various continents and countries to forge such an Alliance, comparable to the foundation of the United Nations in 1945 after World War II? There currently seem to be diverging opinions between the US and the EU on antitrust, digital tax and digital trade35, and consensus on IP policy, ethics, cybersecurity and the need for global value-based standards that respect democratic freedoms, human rights and the rule of law. On the other hand, it can be quite healthy to have mutual differences, and a varied pallet of perspectives within a partnership.

Moreover, who are we to pursue worldwide, culturally sensitive norms and standards? Could this be perceived by other countries as undesirable technologically expansionist behaviour? Will excessive standardization, certification and benchmarking have ramifications on rapid innovation, global competition and consumer welfare?

Brexit has made it painfully clear how difficult it is to agree on even the most trivial affairs. The question is whether the barriers to cooperation will be removed, just because a new wind is blowing from White House.36

In conclusion: political support to realize our ideal is a precondition for success. Preferably not in a weakened compromise form, but in a manner that reflects the power of the technology and the interests at stake. Instead of an isolationist MAGA approach, policy makers on both sides of the spectrum need to see the bigger picture and the urgency of the issues at hand. And reach out to nations that historically share our values and that demonstrably meet the democratic conditions set by the Alliance to qualify for membership.

With existential challenges ahead of us, normative choices must be made. We cannot get there with transactional politics and trade deals alone. We have to bring the best of both worlds together. A combination of normative choices - which are contextual, culturally sensitive and in constant flux - and Realpolitik is the key. Making the right choices today can result in the lasting partnerships we need to respond to the big questions we face. Partnerships based on mutual trust, strategic autonomy and shared sovereignty.37 Partnerships that acknowledge the need for regulatory cooperation and a values-based approach.

5. Are We Democratic Enough Ourselves?

Let's see if we can approach this matter from other, sociocritical perspectives.

First, are the Chinese the real threat, or is it us? Are we really democratic enough ourselves?38 Is making the distinction between the democratic and the authoritarian model the correct line of thinking, the proper approach for our proposed response to the identified challenges? Are technology and data capitalism coupled with the wrong kind of self-regulation causing filter bubbles, fake news and racial bias?39 In other words, could technology that originated from Western online platforms such as Facebook, Amazon, Google and Twitter be the real source of danger? Are the behemoth platforms, with market dominance and lobbying power greater than countries, menacing our democracy? In general, absent regulation, the tech platforms have corporate social responsibility and should adopt an Apollonian mindset towards responsible entrepreneurial ideology, world view and philosophy of life, instead of a Dionysian attitude. 40

One can argue whether the harmful societal influence of the social platforms was caused by naive idealism from Silicon Valley, or by unrealistic price and profit expectations of Wall Street.41 Or by a combination thereof. In this view, the algorithms42 have become less democratic not so much as a consequence of the wrong corporate ideology, but because of the increasing pressure that shareholders are putting on tech companies.43 Thus, the system is to blame.

But can you be a role model for the rest of the world this way? Are the dangers of our privatized technology governance model not as threatening, or even more dangerous to our society than the predictable authoritarian technology governance model could ever be? Is there an enemy within, that stands at the cradle of excesses like the Capitol Insurrection? 44 Is the privatized power over the digital world a similar existential challenge, for which solutions must be developed? The answer appears to be in the affirmative. Democratic countries themselves have serious internal problems.

Moreover, there is no empirical evidence that AI will endanger democracy and reinforce authoritarianism, totalitarianism or even fascism, since AI is ideologically neutral.45 That said, shouldn’t we better use machine values instead, since human values create biases in data and algorithms, fake news and conspiracy theories?46

Be that as it may, from a higher level, a strategic democratic alliance can provide a counterbalance to both the free-market capitalism based privatized digital governance model, and the authoritarian model. In the duel for AI dominance and the battle to be the first to build a functioning multi-purpose quantum computer, the West desperately needs the Tech Giants from the Silicon Valley and Massachusetts innovation clusters.

6. Two Dominant Tech Blocks

Currently, two dominant tech blocks exist: the US and China. The blocks have incompatible political systems. It is a battle between ideologies.47 Liberal democracy versus authoritarianism. Free market capitalism versus surveillance capitalism. Europe stands in the middle, championing a legal-ethical approach to tech governance. Its Member States often divided when it comes to Beijing: 12 of them participate in Xi Jinping’s Belt and Road program.

It is of crucial strategic importance to proactively consider potential alternative scenarios.48 Future scenarios in which our desired coalition of democratic countries did not materialize for whatever reason. We can use scenario planning for this. Scenario planning, or scenario analysis, is the development, comparison and anticipation of probable future scenarios, together with short- and longer-term transitions. 49 Impending scenarios meant to be used as thinking instruments.

Alternatives to the creation of a strong democratic Strategic Tech Alliance are no alliance or different alliances. Each scenario could bring both (trade) war and peace to the world. Please note that establishing a league of like-minded democratic countries does not guarantee winning the race for AI and quantum supremacy. Moreover, competition and rivalry between blocks could incentivize exponential innovation. The race for AI supremacy is not a zero-sum game.

Does one rule out the other? Could the US or the EU be both a partner and rival of China through smart partnerships? In theory, it is a position that both the US and the EU could take. In tandem with bolstering alliances with our allies, we should -to a certain extent- be open to dialogue and cooperation with the regimes. We also have to consider an unthinkable alliance of EU-China-Russia ‘against’ a pact between countries like US/Canada/UK/Israel/Australia/India/South-Korea/Japan.50

Another scenario is a protracted Cold War for AI Supremacy with no winner between the US and China.51 A no winner takes all scenario would eventually mark the Splinternet.52 On the one hand a China led internet, characterized by a top-down approach to tech. It would comprise of countries that adopt Chinese apps. Its rival would be a US influenced internet, including countries that adopt US built platforms and apps. From the server level, cloud computing and AI all the way down to the phone operating system level. Cyberbalkanization could result in two parallel worlds, each with distinct divisions regarding technology, trade and ideology. In practice, this implies two opposing ecosystems would exist, each using its own standards and architectures that are incompatible with one other.

In the event China wins the race for AI and quantum, it will have the power to overthrow the EU and the US.53 The world would see a new era of authoritarian surveillance capitalism. In the case that a strategic partnership of democratic countries led by the US and the EU will prevail, it may well coerce China to adopt Humanist values.

To prevent China Standards 2035, 54 we need a coalition of democratic countries that bakes its values into its technology and that sets worldwide interoperability standards for telecommunications, AI & quantum infrastructures.

7. Harms of Doing Nothing

The described advantages of the establishment of an alliance must be weighed against disadvantages, unintended consequences and the harms of doing nothing.

First, no alliance means fragmentation and division, without synergetic effects. A lack of action entails less chance of winning the race for tech dominance and securing the chance to set and control global standards. Standards that preserve democratic values. The danger of global autocratic values in technology and infrastructure increases in this analysis, because there is no en bloc counterbalance to emerging countries such as China, the country of the large numbers of consumers, hordes of AI talent, and huge amounts of machine learning training data, regurgitated by labelling farms. China has massive government budgets for the development of smart algorithms and quantum technology applications. Currently it’s everybody for himself; that won’t help us win the race. We need an alliance instead of division.

Second, quantum technology enhances AI. Together with blockchain it promises machine learning on steroids. Quantum and AI hybrids will give to the world a new perspective of science itself. In this context, it is crucial to raise awareness of their incredible potential for good, and their anthropogenic risks. The Fourth Industrial Revolution will bring about a world in which anything imaginable to improve, or worsen the human condition, can be built in reality.

Authoritarian countries obtaining this powerful technology and using it against us, poses serious national cybersecurity (cyberwarfare, hacking) threats.55 More importantly, the regimes would have the ability to impose their non-democratic values on us through technological expansionism. From our liberal-democratic viewpoint, this could lead to a dystopian scenario. AI driven facial recognition systems used for shadowing and social credit systems would become the standard. Surveillance machines are a dictator’s dream. Authoritarian a-moral machina sapiens will take over creation and invention. Privacy, mental security and freedom of thought will become a distant memory.

Our society will be better off when we forge Democratic Alliances. A united democratic tech block has a greater chance of winning the race for AI & quantum dominance.

Third, long term risks of underinvesting in 4IR technology are no less than existential. The US needs to invest heavily in safe & responsible AI and quantum. The market cannot pull this off on its own. The state should take the lead and launch a mission oriented, 2030 US Standards plan, backed by large-scale funding. 56 This plan should be sharply demarcated, and executed by golden triangle, public-private partnerships. These partnerships can be based on the triple helix innovation model, which guarantees synergistic effects between government, academia and business.

The portrayed advantages of bolstering an alliance, and actively shaping technology for good evidently outweigh the harms of remaining passive or indecisive. It is critical that the US does not hang back in a never-ending balancing of stakeholder concerns but that it is confident in formulating a vision and focussed in accomplishing its well defined national and global policy objectives. By doing nothing the US will fall behind economically. The US and the EU should set out the path along transatlantic lines and guide their democratic allies toward a Strategic Tech Alliance.57

## stagnation

### Adv 1

**Class action lawsuits don’t stop cartelization---empirics go our way.**

**Juska 17** --- Zygimantas Juska, Doctor of Law, Leiden University. The Effectiveness of Private Enforcement and Class Actions to Secure Antitrust Enforcement. The Antitrust Bulletin. 2017. 62(3): 629

A. Low Deterrence Value The core element of the class action lawsuit is the seeking of class certification. Due to the defendants’ aggressive defense, antitrust class actions may reach the certification stage and be denied on the basis of failing to meet the requirements under **Rule 23**. Most importantly, the courts utilize strict evidentiary standards for the class certification in antitrust cases. In the In Re Hydrogen Peroxide Antitrust Litigation, 179 the 3rd Circuit established that the class certification requires “**rigorous analysis**” of factual and legal evidence.180 This examination extends to assessing the testimony of both defendant’s and plaintiffs’ experts.181 In addition, the standards for meeting the requirements under Rule 23 must be met by a “preponderance” of evidence, rather than by a mere “threshold showing.”182 Therefore, there is a **high chance** that defendants may succeed in **opposing** the class certification. In such case, the **class action rule** serves no use. As mentioned before, if a court certifies a class action, the large majority of class action lawsuits are settled; very few certified class actions proceed to trial. Consequently, treble damages are **typically removed** from the negotiation process and, after all, defendants admit no liability for having violated antitrust laws. From this issue flows another concern: that the private attorney general mechanism is not the right tool to facilitate deterrence. Lawyers make huge investments in antitrust cases and are thus the ones who decide when and whether to settle the case.183 The individual damages caused by antitrust wrongdoers are typically **very small**, so few if any class members have an incentive to monitor the settlement negotiations. As a consequence, defendants are satisfied to “buy off” the attorney in exchange for a favorable settlement agreement.184 The opposite may also be true: the class counsel may coerce defendants to go into settlements out of fear, regardless of whether the claim has merit or not.185 Thus, the settled class action lawsuits undercut the deterrence of class litigation. From a cartel perspective, a majority of class actions follow successful government actions.186 Consequently, private attorneys use the efforts of public enforcers for their **own benefit**, for example, by reducing their own costs in expensive fact discovery proceedings.187 According to this view, private actions are unable to cure public shortcomings like, for example, a low detection rate. Another critical argument is that corporate managers (who should be foremost affected) are **not deterred** by private litigation. First, the time period between the beginnings of anticompetitive behavior until the judgment is considered the important deterrence criteria against corporate managers. In a typical antitrust case, the period may last from at least five years to **more than ten years**.188 It is highly unlikely that corporate managers and midlevel executives will still hold their positions at the time of the judgment.189 In case of settlement cases, the early deterrent impact is also **improbable**, because, even if the day of judgment is speeded up, the average time from the planning of anticompetitive conduct to any settlement payout is still more than five years.190 Second, corporate managers are unlikely to internalize the wrongdoing immediately after launching the antitrust claim. As mentioned before, empirical studies showed that government antitrust actions reduce the share value by 6% on average, and filling a private lawsuit by around 0.6%. 191 Thus, “[a] half-percent drop in market capitalization” is highly unlikely to cause **negative impacts** on corporate managers.192

### 1NC – Cartels

#### Cartels solve themselves quickly

DePaola 14 (Joe DePaola, Managing Partner & President at BizShifts, former VP Worldwide Sales & Business Development, CIC Inc., former PhD student Business/Engineering, Stanford University, MS Engineering, New York University, “Sinister-Side of Cartels, Collusions… For Dominating Markets: Sleeping with the Competition is a Dubious Business Strategy,” BizShifts-Trends, 4-10-2014, https://bizshifts-trends.com/sinister-side-cartels-collusions-dominating-markets-sleeping-competition-dubious-business-strategy/)

Generally cartels contain seeds of their own destruction... cartel members are reducing their output below their existing potential production capacity, and once the market price increases, each member of the cartel has the capacity to raise output relatively easily. The tendency is for cartel members to ‘cheat’ on their quota, increasing supply to meet market demand and lowering their price.

Most cartels agreements are unstable at the slightest incentive they will quickly disband, and returning the market to competitive conditions… Cartels appeared most strongly in those industries defined by scale and scope economies and with high fixed costs… Therefore, they are more common in wealthy countries with big businesses. Cartels also tended to appear among domestic firms first, before going international (except, for example; early– zinc, rail, shipping… cartels)…

#### Many thumpers to supply chain prices and disruption – BUT COVID solves – deglobalization and resilience (to both price volatility and thumpers)

Tsang et al 21 (Raymond Tsang, and Gerry Mattios, both partners and leaders of Bain & Company's Performance Improvement practice based in Shanghai and Singapore respectively; and Sri Rajan, partner based in San Francisco; “Confronting a new era of supply chain volatility,” Bangkok Post, 4-8-2021, https://www.bangkokpost.com/opinion/opinion/2096827/confronting-a-new-era-of-supply-chain-volatility)

As Covid-19 threw fragile global supply chains into disarray, many companies were stunned by their own vulnerability. The risk of depending on a supply base that is concentrated in one geographic region has been increasing over the past 30 years, but the pandemic quickly demonstrated how much chaos and pain one unexpected event could inflict.

It was a powerful wake-up call. The disruption triggered by Covid-19 has prompted leadership teams to confront a new era of supply chain volatility.

Bracing for an era of increased turbulence, leading multinationals are rethinking their supply chain strategies to lower the risk of disruption. In a recent survey of 200 global manufacturers by Bain & Company and the Digital Supply Chain Institute, executives ranked flexibility and resilience as their top supply chain goals. Only 36% of senior executives ranked cost reduction as a top three goal, down from 63% who saw it as a priority over the past three years.

To improve supply chain resilience, 45% of respondents plan to shift production closer to home markets in the coming years. The good news is that automation has reduced the cost of manufacturing, eroding the labour arbitrage advantage that fuelled decades of investment in offshore production.

The cost of humanoid robots is comparatively lower now which means companies with processes capable of being automated such as consumer electronics can opt to move supply chains closer to home without raising costs significantly.

For the last 30 years, manufacturing companies have wrung out supply chain costs by disaggregating the various steps of the value chain, concentrating each step with a limited number of companies and geographies to improve economies of scale.

As a result, most leadership teams lack sufficient supply chain visibility to assess their geopolitical and geographical risks.

Before investing in a new supply chain strategy, successful leadership teams evaluate their supplier and contract manufacturer risk according to two factors: the country where goods are produced and the supplier's headquarters location.

Two key factors that determine geopolitical supply chain risk are the supplier's headquarters and its manufacturing location.

Once leaders understand their risk exposure, they start building resilience into their value chains in a two-step process. First, they quickly add flexibility to the supply of finished goods and high-risk subcomponents where possible, to limit immediate risks and satisfy customers. Second, they take a strategic approach to rethinking the value chain from end to end. That includes deciding the pace of change and periodically reviewing decisions based on external conditions and internal capabilities. Below are three steps to help companies pioneer the shift to supply chain resilience:

1. Boost flexibility

Supply chain flexibility is becoming a more and more important concept for gaining competitive advantages. The first priority in making supply chains shock-proof is increasing flexibility for supplying finished goods and high-risk subcomponents. This would open the possibility for companies to respond to short-term changes in demand and supply situations as well as structural shifts in the environment of the supply chain on an immediate basis.

Not many countries have the capacity and infrastructure to handle all the volume, so manufacturers often have to piece together a solution across multiple neighbouring countries. For many companies, aligning a new production location with demand can deliver significant benefits, particularly in industries where demand is rising even through the downturn, including MedTech and certain consumer products.

2. End-to-end network rethink

For each value chain, leadership teams need to properly balance risk and resilience at the lowest total landed cost. This includes decisions on single vs. multiple sourcing, where to manufacture at each stage of assembly, and proximity to customers. They also need to determine whether to produce in-house or outsource, taking into account variables such as national incentives and declining manufacturing costs. Successful companies revisit their value chain choices regularly, especially in turbulent times.

3. Balancing cost and risk

Resilience does not eclipse every consideration. As leadership teams start to understand where they need flexibility, they face important trade-offs on cost. Investing in too much flexibility can render a company uncompetitive. As they look to reshape supply chains for the future, successful companies determine how much resilience they need, where it matters most, and what they can afford.

Resilient and flexible supply chains can be a powerful defensive hedge, but also a source of competitive advantage. Leaders make the most of options such as capacity buffers, digital infrastructure and nimble teams to react faster and more efficiently than their peers.

The investment to build and maintain these capabilities varies, depending on a company's need for responsiveness and efficiency, as well as the level of industry competition. This is why the roadmap for resilient supply chains must be linked to a company's long-term business strategy. For example, a high-growth business that has high margins and short product life cycles, and is dependent on components coming from widely distributed sources such as high-end cell phones, will require a different type of supply chain resilience than a hypercompetitive low-margin business, such as clothing or toys, which relies on imported finished goods.

Geopolitical volatility and market turbulence will transform supply chain management in the coming decade. Leadership teams that invest in strategies to increase supply resilience will simultaneously create a new source of competitive advantage.

### 1NC – Slow Growth !

#### Decline of US economic strength is structurally inevitable---delays to the multipolar transition risk great power conflict AND prevent regulations that solve their impacts.

Burrows 16 (Matthew Burrows, Director of the Atlantic Council’s Strategic Foresight Initiative, Ph.D. in European History, “Global Risks 2035: The Search for a New Normal,” September 2016, Atlantic Council, <https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/Global_Risks_2035_web_0922.pdf>, recut GBN-TM)

The multilateralist global system that the United States and the West built after the end of the Second World War was premised on an economically strong United States and West. In 1945, the United States was the only victor that was not completely devastated. World War II had brought the country out of the Great Depression, and the US GDP constituted more than 50 percent of the world’s total. Into the twenty-first century, the members of the Group of Seven (G7) were the world’s political and economic heavyweights. It has only been in the past several years that the collective GDP of the developing world—led by China—has surpassed the developed world’s. Even as non-Western powers grow, it is psychologically hard for the West to think about relinquishing its reins. Demographically, the West has, for a long time, been in the minority. What’s more recent is the aging of the Western population (analyzed in chapter 2), which is already occurring in Japan and Europe, beginning to squeeze the availability of resources for anything but health, social security, and interest payments on debt. Unless healthcare becomes far more efficient, the US economy will be overburdened with healthcare and pension costs as the “baby boomer” generation ages. Healthcare constitutes a whopping 18 percent of the US GDP—significantly more than is the case for other industrialized countries—without necessarily providing better results. With more going to health and pensions, there will be less capacity for defense and military spending. The United States is the biggest military spender, but China is increasing its portion of worldwide military spending, while the worldwide share of European NATO members is diminishing. China’s military probably will not rival the United States’ power-projection capabilities even by 2035, but it will have greater anti-access and denial powers. In a military contest, China may never be able to deliver a knockout blow, but it could tarnish the US image of military invincibility in a conventional state-on-state contest held in its region. Equally, a confrontation that results in a Chinese humiliation could set back China’s aspirations for regional leadership, if not trigger a domestic legitimacy crisis for the Communist Party leadership. Biggest Problem Is Domestic The biggest psychological blow to ordinary Western citizens has been their sagging standard of living (more analysis in chapter 1). Despite a much better record of overall growth in the United States since the 2008 financial crisis, those with median incomes have taken a hit. Worrisome for future US growth potential has been the drop in the labor-participation rate, from the 67 percent range before the 2008 financial crisis to 62-63 percent in the years since. The labor-participation rate was destined to drop due to a growing numbers of retirees, but much of the current sharp decrease comes from unskilled males in their prime working years—forties and early fifties—dropping out. Additionally, many younger women are not entering or staying in the job market. Global Trends 2030 looked at two scenarios for future US growth—one in which the United States maintained or slightly increased its average 2.5 percent pre-2008 growth rate, or one in which growth would slow to an average of 1.5 percent a year. In the first, there would still be the global economic shift to China. On the other hand, the 2.5 percent average growth would help boost average living standards, engendering a “feel-good” factor, which would make more Americans interested in reengaging with world issues.91 Given the record of slower growth and labor-force decline since the 2008 financial crisis, the likelihood of the second scenario is increasing. That scenario anticipated lower growth rates—which accelerated declines in average living standards—making it harder to continue trade-liberalization efforts. Indeed, the IMF warned in June 2016 that the United States faces potentially significant longer-term challenges to strong and sustained growth, saying, “concerted policy actions are warranted, sooner rather than later… focusing on the causes and consequences of falling labor force participation, an increasingly polarized income distribution, high levels of poverty, and weak productivity.”92 Moreover, it is not as if traditional US partners—Europe and Japan—are doing much better. Japan and many European countries are aging faster than the United States, eliminating labor-force growth as a driver of future economic growth. Europe’s and Japan’s economic performances have been declining since the 1990s. In Europe, the public discontent with high unemployment and declining incomes has helped to spur the rise of antiestablishment far-right and populist parties that want to weaken the EU and transatlantic ties. Even in richer European countries, such as Germany, a backlash has been growing against the Transatlantic Trade and Investment Partnership (TTIP), out of fear that Europe’s rewards would be meager and European standards would be diluted. McKinsey Global Institute, for example, believes a “return to sustained growth of 2-to-3 percent” is possible for Europe, but would require many politically difficult reforms.93 These include: reducing dependence on imports (much coming from Russia) for crude oil and natural gas; fostering a more vibrant digital economy; increasing workforce participation by the elderly, women, and migrants; and promoting flexibility in labor markets. China now spends a greater share of its GDP on research and development than does Europe. The latest OECD figures show that Europe now spends even less than the rest of the OECD.94 In both the United States and Europe, there is increasing anti-immigrant sentiment despite documented economic benefits from immigration. According to EU Commission Employment Analyst Dr. Jorg Peschner, productivity, by itself, will not be enough to reverse the negative employment trend absent more immigration: “EU’s productivity growth would have to double in order to keep the EU’s economy growing at the same pace as it did before the crisis started.” For employment growth to remain positive as long as possible, improving the labor participation of women, low-educated people, and migrants will also have to be a priority. In the United States, many of the new businesses started every year are started by first- or second-generation immigrants.95 Politically, there has been a large rise in support for right-wing and populist parties in the United States and Europe, undermining traditional parties. The gaps, for example, between the leadership and supporters in the US Republican and UK Tory and Labor Parties have been particularly evident in the selection of Donald Trump as presidential candidate and the June 2016 victory of the “Leave” vote in Britain. Unfortunately, there is no end of economic disruption. The job churn will continue as more and more skills and professions are automated, also increasing the potential for more “losers” from globalization, greater political polarization, and inequality. The increased competitiveness of the developing world with the West is a particular morale buster for Western middle classes who got used to ever-increasing prosperity for themselves and succeeding generations. Adapting to a new norm of economic turbulence—more prevalent in other eras—may be one of the biggest mental hurdles for Westerners. The West is used to thinking of the “Third World,” not home, as the place where economic turmoil happens. And a Multipolar Financial Architecture, Too Historically, US and Western power has rested on having a monopoly on reserve currencies and a Westerndominated financial system. In 2035, the dollar will be the biggest reserve currency, but its share of global financial transactions is expected to drop from 60 percent today to 45 percent. The euro will probably remain the second reserve currency, while the Chinese yuan or RMB—which became a part of the IMF benchmark-currency basket in 2015—will become a third reserve currency, accounting for 10 to 15 percent of global finance in two decades’ time.96 The financial architecture will also become more regionalized. The central role played by the financial centers of New York and London will also diminish, and a multitiered financial architecture will develop. Following the UK Brexit, those centers’ share in financial intermediation will decrease, as a second pole of global finance forms in the Eurozone. A third pole will develop in East Asia and Southeast Asia. Gradually, a growing share of global financial resources will be concentrated in those regional clusters. As with the growth of regional trade, the regional clusters will be more self-encapsulated, spurred by rising domestic demand in China and other developing countries with growing middle classes. With the role of electronic money likely to grow, the traditional banking system will probably also undergo major revision, with potential impacts on governmental powers. A more multipolar reserve system and regionalized financial architecture should lessen risks and contribute to greater stability. But the large-scale technological innovations—some of which contributed to the 2008 breakdown—will continue, making global finance still volatile. Emerging-market countries with fragmentary regulatory regimes will be particularly prone to suffering financial crises. The aging population factor also increases risks to public finances. This report anticipates modestly increased volatility, lower than what occurred in the global economy during the 1890s through the 1940s, but higher than in the 1950s and 1960s—more of a continuation of what has been the trend line since the mid-1980s. Are There Alternative Visions to Western Order? Four years ago, when Global Trends 2030 was published, the answer was largely no.97 Increasingly, the facts on the ground would suggest otherwise. They do not add up to a cohesive plan to substitute wholesale all Western institutions and practices. However, they clearly indicate that there are some no-go areas, particularly those connected to regime change, democracy promotion, state control over NGOs, and maintaining sovereignty. Russia and China, in particular, see themselves as great powers and, as such, believe they have special rights to dominance in their regions. However, as other powers like India develop, it is likely that they will see themselves as regional powers with inherent prerogatives. It is worth recalling the United States’ expansive Manifest Destiny and nineteenth-century Monroe Doctrine, claiming special rights to determine the future of the Western Hemisphere. The Mercator Institute for China Studies (MERICS) has been closely following Beijing’s efforts to build a network of parallel structures to existing international organizations. It has concluded that China “is not seeking to demolish or exit from current international organizations…It is constructing supplementary— in part complementary, in part competitive—channels for shaping the international order beyond Western claims to leadership.”98 As the accompanying chart indicates, China’s shadow network of alternative international structures encompasses everything from financial and economic partnerships (the Silk Road Economic Belt and the Asian Infrastructure Investment Bank) to full-blown political groupings like the Shanghai Cooperation Organization, Conference on Interaction and Confidence Building Measures in Asia (CICA), and the BRICS association of Brazil, Russia, India, China, and South Africa.99 Moreover, there is increasing cooperation among many of the emerging powers—beyond just authoritarians—to not just limit what they see as Western meddling in domestic affairs, but to go on the attack globally. According to a recent academic study, the “Big Five” authoritarian states of China, Russia, Iran, Saudi Arabia, and Venezuela “have taken more coordinated and decisive action to contain democracy on the global level.” They have sought to “alter the democracy and human-rights mechanisms of key rulesbased institutions, including the Organization of American States, the Council of Europe, the Organization for Security and Cooperation in Europe, and international bodies concerned with the governance of the Internet.”100 How durable are these preferences for nondemocracy and state control? By 2035, if not sooner (in the case of Venezuela), some of the now-authoritarian states could be liberalized, and the perceived threat posed by Western civil-society NGOs may ease. However, China and Russia are more likely than not to want to dominate their regions. Nationalism and democracy have been shown to be highly compatible. It is not clear that an even more powerful China or India would defer to Western leadership of the global order, even if both sides’ values in other areas begin to converge. What Kind of Post-Western World? Clearly, there is a need to plan for a world that will not have the West as its big economic powerhouse—a prospect hard for Western elites and publics to conceive of, despite a decade or more of publicity about the “rise of the rest.” According to a recent survey, Europeans and Americans are more comfortable with each other than they are with anybody else. Although a majority of Europeans said, in the most recent German Marshall Fund transatlantic-trends polling, that they would like to see their country take an approach more independent from the United States, both Americans and Europeans still prefer each other over more Russian or Chinese leadership in the world. The Obama administration—considered among the most multilateralist of recent administrations— campaigned hard in 2015 to convince Europeans not to join China’s proposed Asian Infrastructure and Investment Bank (AIIB). It was as if the United States was against any governance structure not “made in the USA,” even when those running the AIIB have made clear their intentions of operating with the World Bank and the Asian Development Bank. More and more, the talk among Western elites is about locking in as much as possible the status quo, which favors the West, so that it will be harder for the newcomers to overcome. The TPP was sold as a way to set the rules before China gains much more power. A former Obama administration official advised that now might be the best time to undertake UN Security Council reform, before China and other uncooperative powers become more powerful. “A new US administration may be able to advance a proposal to address the Security Council’s anachronistic makeup while perpetuating a council that Washington can work with.”101 For Westerners, the challenge will be to plan for a future that will not be solely run by them, but which they can live with. Handovers have been historically difficult and fraught—more often than not, decided by bloody contests. One could envisage different scenarios, some already described in the earlier chapter on conflict, of military contests between the United States and China, or the United States and China with Russia, or the United States with NATO against Russia. Without delivering a knockout blow by one side or the other, these contests would most likely pit West against East, creating something akin to a new Cold War. Even if there were a knockout blow by the United States against China, it is hard to imagine a defeated China deferring permanently to the West. Its population has been imbued with such a narrative about the injustices by the West against China that any defeat or setback would be confirmation that the United States and West are dead set against a rising China. Perhaps the most harmful effect of such a contest would be to convince both sides that neither is trustworthy. For the non-West, it would confirm the suspicion that the West does not want to relinquish its leadership position. For the West, it would make it harder to ever reach out and help establish a truly global system. Need for a Second-Generation US and Western Leadership Model War is not, and should not be, inevitable as the West struggles with the growing clout of China and other developing states on the world stage. Unlike during other transitions, the tools exist for ensuring more peaceful outcomes. They will require Western acquiescence to greater roles for the developing world to set and implement new rules of the road for the international order. A key feature of the post-1945 US design for the world order is its multilateralist structures. Many of these operate below most people’s radar. This plumbing of the international system has enabled the daily functioning of globalization. To keep it viable, China, as well as other developing countries, must be accorded more representation. There are too many long-term risks involved, for example, in China having only the equivalent of France’s voting rights in the IMF, when it is the first or second economic power in the world. This is how resentments are nurtured—all the more dangerous in China’s case because of its underlying “century of humiliation” mental complex. As emerging technologies come online, the lack of a truly global institutional framework could be particularly dangerous. Assuring the future security of the Internet is particularly important in this regard, because all the new emerging technologies—bio, 3D printing, robotics, big data—take for granted a secure, global Internet. Everyone loses if cyber crime and cyber terrorism undermine the Internet. In the worstcase scenarios, in which cyber crime proliferates or strong national borders fragment the Internet, an Atlantic Council study, as mentioned, found that the economic costs could be as much as $90 trillion out to 2030, in addition to the risk of open conflict.102 Besides bringing the emerging powers into leadership roles in the panoply of multilateral institutions, the United States will need to temper its often “exemptionalist” stance to ensure the survival of the multilateralist order. According to the Council on Foreign Relations’ Patrick Stewart, a prominent scholar of global governance, one of the persistent paradoxes of the post-1945 decades has been that the “United States is at once the world’s most vocal champion of a rules-based international order and the power most insistent on opting out of the constraints that it hopes to see binding on others.”103 No country has the networks and connections that the United States does, but the system is now polycentric, rather than unipolar, and others resent the “exceptional” privileges that the United States claims. The Global Trends works have talked about the need for a new model of US global leadership. The United States needs to be guiding the international system as a “first among equals,” and willing to play by its own rules. Paradoxically, there is likely to be no vibrant global-governance system without US and Western leadership, but too much domineering behavior could doom it. Even if the United States adapted its global role, this is not to say that the tensions and differences with many emerging powers would all disappear, or that the governance system would function seamlessly. In addition to the growing number of new state actors, the increasing importance of nonstate actors adds a new complexity to the functioning of global institutions. Moreover, there are clear-cut differences between the West and emerging powers on values-based issues, such as democracy promotion and the responsibility to protect. Many developing-country publics still resent Western colonialism and equate any intrusion with past historical wrong. They point to the 2011 humanitarian intervention in Libya, for example, as cover for the Western goal of regime change. Hence, the UN Security Council failure to stop the fighting in Syria, with more than two hundred thousand killed and 7.6 million displaced. Russia and China want to make a stand against the United States and the West getting their way and ousting the Assad regime. On the other hand, the lack of a solution smacks more of anarchy than global governance. Certainly, it shows one of the gaps that remains, and likely will remain, limiting global governance because of differences in values. The speed with which new technologies are coming online and becoming an important political, military, and economic tool—for both good and bad—carries big risks for global governance. Stewart Patrick lists four potential new technologies that “cry out for regulation”: geoengineering, drones, synthetic biology, and nanotechnology. Without some setting of rules for their operation, there is the risk of major disruptions, if not catastrophes, stemming from their abuse. The recent advances in synthetic biology lower the bar to abuse by amateurs and terrorists alike, forever affecting human DNA. Geoengineering involves planetaryscale interventions that could interfere with complex climatic systems. However cumbersome, politically unpopular, and ineffective at times, there is little alternative to increased global cooperation if one does not want to see higher risks of conflict and economic degradation. Without some sort of bolstered global governance, the West would end up with less sovereignty in a “dog-eatdog” world, in which it was increasingly in the minority. But can the United States and the West rise to the challenge of investing in a global-governance system that will not always favor their interests on every issue? Historically, the United States could be especially generous because it was on top of the world in about everything after the Second World War. Europeans came to truly believe in pooling sovereignty and joint governance after centuries of internecine conflict. The tough economic times at home have seen US and European publics become distrustful of overarching multilateral institutions, believing the will of the United States or individual European countries will not be served. It is oftentimes easier for political leaders to fall in with the public mood rather than display leadership that might appear to work against it. Over time, economic power will also be consolidated in Asia, replicating the situation three centuries ago, when China and India were the biggest economic powers in the world, and the center of the global economy was in the East. Over a longer term, one could also see a concentration in just three countries: CHAPTER 9 The Big Picture The breakdown of the post-Cold War political and security order is irrevocable. Not only are there new powers—particularly China—that do not share the West’s vision of a liberal order, but Western publics themselves have turned against globalization, which has been the overall megatrend of the past three decades. The geopolitical landscape ahead will be much different. The best case is looking at multipolarity with limited multilateralism. In the worst case, that multipolarity evolves into bipolarity with China, Russia, and their partners pitted against the United States, Europe, Japan, and other allies. In that scenario, conflict would be almost inevitable. Besides the tectonic shifts at the geopolitical level, the technology revolutions have changed, and will continued to upend, everyday life for most everyone. Three decades after its popularization, the Internet is a fact of life that no one can live without. The doubling of computing power every eighteen months, combined with the ubiquity of the Internet, has opened up wide possibilities for other technologies—to the point of a third or fourth industrial revolution, depending on how one counts the historical precedents. This communications revolution—based on the Internet and its spread—has spurred globalization, making the world into a village in which everyone across five continents can see how others live in real time. Ironically, one of the impacts of the accelerating technology revolution has been to increase inequality and, as with past technology revolutions, helped spur a backlash against it and globalization. More than previous technological revolutions, the speed, wide scope, and rapidity of the disruptions to jobs and livelihoods means that there are now many who believe they have lost despite all the improvements in everyday consumer products, medicine, and other services and products. The emerging technologies are only at the cusp of their development; the new discoveries and knowledge cannot be reversed. But the political and social responses to the new technological developments are not as linear as once thought. In the early days of globalization and technological breakthroughs, the thinking was that each would reinforce each other. Two decades later, it is becoming evident that that is not true anymore. The earlier World Wide Web could be broken up. China’s firewall is maybe the first indication of that segmentation. The Atlantic Council’s Cyber Statecraft Initiative has examined four possible futures for the Internet, several of which radically differ from the vision the founders had for an open and bottom-up vehicle for enlightenment and individual enrichment.104

## europe

### 1nc – harmonization

#### Their evidence says that the EU had recognized the need for harmonization WITHIN it, not that they’ll model the US.

**EU doesn’t model --- harmonization impossible**

**Abrenica 18** --- Ma. Joy V. Abrenica, Professor, School of Economics, University of the Philippines Diliman. BALANCING CONSUMER WELFARE AND PUBLIC INTEREST IN COMPETITION LAW. 13:2 Asian J WTO & Int'l Health L & Pol'y 443. 2018. Pg 448-449

The economic approach to antitrust enforcement has been embraced not only by the U.S. and European Commission (hereinafter "EC"), but also by developing countries whose antitrust laws were very much influenced by these two regimes. The OECD describes the convergence among antitrust regimes as follows: There is **general consensus** that the basic objective of competition law is to protect and preserve competition as the most appropriate means of ensuring the efficient allocation of resources . . . in free market economies. While **countries differ** somewhat **in defining** efficient market outcomes, there is general agreement that the concept is manifested by lower consumer prices, higher quality products and better product choice. 22 But the adoption of a common framework has **not resulted** in uniform implementation of competition principles. This is because most competition regimes are still conditioned by the zeitgeist of their own competition law, as well as by **social and political realities** in the domestic front. Two opposing philosophies are driving antitrust enforcement in different directions. One perspective presumes that unencumbered markets are vulnerable to abuse of dominance and collusion among competing producers; thus vigorous enforcement is necessary to preserve competition. Another perspective holds that market competition is robust and could prevail upon any private attempt to suppress it; therefore, rigid enforcement is counterproductive as it could undermine rivalry, hinder innovation and thus harm consumers in the long term. Most regimes would strive for the middle ground, i.e., neither intransigent nor too lenient. However, the effects of and intent behind market behavior are rarely apparent and often difficult to discern. This could result in a finding of infringement when in fact the conduct is a legitimate response to competitive pressure (type 1 error), or a failure to foil an anticompetitive conduct as it is mistaken for an innocuous pursuit of efficiency (type 2 error). Both types of error could ruin competition. Indeed, striking the right balance in enforcement is arduous and mature jurisdictions are not exempted from the challenge. One observes notable disagreements between the U.S. and EC on such issues as refusal to deal and reverse patent payments, for example, as well as **flip-flopping of decisions** on various forms of vertical restraints. The **divergence in views** and inconsistencies in decision is **probably inevitable** as the understanding of economic behavior and market processes continue to evolve. Boudreaux explained: Almost all of the original bases for antitrust intervention have been shattered by sound economics. Price-cutting is no longer an obvious means of monopolizing; bigness is no longer believed to be inevitable, inevitably harmful, or perpetual; and the myriad contracting arrangements devised by actual market participants are increasingly understood to enhance competition despite having been ignored by authors of textbooks. The advances that have occurred in economic theorizing are generally abstruse demonstrations of theoretical possibilities. Only when these theories have been supported by solid empirical findings should they serve as the basis for policy . . .. (emphases added)23 Against this perplexed environment in the backdrop, the meshing of public interest and competition objectives adds **further complication**, uncertainty and unpredictability in **competition enforcement**.

**Differences in enforcement inevitable --- causes divergence**

**Keyte 18** --- James Keyte, Director of the Fordham Competition Law Institute, an adjunct professor of Comparative Antitrust Law at Fordham Law School, and an Editor of ANTITRUST, Fall 2018. “Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement Is So Difficult to Bridge.” <https://www.antitrustinstitute.org/wp-content/uploads/2018/12/fall18-keyte.pdf>

Setting the Stage

To start, there are **simple differences** that are **not likely to change** any time soon. Article 102 is both more specific and broader than Section 2 of the Sherman Act, and the **enforce- ment and judicial systems** also are quite distinct. Unlike in the U.S., in the EU’s administrative law system, the Commis- sion is the investigator, prosecutor, and decision maker; it does not have to go to court to impose penalties or other remedies. Moreover, in contrast to the U.S., the Commis- sion’s decisions are given significantly more discretion with respect to competition policy choices and the assessment of complex economic issues.2

### Energy diversified

**Diversification now**

**Åslund 20** [Anders Åslund is a resident senior fellow in the Eurasia Center at the Atlantic Council, leading specialist on economic policy in Russia, Ukraine, and East Europe, Steven Fisher worked 35 years at Citi in various emerging markets corporate and investment banking leadership positions, "New challenges and dwindling returns for Russia’s national champions, Gazprom and Rosneft", 6/5/20, https://www.atlanticcouncil.org/in-depth-research-reports/report/new-challenges-and-dwindling-returns-for-russias-national-champions-gazprom-and-rosneft/]

In the past decade, European regulations and legal decisions have also **complicated life** for Gazprom and Rosneft, culminating in a major trust-busting decision in May 2018 against Gazprom.

Gazprom has long favored long-term “take-or-pay” contracts with its big clients in Western Europe, while its agreements with former Soviet republics had been of a completely different nature, with arbitrary pricing and shady middlemen. Both models came under pressure in the 2000s. As international gas prices rose, Gazprom wanted the freedom to hike its prices as well (shortly before the emergence of a spot market in Europe would help push prices down), while the former Soviet republics were tired of arbitrary prices and persistent crises with their gas supplies.

Gazprom’s January cuts of gas supplies through Ukraine, for four days in 2006 and especially for two weeks in 2009, were the **last straw for the shivering Europeans**, who demanded different trading rules with the company. In 2009, the European Union adopted its third energy package, which **compelled** the **unbundling** of energy supply and production from distribution networks. One consequence was that South Stream, a Russian gas pipeline project designed to deliver gas to the Balkans, was **stopped** by the EU rules. In August 2012, the European Commission opened an antitrust investigation into Gazprom’s monopolistic pricing and trading policies in Eastern Europe.

Gazprom has long favored long-term “take-or-pay” contracts with its big clients in Western Europe,”

A board with the logo of Gazprom Neft oil company is seen at a fuel station in Moscow, Russia, May 30, 2016. REUTERS/Maxim Zmeyev/File Photo

Three years later, the EU moved to create a **unified energy market** that, among other things, sought to **relieve** some members’ **reliance on outside suppliers**. An EU press release noted that six EU countries—Bulgaria, Estonia, Finland, Latvia, Lithuania, and Slovakia—depended on a single external supplier for all their gas imports.39 All but Finland had suffered multiple politically motivated supply cuts.40

### Impact

#### Energy prices not key OR the EU resilient.

Archick – 10-28

2021 - Kristin Archick - Specialist in European Affairs. Foreign Affairs, Defense, and Trade Division of the Congressional Research Service - “The European Union: Questions and Answers” – Congressional Research Service - October 28, 2021 - #E&F - https://sgp.fas.org/crs/row/RS21372.pdf

Despite concerns about euroskepticism, opinion polls indicate that a majority of EU citizens are supportive of the EU. Some analysts note that euroskeptic parties did not do as well as expected in the 2019 European Parliament elections. The difficulties encountered by the UK as it sought to leave the EU appear to have dampened euroskeptic enthusiasm in other EU countries. Many stridently euroskeptic parties, such as France's National Rally and the Netherlands' Freedom Party, have focused more on calling for EU reforms in recent years than on promoting the dissolution of the eurozone or the EU itself. At the same time, experts caution that populism and related euroskeptic sentiments remain potent political forces in Europe. Some suggest that COVID-19's economic challenges could lead to increased support for antiestablishment, anti-EU parties in the years ahead.26

The UK had long been considered one of the most euroskeptic members of the EU, with many British leaders and citizens traditionally cautious of ceding too much sovereignty to Brussels. Brexit—or the UK's withdrawal from the EU—stems from a June 2016 public referendum in the UK on whether the country should remain a member of the EU. UK voters favored leaving the EU by 52% to 48%. Several factors heavily influenced this outcome, including economic dissatisfaction, fears about globalization and immigration, and anti-elite and antiestablishment sentiments. The UK government enacted the results of the Brexit referendum in March 2017, when it invoked Article 50—the so-called exit clause—of the Treaty on European Union. The UK and the EU subsequently began negotiations on the terms of the UK's withdrawal.

UK-EU negotiations on the withdrawal agreement proved complicated and lengthy. Challenges related to maintaining an open border between Northern Ireland (part of the UK) and the Republic of Ireland (an EU member state) were key stumbling blocks. In October 2019, the UK and EU agreed that post-Brexit, in order to ensure an open border on the island of Ireland and preserve the peace process, Northern Ireland would effectively remain in the EU's single market and customs union. This arrangement would eliminate the need for regulatory and customs checks on trade in goods on the Northern Ireland land border, but it also essentially created a customs border in the Irish Sea between Northern Ireland and the rest of the UK(i.e., Great Britain) to safeguard the rules of the EU single market.

Days before the end of the transition period in December 2020, the UK and the EU concluded a 1,200-page Trade and Cooperation Agreement (TCA), along with two other accords on nuclear cooperation and on protecting the security of classified information. Since the post-Brexit arrangements for Northern Ireland took effect in January 2021, however, implementation difficulties have disrupted some trade between Northern Ireland and Great Britain, heightened political and societal divisions within Northern Ireland, and significantly strained UK-EU relations. The EU rejects calls by the UK government and some in Northern Ireland to renegotiate the post-Brexit rules for the region, but the EU is engaged in talks with the UK to overcome the operational challenges and ease tensions in Northern Ireland.

Despite Brexit, EU leaders assert that "the Union of 27 countries will continue."27 However, the UK was the bloc's second-largest economy and, along with Germany and France, was regarded as one of the EU's "big three." Many observers view the EUas having taken a tough line in the withdrawal agreement and subsequent trade agreement negotiations—refusing to allow the UK to cherry-pick the benefits of the EU without taking on the required obligations—in part to discourage other member states and euroskeptic publics from contemplating a break with the EU that would further fracture the bloc. Some in the EU continue to express concerns that the UK could become an economic competitor, especially if the UK were to diverge significantly from EU environmental, labor, or state aid standards in ways that could give UK businesses a trade advantage. Other experts argue that Brexit could reduce the EU's influence on the world stage, given that the EU now finds itself without the UK's diplomatic, military, and economic clout. At the same time, some contend that Brexit ultimately could lead to a more like-minded EU, able to pursue deeper integration without UK opposition.28

In light of Brexit and other challenges, the EU has faced questions about its future shape and character. In June 2016, EU leaders announced the launch of a "political reflection" process to consider the EU's future.29 The EUconcluded its reflection process in March 2017 during its commemoration of the 60th anniversary of the Treaties of Rome (foundational EU treaties). In the 60th anniversary Rome Declaration, the leaders of the EU-27 renewed their commitment to the European integration project, acknowledged the challenges facing the EU, and pledged to "make the European Union stronger and more resilient, through even greater unity and solidarity amongst us."30 Some experts argue that "more EU" and further integration is necessary to better address the range of political and economic issues confronting the bloc. Others are skeptical that national governments will be inclined to cede more authority to a Brussels bureaucracy viewed as opaque and out of touch with the problems of average Europeans.

### decarbonization

#### inevitable or impossible – antitrust not key

1ac Roche ’21 [Darragh; October 9; Journalist, citing Professor Dirk Buschle, the Iberdrola Manuel Marin Chair for European Energy and Climate Policy at the College of Europe; Newsweek, “Gripped by Energy Crisis, Europe Considers Breaking Climate Promises and Turning to Coal,” <https://www.newsweek.com/gripped-energy-crisis-europe-breaking-climate-promises-coal-gas-1637291>]

Europe is in the grip of an energy crisis amid rising prices for natural gas, increased demand for fossil fuels and the approach of the winter that will make access to fuel even more urgent.

The price of natural gas on the continent has risen sharply over the past year with the European benchmark up nearly 600 percent as of Thursday and the [European Union](https://www.newsweek.com/topic/european-union) ([EU](https://www.newsweek.com/topic/eu)) seeking more gas supply from Russian energy firm Gazprom, which is already Europe's largest supplier, providing 35 percent of the continent's needs.

The price fell on Thursday to $120.79 per megawatt-hour (MWh) after Russian President [Vladimir Putin](https://www.newsweek.com/topic/vladimir-putin) said the country could sell gas to European spot buyers through its domestic market. The previous price was $134 per MWh on Tuesday.

Rising costs have been driven by increased demand in Asia and other parts of the world as economies reopen after shutdowns during the COVID-19 pandemic. The ongoing difficulties with gas supply and costs have reopened questions about the use of coal.

Coal is the most polluting fossil fuel and European countries have committed to phasing out its use and closing all coal plants by 2030, according to Climate Action Network (CAN) Europe, a climate change nongovernmental organization (NGO).

Europe was already halfway to that goal as of March this year but the energy crunch has led some power producers to ask Russia for greater supplies of coal as well as gas, while API2 Rotterdam coal futures - a benchmark price reference for coal imported into northwest Europe - rose $80 per metric tonne in September and passed $230 per metric tonne.

Coal stocks have also rallied as demand has increased, with European producers turning to coal as a result of the energy crisis.

Experts who spoke to Newsweek suggested that coal was not the future of energy supply for Europe but criticized the current EU energy policy.

Prolonging the Agony

Professor Dirk Buschle is Iberdrola Manuel Marin Chair for European Energy and Climate Policy at the College of Europe, which has its main campus in Bruges, Belgium. He told Newsweek that current difficulties should encourage more investment in renewable energy.

"During the oil crises in the 1970s, European countries such as Germany believed that to continue domestic coal production could deliver them from dependency. This revival proved to be short-lived when oil prices returned back to normal and came at the cost of high subsidies," Buschle said.

"Today, the situation is similar and different at the same time. Similar because this last spark will again not suffice to justify investments in coal production or power generation from coal. It will just prolong the agony. Different, because in Europe we price in the negative externalities of fossil fuels through the Emission Trading Scheme (ETS), and thus create at least the basic conditions for a level playing field among them, and among them and renewables.

"But the ETS price is not the only factor affecting the merit curve of different fuels, their prices may rise for other reasons," he went on.

"This happened to the price of gas, a fossil fuel less polluting than coal and often used to balance intermittent renewable power. While the price surge may indeed be a consequence of scarcity following the principles of a (global) gas market, we should have an interest in Europe to address any possible market abuses by fully using our competition law toolbox."

"To avoid distortions, we should also speed up the phase-out of coal subsidies. This would help re-establishing the balance between gas and coal at least in the mid-term. With all the hardship it causes, current high prices could and should also be an incentive to invest more and faster in renewables," Buschle said.

Ideology Meets Reality

Ralph Schoellhammer, an assistant professor of international relations at Webster Vienna Private University in Vienna, Austria, pointed to the issue of nuclear power.

"In Europe reality has now finally caught up with ideology since climate policy has been formulated primarily by NGOs and young climate activists but not the hard scientific evidence," Schoellhammer told Newsweek.

"This becomes particularly obvious in the case of nuclear energy, which in many respects would be a climate-friendly way of producing energy, but it is ideological concerns that caused the abandonment of nuclear energy, for example in Germany by 2022, and at the moment a U-turn seems unlikely."

"All of this causes severe energy shortages – Sweden had to power up two oil-based power plants that burn 140,000 liters of oil per hour, while having simultaneously shut down six out of its 12 nuclear power plants."

"Politically for the moment, it seems that a return to coal is more 'sellable' than a return to nuclear, because exiting the latter has been promoted as an enormous success that it never was," Schoellhammer went on.

"The real problem, however, will be the return of stagflation that becomes an ever more likely probability: German industrial production has declined by 4 percent month-on-month in August, while inflation is reaching new heights of over 4 percent."

The Risk of Freezing to Death

"The turn away from fossil fuels was always based on the mirage that it would have no real-life consequences for the average European, or that they would not fully comprehend slowly rising energy prices as part of general inflation," Schoellhammer told Newsweek.

"With the risk of runaway inflation, however, people are becoming increasingly more sensitive to what their monthly bills consist of, and at some point using fossil fuels and nuclear energy will be politically more expedient than clinging to climate change goals.

"This was already reflected in the German elections on September 26, where first-time voters were more attracted to the pro-nuclear energy FDP than the Greens," he went on.

"All the major parties in Europe fear people at the risk of freezing to death [like what happened in Texas in March of 2021](https://www.newsweek.com/texas-energy-operators-sued-over-winter-power-outage-that-led-womans-death-1627201) due to widespread energy outages. But even if human casualties can be avoided, energy poverty becomes an ever more realistic prospect for large parts of the European populace, a risk driven mainly by ideological decisions that were based on very little scientific evidence.

"If things continue the way they are developing at the moment, this could well be the first step of the Green movement's ultimate decline, since the costs for switching Europe to alternative energy sources are slowly but surely exceeding the sacrifices particularly the lower classes are willing to shoulder," Schoellhammer said.

Market Incentives

Daniel Esty is a professor at Yale Law School and former commissioner at the Connecticut Department of Energy and Environmental Protection. He also served as U.S. climate change negotiator from 1989 to 1993. He told Newsweek more had to be done to create incentives for cost-effective renewable energy.

"Progress toward a clean energy future will almost certainly not be smooth," Esty said. "Energy markets are, after all, like other markets and susceptible to price swings as supply and demand conditions change. As prices spike, the public's willingness to pay a significant premium to avoid greenhouse gas emissions wanes.

"So policies need to focus not just on clean energy and renewable power but also on cheaper and more reliable electricity. In this regard, European leaders have made some serious policy mistakes including a commitment to shut down nuclear powerplants before renewable energy was available at scale and competitive cost," he went on.

"More generally, there has been too much emphasis on renewable energy targets and too little focus on the strategies and market incentives needed to ramp up clean energy in a cost-effective way," Esty said.

# 2nc

**Supreme court is hostile to the FAA --- very narrow interpretation**

**Pasternak & Legault 19** --- Daniel B. Pasternak Partner, Melissa Legault Melissa Legault Labor & Employment Attorney Squire Patton Boggs Phoenix, AZ Associate, “US Supreme Court Unanimously Rules in Favor of Workers, Holding Trucking Company’s Arbitration Agreement Exempt From Federal Arbitration Act”, January 15, 2019, https://www.natlawreview.com/article/us-supreme-court-unanimously-rules-favor-workers-holding-trucking-company-s

The Court’s ruling in New Prime was **unanimous**, authored by Justice **Gorsuch**, with only Justice Ginsberg writing a separate concurring opinion (Justice Kavanaugh took no part in the consideration or decision). The ruling is noteworthy particularly because the Court, with a conservative majority, chose to interpret the FAA in a way that **expands worker’s rights.** Practically speaking, the decision will undoubtedly have a broad and sweeping impact on the interstate transportation industry given that it relies heavily on the independent contractor framework.

**“Public injunctive relief” laws allow states to use antitrust to circumvent the FAA**

**Daly 19** --- Michael P. Daly is a partner with the law firm of Drinker Biddle & Reath LLP in Philadelphia, Pennsylvania. Mark D. Taticchi is an associate who practices at Drinker Biddle’s Philadelphia office. Matthew J. Adler is an associate at Drinker Biddle’s office in San Francisco, California., “Whither McGill? The Intersection of Federal Arbitration Act Preemption and Public Injunctions”, September 23, 2019, https://www.americanbar.org/groups/litigation/committees/class-actions/articles/2019/summer2019-intersection-federal-arbitration-act-preemption-public-injunctions/

In McGill, the California Supreme Court held that an arbitration clause that prohibits an individual from seeking “public injunctive relief” in both an arbitral and a judicial forum is **unenforceable** under California law. The court did so based on a California statutory directive that “a law established for a **public reason** cannot be contravened by a **private agreement**.” Cal. Civ. Code § 3513. (So-called “public” injunctive relief is relief that has the “primary purpose and effect of prohibiting **unlawful acts** that threaten future injury to the **general public**,” as opposed to relief that has the “primary purpose or effect of redressing or preventing injury to an individual plaintiff—or to a group of individuals similarly situated to the plaintiff.” McGill, 393 P.3d at 90 (internal quotation marks and citation omitted).) The McGill court also held that its ruling was a generally applicable contract defense and, thus, **not preempted by the FAA.**

The McGill rule thus invalidated all such public injunctive relief waivers for contracts governed by California law. And because many arbitration clauses contain a **severability provision** stating that those waivers are an essential part of the arbitration agreement, the practical effect of McGill in many cases **will be the invalidation of the arbitration clause.**

The Aftermath: Three Federal Courts in California **Follow McGill**

Shortly after McGill was decided, three different judges in the Northern District of California applied its holding to invalidate the arbitration provisions in three different consumer contracts. In McArdle v. AT&T Mobility LLC, No. 09-1117, 2017 WL 4354998 (N.D. Cal. Oct. 2, 2017), Judge Claudia Wilken held that McGill invalidated the arbitration provision in a wireless telephone contract. A few weeks later, Judge William Alsup issued Blair v. Rent-A-Center, Inc., No. 17-2335, 2017 WL 4805577 (N.D. Cal. Oct. 25, 2017), in which the court largely rejected an attempt to enforce the arbitration provision in a rent-to-own agreement. Finally, a few months after Blair, Judge Vince Chhabria applied McGill to invalidate an arbitration provision in a cable services agreement. See Tillage v. Comcast Corp., No. 16-5969, 2018 WL 4846548 (N.D. Cal. Feb. 15, 2018). All three courts further found that the McGill rule was not preempted by the FAA.

The defendants in these cases each appealed to the Ninth Circuit Court of Appeals.

**The Ninth Circuit Upholds the McGill Rule**

On June 28, 2019, the Ninth Circuit issued opinions in each case, though only Blair was published. See Blair v. Rent-A-Ctr., Inc., 928 F.3d 819 (9th Cir. 2019). The primary issue in Blair was whether the FAA preempts the McGill rule. **The court held that it does not.**

**Supreme court votes neg**

Frankel 20 --- Alison Frankel “U.S. Supreme Court allows Calif. consumers to evade arbitration due to injunctive claims”, Reuters, June 2020, https://www.reuters.com/article/legal-us-otc-arbitration/u-s-supreme-court-allows-calif-consumers-to-evade-arbitration-due-to-injunctive-claims-idUSKBN2392ZY

The U.S. Supreme Court has **given its blessing**, at least for now, to a tactic that the U.S. Chamber of Commerce has described as “a road map marked **with an easy-to-follow path**” for California consumers to evade mandatory arbitration with corporations.

The justices on Monday declined to grant petitions by AT&T and Comcast for review of a 2019 ruling by the 9th U.S. Circuit Court of Appeals, which said companies cannot enforce mandatory arbitration provisions requiring consumers to waive their right to seek a **public injunction**. The 9th Circuit decision applied California Supreme Court’s so-called McGill rule, from 2017’s McGill v. Citibank (2 Cal.5th 945), that the Federal Arbitration Act does not preempt California public policy favoring the right to seek injunctive relief.

Under the McGill rule, companies cannot require consumers to waive the right to seek a **public injunction,** although the rule does not specify whether plaintiffs must sue or arbitrate. AT&T and Comcast purported to require waivers in arbitration provisions that **were non-severable.**

The companies’ veteran Supreme Court counsel – Andrew Pincus of Mayer Brown for AT&T and Mark Perry of Gibson Dunn & Crutcher for Comcast – argued that the McGill rule is just another improper attempt by California to undermine U.S. Supreme Court precedent establishing the power and reach of the FAA. But we needn’t spend much time today on the companies’ legal reasons for why the Supreme Court should take their cases, since **those arguments failed to persuade the justices.**

#### Prices take years on average to stabilize – time distinction between disbandment and successful enforcement is negligible

DePaola 14 (Joe DePaola, Managing Partner & President at BizShifts, former VP Worldwide Sales & Business Development, CIC Inc., former PhD student Business/Engineering, Stanford University, MS Engineering, New York University; **internally citing John Connor, Professor of industrial-organization economics at Purdue University, specializes in empirical research in antitrust policy, PhD University of Wisconsin**; “Sinister-Side of Cartels, Collusions… For Dominating Markets: Sleeping with the Competition is a Dubious Business Strategy,” BizShifts-Trends, 4-10-2014, https://bizshifts-trends.com/sinister-side-cartels-collusions-dominating-markets-sleeping-competition-dubious-business-strategy/)

In the study ‘Cartels and Antitrust Portrayed: Private International Cartels’ by John Connor; calculates the range of cartel price overcharge to be between 17% and 21%… it’s important to note that the research may under-estimate the true extent of the higher price from cartels… Also, the study shows that prices don’t fall very quickly to market levels after a demise of a cartel. Rather, prices fall gradually over a period of time– few months, even few years, e.g., after the ‘construction concrete products industry’ cartel was dissolved, prices were still falling three years later…

#### Many thumpers to price increases and volatility – growth, tight labor market, protectionism, trade disruptions, bottlenecks, transportation costs and shortages, wages, commodities, shift in demand curves, geopolitics, climate change, political environment – BUT companies are already adapting in ways that solve

Wanklyn et al 18 (Jane Wanklyn, Partner; Marc Hochman, Partner; Yves Thill, Partner; and Jim Barnes, Managing Director, Institute for Supply Management; all at Kearney, leading global management consulting firm; “High inflation: uncharted waters for supply management,” Kearney, 2018, https://www.kearney.com/procurement/article/?/a/high-inflation-uncharted-waters-for-supply-management)

A growing economy. A tight labor market. Two of the biggest telltale signs of inflation have been evident in recent months, and concerns have been further fueled by two factors: tariffs and trade turbulence stemming from the Trump administration’s protectionist policies and supply chain bottlenecks as a result of rising transportation costs and ongoing truck-driver shortages. The US inflation rate for the 12 months ending in July was 2.9 percent—the highest since February 2012.

Prices for many commodities are already on the rise, and the dynamics are in place for a potential long- term inflationary environment that would be new territory for most supply management professionals, especially with trade-war speculation showing no signs of abating.

According to Merriam-Webster, economic inflation is defined as “a continuing rise in the general price level usually attributed to an increase in the volume of money and credit relative to available goods and services.” Historically, price inflation conditions have produced increases in costs for purchased goods and services that negatively impact how much we pay. Long periods of inflation can make it seem as though there’s no limit to price increases. The last time western economies experienced double-digit inflation was more than 40 years ago in the 1970s and early 1980s.

Merriam-Webster goes on to describe the financial definition of inflation as “the rate at which prices rise and purchasing power falls. It is why something that cost $1 in 1980 cost $2.37 in 2005.”

The Institute for Supply Management® (ISM) and Kearney partnered to study how companies are responding to the current environment of increasing price inflation and likelihood of continued acceleration in inflation, using an online survey of a sample of ISM customers and members from April 5 to May 18. In all, 304 usable responses were collected. (Among respondents, 54 percent were from manufacturing industries, 43 percent were employed by organizations with revenue of $1 billion or more, and 66 percent were managers or higher.)

This inflation study integrates the practitioner network of ISM with the client experiences of Kearney to identify how companies are reacting and what supply managers can do to mitigate the impact of inflation on the prices they pay to suppliers.

The impact on supply management

When supply management professionals evaluate how inflation will make their jobs more difficult, lost purchasing power is their primary concern. A long inflation cycle may be brewing, and many of today’s professionals have never lived through the kind of double-digit inflation that could be coming. In fact, recent decades have provided low price inflation, and many industries (such as automotive and electronics) have seen price declines thanks to improved efficiencies and newer technologies. Pointing to clear bottom-line cost savings may become difficult when procurement success means avoiding price increases that suppliers request—or demand.

Today, inflation is mostly driven by rising commodity prices. The Manufacturing ISM Report On Business® Prices Index has been above 70 percent since January. In 2017, the Index dipped below 60 percent only twice and averaged 65 percent for the year. In May, the Index reached its highest level (79.5 percent) since April 2011 and reflected price increases for 27 straight months.

Notably, the Manufacturing ISM Report On Business showed that, for May, hot-rolled steel prices and aluminum prices rose 18 and 19 straight months, respectively. However, it may not take long for inflation to affect other types of purchases, including labor. We expect to see wages go up as competition for workers intensifies. In 2018, for the first time in many years, the number of unfilled jobs exceeded the number of unemployed workers (see figure 1).

Graph of The United States has more unfilled jobs than unemployed workers

The signs of inflation

Inflation warnings are in the news, and the impact of rising prices is being felt by companies across many industries. A sampling of current articles highlights the severity of this concern, as there are daily reports on rising commodity prices, growing construction costs, and a tightening labor market. Also, healthcare costs are rising at a faster rate year over year.

Commodity costs are rising, and volatility is growing. Such factors as increasing demand among major and developing economies, geopolitical uncertainty, trade protectionism, and climate change all create supply chain risk, increase costs, and contribute to price volatility. For example, Chinese government shutdowns of factories that do not comply with environmental regulations, combined with US tariffs, create upstream and downstream price pressures on steel and aluminum as supply constraints and import taxes increase. Today’s trade environment is distinctly different from previous ones in breadth alone, and this is the first time companies have to address trade policy as a risk, as added costs cannot simply be passed off to consumers.

Higher prices impact procurement professionals in several ways. Inflationary environments make it difficult for buyers to determine price increases their suppliers need to offset inflation, compared with opportunistic price increases. This is especially true in commodity markets, where commodity producers have endured years of low margins and will try to recover in an inflationary environment.

Year-over-year reductions in prices and purchase price variance are not always possible. In such a situation, controlling price increases and showing value to an organization becomes the focus of procurement activities. Interestingly, at the beginning of long-term inflationary cycles, commodities play a key role. Our study confirms that business leaders’ primary concerns are about price inflation for commodities versus non-commodities (see figure 2).

Graph of Business leaders are concerned about price inflaction for commodities

Uncertainty may come from the US government’s unclear direction on tariffs and other international issues and a lack of experience with inflationary economic environments among many supply management professionals. A selection of headlines provides an overview of recent reporting on these dynamics:

Mexico’s President-Elect Balks at Including Energy Chapter in New NAFTA

—The Wall Street Journal, August 21, 2018

Trump’s Fed Criticism Sends U.S. Dollar Lower

—Financial Times, August 20, 2018

Starbucks Boycott? Nike Shutdown? China Holds Trade War Leverage

—Bloomberg, August 20, 2018

The World’s Biggest Shipping Company Says Trump’s Trade War Will Hurt America More Than Anyone Else

—Business Insider, August 20, 2018

Canada on the Sidelines as U.S. and Mexico Near an Agreement on NAFTA

—The New York Times, August 17, 2018

Trump Tariffs Could Reduce U.S. Exports, Says Fed

—Financial Times, August 13, 2018

Trump Trade Blasts Send a Chill over Canada

—Financial Times, June 7, 2018

U.S. Factory Orders Fall More Than Expected in April

—Financial Times, June 4, 2018

China Tariff Threat Deals Another Blow to U.S. Farmers

—Financial Times, April 5, 2018

NAFTA’s Biggest Challenge May Come After the Deal

—Council on Foreign Relations, March 1, 2018

Oil Companies Clash with Trump over NAFTA Changes

—The Houston Chronicle, May 11, 2018

The current political and economic environment could threaten what has been a seemingly inexorable march toward more integrated economies and more integrated global supply chains. A company’s flow of goods and services are profoundly global and deeply dependent on a free flow internationally. Businesses are revising sourcing and distribution strategies that they relied on for decades. This diverts resources from other business activities, such as new product development or expansion into new markets. Also, inflation may make it difficult for net cost savings to be seen on a company’s bottom line.

#### Prices don’t solve your Russia impact because Moscow locks-in exclusive contracts. Those already exist in many instances.

Sabadus – 10-25

2021 - Dr. Aura Sabadus is a senior energy journalist who writes about Eastern Europe, Turkey, and Ukraine for Independent Commodity Intelligence Services (ICIS), a London-based global energy and petrochemicals news and market data provider. “Europe must face up to the chilling reality of Putin’s energy blackmail” – Atlantic Council - #E&F - https://www.atlanticcouncil.org/blogs/ukrainealert/europe-must-face-up-to-the-chilling-reality-of-putins-energy-blackmail/

Long-term contracts offer no guarantee that buyers would always benefit from cheaper prices. However, they do lock in market share for producers such as Gazprom, while also hampering consumers from reacting swiftly in case of market volatility. If anything, the geopolitical risk which has partially contributed to major price swings from record lows in 2020 to record highs in 2021 should persuade companies to use the flexibility granted by markets to react quickly and efficiently.

In the past, long-term contracts such as Ukraine’s 2010 agreement, whereby Gazprom offered a hefty price discount in exchange for Kyiv renewing a lease on Russia’s naval base in Crimea until 2042, served to deepen buyer vulnerability and dependence on Russia.

#### And there are now mechanisms that mean that fights won’t derail everything. Means EU’s already fragmented AND no one issue can derail everything.

Archick – 10-28

2021 - Kristin Archick - Specialist in European Affairs. Foreign Affairs, Defense, and Trade Division of the Congressional Research Service - “The European Union: Questions and Answers” – Congressional Research Service - October 28, 2021 - #E&F - https://sgp.fas.org/crs/row/RS21372.pdf

Considerable attention since 2016-2017 has focused on developing a "multispeed EU," in which some member states could agree to greater integration in certain areas and others could opt out. Some European policymakers and analysts suggest that such a multispeed EU already exists in practice, with varying membership on a range of EU initiatives, including the eurozone, Schengen, justice and home affairs issues, and defense policy. Critics contend, however, that making the multispeed concept central to the EU's identity could be divisive, undermine EU solidarity, and potentially lead to different classes of EU membership.31

# 1nr

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

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

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

#### Its existential – loss of norms causes Great Power War, runaway emerging tech, and ecological disaster

Jain 19 [et al; Ash Jain is a Senior Fellow and coordinates the Atlantic Council’s Democratic Order Initiative and D10 Strategy Forum. He previously served as a member of the Secretary of State’s policy-planning staff, focusing on US alliances and partnerships, international norms, and challenges to the democratic order—including those posed by Russia, China, Iran, and North Korea. Mr. Jain has also taught as an adjunct professor at Georgetown University’s School of Foreign Service. He earned a JD/MS in foreign service from Georgetown University – “Present at the Re-Creation: A Global Strategy for Revitalizing, Adapting, and Defending a Rules-Based International System” - Atlantic Council Strategy Papers – October - - https://www.atlanticcouncil.org/wp-content/uploads/2019/10/Present-at-the-Recreation.pdf**]**

This international system, while not perfect, has proven to be more successful than any in human history at providing security, economic prosperity, and freedom. The evidence of this is apparent in the numbers. Before 1945, major powers frequently engaged in direct warfare on a massive scale, as in the Napoleonic Wars, World War I, and World War II. Since 1945, however, there have been zero great-power wars. As shown in Figure 1, the percentage of people killed in armed conflict has drastically declined in the post-World War II era. Armed conflict killed an average of 1–2 percent of the human population from 1600 to 1945. During the Cold War, an average of 0.4 percent of the world’s population perished due to war. Since the year 2000, less than one one-hundredth of 1 percent of people have died this way.8 Under a rules-based system, the world has continued to make progress in reducing deaths from all kinds of war, including often-intractable civil conflicts.9

Turning to economic prosperity, the global gross domestic product (GDP) per capita in 1945 was $4,079.10 Today it is $11,570.11 This drastic increase in global living standards is evident in Figure 2. The share of the global population living in poverty has dramatically decreased. In 1929, the number of people living in extreme poverty (defined as earning less than 1.90 international dollars per day) was 1.35 billion, almost two-thirds of the world population at the time. In 2015, that figure was 733.48 million, or slightly less than 10 percent of the world population.12 China itself has been one of the biggest beneficiaries of this system, as geopolitical stability in Asia and integration into the global economy helped to lift four hundred million Chinese out of poverty.

In the realm of good governance, the number of democracies has substantially increased. With the end of World War II and decolonization, the number of democracies increased from seventeen to forty-eight between 1945 and 1989.13 That number further skyrocketed at the end of the Cold War, as countries formerly behind the Iron Curtain rushed to join the West. In the year 1900, there were twelve democracies in the world. Today there are ninety-six.14 The percentage of the world’s population living under democratic governments has also increased from about 12 percent in 1900 to more than 55 percent today.15 This trend is visible in Figure 3.

To be sure, these outcomes are the result of an enormous and interconnected range of factors. International-relations scholars, for example, believe that nuclear deterrence and the absence of a multipolar distribution of power also contributed to great-power peace.16 In addition, globalization and economic development have been fueled by new technological developments. Further, global norms on democratic governance and human rights have come a long way since the early twentieth century.17

Still, it is doubtful whether this dramatic improvement in the human condition could have been achieved in the absence of the rules-based international system. Moreover, many of these other driving forces are themselves constitutive of, if not partially the result of, that system. Global bipolarity, and then unipolarity with the United States at its center, was critical for the postwar development of a rules-based system, which may not have been possible in a more multipolar distribution of international power, or with a non-democratic hegemon at the system’s apex. The splitting of the atom could have resulted in widespread nuclear-weapons proliferation and nuclear use had it not been for the NPT and extended US nuclear deterrence in Europe and Asia.18 The most important technological advances for globalization, including the Internet, occurred and flourished in the free world, defended by the United States and its democratic allies and partners.19 Finally, the United States and its democratic partners, along with nongovernmental organizations and individuals operating in these states, were the most important norm entrepreneurs propagating global norms around issues of good governance, democracy, and human rights.

In sum, the rules-based international system that has been the defining feature of global order for the past seventy years has coincided with—and was almost certainly essential in bringing about—the most secure, prosperous, and well-governed world humanity has ever known.

Despite this record of unprecedented and enduring success, the rules-based international system is currently besieged by a number of challenges unleashed by rapid and dramatic global change. Understanding the current strategic context, including global trends and threats both external and internal to the system’s democratic core, is a necessary first step toward devising a strategy to revitalize, adapt, and defend a rules-based international system.

Global Diffusion of Power. The international distribution of power, as defined by relative economic weight, is shifting away from the founders of the post-World War II system to other emerging economies. As recently as the 1990s, nearly 70 percent of global economic activity occurred in Europe and the Americas. By the 2040s, that number is expected to drop to roughly 40 percent. At the same time, the Asian share of global GDP will increase from 32 percent at present to 53 percent in 2050, meaning that, by that time, the majority of all economic activity on Earth will occur in Asia.

While the United States remains the world’s most powerful state militarily and economically, it is declining relative to other rising powers, particularly China. When corrected for purchasing-power parity (PPP), China’s GDP has already surpassed the United States. The better metric for international power and influence, however, is real GDP; here, too, the US advantage is narrowing, but more slowly.21 At the conclusion of World War II, the United States possessed roughly 50 percent of global GDP.22 From the 1970s through today, that number has held steady at roughly 25 percent.23 Despite a common misperception, the United States’ share of global power is not declining in absolute terms.

Rather, other powers—especially China—are rising. China’s share of global GDP rose from 4.6 percent in the 1990s to 15 percent today.24 Many economists predict that China could surpass the United States as the world’s largest economy by 2030. It is noteworthy, however, that in 2009, economists predicted that this transition would happen by 2020. That date has been pushed back a decade as Chinese growth has slowed. Future projections depend entirely on assumptions about growth rates in the United States and China that cannot be known with certainty. Still, most economists expect that China will, at some point, surpass the United States as the world’s largest economy.

China is joined by other emerging economies with rapid growth rates, including India, Indonesia, and others. US allies, including Japan, Germany, and the United Kingdom, remain among the wealthiest nations on Earth, but their share of global power is also declining relative to the rise of the rest.

This shift is significant because international orders function best when their formal attributes at least roughly reflect the underlying balance of power. While only one measure of global influence, economic power is central given the leverage it provides over trade and investment, and the resources it offers to sustain military and security advantages.

It is also important to point out, however, that the United States and its formal treaty allies continue to possess a preponderance of power in the international system. As Figure 4 shows, the United States and its formal allies currently produce 59 percent of global GDP. When including other countries considered to be “democracies” by the widely used Polity scores, that number rises to 75 percent of global GDP. Democracies continue to retain global influence because more countries have transitioned to democracy since the end of the Cold War, and overall economic growth in democratic countries has outpaced that in autocratic states since 1991.

The major shift since the dawn of the post-Cold War world, therefore, is not that the power of the United States and its democratic allies and partners has declined substantially. The major difference is that the share possessed by autocratic challengers, especially China, has grown. As Figure 4 shows, the world is approaching a more bipolar distribution of power, with more wealth concentrated in the democracies and in a grouping of autocratic challengers led by China.

This means that, if they are able to work together more cohesively, the United States and its democratic allies and partners still have the power and influence necessary to significantly shape international outcomes. Moreover, if they are able to expand their ranks to court other nonaligned democracies like India, Indonesia, and Mexico, their influence on the international system can be even more decisive.

Disruptive Technologies. New technologies—including artificial intelligence (AI), robotics, quantum computing, and biotech, among others—are being developed at an exponential pace, and have the promise to transform society. They will determine how people live and function in the twenty-first century, significantly shaping the global economy, international security, and the course of geopolitics.

Throughout history, progress has been built on technological innovation, ranging from Thomas Edison’s light bulb to Henry Ford’s assembly line to the silicon chip, the personal computer, and the Internet. While new technology promises improved productivity and quality of life, it will bring serious downside risks, including economic dislocation and weapons proliferation. AI, for example, is already being widely adopted in the private sector to achieve great efficiencies and cost savings.25 At the same time, automation threatens to put millions out of work as jobs once performed by humans are replaced by machines. Moreover, AI is also being introduced into national militaries. A logical next step is fully autonomous weapons that can select and engage targets without a human in the decision-making loop. Some warn that these “killer robots” introduce many ethical and security risks, including the fear that they may turn on their creators and threaten humans’ very existence or, indeed, what it means to be human.26 Henry Kissinger warns, “We are in danger of losing the capacity that has been the essence of human cognition.”27

The existing international system was designed to deal with the most important dual-use technologies of the twentieth century, such as nuclear power, but it must be updated to deal with the technologies of the twenty-first century. As with nuclear energy, the international community needs an entirely new set of international norms, standards, and agreements for responsible uses of new technologies that mitigate their downside risks, while maximizing their upside potential.

Since the time of Edison, the United States has been the world’s most innovative country, but it is at risk of losing that title to China and other countries that aim for the first-mover advantage in the next round of technological breakthroughs. Throughout history, technological progress and international leadership have gone hand in hand. Think of roads and aqueducts in ancient Rome, the steam engine in nineteenth-century Great Britain, and the Internet in the United States. If China or another country takes the lead in the new tech arms race, Beijing may be in a better position to rewrite the international system’s rules.

Nuclear Proliferation. Even as the world grapples with the technological challenges of the twenty-first century, century-old technological challenges remain. The NPT may be the most successful treaty in history, but its future is uncertain. North Korea has become the only country in history to sign the treaty, withdraw, and build nuclear weapons. If North Korea is allowed to become an accepted nuclear-weapons state, it would pose a severe threat to international peace and security. Other members of the treaty may also reconsider their nuclear options. In particular, South Korea and Japan may be at risk of pursuing nuclear-weapons programs if the program in Pyongyang continues to advance and the United States is unwilling or unable to provide Seoul and Tokyo with adequate security assurances.

Iran’s nuclear program was allowed to operate within strict limits according to the terms of the Joint Comprehensive Plan of Action (JCPOA), but the US withdrawal from that agreement may lead Tehran to accelerate its nuclear program or dash to achieve a nuclear weapon. A bomb in Iran could also instigate further regional nuclear proliferation.28 Officials in Saudi Arabia, for example, have declared that if Iran acquires nuclear weapons, Riyadh will follow suit.

A proliferation cascade in East Asia or the Middle East would undermine the global nonproliferation regime and fuel regional insecurity. Moreover, new technologies such as additive manufacturing may make it easier for future proliferators to build nuclear-weapons programs, and harder for the international community to catch and stop them.29

The additional spread of a weapon that remains the ultimate instrument of military force could threaten the global security and stability necessary for the smooth functioning of the rules-based international system.

Ecological Disaster. As with nuclear war, an ecological disaster could constitute a direct threat to humanity’s very existence. While states have made efforts to address climate change caused by carbon emissions, including in the Paris Climate Agreement, these steps will not be sufficient to keep emissions below the target levels set by leading scientific panels. Higher average global temperatures are leading to rising sea levels, drought, an increased frequency of violent storms, and forced migrations, all of which are threatening vulnerable societies, undermining already-weak national governments, and contributing to conflicts over natural resources.

#### Reverse causal – Chevron’s key to the cred they talk about

Pierce 5 [Richard J. Pierce, Jr. Lyle T. Alverson Professor of Law, George Washington University, October 2005 “Democratizing the Administrative State” http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=839227]

The courts have announced corollaries to two of the deference doctrines that logically follow from the quite different bases for each. Thus, for instance, Chevron deference applies only to a statutory interpretation adopted by an agency that Congress has authorized to make policy decisions in the process of implementing a statute;21 Chevron deference does not apply when an agency adopts an interpretation of a statute based on the agency’s interpretation of court opinions;22 and, Chevron deference applies with as much strength to an agency decision to change its interpretation of an ambiguous agency-administered statute as to an agency decision to adhere to a previously announced interpretation.23 Each of those corollaries follows logically from the basis for Chevron deference. An agency that does not have the power to make policy decisions is not entitled to judicial deference when it exceeds its statutory authority by attempting to make a legally binding policy decision, and an agency that adopts a statutory interpretation based on its interpretation of judicial decisions is not entitled to deference because its interpretation is not based on a policy decision.

The last of the three corollaries to the Chevron doctrine is particularly important. By instructing courts to confer as much deference on changes in pre-existing agency interpretations of ambiguous statutes as on reaffirmations of long-standing interpretations, the Supreme Court recognizes the need to allow any newly elected President to change government policies within the boundaries set by Congress. It would be inconsistent with the fundamental tenets of democratic government to force a President to adhere to the policies of [their] ~~his~~ predecessor when Congress has written a statute that delegates policy making power to an agency in terms that permit a President to adopt either ~~his~~ preferred policies or those of ~~his~~ [their] predecessor. People vote in Presidential elections because they prefer one candidate’s policy preferences to those of his [their] opponent. The courts should not be in the business of blocking implementation of the policies presumptively preferred by the electorate except in the rare case in which those policy preferences violate the Constitution.

#### Jettisoning Chevron wrecks judicial review – overstretches the judiciary

Walke 16 – John Walke, Clean Air Director and Senior Attorney for the Natural Resources Defense Council, HEARING ON H.R. 4768, THE “SEPARATION OF POWERS RESTORATION ACT OF 2016”, U.S. House Testimony, 5-17, https://www.nrdc.org/sites/default/files/testimony-separation-of-powers-restoration-act-20160517.pdf

NRDC has lost its fair share of lawsuits challenging federal agency rules that were deregulatory or that failed to fulfill statutory promises to protect public health and the environmental, when judges decided that the challenged agency interpretations were permissible under the Chevron test. By jettisoning Chevron deference, H.R. 4768 also would incentivize more frequent and more wide-ranging lawsuits challenging deregulatory actions by agencies under administrations committed to that agenda. It is true that starkly deregulatory rulemakings in prior administrations have foundered more often at the first step of Chevron, by contravening the plain language of statutes.18 That would continue to be the case were H.R. 4768 to become law. One suspects, therefore, that political and corporate opponents of regulation and proponents of deregulation have made a calculation that H.R. 4768 would have disproportionate adverse impacts on regulations protecting the public. That is almost certainly true, and it is the central reason why this irresponsible legislation has no business becoming law.

III. Federal Agencies and Judicial Review Doctrines

Well-established judicial review doctrines headlined by Chevron v. Natural Resources Defense Council establish that reviewing courts defer to a federal agency’s interpretation of a federal statute that is silent or ambiguous with respect to a particular issue, if that statutory construction is permissible or reasonable. Professor Richard J. Pierce, Jr. outlined these judicial review doctrines in his March 16 testimony before this Subcommittee.19 In short, for present purposes, the Chevron doctrine states:

First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question is whether the agency's answer is based on a permissible construction of the statute.

Pierce Testimony at 5, quoting Chevron v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984). Professor Pierce correctly noted that by designing the doctrine thusly, the Supreme Court deferred to the relevant administrative agency on “issues of policy that should be resolved by the politically accountable Executive Branch rather than the politically unaccountable Judicial Branch when Congress has declined to resolve the issue.”20 Further, Professor Pierce notes that “[t]he Auer doctrine is similar in its effects to the Chevron doctrine but it applies not to agency interpretations of agency-administered statutes but to agency interpretations of agency rules.”21 Neither doctrine approaches the radical framework that de novo review would impose upon judicial review of agency regulations. As Professor Emily Hammond noted in her March 16 testimony before this Subcommittee, “[e]ven prior to the enactment of the Administrative Procedure Act (APA), courts afforded at least some deference to agencies’ legal interpretations in many circumstances.”22

Federal agencies today exercise their subject-matter expertise and understanding in promulgating regulations, utilizing the appropriate subject matter experts for a rulemaking—scientists, doctors, economists, engineers and other technical experts who supply valuable input into the regulatory process. Further, these administrative rulemakings can involve lengthy public processes, large administrative records with hundreds or thousands of technical documents and comments, including input from many stakeholders. Through these sometimes lengthy and highly technical processes, agencies finalize complex rulemakings over fairly long time horizons. Saddling the judicial branch with such time-intensive, complex, and technical reviews of each challenged rulemaking would grind the judicial branch to a halt. The judicial system is already extremely resource-constrained, and H.R. 4768 would compound those problems immeasurably. Professor Emily Hammond notes in greater depth the implications of a de novo review regime, as proposed in H.R. 4768. In particular, she notes that “there are [] important separation-of-powers principles at work relevant to the legislative branch. First, courts defer to agencies because Congress has assigned to them—not to the courts—the duties associated with our major statutory schemes.”23 Further, “Congress can craft substantive statutory language more tightly if it wants to cabin an agency’s discretion in carrying out its mandate.” Id. In contrast to de novo review, “Chevron is an exercise in judicial self-restraint: by deferring to agencies’ reasonable constructions rather than substituting their own judgment, the unelected courts avoid inserting their own policy preferences into administrative law.” Id.

It is well-documented that the federal judiciary is overburdened handling current litigation dockets. Chief Justice John Roberts, in his annual report on the state of the federal judiciary, notes that federal judges are “faced with crushing dockets.”24 Further, the Chief Justice notes that overburdened court dockets are threatening the public’s interest in speedy, fair, and efficient justice.25 The American Bar Association affirms that the federal judiciary is overtaxed, and that this problem is compounded by increasing numbers of vacancies on the federal bench.

Specifically, persistently high numbers of judicial vacancies deprive the nation of a federal court system that is equipped to serve the people. This has real consequences for the financial well−being of businesses and the personal lives of litigants whose cases may only be heard by the federal courts−e.g. cases involving challenges to the constitutionality of a law, unfair business practices under federal antitrust laws, patent infringement, police brutality, employment discrimination, and bankruptcy.26

Currently, there are over 87 judicial vacancies on the federal bench.27 The ABA notes that these twin pressures of increased vacancies and overtaxed dockets, if left unchecked, “inevitably will alter the delivery and quality of justice and erode public confidence in our federal judicial system.”28

#### Overruling Chevron power bombs environment – reverses crucial regulatory safeguards

Goodwin 20 [James Goodwin, J.D., M.P.P., is a Senior Policy Analyst with the Center for Progressive Reform, 10-15-2020 https://blog.ucsusa.org/guest-commentary/will-confirming-judge-barrett-be-the-death-of-chevron-deference/]

So, how would eliminating Chevron deference contribute to the goal of kneecapping our system of regulatory safeguards? Most immediately, it would erect a major barrier to expertise-based, science-driven implementation of federal regulatory laws like the Clean Air Act. It is an inescapable feature of lawmaking that even the best-written laws passed by the most conscientious and virtuous lawmakers could not possibly account for all technical details or possible future contingencies that might arise through sound and faithful implementation. Practical experience of enforcing the law will inevitably uncover gaps and expose ambiguities. This will especially be the case in regulatory statutes that require the application of cutting-edge science and technology for their effective implementation. What constitutes a “source” of air pollution? Or, how should the EPA go about determining the scope of reductions of air pollution one state should achieve so as not to cause problems for downwind states?

The real question is: Who is in the best position to fill these kinds of gaps and stake out a sensible position amidst these kinds of ambiguities? As both a constitutional and a policy matter, and clearly with respect to technical expertise, we should prefer agencies over the courts, and Chevron deference merely reflects this preference. Constitutionally, this approach is superior because Congress, in authorizing agencies to implement statutes, is also delegating authority to them to resolve these questions – and not to the courts. Thus, intrusion by the courts on these matters would be inconsistent with, if not an open defiance of, the clear instructions that Congress has laid out in the statutes. In terms of good policy, agencies – thanks to the vast expertise they have at their disposal (particularly compared to generalist judges) – are better equipped to resolve these details coherently and in a way that best effectuates the laws’ underlying purposes and goals. That is why Congress committed these issues to them in the first place.

But, by repealing Chevron, the Supreme Court would essentially invite judicial policymaking, as activist judges would have freer rein to exploit unavoidable statutory ambiguities in order to substitute their own policy preferences. Or worse, it could halt agency action until Congress could pass legislative changes to resolve all ambiguity. For instance, if construing a term like “source” in a particular way would lead to weaker regulations, then judges might be able to do just that – even if the EPA had sought to adopt a different interpretation that would have promoted stronger public health and environmental safeguards consistent with the Clean Air Act’s protective orientation.

If that’s not bad enough, the importance of Chevron has taken on an extra dimension in recent years – one that not coincidentally traces its origins to the paralyzing dysfunction that has come to define Congress: Many agencies’ authorizing statutes have not been updated, to account for changes in technology or emerging threats implicated by the statutes’ objectives. The good news, though, is that in many cases, Congress had the foresight to design these statutes in ways that would permit agencies to remain responsive even in the face of inevitable, but always unpredictable, change, as long as deference to agency expertise remains the doctrine.

The Clean Air Act offers a good illustration. For years, lawmakers have failed in all efforts at passing legislation to address the climate crisis. Consequently, following the Supreme Court’s 2007 Massachusetts v. EPA decision, which held that the Clean Air Act covered greenhouse gases, the Obama administration set about developing regulations under the statute to address emissions from leading sources, including automobiles and fossil-fueled power plants. Unsurprisingly, the application of the law’s provisions to this novel air pollutant revealed new gaps and ambiguities, which the EPA was required to resolve by drawing upon its technical and scientific expertise. There was nothing illegitimate or inappropriate about any of this. Rather, the law was working exactly as Congress had intended. Just as importantly, had the Trump administration not repealed those rules, the Chevron deference doctrine still would have provided reviewing courts ample power to police any attempts by the Obama EPA to stray beyond the statute’s boundaries.

And this is precisely the scenario that some business interests have in mind as they continue to wage war against Chevron deference. The counter-majoritarian dynamics of Congress are such that they have been able to block new regulatory legislation to address emerging issues like the climate crisis. But they haven’t been able to cobble together the votes to repeal or weaken existing laws. And, thanks to Chevron deference, those laws remain a powerful vehicle for advancing protective safeguards as long as they remain on the books. In contrast, repealing Chevron would effectively “fossilize” them in a state not much different from when they were first enacted. They would be like the Jurassic Park mosquitos trapped in amber – parchment relics perfectly preserved but otherwise incapable of living and responding to present day circumstances. In short, through the repeal of Chevron deference, these interest groups hope to achieve through litigation what they could not achieve through legislation: neutralizing critical public interest laws like the Clean Air Act.

#### You don’t solve unless you use the Supreme Court

Davis 17 [Joshua and Robert Lande; 2017; Professor and Director of Center for Law and Ethics at the University of San Francisco; Venerable Professor of Law at the University of Baltimore, M.P.P. and J.D. from Harvard University; Scholar Works, “Restoring the Legitimacy of Private Antitrust Enforcement,” Ch. 6]

E. Class Action Waivers in Arbitration and Illinois Brick Reform

In American Express Co. v. Italian Colors Restaurant, the Supreme Court made it very difficult to challenge predispute arbitration provisions that bar class actions.109 Few court will be able to set aside such provisions in the future. As a result, class action waivers in effect immunize many potential violators from private purchaser actions.110 Allowing waiver of class treatment is a particularly concerning in antitrust because of the Illinois Brick rule; as Professor Gilles notes, "The only people who can bring an antitrust class action in federal court [direct purchasers] are those on whom collective action waivers may most easily and directly be imposed."111

Meanwhile, the controversy over indirect purchaser damage suits under federal law has raged for almost 40 years. Since the Supreme Court's decision in Illinois Brick, indirect purchasers have been unable to recover damages under section 4 of the Clayton Act,112 while direct purchasers can recover the full amount of an overcharge under Hanover Shoe without allowing for any pass-on defense.113 Italian Colors creates new urgency to reconsider Illinois Brick so that private lawsuits can help deter antitrust violations. Private antitrust suits arguably have done more to discourage law-breaking than criminal enforcement by the DOJ.114 Given the essential role that class actions play in private antitrust enforcement,115 the combined effect of Italian Colors and Illinois Brick may be to decrease significantly the efficacy of U.S. antitrust laws.116

The next administration should work to overrule Italian Colors. But given the current political situation, that may not prove feasible. Instead, or in addition, the next best solution may be to reform Illinois Brick. If so, here are some principles to guide that challenging effort: (1) historical levels of antitrust deterrence should not be undermined; (2) consumers should be compensated for their harm to the extent practicable; (3) the calculation of potential damages to any class of purchasers should be reasonably predictable so as to provide clear incentives for private lawyers to take on cases; (4) administrative costs should be minimized to the extent this would not interfere with any of the other goals in this area; (5) procedural hurdles, particularly in the class certification process, should not undermine the effectiveness of direct or indirect purchaser actions; and (6) state attorneys general should retain the option of bringing parens patriae actions under state law in state court, without removal.117

F. Class Certification Standard

The Supreme Court has issued several recent opinions pertaining to the standard at class certification. Some of them threatened to undermine class actions and, with them, the efficacy of private antitrust enforcement.118 The upshot, however, is that the class certification standard has been clarified but not for the most part made more exacting. Wal-Mart Stores, Inc. v. Dukes119 held that courts may consider the merits of a class action to the extent they are relevant to determining whether plaintiffs have carried their burden to certify a class under Rule 23. Amgen Inc. v. Conn. Ret. Plans & Trust Funds120 clarified that the inquiry to into the merits is permissible "only to the extent" it bears on the Rule 23 standard121 and confirmed that the Rule 23 "grants no license to engage in free-ranging merits inquiries at the class certification stage."122 Comcast Corp. v. Behrend123 held that plaintiffs' theory of liability much match their theory regarding damages.124 Each of these decisions could have dealt a serious blow to antitrust class actions. In the end, none did. Yet, as in the past, the class action standard remains under siege.

One ominous case on the horizon is Bouaphakeo v. Tyson Foods. The Supreme Court has taken up the question of whether a class may be certified under Rule 23(b)(3) if it includes "members who were not injured and have no legal right to any damages."125 AAI successfully briefed this issue in In re Nexium Antitrust Litigation, in which the First Circuit recognized that "objections to certifying a class including uninjured members run counter to fundamental class action policies."126 Including uninjured members in a class need not increase a defendant's damages and does not raise due process issues, particularly not ones a defendant should have standing to raise.127 Indeed, awarding classwide damages in an antitrust case—including for a class that includes uninjured members—can minimize error costs, providing a more accurate measure of damages than would individual litigation.128

In the upcoming Term, the Court will also consider whether defendants can defeat class actions by "picking off" the proposed class representatives with an offer of complete relief for the representative's individual claim, even when the offer to settle is rejected. Campbell-Ewald Co. v. Gomez.129 Specifically, the Court will consider whether a class representative's claim is mooted by an offer of complete individual relief before the class is certified, an issue left open in Genesis Healthcare Corp. v. Symczyk.130 For the reasons stated in Justice Kagan's dissent for four justices in Genesis Healthcare, an unaccepted offer is a legal nullity that should not moot a class representative's claim, let alone the claims of the class.

The Supreme Court does not pose the only threat to class actions. Some lower courts have created a demanding "ascertainability" requirement not found in Rule 23. They have held not only that plaintiffs must offer a class definition based on objective criteria, but that an "administratively feasible" method must exist for identifying individual class members and ascertaining their class membership. The heightened ascertainability requirement poses a particular threat to consumer class actions,131 but it could place some antitrust class actions at risk as well. Indeed, it may be just another way to impose a requirement that all members of a proposed class suffer injury.

Further, some anti-class action groups are on a campaign to eliminate or curtail cy pres.132 The groups apparently recognize that eliminating or restricting cy pres can undermine consumer class actions seeking to recover small amounts of money. And some courts have been overly restrictive about the

use of cy pres as part of class settlements.133 The Chief Justice has expressed skepticism of cy pres as part of class settlements, noting "fundamental concerns surrounding the use of such remedies in class action litigation," and that in a "suitable case, this Court may need to clarify the limits on the use of such remedies."134

Not only the courts threaten the viability of class actions. The House is considering H.R. 1927, the "Fairness in Class Action Litigation Act," which would effectively eviscerate consumer, antitrust, employment, and civil rights class claims. The bill bars class certification unless proponents demonstrate, based on a "rigorous analysis," that each person in a class has suffered "the same type and scope of injury." This standard would be inconsistent with the letter and spirit of Rule 23. It would go beyond requiring harm to all class members, imposing an extreme and arbitrary standard that would prevent certification of many classes that would meet the requirements of the current Rule 23 and case law interpreting it.

At first, a recent interest in revising Rule 23 on the part of the Advisory Committee on Civil Rules also appeared to be a threat. However, the "conceptual sketches" provided by the Rule 23 subcommittee of the Advisory Committee on Civil Rules in April—a prelude to presenting draft amendments to the full committee at its Fall 2015 meeting—appear on the whole to be even-handed and reasonable, more likely to improve the functioning of Rule 23 than to damage it. The sketches address settlement approval criteria, settlement class certification, cy pres, objectors, Rule 68 offers and mootness, issue classes, and notice. Indeed, it is a sign of the reasonableness of the sketches that critics of class actions have sharply criticized them.135

The next administration should work to preserve class actions and, with them, private enforcement of the antitrust laws. It should submit amicus briefs in support of reasonable interpretations of Rule 23, particularly before the Supreme Court. And it should oppose legislation designed to prevent access to justice and to use procedural ploys to deprive consumers of their substantive legal rights.

#### They’ll decline to apply Chevron in this case but they will try to avoid explicitly overruling if possible

Wheeler 21 [Lydia Wheeler, Senior Reporter at Bloomberg Law, 5-21-2021 https://news.bloomberglaw.com/health-law-and-business/high-court-medicare-payments-case-challenges-agency-deference]

Jurisdiction

Chevron deference comes from the Supreme Court’s 1984 holding in Chevron v. National Resources Defense Council, in which the justices said courts should defer to an agency in ambiguous situations as long as its interpretation of a law is reasonable.

“Federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do,” Justice John Paul Stevens said in the court’s majority ruling. “The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.”

But the AHA argues “it is up to the federal courts, not administrative agencies, to determine” when they can and can’t hear a challenge to an agency action.

The AHA’s case stems from cuts the Department of Health and Human Services made in 2019 to Medicare payments that hospitals get for providing services at off-site outpatient clinics. The HHS said its interpretation of a Medicare provision allowed it to reduce reimbursement rates to control an unnecessary increase in the volume of evaluation and management services provided at outpatient departments.

The district court sided with the AHA, which argued this “method” of volume control wasn’t allowed under the Medicare statute and that Congress already expected these facilities to have higher rates.

But the U.S. Court of Appeals for the District of Columbia Circuit reversed that ruling. The appeals court said it lacked jurisdiction to hear a challenge to the rate reductions.

The D.C. Circuit said it can’t review the lawfulness of an agency action if a statute precludes judicial review unless that action is barred by the statute. Because the Medicare statute is ambiguous, the appeals court said it deferred to the agency and found that it reasonably interpreted the statute to allow for the reimbursement cut.

“By deferring to HHS’s interpretation of that statute, the D.C. Circuit permitted the agency to set the boundary of the court’s power,” the AHA argues in its February petition.

The Department of Justice, representing the HHS, counters that Congress never intended for courts to override provisions that limit judicial review.

“It is very unlikely that Congress, in expressly precluding review of HHS’s adoption of volume-control measures under that provision, intended such an unstated, easily manipulated exception,” acting Solicitor General Elizabeth Prelogar and other DOJ attorneys said in a reply brief.

Under Medicare’s outpatient prospective payment system, the DOJ said HHS sets annual payment rates and that the statute directs HHS to develop a method for controlling unnecessary increases in the the volume of services covered to manage costs.

The “statute expressly precludes judicial review of specified agency actions,” including those methods of controlling costs, the agency argues.

Whittle Down

Not all statutes include provisions that limit judicial review like the Medicare Act. But the AHA says laws governing immigration, the Transportation Security Administration, the Federal Communications Commission, the Supplemental Nutrition Assistance Program, and state telecommunications commissions include provisions that do.

If the court rules Chevron doesn’t apply to statutes with these preclusions, it could reduce the context in which Chevron doctrine would apply, law scholars say.

“If the court wants to continue to whittle Chevron down, this is another way to do it,” said Jeffrey Lubbers, an administrative law professor at American University Washington College of Law.

While the court may be unlikely to want to say explicitly that Chevron is overruled, “I do think that if you count up the justices there seems to be several who have suggested that in the past perhaps Chevron has been too readily applied,” said Jennifer Mascott, an assistant professor of law at the Antonin Scalia Law School at George Mason University.

The AHA cited rulings in which Justices Neil Gorsuch and Clarence Thomas and Chief Justice John Roberts were critical of Chevron doctrine. In a dissenting opinion while on the U.S. Court of Appeals for the Tenth Circuit, Gorsuch said Chevron permits executive agencies “to swallow huge amounts of core judicial” power.

“I’d be surprised if they didn’t grant cert.,” Lubbers, said, noting it only takes four justices to agree to hear a case.

And some legal minds think the AHA has a strong case.

“If it gets consideration, a majority of the court is likely to agree with the point that Chevron deference should not apply here,” Mascott said.

#### This term is otherwise light on business cases

Stohr 21 [Greg Stohr, Reporter at Bloomberg, 10-1-2021 https://www.bloomberg.com/news/articles/2021-10-01/abortion-just-the-start-as-supreme-court-tackles-guns-religion]

Federal Regulation

In a term that so far is light on business cases, companies will be looking at a clash that could limit the power of regulatory agencies to put their own spin on ambiguous federal statutes.

The case, set for argument Nov. 30, concerns cuts made by the Department of Health and Human Services to Medicare prescription-drug reimbursements for hospitals that serve low-income and underserved communities. A group led by the American Hospital Association contends the reductions can’t be squared with federal law.

More broadly, the case tests a legal doctrine known as Chevron deference that has drawn criticism in conservative circles in recent years. The doctrine, which draws its name from a 1984 Supreme Court ruling, requires courts to defer to agencies on the meaning of unclear laws if the regulators’ interpretation is reasonable.

The U.S. Chamber of Commerce is among those urging the court to rein in the use of Chevron deference, arguing that federal agencies “are only too happy to exploit openings to aggrandize their own powers.”

#### Capital is finite and spills over---the Court will seek to balance decisions within issues

HLR 11 – Harvard Law Review, “ADVISORY OPINIONS AND THE INFLUENCE OF THE SUPREME COURT OVER AMERICAN POLICYMAKING”, June, 124 Harv. L. Rev. 2064, Lexis

In assessing the Court's power relative to the elected branches, it is first necessary to be clear about what motivates the Supreme Court. When exercising judicial review, the Court seeks to vindicate its constitutional vision by striking down legislation repugnant to that vision. This is true whether one believes that the Court seeks in good faith to divine the true meaning of the Constitution and impose it on the elected branches, attempts to interpret the Constitution faithfully but subconsciously imports its own policy views, or disingenuously strives to implement its policy preferences in the guise of neutral interpretation. For the purposes of the present argument it is irrelevant which view or combination of views is most accurate, and the phrase "constitutional vision" will stand for any and all of these. Yet as suggested above, the Court is not unconstrained when it seeks to effect its constitutional vision through judicial review: if it strays too far from the political mainstream, n55 it will face consequences that undermine its constitutional [\*2076] vision even more than would the upholding of a disfavored statute. n56 The upshot is that the Court operates under conditions of scarcity and must economize on its political capital to go as far in implementing its constitutional vision as political realities allow, which sometimes means upholding (or declining to review) government actions that contravene that vision. n57 And, as a distinct matter, most [\*2077] Justices have displayed a desire to conserve the Court's political capital and maintain its institutional prestige as much as possible even where the Court was not immediately threatened with any hard political constraints. n58 This conservatism is especially understandable given that the Justices are generally not political experts and lack the sophisticated public relations apparatuses of the elected branches, and that the elected branches have substantial capacity to shift public opinion about the Court if they so choose; these factors make it rational for the Court to be parsimonious with its political capital in order to avoid blind overreaching.

[FOOTNOTE]

n57. Thus, the Court's decisionmaking process in a judicial review case incorporates its internal preferences and its view of external constraints as follows: R = B / C, where B equals the benefits to the Court's constitutional vision of invalidating a given piece of legislation, C stands for the cost the Justices expect to incur in terms of political capital, and R gives the trade-off rate between costs and benefits in any given case, such that the Court will expend its political capital in those cases where R is highest, so long as R > 1.

A reasonable objection to the model elaborated in this Part is that although the Court is politically constrained, this "bank account" model in which the Court has finite political capital to "spend" by striking down popular government actions is unrealistic: the Court can also increase its prestige - its institutional capital - by exercising judicial review, which has been the effect of Marbury and Brown, two decisions without which the Court would be much weaker now. Nonetheless, most countermajoritarian decisions do seem to cost the Court rather than increase its capital (Marbury was a refusal to make the countermajoritarian decision, see Friedman, supra note 53, at 60-62, and Brown jeopardized rather than solidified the Court's power over the years immediately following the decision, see Klarman, supra note 53, at 312-43). This is especially true in the short run, while the decision remains countermajoritarian, and it is the short run that counts for the current Justices: the fact that Brown is today sacrosanct did not help the Court when Southern resistance threatened that decision's efficacy in the years immediately after its announcement. Cf. Daryl J. Levinson, Parchment and Politics: The Positive Puzzle of Constitutional Commitment, 124 Harv. L. Rev. 657, 743 (2011) ("Evidently, the Court can build up a savings account of approval that it can then spend down by issuing unpopular decisions without losing public support."). The necessary implication of Levinson's statement is that the "savings account" - and thus the Court's countermajoritarian capacity - is finite. At any rate, the Court's position is no different from that of any other political actor: though the presidency as an institution, for instance, would certainly lose influence as a result of a string of weak, unassertive presidents, and might gain it through the acts of a strong leader, any given President at any given time is undoubtedly limited by political constraints.

#### Here’s the ONLY labor specific card

Redish and Amuluru 6 (Martin H. Redish, Louis & Harriet Ancel Professor of Law and Public Policy, Northwestern University School of Law; and Uma M. Amuluru, JD Northwestern University, AB Duke University; “The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications,” Minnesota Law Review, vol.90, 2006, https://www.minnesotalawreview.org/wp-content/uploads/2011/11/RedishAmuluru\_Final.pdf)

II. THE CONFLATION OF SUBSTANCE AND PROCEDURE: THE POLITICIZATION OF THE FEDERAL RULES

It is beyond controversy today that many Federal Rules of Civil Procedure implicate substantial policy issues, often going to the core of modern political and ideological debates. Indeed, the Court itself has noted that “rulemaking under the enabling Acts has been substantive and political in the sense that the rules of procedure have important effects on the substantive rights of litigants.”50 This fact is not earthshaking. Rules 11 (dealing with sanctions),51 23 (providing for class actions),52 and 26 (concerning discovery)53 are just a few of the Rules that directly implicate tort-reform issues and have therefore become the subject of debate and the object of lobbying efforts by interest groups such as consumer-advocacy organizations, large corporations, and trial lawyers associations.54 Growing out of the heavily disputed belief that the U.S. court system is overburdened with frivolous civil lawsuits that harass corporate defendants and lead inexorably to higher prices for goods and services, the modern tort-reform movement includes proposals to impose damage caps, rewrite contributory negligence laws, and impose heavier sanctions on people bringing frivolous suits.55 Underlying the tort-reform debate are more foundational disputes over ideology and normative political theory.56 These issues implicate the value placed on such substantive policy concerns as civil rights and consumer protection, as well as fundamental questions about societal resource allocation, wealth transfer, and economic efficiency.57 The inescapable implication is that how society structures its system of adjudication inevitably has a substantial impact on the protection of substantive rights and the foundations of substantive social policy.

The recent political focus on issues of tort reform has underscored the politicization of many of the Federal Rules.58 The political nature of the Rules, however, is by no means a recent development, despite the failure of both the Enabling Act’s drafters and the postenactment Supreme Court either to recognize or acknowledge this fact. To the contrary, from the outset many of the Rules possessed a distinctly political nature because the manner in which they are shaped inherently impacts the enforcement of society’s substantive policy choices.

One of the most visible illustrations of this phenomenon is Rule 11, which enables judges to sanction lawyers for filing pleadings or motions for dilatory or other improper purposes.59 As revised in 1983, Rule 11 required certification that, among other things, the pleading or motion was “well grounded in fact.”60 This alteration was quite obviously (albeit indirectly) intended to constrain the sweeping scope of Rule 8(a),61 which established the so-called “notice pleading” system. Under the framework of the system created by Judge Clark and the original Advisory Committee, all a litigant need do in a pleading is provide “a short and plain statement” of the claim62—an intentionally low burden.63 The underlying goal of the system was to enable litigants to initiate use of the Rules’ elaborate discovery process to facilitate the enforcement of substantive claims.64 By effectively expanding the scope of the parties’ burdens at the pleading stage, the 1983 version of Rule 11 dramatically impacted the ability of plaintiffs to enforce their substantive rights65 and, not surprisingly, gave rise to significant political debate.

In contrast, the next revision of Rule 11 ten years later facilitated plaintiffs’ enforcement of substantive claims by removing the requirement that the litigant certify that the assertions contained in her pleading are “well grounded in fact.”66 A central element of the tort-reform movement has therefore been an attempt to strengthen Rule 11 through congressional enactment.67 In September 2004, the House of Representatives approved a measure amending the current (1993) version of Rule 11 to require sanctions on lawyers who file “frivolous” lawsuits.68 Not surprisingly, the bill was politically polarizing; Republicans touted it as necessary “to end nuisance lawsuits that . . . were driving companies out of business and costing consumers,” while Democrats said it “could make it harder for lessaffluent Americans to retain legal counsel if lawyers were nervous about facing sanctions.”69 Also illustrative of the extent to which the Rules may become intertwined with matters of important social policy is the recent amendment concerning electronic discovery.70 The Advisory Committee hearings on the issue are replete with testi mony by trial lawyers associations, representatives of large global companies, and spokespersons for consumer groups.71

Naturally, regulations of electronic discovery will have important and inescapable implications both for litigants’ ability to enforce existing substantive law and for businesses of all sizes seeking to operate in an economically efficient manner.72 Plaintiffs’ lawyers and consumer advocacy groups favored rules that require litigants to preserve as much material as possible for as long as possible.73 Large corporations and the defense bar, on the other hand, stressed the great expense of electronicdocument storage, and favored more lenient provisions on mandatory disclosure and record preservation.74 Such proposals could readily implicate fundamental policy debates. Plaintiffs often depend on electronic discovery to support their efforts to compel wealth transfer and enforce substantive restrictions on corporate behavior,75 while the Rules’ dictates may force corporate defendants to incur enormous expense in altering their record-keeping systems. The impact of electronic discovery on social and economic policy is thus significant.

Perhaps the rule that has generated the most intense political controversy in recent years is Rule 23, governing the procedures for class action suits. Although Rule 23 was part of the original Federal Rules of Civil Procedure, it was not until 1966 that sweeping revisions transformed class actions into a power ful tool for implementing socio-political change.76 The modern class action arose out of a period of social and political revolution; in the wake of the civil rights movement and the social revolution of President Johnson’s “Great Society” programs, the rulemakers saw a need for procedural devices that would legally empower otherwise unempowered groups.77 Thus, in 1966, they transformed Rule 23,78 and it has since become an important instrument for enforcement of legislative and common law proscriptions of business behavior.79 On the other hand, because class actions may well threaten a company’s very existence, class action suits may coerce corporate defendants into settling even nonmeritorious claims. Because the costs of these settlements will be passed on to consumers, unduly lax class-certification standards will inevitably lead to undue inflation and economic inefficiency. Regardless of their substantive views, both sides of the class action debate can agree that class action procedure lies at the core of fundamental political and ideological choices.