## T subsets

#### Prohibitions are distinct from remedies that only block the anticompetitive elements of a practice, rather than the practice itself.

Jo Seldeslachts et al. ‘7. Professor of Industrial Organization at KU Leuven and a Senior Research Fellow at DIW Berlin, with Joseph A. Clougherty and Pedro Pita Barros. “Remedy for now but prohibit for tomorrow: the deterrence effects of merger policy tools.” https://www.ssoar.info/ssoar/bitstream/handle/document/25862/ssoar-2007-seldeslachts\_et\_al-remedy\_for\_now\_but\_prohibit.pdf;jsessionid=A244005110FDB5816E0347D9F1B75436?sequence=1

Let us now think about the differences between the two antitrust actions of prohibitions and remedies.7 In the case of a prohibition, the penalty for proposing a merger with significant anti-competitive problems involves the full prohibition of the merger: both the pro-competitive and the anti-competitive profits for merging firms are negated by the prohibition. The throwing out of the pro-competitive profits along with the anti-competitive profits is important, as this brings about the punitive measure that Posner (1970) acknowledges as being crucial for deterrence. The big difference between remedies and prohibitions is that remedies attempt to identify and eliminate the anti-competitive elements of a merger. In essence, the merging firms are able to hold on to the pro-competitive elements of the merger—so they keep (ΠPC), but the anti-competitive elements of the merger (ΠAC) are negated by the remedial action. If an antitrust authority imposes remedies, then the disincentive for firms to propose anti-competitive mergers is clearly lower. In short, prohibitions seemingly involve more deterrence than do remedies, as prohibitions represent larger punishments.

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

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

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

#### Violation: The plan only increases behavioral remedies that target anticompetitive aspects of the practice---topical affs must increase prohibitions on the practices themselves

#### Vote neg for limits and ground---infinite behavioral remedies and no link uniqueness for offense.

## T Per Se

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

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

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

**Prohibit means forbid by authority**

**Merriam-Webster No Date** <https://www.merriam-webster.com/dictionary/prohibition> and <https://www.merriam-webster.com/dictionary/prohibiting>

Definition of **prohibition** 1**:** the act of prohibiting by authority

Definition of **prohibit** transitive verb 1**:** to **forbid** by authority : ENJOIN

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

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

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

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

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

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

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

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

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

**Prefer it:**

**1) GROUND---key to link uniqueness and a unidirectional topic. Fringe standards dodge topic links, AND they can pick a broader but more permissive standard, making the topic bidirectional.**

**2) LIMITS---too many possible standards, each requiring distinct answers, makes the topic unmanagbly large.**

## AT Pic

#### The United States federal government should

#### strip antidumping petitioners Noerr-Pennington privilege as tortious interference.

* implement a prospective duty collection system.

#### First plank is from their solvency advocates says it solves w/o changing Noerr

Sungjoon Cho 10, Professor of Law at Chicago-Kent College of Law, 09/03/2010, Anticompetitive Trade Remedies: How Antidumping Measures Obstruct Market Competition, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1670313

C. **Disapplying the Noerr-Pennington Doctrine Based on Tort Law** In an attempt to narrow the scope of antitrust immunity, Gary Minda linked common law remedies (e.g., the tort of abusive litigation) to antitrust challenges against predatory behaviors or other anticompetitive actions to restrain trade.48 First, he finds a possibility of disapplying the Noerr-Pennington doctrine under certain circumstances in Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,4 "9 which justified the introduction of common law remedies in the area of antitrust disciplines.410 In Walker Process, the Supreme Court held that the enforcement of a patent earned by fraud in order to monopolize or attempt to monopolize a relevant market may violate section 2 of the Sherman Act.4 ' **By focusing on the fraudulent behaviors and anticompetitive motivations of the petitioner, the Court paved the way for disciplining abusive petitioning without engaging the Noerr-Pennington doctrine**.412 When applied to antidumping complaints, the Walker Process case law can be adopted by courts, at least by analogy, to subject domestic industries' predatory antidumping petitions based on deliberate misrepresentations on facts and data to the Sherman Act disciplines, without any need to engage the doctrine of Noerr-Pennington immunity. **This approach of stripping antidumping petitioners of the NoerrPennington privilege via tort doctrines**, such as tortious interference, hinges on the basic values that the general tort system aims to protect, like fairness and business ethics.413 **If domestic producers abuse the import relief, such as the antidumping mechanism, through an intentional, deliberate use of false information and misstatements**, they fail to comply with the "rules of the game," and the value of competition is compromised beyond the permissible exception.4 4 Under these circumstances, antitrust immunity, which is reserved for normal joint petitioning under the Noerr-Pennington doctrine, is no longer applied. Nonetheless, it remains uncertain whether the court subscribes to this tort-based disapplication of the Noerr-Pennington doctrine. In fact, the Third Circuit in Ethyl extended the Noerr-Pennington doctrine even to common law tort claims. In this case, an Indian ibuprofen manufacturer, Cheminor, sued an American ibuprofen manufacturer, Ethyl, on the grounds of antitrust violation and common law torts of unfair competition and tortious interference.415 Ethyl was the only bulk ibuprofen producer in the United States before Cheminor started to export bulk ibuprofen to the United States.416 After filing a petition with the USTR to block Cheminor's market access, Ethyl filed an antidumping and countervailing duty suit against Cheminor and obtained a decision ordering Cheminor to pay 43.71% duties on their export amounts.4 17 This additional cost forced Cheminor to retreat from the U.S. market, which was followed by Ethyl withdrawing its petition.4"8 Cheminor then sued Ethyl on grounds of both antitrust and common law tort.419 The district court dismissed the antitrust claim under the NoerrPennington doctrine and rejected jurisdiction over the common law torts on procedural grounds.4 20 The Third Circuit also dismissed the antitrust claim by applying the Noerr-Pennington doctrine. At the same time, it extended the doctrine to the tort claims and thus rejected them.421 The court held that: [W]e have been presented with no persuasive reason why these state tort claims, based on the same petitioning activity as the federal claims, would not be barred by the Noerr-Pennington doctrine.422 The court basically viewed First Amendment principles as applying to the New Jersey tort claims based on Brownsville, which held that the Noerr-Pennington doctrine immunizes tort liability for the failure of reporting nursing home violations to regulatory authorities.423 However, the dissenting judge in Ethyl, Judge Sloviter, who was the very author of the Brownsville opinion, argued that the majority's interpretation of the sham exception was flawed and thus unduly narrowed the operational scope of the Sherman Act.424 She also contended that Brownsville should not be read to warrant the majority's broad application of antitrust immunity to common law tort claims, because the decision simply dismissed a damage action against a legitimate reporting activity and should thus be distinguished from the current case, which elicited government actions via alleged fraudulent misrepresentations.425 **Therefore, one might reasonably conclude that deliberate and fraudulent misrepresentations in antidumping proceedings could still potentially be subject to common law tort claims and thus block the application of the Noerr-Pennington doctrine.**

#### Second plank solves by harmonizing duty collection make settlement under current law easy

Alexandra B 1AC Hess 11, Associate at Hughes Hubbard & Reed LLP, 11/30/11, United States: Settlements Between Foreign Producers And The Domestic Industry In The Antidumping Duty Review Context: Beneficial Or Extortionist?, https://www.mondaq.com/unitedstates/international-trade-investment/155626/settlements-between-foreign-producers-and-the-domestic-industry-in-the-antidumping-duty-review-context-beneficial-or-extortionist

Conclusion

All three common objections to settlement agreements raise legitimate concerns, but not about settlements per se. Instead, the concerns reveal inherent characteristics of the U.S. trade remedy system that promote less-than-idyllic incentives to settle. While beneficial settlements should be lauded, abuse of a difficult-to-administer system should not. Many solutions could be suggested, such as requiring an easier mechanism for foreign producers to question the legitimacy of a review request, awarding attorney's fees for baseless requests for review, increasing transparency and reducing agency discretion with regard to margin calculation methodology, creating provisions for judicial review of settlement agreements, relaxing the objectivity prong of the sham exception to the Neorr-Pennington doctrine in the trade context, etc. Such a comprehensive overhaul of the U.S. trade remedy legislation may not be realistic in the near future, however, especially given the current political economy. Another seemingly viable solution that has recently been of much debate in the trade community is to move to a prospective duty collection system. Among the largest trading economies of the world, the United States is alone in its use of this retrospective AD duty collection system. Most other major economies use a prospective system by which the authorities set a duty rate that is levied on products coming into the country from that date forward. Any change in the rate is applied only to products coming in after the final determination is made. Under such a prospective duty collection system, there would be less room for perverse incentives to settle because the uncertainty is removed—a foreign producer's final rate for its imports into the U.S. is a known quantity at the border. Less risk of exposure, less incentive to settle. Accordingly, a settlement decision would be dictated more by a calculation of the merits of the dispute (a legitimate settlement incentive) rather than by unreasonable risks of a retroactive change of duty rates applied to goods brought into the United States and sold years earlier.

## Civil Rico

#### The United States federal government should prohibit algorithmic dynamic pricing as a violation of RICO\*.

\*RICO = the Racketeer Influenced and Corrupt Organizations act.

**Solves better than antitrust**

Irvin B. **Nathan ‘83**, Doubling the Treble Damage Option: What an Antitrust Practitioner Needs to Know about RICO, 52 Antitrust L.J. 327 (1983).

Antitrust practitioners need to become more familiar with the private, civil remedies provided by the Racketeer Influenced and Corrupt Organizations statute ("RICO").' RICO's treble damage provisions, explicitly patterned on Section 4 of the Clayton Act,' are increasingly being invoked in a wide variety of commercial contexts. Although **RICO is far more encompassing** than the antitrust laws, there are **broad areas of overlap**. RICO's civil provisions have been utilized in cases involving allegations of horizontal and vertical price fixing,3 attempted monopolization, 4 anticompetitive mergers, 5 collusion over municipal contracts 6 industrial espionage,' Robinson-Patman Act violations8 and other forms of unfair competition.9 Enacted in 1970 as part of an effort to combat organized crime and prevent its infiltration into legitimate businesses, RICO was considered during the first decade of its existence principally a criminal statute. The statute authorizes stiff fines, long periods of imprisonment and even forfeiture of property to the federal government. 0 RICO's civil provisions, little noted when the statute was enacted, were intended by Congress to allow private parties to use machinery based on the antitrust model to supplement the federal government's criminal enforcement of RICO." The statute permits a federal action for treble damages and attorney's fees for any person injured in his business or property by reason of a violation of the substantive provisions of RICO 12. Within the last several years, some plaintiffs' counsel have invoked these provisions in a rapidly growing number of commercial cases generally having little or nothing to do with "organized crime."

## Profit Sacrifice

#### The United States federal government should apply a profit-sacrifice analysis when finding the existence of a sham in antidumping proceedings.

#### CP adopts a profit-sacrifice analysis to determine a sham---this is better than the aff because it relies on objective economic evidence, rather than presumption of a sham, to determine anticompetitive harm

Hakun 21 (Nicholas E. Hakun, Adjunct Assistant Professor, Department of Legal Studies, Fox School of Business and Management, Temple University. Law Clerk, U.S. District Court for the Eastern District of Pennsylvania. J.D., cum laude, Georgetown University Law Center, Strategic Litigation and Antitrust Petitioning Immunity, 2-25, UC Irvine Law Review Forthcoming, <https://ssrn.com/abstract=3792995>, y2k)

In the fourth quadrant (lower-right box), lies the world of mixed motives. These cases, defined as one where “the process of petitioning is used both in hopes of obtaining governmental action and in order to impose expense and delay on competitors,” are where the courts and economists diverge.211 Under PRE, mixed motives do not impact sham analysis. If the suit has any legal merit (i.e., probable cause) the collateral anticompetitive benefits are ignored out of deference to the First Amendment. As this Article has shown, this approach is unnecessary, imprecise, and ignores the fundamental issue.

The solution is not as easy as flipping the script. One cannot expect the mere existence of a collateral anticompetitive benefit to automatically destroy any chance of antitrust petitioning immunity, either. As Professor Elhauge explains:

If a genuine hope of winning sufficed to receive immunity, then abuses of process would effectively go undeterred, and predatory litigation would flourish. If, on the other hand, a purpose of harassing opponents sufficed to lose immunity, then firms would fear to bring even meritorious litigation against their competitors. The mere existence of either motive should thus not suffice to establish immunity or non- immunity. Some weighing of the motives must be made.212

I agree. But before reaching this critical balancing test, I will address several screening techniques that courts should utilize to decrease the chances of improperly stripping a litigant of its petitioning immunity when the time to balance motives arises.

This Article’s proposal proposes a robust enquiry into whether litigation is used as an anticompetitive weapon that is mindful of protections for those who petition the government. The primary tension that my proposal resolves is the minimization of false-positives (Legitimate lawsuits that are mistakenly prosecuted as predatory) while not categorically protecting false- negatives like PRE (predatory suits lawsuits that receive petitioning immunity). To achieve this goal, I propose a three-step process. First, the case would need to be evaluated through an “antitrust screen” that would eliminate allegations of predatory litigation that are not, in fact, antitrust claims. Second, if the case successfully passed the “antitrust screen,” the case would then have to pass through the second screen that seeks to eliminate close instances of false positives. Third, if the case survives the two screens, then the case loses Noerr petitioning immunity and is analyzed under the typical predation test from antitrust law. Now, I break down each component of this test.

A. The Antitrust Screen

In Part II, I discussed several market factors that would allow courts to discern whether a predatory suit was possible from an antitrust standpoint.213 These factors are 1) market power; 2) existence of a competitive or potentially competitive relationship between plaintiff and defendant; and 3) an exclusionary externality stemming from the litigation.

The existence of these three factors establish that the case is properly filed as an antitrust claim. Most interestingly, PRE would fail this test because there was no evidence of any collateral anticompetitive benefit.

B. The Specific Intent Screen

After determining these market-factors exist, it is time to begin critically analyzing the intents and injuries stemming from the allegedly anticompetitive litigation. Recall our analysis of the multiple anticompetitive motives and injuries from Part III of this Article. There, I laid out that a predatory lawsuit could have two different motives and sources of anticompetitive injury. The difference was whether the intent to harm competition or the resulting injury arose from the outcome or the process. First, I will discuss the injury.

If an allegedly predatory lawsuit does not have a collateral anticompetitive injury, it can never be the subject of a Section 2 violation. If the only anticompetitive injury arising from an allegedly predatory case is from the relief sought by the underlying plaintiff, then this is not an instance of mixed-motives and there is no attempt to inflict injury through the litigation process. Such a case must be immunized under Noerr-Pennington.

In contrast, if the antitrust plaintiff can articulate a cognizable antitrust injury stemming from the litigation process, as opposed to the outcome, then a predatory case can exist. To establish whether a litigant possessed an anticompetitive intent to inflict that process injury, I recommend using specific intent analysis, instead of subjective intent.

Then, the question arises, how much evidence is necessary? Past proposals have included examinations of whether one motive or the other was “significant,”214 and a proposal that the collateral anticompetitive be both a “necessary and sufficient objective motivation for the allegedly strategic litigation.”215

Of these proposals, the combination of necessary and sufficient conditions appears not only to be the most robust, but also the one that most closely resembles the underlying antitrust principles in play and the abuse of process foundation of the legal test at issue. This test, proposed by Professor Elhauge, requires “the antitrust plaintiff alleging strategic litigation… to show: (1) that the antitrust defendant would not have brought the original suit but for the direct injury imposed on his competitor, and (2) that the defendant would have brought suit even without any prospect of winning in order to inflict the direct costs or delays on his competitor.”216 From an economic equation standpoint, Elhauge’s test would look like Equation 6, below.

(6) Jx < C < A Prosecutable Predatory Litigation

The expected judgment of the litigation, itself, opposed to the costs of litigation, makes the suit irrational. At the same time, the collateral anticompetitive benefit, itself, is more valuable than the cost of litigating. The predator needed the collateral anticompetitive benefit to make the suit rational and the value of that benefit alone was worth initiating the suit.

The sufficient condition, that the collateral anticompetitive benefit to the predatory litigant exceed the cost of litigating, is out of deference to the abuse of process “primary” motive doctrine.217 The necessary condition, that the expected value of the suit be less than the cost of litigating follows the profit sacrifice model used in antitrust for predatory action in Section 2 cases and Judge Posner’s Grip-Pak opinion. Under this test, “the monopolist's conduct must be irrational but for its anticompetitive effect.”218 This is precisely what Posner articulated in Grip-Pak, Stevens suggested in PRE, and economists have concluded is the proper test for predatory behavior in the antitrust realm, as described in Part III.

But, unlike Professor Elhauge’s proposal, I do not recommend requiring that both the necessary and sufficient conditions be met to lose Noerr petitioning immunity. This is because, unlike PRE “sham” litigation, strategic litigation under this test should not be treated as per se anticompetitive. Strategic litigation should only become predatory under the antitrust laws after a thorough analysis of whether the profit sacrifice test was met. Instead, I argue that the sufficient condition, whether the case would have been filed even with no chance of success, should be the threshold question that determines whether immunity should exist. If that can be established, then the necessary condition, the profit sacrifice test, should be analyzed traditionally.

C. Predatory Behavior, Profit Sacrifice Analysis

To review, to plead a proper case of predatory litigation, the plaintiff must first pass the “antitrust screen.” This requires establishing (1) “evidence of market structure” (i.e., market power and relevant markets, which are not in dispute in this case) and (2) “exclusionary effect” (i.e., foreclosure of a competitor from a market, which is also not in dispute in this case)—“both of which can ordinarily be obtained without access to the defendant's own records—[and] indicate that an antitrust violation is plausible.”219 These factors, plus evidence that the plaintiff and defendant are competitors, are the first level antitrust screens.

Then, to overcome the presumption of antitrust petitioning immunity, it would have to plausibly allege that “the defendant would have brought suit even without any prospect of winning in order to inflict the direct [anticompetitive harm] on his competitor.”220 This is the sufficient condition proposed by Professor Elhauge.

At this point, the antitrust-plaintiff has shown that the monopolist-defendant had market power, was a competitor of the plaintiff, that the litigation process caused him anticompetitive harm, and that the benefit to the monopolist of that harm was large enough to be worth filing this lawsuit, even if there was no chance of winning. Having proven this, the potentially predatory suit should not be immunized under Noerr-Pennington and should be evaluated in a way similar to other forms of allegedly predatory conduct under Section 2.

The goal would be to determine whether the primary motive was to harm competition through the litigation process, not the outcome. This would be governed by specific evidence of anticompetitive intent. The prosecuting entity would present objective evidence that the conduct was irrational but for the collateral anticompetitive benefit, as well as any subjective evidence of improper anticompetitive intent that could be useful to assist the finder of fact. Against this, the accused predator would argue that the anticompetitive impact from the process was not the driving force of the suit.

Finally, the finder of fact would be tasked with deciding the primary motive for the suit. Whether this is done via a calculation of expected benefit versus the collateral anticompetitive benefit, or is done qualitatively is not necessary to define now. The importance of this test is to provide adequate screens to prevent false positives, while still ensuring that predatory litigation can be identified and prosecuted.

As with any test, it is imperfect. If a predatory motive existed but was not sufficiently large enough on its own to justify the suit, an irrational lawsuit would still be immunized under this test. At the same time, a borderline-legitimate suit was filed alongside a coincidental anticompetitive harm could, theoretically, be improperly prosecuted. However, the fact that I am using market screens to ensure that only dominant players pursuing monopolies whose actions have imposed exclusionary effects on competitors, ensures that even if this test is incorrect, it harms someone who can afford the mistake.

CONCLUSION

When litigation is used as an anticompetitive weapon, it should be prosecuted under the antitrust laws as predatory. Under our current framework, this is only sometimes the case. Hopefully, this Article’s proposal provides a solution to this problem that is accurate, practical, and fair. While no standard is perfect, this Article may help future courts grapple with the failings of the Noerr-Pennington doctrine when mixed motives are at play. The mixed motives of strategic, predatory litigation impose great challenges on our courts, but as I have laid out here, this problem is not only solvable, but very much worth solving.

## Biz Con

**The economy is growing now.**

Tim **Smart 1/21**/22. Contributing Editor for News at U.S. News & World Report. “**Leading Indicators Suggest Economy Will Keep Growing**.” https://www.usnews.com/news/economy/articles/2022-01-21/leading-indicators-suggest-economy-will-keep-growing

A forward-looking gauge of the economy’s health rose 0.8% in December, the Conference Board reported on Friday.

The organization’s Leading Economic Index now stands at 120.8, following a 0.7% increase in November. The move is consistent with **many reports that foresee steady**, if slower, **growth ahead for the economy**.

“The U.S. LEI ended 2021 on a **rising trajectory**, suggesting the economy will continue to expand well into the spring,” said Ataman Ozyildirim, senior director of economic research at The Conference Board. “For the first quarter, headwinds from the Omicron variant, labor shortages, and inflationary pressures – as well as the Federal Reserve’s expected interest rate hikes – may moderate economic growth.”

“The Conference Board forecasts GDP growth for Q1 2022 to slow to a relatively healthy 2.2% percent (annualized),” he added. “Still, for all of 2022, we forecast the US economy will expand by a robust 3.5 percent – **well above the pre-pandemic trend growth**.”

**The plan deters all petitioning.**

James M. **Sabovich 08**. Senior associate in Gibson, Dunn & Crutcher, LLP's Environmental and Natural Resources Practice Group. J.D. from UCLA in 2001. "Petition without Prejudice: Against the Fraud Exception to Noerr-Pennington Immunity from the Toxic Tort Perspective." Penn State Environmental Law Review 17, no. 1 (Fall 2008): 1-54

V. The Political Speech Lessons of Toxic Torts: Why a Fraud Exception **Begets Folly**

Noerr-Pennington immunity is premised on the recognition that the specter of tort liability for petitioning is a **powerful and undesirable** 226 **deterrent**. The longstanding **constitutional edict** in the United States is that an atmosphere of freedom to petition, on the whole, is a **societal good**,227

**---FOOTNOTE 227 STARTS, MID-PARAGRAPH---**

227. See, e.g., E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139-40 (1961) ("A construction of the Sherman Act that would disqualify people from taking a **public position** on matters in which they are financially interested would thus **deprive the government** of a valuable source of information and, at the same time, **deprive the people of their right to petition** in the very instances in which that right may be of the most importance to them.").

**---FOOTNOTE 227 ENDS, PARAGRAPH CONTINUES---**

while systematic inhibitors of petitioning are a detriment.22 8

There are two lessons relevant to political speech to be taken from the Bendectin and breast implant litigation, and another from sitespecific lobbying. First, neither the causative allegations nor verdicts in toxic torts are particularly good indicators of scientific truth. As a society, we would be foolish to allow either to set the bounds of our political discourse. Second, the toxic **tort is politicized** such that it influences and is itself influenced by regulatory and legislative determinations. This is to be expected, but becomes problematic if a **fraud exception to Noerr**-Pennington immunity allows one side to be **systematically deterred** from participating in the political process. It is **undemocratic** and contrary to Noerr-Pennington for any tort allegation or finding to circumscribe political debate. Those of the toxic tort are uniquely unsuited to do so because each party can potentially enhance its litigation position through political success. Lastly, a fraud exception to petition immunity **undermines site-specific lobbying** by stifling necessary communication between PRPs and agencies with the **threat of voyeuristic fraud claims**.

**That collapses the economy---removes incentives for innovation.**

Mary **Fales 16**. Patent attorney & founder of San Diego Patent Prep & Pros, Inc., has been practicing U.S. and foreign patent preparation and prosecution for over ten years. She started out as a registered patent agent in 2008. “The Truth About Patent Trolls – An Honest Look at What's Really Happening and at Stake” SSRN. 1-1-2016. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2709493

What Do we Know?

IP is Critical to the U.S. Economy

Even before the U.S. Constitution colonies allowed for patent monopolies in order to attract valuable technology and resources to newly undeveloped lands.154 Individual States seeing the benefit of patents allowed patent monopolies in a variety of terms and conditions before the national system under the Constitution.155 Since the Constitution our country has been developing our patent system for hundreds of years. There have been turbulent times throughout,156 but the undisputed fact is **IP is necessary for economic growth**.157 As the U.S. trade deficit increased from labor moving offshore, in the 1980s President Reagan’s administration fought for patent laws that would protect not only our IP, but the IP of other countries.158 The courts who had been traditionally anti-monopoly began upholding patents in court.159 The U.S. emerged as global IP leader. In the mid 1990s the U.S. IP exports were well over 50% of all U.S. exports.160 In 2012, using only IP royalties and license fees, it was estimated that the U.S. exported $120.8 billion.161 Without the financial incentives of being able to obtain patents, most companies and individuals would not invest their time and money into innovation.162 The U.S. economic power is rooted firmly in IP. “IP-intensive industries accounted for about $5.06 trillion in value added, or 34.8 percent of U.S. gross domestic product (GDP), in 2010.”163 We need to protect **our IP system** in order to maintain our economy, and we need to make sure that going after an annoyance like trolls won’t jeopardize it, **because a lot is at stake**.

The Supreme Court Opened the Software Patent Doors and Can Close Them

I’m not arrogant enough to claim to be able to read The Supreme Court Justice’s minds, but it doesn’t take much thought to realize trolls may be a consideration in regards to Alice Corporation v. CLS Bank International. 164 The strong relationship between software patents and trolls can’t be overlooked. Let’s face it, the facts are trolls acquire software and business method patents, because they lend themselves to being broad and infringed by many users. Software patents increased as a result of Diamond v. Dierh. Other countries that have stricter patent laws regarding software like India and Japan, don’t seem to have much of a Troll problem at all.165 In fact, India’s 2005 Patent Act greatly reduced the amount of troll issues they were having.166 Plus, it’s not the first time the Court has made efforts to reign in the overly broad patents that have a high social cost. 167 This is what the court does well according to Cass & Hylton.168 It seems reasonable the Supreme Court could be reconsidering their previous decision on allowing software patents to be patent eligible subject matter under 35 U.S.C. § 101.

The issues surrounding software patents are complicated. Many large companies that heavily support the U.S. economy rely on them.169 However, they have been controversial and many think they should never have been patentable subject matter in the first place.170 The truth is we have them now, **companies have invested and become dependent on them, and taking away their protection completely** under 35 U.S.C. § 101 **seems catastrophic**. **It’s like thinking we can pluck Mercury** out of our solar system and nothing negative will result. **More is at stake than troll attacks**. **What’s at stake is the U.S. economy itself**. We’ve put into action safe anti-troll changes, but we need to give them time to work.

Conclusion

Trolls, are a problem, but the truth is no one knows just how big of a problem they are. We need more accurate data and well reasoned educated thought to address them. We’ve already moved to good places **for the long run** with AIA, the market, and court support. We just need to give these measures time to work. **Let’s not harm the U.S.’s economy and global IP leadership by trying to swat away some trolls**. If we make hasty decisions, **we could be in a lot more trouble** than we are today.

**Economic decline cascades and goes nuclear---defense doesn’t assume post-COVID shifts.**

Dr. Mathew **Maavak 21**, PhD in Risk Foresight from the Universiti Teknologi Malaysia, External Researcher (PLATBIDAFO) at the Kazimieras Simonavicius University, Expert and Regular Commentator on Risk-Related Geostrategic Issues at the Russian International Affairs Council, “Horizon 2030: Will Emerging Risks Unravel Our Global Systems?”, Salus Journal – The Australian Journal for Law Enforcement, Security and Intelligence Professionals, Volume 9, Number 1, p. 2-8

Various scholars and institutions regard **global social instability** as the **greatest threat** facing this decade. The catalyst has been postulated to be a **Second Great Depression** which, in turn, will have **profound implications** for **global security** and national integrity. This paper, written from a broad systems perspective, illustrates how emerging risks are getting more complex and **intertwined**; blurring boundaries between the economic, environmental, geopolitical, societal and technological taxonomy used by the World Economic Forum for its annual global risk forecasts. **Tight couplings** in our **global systems** have also enabled risks accrued in **one area** to **snowball** into a **full-blown crisis** **elsewhere**. The COVID-19 pandemic and its socioeconomic fallouts exemplify this systemic chain-reaction. Onceinexorable forces of globalization are rupturing as the current global system can no longer be sustained due to poor governance and runaway wealth fractionation. The coronavirus pandemic is also enabling Big Tech to expropriate the levers of governments and mass communications worldwide. This paper concludes by highlighting how this development poses a dilemma for security professionals.

Key Words: Global Systems, Emergence, VUCA, COVID-9, Social Instability, Big Tech, Great Reset

INTRODUCTION

The new decade is witnessing rising volatility across global systems. Pick any random “system” today and chart out its trajectory: Are our education systems becoming more robust and affordable? What about food security? Are our healthcare systems improving? Are our pension systems sound? Wherever one looks, there are dark clouds gathering on a global horizon marked by volatility, uncertainty, complexity and ambiguity (VUCA).

But what exactly is a global system? Our planet itself is an autonomous and selfsustaining mega-system, marked by periodic cycles and elemental vagaries. Human activities within however are not system isolates as our banking, utility, farming, **health**care and retail sectors etc. are increasingly **entwined**. Risks accrued in **one system** may **cascade** into an **unforeseen crisis** within and/or without (Choo, Smith & McCusker, 2007). Scholars call this phenomenon “emergence”; one where the behaviour of **intersecting systems** is determined by **complex** and largely **invisible interactions** at the **substratum** (Goldstein, 1999; Holland, 1998).

The ongoing COVID-19 pandemic is a case in point. While experts remain divided over the source and morphology of the virus, the contagion has ramified into a global health crisis and supply chain nightmare. It is also tilting the geopolitical balance. China is the largest exporter of intermediate products, and had generated nearly 20% of global imports in 2015 alone (Cousin, 2020). The pharmaceutical sector is particularly vulnerable. Nearly “85% of medicines in the U.S. strategic national stockpile” sources components from China (Owens, 2020).

An initial run on respiratory masks has now been eclipsed by rowdy queues at supermarkets and the bankruptcy of small businesses. The entire global population – save for major pockets such as Sweden, Belarus, Taiwan and Japan – have been subjected to cyclical lockdowns and quarantines. Never before in history have humans faced such a systemic, borderless calamity.

COVID-19 represents a classic emergent crisis that necessitates real-time response and adaptivity in a real-time world, particularly since the global Just-in-Time (JIT) production and delivery system serves as both an enabler and vector for transboundary risks. From a systems thinking perspective, emerging risk management should therefore address a whole spectrum of activity across the economic, environmental, geopolitical, societal and technological (EEGST) taxonomy. Every emerging threat can be slotted into this taxonomy – a reason why it is used by the World Economic Forum (WEF) for its annual global risk exercises (Maavak, 2019a). As traditional forces of globalization unravel, security professionals should take cognizance of emerging threats through a systems thinking approach.

METHODOLOGY

An EEGST sectional breakdown was adopted to illustrate a sampling of extreme risks facing the world for the 2020-2030 decade. The transcendental quality of emerging risks, as outlined on Figure 1, below, was primarily informed by the following pillars of systems thinking (Rickards, 2020):

• Diminishing diversity (or increasing homogeneity) of actors in the global system (Boli & Thomas, 1997; Meyer, 2000; Young et al, 2006);

• Interconnections in the global system (Homer-Dixon et al, 2015; Lee & Preston, 2012);

• Interactions of actors, events and components in the global system (Buldyrev et al, 2010; Bashan et al, 2013; Homer-Dixon et al, 2015); and

• Adaptive qualities in particular systems (Bodin & Norberg, 2005; Scheffer et al, 2012) Since scholastic material on this topic remains somewhat inchoate, this paper buttresses many of its contentions through secondary (i.e. news/institutional) sources.

ECONOMY

According to Professor Stanislaw Drozdz (2018) of the Polish Academy of Sciences, “a global financial crash of a previously unprecedented scale is highly probable” by the mid- 2020s. This will lead to a **trickle-down meltdown**, impacting **all areas** of human activity.

The economist John Mauldin (2018) similarly warns that the “2020s might be the worst decade in US history” and may lead to a **Second Great Depression**. Other forecasts are equally alarming. According to the International Institute of Finance, global debt may have surpassed $255 trillion by 2020 (IIF, 2019). Yet another study revealed that global debts and liabilities amounted to a staggering $2.5 quadrillion (Ausman, 2018). The reader should note that these figures were tabulated before the COVID-19 outbreak.

The IMF singles out widening income inequality as the trigger for the next Great Depression (Georgieva, 2020). The wealthiest 1% now own more than twice as much wealth as 6.9 billion people (Coffey et al, 2020) and this chasm is widening with each passing month. COVID-19 had, in fact, boosted global billionaire wealth to an unprecedented $10.2 trillion by July 2020 (UBS-PWC, 2020). Global GDP, worth $88 trillion in 2019, may have contracted by 5.2% in 2020 (World Bank, 2020).

As the Greek historian Plutarch warned in the 1st century AD: “An imbalance between rich and poor is the oldest and most fatal ailment of all republics” (Mauldin, 2014). The stability of a society, as Aristotle argued even earlier, depends on a robust middle element or middle class. At the rate the global middle class is facing catastrophic debt and unemployment levels, widespread social disaffection may morph into outright anarchy (Maavak, 2012; DCDC, 2007).

Economic stressors, in transcendent VUCA fashion, may also induce **radical geopolitical realignments**. Bullions now carry more weight than NATO’s **security guarantees** in **Eastern Europe**. After Poland repatriated 100 tons of gold from the Bank of England in 2019, Slovakia, Serbia and Hungary quickly followed suit.

According to former Slovak Premier Robert Fico, this **erosion** in **regional trust** was based on historical precedents – in particular the 1938 Munich Agreement which ceded Czechoslovakia’s Sudetenland to Nazi Germany. As Fico reiterated (Dudik & Tomek, 2019):

“You can hardly trust even the closest allies after the Munich Agreement… I guarantee that if something happens, we won’t see a single gram of this (offshore-held) gold. Let’s do it (repatriation) as quickly as possible.” (Parenthesis added by author).

President Aleksandar Vucic of Serbia (a non-NATO nation) justified his central bank’s gold-repatriation program by hinting at economic headwinds ahead: “We see in which direction the crisis in the world is moving” (Dudik & Tomek, 2019). Indeed, with two global Titanics – the **U**nited **S**tates and China – set on a **collision course** with a quadrillions-denominated iceberg in the middle, and a viral outbreak on its tip, the **seismic ripples** will be felt **far**, **wide** and for a **considerable period**.

A reality check is nonetheless needed here: Can additional bullions realistically circumvallate the economies of 80 million plus peoples in these Eastern European nations, worth a collective $1.8 trillion by purchasing power parity? Gold however is a potent psychological symbol as it represents national sovereignty and economic reassurance in a potentially hyperinflationary world. The portents are clear: The current global economic system will be weakened by rising nationalism and autarkic demands. Much uncertainty remains ahead. Mauldin (2018) proposes the introduction of Old Testament-style debt jubilees to facilitate gradual national recoveries. The World Economic Forum, on the other hand, has long proposed a “Great Reset” by 2030; a socialist utopia where “you’ll own nothing and you’ll be happy” (WEF, 2016).

In the final analysis, COVID-19 is not the root cause of the current global economic turmoil; it is merely an accelerant to a burning house of cards that was left smouldering since the 2008 Great Recession (Maavak, 2020a). We also see how the four main pillars of systems thinking (diversity, interconnectivity, interactivity and “adaptivity”) form the mise en scene in a VUCA decade.

ENVIRONMENTAL

What happens to the **environment** when our **economies implode**? Think of a **debt-laden** workforce at sensitive **nuclear** and **chemical plants**, along with a concomitant **surge** in **industrial accidents**? **Economic stressors**, workforce demoralization and rampant profiteering – rather than manmade climate change – arguably pose the **biggest threats** to the environment. In a WEF report, Buehler et al (2017) made the following pre-COVID-19 observation:

The ILO estimates that the annual cost to the global economy from accidents and work-related diseases alone is a staggering $3 trillion. Moreover, a recent report suggests the world’s 3.2 billion workers are increasingly unwell, with the vast majority facing significant economic insecurity: 77% work in part-time, temporary, “vulnerable” or unpaid jobs.

Shouldn’t this phenomenon be better categorized as a societal or economic risk rather than an environmental one? In line with the systems thinking approach, however, global risks can no longer be boxed into a **taxonomical silo**. Frazzled workforces may precipitate another Bhopal (1984), Chernobyl (1986), Deepwater Horizon (2010) or Flint water crisis (2014). These disasters were notably not the result of manmade climate change. Neither was the Fukushima nuclear disaster (2011) nor the Indian Ocean tsunami (2004). Indeed, the combustion of a long-overlooked cargo of 2,750 tonnes of ammonium nitrate had nearly levelled the city of Beirut, Lebanon, on Aug 4 2020. The explosion left 204 dead; 7,500 injured; US$15 billion in property damages; and an estimated 300,000 people homeless (Urbina, 2020). The environmental costs have yet to be adequately tabulated.

Environmental disasters are more attributable to Black Swan events, systems breakdowns and corporate greed rather than to mundane human activity.

Our JIT world aggravates the **cascading potential** of risks (Korowicz, 2012). Production and delivery delays, caused by the COVID-19 outbreak, will eventually require industrial **overcompensation**. This will further stress senior executives, workers, machines and a variety of computerized systems. The trickle-down effects will likely include substandard products, contaminated food and a general lowering in health and safety standards (Maavak, 2019a). Unpaid or demoralized sanitation workers may also resort to indiscriminate waste dumping. Many cities across the United States (and elsewhere in the world) are no longer recycling wastes due to prohibitive costs in the global corona-economy (Liacko, 2021).

Even in good times, strict protocols on waste disposals were routinely ignored. While Sweden championed the global climate change narrative, its clothing flagship H&M was busy covering up toxic effluences disgorged by vendors along the Citarum River in Java, Indonesia. As a result, countless children among 14 million Indonesians straddling the “world’s most polluted river” began to suffer from dermatitis, intestinal problems, developmental disorders, renal failure, chronic bronchitis and cancer (DW, 2020). It is also in cauldrons like the Citarum River where pathogens may mutate with emergent ramifications.

On an equally alarming note, depressed economic conditions have traditionally provided a waste disposal boon for organized crime elements. Throughout 1980s, the Calabriabased ‘Ndrangheta mafia – in collusion with governments in Europe and North America – began to dump radioactive wastes along the coast of Somalia. Reeling from pollution and revenue loss, Somali fisherman eventually resorted to mass piracy (Knaup, 2008).

The coast of Somalia is now a maritime hotspot, and exemplifies an entwined form of economic-environmental-geopolitical-societal emergence. In a VUCA world, indiscriminate waste dumping can unexpectedly morph into a Black Hawk Down incident. The laws of unintended consequences are governed by actors, interconnections, interactions and adaptations in a system under study – as outlined in the methodology section.

Environmentally-devastating industrial sabotages – whether by disgruntled workers, industrial competitors, ideological maniacs or terrorist groups – cannot be discounted in a VUCA world. Immiserated societies, in stark defiance of climate change diktats, may resort to dirty coal plants and wood stoves for survival. Interlinked ecosystems, particularly water resources, may be **hijacked** by nationalist sentiments. The **environmental fallouts** of critical infrastructure (CI) breakdowns loom like a **Sword of Damocles** over this decade.

GEOPOLITICAL

The **primary catalyst** behind **WWII** was the **Great Depression**. Since history often **repeats itself**, expect **familiar bogeymen** to **reappear** in societies roiling with **impoverishment** and ideological clefts. Anti-Semitism – a societal risk on its own – may reach alarming proportions in the West (Reuters, 2019), possibly **forc**ing Israel to undertake **reprisal operations** inside allied nations. If that happens, how will **affected nations** react? Will security resources be reallocated to protect certain minorities (or the Top 1%) while larger segments of society are exposed to restive forces? **Balloon effects** like these present a classic VUCA problematic.

Contemporary geopolitical risks include a possible **Iran-Israel war**; **US-China military confrontation** over **Taiwan** or the **S**outh **C**hina **S**ea; **North Korean proliferation** of **nuclear** and **missile technologies**; an **India-Pakistan nuclear war**; an **Iranian closure** of the Straits of **Hormuz**; **fundamentalist-driven implosion in the Islamic world**; or a **nuclear confrontation** between **NATO** and **Russia**. Fears that the Jan 3 2020 assassination of Iranian Maj. Gen. Qasem Soleimani might lead to WWIII were grossly overblown. From a systems perspective, the killing of Soleimani did not fundamentally change the actor-interconnection-interaction adaptivity equation in the Middle East. Soleimani was simply a cog who got replaced.

## Axon

**The Supreme Court will narrowly rule in Axon v. FTC over procedural due process rights in the administrative proceedings, but it will spawn a wave of broad constitutional challenges in the future---if they succeed, then it upends the structure of independent agencies like the FTC and the Securities and Exchanges Commission**

Christopher **Cole 2-18** High Court's FTC Case Carries Potential For Broad Impact, https://www.law360.com/articles/1465429/high-court-s-ftc-case-carries-potential-for-broad-impact

The U.S. Supreme Court is poised to decide when **lower courts** can take up **challenges** to the **F**ederal **T**rade **C**ommission's structure in a case that could have **far-reaching implications** for commission merger reviews and efforts to protect consumers from fraud, but more **broadly** for **administrative powers of other federal agencies**, too.

The court recently agreed to hear one question, that of when parties defending themselves in an FTC administrative proceeding may challenge the constitutionality of the FTC's action.

The case arose from police body cam supplier **Axon Enterprises'** bid to fend off an FTC merger challenge. Axon initially asked that **the high court** case examine the **constitutionality** of the FTC's structure, but the court agreed to review only the **narrower question** of whether **district courts** could take up such **constitutional challenges** before the agency has issued a **final order** of some kind.

The company, which faces an FTC administrative trial over the merger, has argued that its challenge to the agency's in-house proceeding should be heard by a district court right now rather than after the agency action wraps up. The company argues that the FTC's administrative proceedings violate **due process rights** because cases are fixed in **favor of the agency**, which effectively serves as **prosecutor**, **judge** and **jury**.

Justices chose **not** to get to the **heart** of Axon's due process concerns in their upcoming review, but they agreed to dissect the trial courts' authority to field the issue while an underlying agency proceeding remains underway. In the meantime, the commission's in-house proceeding over the Axon merger remains on ice pending the Supreme Court outcome.

Their ruling in this case will likely **establish** a key precedent that will affect **other federal agencies** that carry out **administrative trials**.

And while **the jurisdictional question** currently before the court is **narrow**, observers told Law360 that the high court's decision to take the case at all **emboldens** those who would **challenge** the FTC structure's legality and **that larger issue inevitably return to the high court someday**.

New York antitrust lawyer Leonard Gordon, former FTC regional director in the Northeast, told Law360 the court appears focused **for now** on the process of **disputing** agency actions, not whether the commission's own mechanics pass **constitutional muster**.

"I think they're interested in the **procedural question**" of whether someone in the crosshairs of an FTC proceeding can challenge the constitutionality of the administrative process, said Gordon, chair of Venable LLP's advertising and marketing group.

That question is "**limited**," he said, **but** the jurists may well decide that federal courts can hear such challenges before the commission's own procedure is over, which would mark a **shift in jurisprudence**. "The law as it sits **right now** is **not** very favorable for those kinds of challenges."

FTC On Defense - Again

When the justices hear oral arguments in Axon Enterprise Inc. v. FTC this fall, it will be the second time in two years that government lawyers hop the marble steps on First Street in hopes of shielding the commission from a private sector legal attack.

The last round didn't go well for the feds. In AMG Capital Management v. FTC, the commission was challenged on its use of injunctive powers to seek monetary relief directly in district court, a unanimous court ultimately ruled that the FTC's injunction power, established under Section 13(b) of the FTC Act, is meant only to stop bad behavior going forward, not recover money for consumers.

That dealt a body blow to a chief FTC weapon long used to obtain court orders for restitution or disgorgement of ill-gotten gains, though it retained the power to seek restitution and disgorgement through its own administrative trials.

But now those in-house procedures are themselves under siege in the Axon case, in which the Arizona company had originally sought not only the power to sue the FTC in district court to stop the merger suit, but also to overturn the agency's structure as unconstitutional.

By only taking up the **former** question, the justices have **punted** what would otherwise amount to **existential threat** to the FTC, since taking away its power to bring cases before the commission's administrative law judge would undercut the agency's main weapon against alleged marketplace abuses.

That **doesn't** mean, though, that the high court has **permanently** tossed aside the **larger issue**. Companies such as Axon, which faces **an FTC administrative complaint** seeking to unwind its completed purchase of body cam supplier Vievu, stand ready to **litigate** the FTC's structure in the lower courts if the justices say there's no need to wait on the administrative trial.

Although the justices declined to review the larger issues of the FTC's structure right now, Axon officials say that their willingness to look at when such a challenge can be brought to the lower courts is a victory in itself. The thrust of Axon's argument is that harm accrues to a party during the FTC's slow-moving administrative process, so district courts should allow for a remedy - especially given that the process runs afoul of the Constitution in the first place.

"The question the Court agreed to resolve has enormous practical consequences, both for Axon and for others embroiled in proceedings before the FTC," Pam Petersen, Axon's vice president of litigation, told Law360 in a recent email.

"Under a series of recent Supreme Court decisions, it is clear that there are constitutional defects with how the FTC is structured," she said. "But as things stand, we could be forced to spend years submitting to proceedings before an unconstitutionally constituted FTC before we can ever get a court to consider and remedy those defects. We're hopeful that the Supreme Court will recognize that there is no legal basis for such an illogical regime."

The FTC has responded in court papers that Axon is wrongly trying to bypass the plan established by Congress for reviewing commission decisions.

An FTC spokeswoman declined to comment Friday.

Wider Implications Likely

As former FTC general counsel Stephen Calkins put it, the court's review of Axon, which came out of a Ninth Circuit ruling, draws the battle lines for a "two-front war" where Axon fights at the Supreme Court while other companies continue to file district court challenges.

Calkins, a professor at Wayne State University Law School, said Thursday there was nothing to stop litigants from filing a case in federal court regardless of what's happening at the high court.

"You would think there would be a very good chance that the FTC would lose this case, and that any FTC administrative complaint going forward is sure to be met by a district complaint challenging the constitutional structure of the FTC," he said. "It must think simultaneously about being a defendant in a district court lawsuit." He predicted "a number of district court challenges" and that eventually the FTC will be back on the second question, although the FTC could try to stay other court cases with Axon still unresolved.

"The irony with the loss of its 13(b) power," he said, is that "the FTC has been scrambling to find ways to get money to consumers, and one possible option is to file an administrative case and wait to go to district court until after the administrative case has gone through," but now that option could be dashed as well.

Calkins said a **Supreme Court ruling striking down** the FTC's in-house authority and its **overall structure** would give become **important case law** for other challenges to federal bodies that use similar procedures, such as the **S**ecurities and **E**xchange **C**ommission.

Venable's Gordon pointed out that even with the justices tackling only the question of bringing suit in district court against the FTC, a ruling in Axon's favor could be cited in any number of lower court cases seeking to buck agencies' administrative authority.

"Anybody who's got a challenge to the constitutionality of either the process that the government agency is engaged in, or the constitutionality of the way the agency is set up ... it will open up the opportunity for a sort of collateral attack on what the agency does," he said.

Gordon said **plenty of these cases are waiting in the wings**. "There are always some people claiming the administrative state is depriving them of due process."

**Perception of aggressive FTC enforcement causes the court to rule broadly on the constitutionality of FTC and other administrative agencies in future cases**

Grace **Karabinus 1-13**, Associate @ Porter Wright Morris & Arthur LLP, J.D., Vanderbilt Law, Has Axon dealt another blow to FTC authority? <https://www.antitrustlawsource.com/2022/01/has-axon-dealt-another-blow-to-ftc-authority/>

**Takeaway**

Facially, Axon’s bid to the **Supreme Court** may not seem all that significant. **After all,** the **specific** issue is **only** whether a federal district court **can** hear the constitutional challenge **while** the administrative proceeding is ongoing. And **that is a long way from declaring the FTC’s structure unconstitutional**. **But**, FTC administrative orders are **rarely appealed** to a federal appellate court. Therefore, if the Supreme Court allows for a simultaneous federal constitutional challenge, the structure of the **constitutionality** of the FTC and **other administrative** enforcement mechanisms **could** be heard. In this day and age, when **the FTC** has become the **target of** much **criticism** for its **aggressive policies**, this could **become quite significant.**

**SEC regulatory authority solves digital assets laundering**

Todd **Phillips 21** J.D., Director, Financial Regulation and Corporate Governance @ American Progress, The SEC’s Regulatory Role in the Digital Asset Markets, https://www.americanprogress.org/article/secs-regulatory-role-digital-asset-markets/

**Preventing money laundering**, **tax evasion**, **and** **criminal activities** It has been said that the primary uses for **digital assets** are to **evade** **financial sanctions** **and** **collect ransoms**.67 **Bitcoin’s** **notoriety** initially **came from** its **ability to be used to buy** **illicit goods** **and** **services** anonymously **on the dark web**,68 with the FBI estimating that the most infamous platform, Silk Road, facilitated $1.2 billion in sales via bitcoin from 2011 to 2013.69 **Today**, the **North Korean** regime **uses** **digital assets** **to avoid** U.S. and international **sanctions**, **hacking exchanges** **and** **stealing assets** **that it then uses to buy goods and services**.70 Additionally, **the ease** **and** **anonymity** **with which digital assets are** **bought and** sold has **facilitated** **a 66 percent annual rise** **in ransomware** **attacks**, in which hackers will threaten to disable a company’s online services or delete its data unless it pays a significant ransom. As the Colonial Pipeline hack demonstrated, this can have significant real-world consequences.71 According to Chainalysis, the total amount paid by ransomware victims in 2020 reached nearly $350 million in digital assets.72 These blatant violations of the law are possible because individuals can trade digital assets with pseudonymity; although all transactions are registered on a blockchain, it is possible for people to set up and use digital asset wallets without verifying their identities.73 **This** same flaw **also facilitates tax evasion**. Although digital asset owners are required to pay capital gains taxes on proceeds from the sales of their assets, the congressional Joint Committee on Taxation estimates that nearly $30 billion will be lost to the U.S. Treasury over the next decade as a result of U.S. taxpayers not reporting these profits.74 While it is against the law to launder money, finance terrorists, or not pay taxes owed, the nation’s laws do not merely expect compliance; the government requires companies that make up the plumbing of financial markets to prevent such violations from occurring in the first place. **Securities brokers** **and** **asset managers** **are required to know** their **customers’ identities**,75 **so that they can halt** **transactions to or from** **individuals on the** **Treasury** Department’s Specially Designated Nationals and Blocked Persons **List** **and report suspicious activities**.76 **They** are also required to **record and report** customers’ **transactions**, sending 1099-B forms to both clients and the IRS that contain clients’ capital gains information in order to ensure that the tax authorities have full information about what investors owe.77 **If individuals use U.S. companies to attempt illegal activities**, **the companies are legally required to put a stop to it.** Although some digital asset brokers and exchanges state that they “don’t have access to the information required for information reporting,”78 platforms can be designed so that they do.79 **By regulating** **digital asset securities**, **the SEC** and FINRA **would be able to require U.S.-based brokers** **trading in these assets, or those assisting U.S. clients**, **to comply with the various** **a**nti-**m**oney **l**aundering **and** **tax** reporting **laws**. **If these new brokers refuse**, **the SEC** and FINRA **would be able to revoke** their **licenses**, **putting them out of business.** Conclusion The markets for digital assets are a growing area of interest to investors and a growing area of concern for legislators and regulators; without market oversight and the transparency that regulation brings, not only will investors not understand the risks to their investments and be liable to be significantly harmed, but the purported benefits of digital assets will also certainly fail to come to fruition. Fortunately, although new legislation may be necessary in the future, **regulators** **already have** at least some **legal authority**—**through** **enforcing** the **rules already in place** **and drafting new regulations**—**to address** **any** **issues that** **digital assets** raise. This report has discussed the **authority of the SEC** **to regulate digital asset securities**, as well as the brokers, dealers, and exchanges that facilitate their transactions, and has encouraged it to do so in ways that improve the climate footprint of the assets, protect consumers, and **prevent** **money laundering** and tax evasion.

**That funds North Korean nuclear development**

Richard Llyod **Parry 2-22**, British foreign correspondent, Kim Jong-un steals crypto to make a bomb, <https://www.thetimes.co.uk/article/kim-steals-crypto-to-make-a-bomb-hhjxmjvrx>

**No**rth **Ko**rea **is** **using** increasingly **sophisticated** **hacking** **and** **money-laundering** **techniques to steal** **crypto**currencies **in** its **latest effort to evade sanctions and fund** its **nuclear weapons programmes**. **Kim** Jong-un’**s** **government is earning** **hundreds of millions** of dollars at a time **in hacking raids on** **cryptocurrency exchanges**, **where** **currencies** **such as bitcoin are traded digitally**, **studies indicate**. The regime is evading efforts to clamp down on its activities with the use of the latest technologies that help it to transfer and sell digital currencies without detection.

**Unchecked development causes nuclear use**

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**No**rth **Ko**rea’s **nuclear** **and** **missile** **capabilities**—once viewed with derision by outside observers—**have been** **advancing** rapidly in recent years despite international diplomatic efforts and United Nations (UN) economic sanctions designed to end these weapons programs. **If these programs** **continue** along the path North Korean leader Kim Jong Un has outlined to his country’s ruling body, **then** **No**rth **Ko**rea’s **nuclear capabilities will provide a flexible tactical nuclear force**, **robust** **regional** nuclear **strike options, and the capability to credibly** **threaten the US homeland with nuclear retaliation** **with a robust second-strike** **capability**.2 Taken together, **these capabilities** **increase the odds** that **Pyongyang would** **aggressively** **leverage** its **nuclear weapons for coercion** **and** **would** even **risk** **escalating** **to limited nuclear use** **in the event of war**.3 **The continued improvement** **and expansion** of North Korean nuclear and missile capabilities, **if unchecked**, **would** therefore **drive** **a dramatic increase** **in the risk of** two serious scenarios coming to pass in the years ahead. First, a North Korea emboldened by its enhanced capabilities could make **a grave miscalculation** **that would** **lead to spiraling escalation**, **eventually leading to** **a nuclear war** that results in millions of deaths—many of them Americans. Alternately, North Korean **nuclear**-backed **coercion could lead to Seoul’s** **acquiescence** to Pyongyang’s demands, **effectively** **ending** **the US-South Korea alliance** as Washington distances itself to avoid the risk of nuclear retaliation.

## Adv 1

### 1NC

**Plan flaw: “grave non-price predation” is not a term of art but an descriptor Cho uses for the actual problem of “deliberate misrepresentation”**

#### Durable fiat is just the plan text, not interpretation. Courts will willfully modify the language of their decision to best allow for antidumping. “grave non-price predation” is meaningless

#### The aff solves nothing

### 1NC – AD A/C

#### No antidumping law can be successful because of the definition of dumping and impacts on prices

Abbot 22 (Alden Abbott Senior Research Fellow Andrew Mercado Research Assistant, “Reining In Market-Distorting Federal Regulation”, https://www.mercatus.org/publications/antitrust-and-competition/reining-market-distorting-federal-regulation)

Many domestic firms, however, do not operate in a free market, at least not under current trade laws. Special industry-specific tariffs, known as antidumping duties, are designed to protect American producers within an industry against foreign competitors’ “dumping” of a large supply of competing goods on the US market for a low price. Dumping, which is defined by the World Trade Organization as pricing a product below cost when exporting but at or above cost when selling in the domestic market, is a form of price discrimination, but real-world evidence is lacking that competition (as opposed to certain domestic competitors) is harmed by such behavior. There may be various reasons why a firm prices below cost, such as promoting a new product in a new market or setting a price target for long-run price goals. These examples, though, do not indicate an attempt by foreign firms to monopolize the domestic industry they are entering. Furthermore, because antidumping law definitions do not accurately describe economic costs, the law does not truly deal with economic predation.

#### Particularly true of antitrust’s connection to antidumping price effects

Murray, 1AC evidence, 19 Allison Murray 19, Loyola Law School, Los Angeles, Juris Doctor, May 2019. "Given Today’s New Wave of Protectionism, is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade’s Coffin?" 42 Loy. L.A. Int'l & Comp. L. Rev. 117 (2019). https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1785&context=ilr

Many critics of antitrust law claim that the laws themselves are “couched in vague, indefinable terms, permitting the Administration and the courts to avoid defining in advance what a ‘monopolistic’ crime is and what it is not.”21 These critics claim that antitrust laws rely on “deliberate vagueness and ex-post facto rulings” rather than “clear definitions . . . known in advance and discoverable by a jury after due legal process,” which clearly calls into question their efficacy.22 The vagueness and lack of clear definitions for the concepts at issue in antitrust law have caused significant discussion in academic circles: Today, courts appear to be confused about whether market power and monopoly power are similar or distinct concepts . . . Supreme Court opinions demonstrate a marked inconsistency as to whether market power and monopoly power are similar or distinct concepts. We can find no Supreme Court opinion that contrasts the terms “market power” and “monopoly power” deliberately and explicitly, i.e., that finds the existence of one but not the other. . . . Other Supreme Court opinions also appear to treat market power and monopoly power as identical concepts. Despite these references, however, the Supreme Court, in other cases, seems to have articulated standards for “monopoly power” and “market power” that, at least linguistically, are incompatible. In NCAA v. Board of Regents, the Court defined “market power” as “the ability to raise prices above those that would be charged in a competitive market.” By contrast, the Supreme Court has consistently defined “monopoly power,” at least for section two cases, in accordance with the definition articulated in United States v. E. I. du Pont de Nemours & Co.—i.e., as “the power to control prices or exclude competition.” Strictly construed, the Court’s language appears to require a higher burden of proof to establish “market power” than to demonstrate “monopoly power,” because proof of a defendant’s ability to exclude competition would not suffice to demonstrate the existence of “market power.”23 The varied and unpredictable scope of what constitutes a “market” is perhaps the clearest example that critics use to highlight antitrust law as muddied and inconsistent. Market definitions are suggested by the parties to the proceedings and are presumably skewed toward whatever position the suggesting party takes in the dispute. The court either adopts one of these definitions or, if entirely unpersuaded, creates a new one that is more fitting to the situation at hand. Often, the court receives criticism for using too narrow or too broad of a definition.24 Most importantly, while the court requires some rationale behind the definitions proposed by the parties, there is no preset or standard for the scope of market definitions. This largely affects the landscape of antitrust law because whatever market definition is adopted by the court can substantially affect the court’s findings. For example, the European Union (“E.U.”), in a recent investigation of Google, claimed that Google had dominated the market and abused fair competition laws.25 The E.U. authorities defined the relevant product market as the Android operating system.26 Naturally, because the operating system was considered “its own market” and Google obtained control over 100% of the operating system, the court found that Google maintained a monopoly.27 Had that relevant product market been characterized by the court more broadly, perhaps as cell phone operating systems or as online shopping forums, Google probably would not have been found to have the requisite market control required to be a monopolist.28 That ruling, as with many cases, hinged entirely on the scope of the market definition being applied, leaving behind the uncertainty that had the market definition been broader, the court perhaps would have ruled the opposite way.

### 1NC – No Taiwan War

**No war in Taiwan.**

**Sacks 21** – David Sacks, research fellow at the Council on Foreign Relations, International Relations MA from John Hopkins University. [Why a Cross-Strait Crisis Will Be Averted in 2021, 2-18-2021, https://www.cfr.org/blog/why-cross-strait-crisis-will-be-averted-2021]

In sum, leaders in both Beijing and Taipei are not happy with one another, believe they are reacting to moves made by the other side, and are not inclined to make a conciliatory gesture to jumpstart cross-Strait dialogue. While some might conclude that cross-Strait relations will continue to deteriorate and could spark a crisis, instead **this period of tension** will **persist** without **boiling over**.

While China has escalated its coercion of Taiwan, primarily by increasing the frequency and scale of bomber flights over the median line and into Taiwan’s air defense identification zone, Taiwan has not responded in kind. Tsai has **avoided** creating **an escalatory dynamic**. She has also demonstrated **an ability** to improve Taiwan’s relationship with the United States while **not pushing for changes** that would provoke **a harsh response from Beijing**. Tsai is thus **unlikely** to trigger a crisis.

Although Beijing is displeased with Tsai and has increased its coercion of Taiwan, it is **preoccupied with multiple challenges** and does not want to add a **crisis over Taiwan to its inbox**. It is looking to **reset relations** with the United States (albeit on its own terms), bring its economy **back to its pre-COVID level**, and maintain **a positive atmosphere** throughout the year, which marks **the 100th anniversary** of the **C**hinese **C**ommunist **P**arty’s founding. **A confrontation over Taiwan** would complicate China’s ability to accomplish these tasks.

The United States is the other principal actor, and while the Biden administration has indicated it will continue to strengthen **U.S.-Taiwan relations**, it will probably do so in a way that does not test **Beijing’s red lines**. The Trump administration, although it should be commended for bolstering U.S.-Taiwan relations, often prioritized symbolism over substance and unnecessarily publicized certain developments that in turn prompted a forceful Chinese response. The Biden administration can be expected to take a lower key approach that China will feel less compelled to publicly react to.

In addition, the Biden administration has sent useful signals that it would respond to further Chinese coercion against Taiwan. While President Trump allegedly likened Taiwan to the tip of a sharpie, and his desk to China, undermining deterrence by communicating that Taiwan was not defendable, senior Biden administration officials have stated that the United States should be “crystal clear” about its commitments to Taiwan.

While 2021 is unlikely to see cross-Strait tensions spill over into open confrontation, there are a few ways that cross-Strait relations can be put on a firmer footing to minimize the chance of conflict.

First, while the Trump administration did not make it a priority to encourage cross-Strait dialogue, the Biden administration can publicly and privately urge both sides to resume official communications and press one side when it believes it is acting in bad faith. In a positive sign, the State Department urged Beijing to “engage in meaningful dialogue with Taiwan’s democratically elected representatives” in its first statement on cross-Strait relations under the Biden administration. Such messaging should continue, and it should be repeated privately at the highest levels.

Second, the United States can reinforce deterrence by publicly and privately highlighting its commitment to Taiwan and allocating the resources necessary to back up that rhetoric. This would involve developing a credible denial strategy for Taiwan, shifting additional military assets to Asia and dispersing them throughout the region, procuring long-range munitions and stationing them in the region, coordinating with Japan on contingency planning, and working more closely with Taiwan’s military to improve Taiwan’s ability to defend itself. By making clear it has the will and the capacity to come to Taiwan’s defense, the United States would reduce the chances of a cross-Strait conflagration.

Finally, Taiwan and China can seek to cooperate on practical matters even without agreement on the framework for cross-Strait relations. For instance, they can attempt to establish an exchange of medical information to ease travel during the pandemic. In addition, they can look to resume scholarly exchanges, virtually for the time being. Either of these steps would help build trust and place a floor on cross-Strait relations.

While some are predicting that the deterioration of cross-Strait relations will trigger a conflict between China and Taiwan over the next year, Taiwan’s **reluctance to escalate**, China’s **preoccupation with multiple challenges**, and **the change in administration** in the United States make **such a scenario unlikely**. Over the next year, cross-Strait relations will **remain fraught**, but China and Taiwan will avoid **a direct confrontation**

### 1NC – Trade

#### No Trade war

Joel **Einstein 17**. Australian National University. 01-17-17. “Economic Interdependence and Conflict – The Case of the US and China.” E-International Relations. <http://www.e-ir.info/2017/01/17/economic-interdependence-and-conflict-the-case-of-the-us-and-china/>

In 1913, Norman Angell declared that the use of military force was now economically futile as international finance and trade had become so interconnected that harming the enemy’s property would equate to harming your own.[1] A year later Europe’s economically interconnected states were embroiled in what would later become known as the First World War. Almost a century later Steven Pinker made a similar claim. Pinker argues, “Though the relationship between America and China is far from warm, we are unlikely to declare war on them or vice versa. Morality aside, they make too much of our stuff and we owe them too much money.”[2] His argument rests upon the liberal assumption that high levels of trade and investment between two states, in this case the US and China, will make war unlikely, if not impossible. It is this assumption that this essay seeks to evaluate. This essay is divided into three sections. The first briefly outlines the theory that economic interdependence results in a reduced likelihood of conflict, breaking the theory down into smaller components that can be examined. In the second section, this essay suggests that the premise ‘more trade equals less conflict’ is simplistic. It does not take into account many of the variables that can influence the strength of economic interdependence’s conflict reducing attributes. Within this section, the essay considers: the extent to which conflict cuts off trade, theories arguing that how and what a state trades matters, Copeland’s theory of trade expectations and the differences between status quo and revisionist states. The final section deals with the realist perspective, concentrating on arguments pertaining to the primacy of strategic interests and arguments that economic interdependence will increase the likelihood of conflict owing to a reduction of deterrence credibility. Each section will be related back to the US-China relationship with a view to assessing Pinker’s claim. The essay will conclude that economic interdependence does reduce the likelihood of conflict but is insufficient on its own to completely prevent it. To calculate the likelihood of conflict correctly one would need to factor in the nature of the economic interdependence alongside the strength of the strategic interests at stake. Economic Interdependence and Conflict The theory that increased economic interdependence reduces conflict rests on three observations: trade benefits states in a manner that decision-makers value; conflict will reduce or completely cut-off trade; and that decision-makers will take the previous two observations into account before choosing to go to war. Based on these observations, one should expect that the higher the benefit of trade, the higher the cost of a potential conflict. After a certain point, the value of trade may become so high that the state in question has become economically dependent on another. Proponents of this theory argue that if two states have reached this point of mutual dependence (interdependence), their decision-makers will value the continuation of trade relations higher than any potential gains to be made through war.[3] It is on this argument that Pinker rests his statement that the economic relationship between the US and China precludes war. One can see evidence of this when analysing US views on China as trade rises. A 2014 Chicago Council on Global Affairs survey indicates that only a minority of Americans see China as a critical threat, compared to a majority in the mid-1990s. This number is even higher when analysing Americans who directly benefit from trade with China.[4] As compelling as this argument may be, high levels of economic interdependence have not always resulted in peace. The decades preceding WW1 saw an unprecedented growth in international trade, communication, and interconnectivity but needless to say, war broke out.[5] This instance alone is not enough to disprove Pinker’s logic. War may become very unlikely but began nonetheless.[6] Let us take two hypothetical scenarios, one in which the chances of war is 80% and the other in which trade has reduced the likelihood of war to 10%. Just knowing that war did indeed take place does not tell us which scenario was in play. Similarly, the fact that WW1 took place gives us no information about whether economic interdependence made war unlikely or not. In fact, evidence even exists to suggest that economic linkages prevented a war from breaking out during the sequence of crises that led up to WW1.[7] However, the fact that a war as detrimental as WW1 could break out despite a supposed reduction of the likelihood of conflict gives us an impetus to examine whether this reduction does take place. Additionally, if this is the case, what variables can weaken this pacifying effect? Does Conflict Cut off Trade? Economic interdependence theory makes the assumption that conflict will reduce or cut-off trade. This assumption appears to be logical, as one would expect that the moment two states are officially adversaries, fear of relative gains would ensure that policy makers want to completely cut-off trade. However, there are many historical examples of trade between warring states carrying on during wartime, including strategic goods that directly affect the ability of the enemy to carry out the war.[8] For example, in the Anglo-Dutch Wars, British insurance companies continued to insure enemy ships and paid to replace ships that were being destroyed by their own army.[9] Even during WW2, there are numerous examples of American firms continuing to trade strategic goods with Nazi Germany.[10] Barbieri and Levy argue that these examples and their own statistical analysis suggest that the outbreak of war does not radically reduce trade between enemies, and when it does, it often quickly returns to pre-war levels after the war has concluded.[11] In response to this result, Anderton and Carter conducted an interrupted time-series study on the effect war has on trade in which they analysed 14 major power wars and 13 non-major power wars. Seven of the non-major power wars negatively impacted trade (although only four of these reductions were significant), but in the major war category, all results bar one showed a reduction of trade during wartime and a quick return to pre-war levels at its conclusion.[12] Accompanying this contradictory finding one must take into account that even if war does not radically reduce trade, if a state believes that it does then potential opportunity cost would still figure in their calculations. Variables that Impact the Pacifying Effect of Economic Interdependence The purpose of this section is to demonstrate that the pacifying effect of economic interdependence is not constant. It achieves this via a discussion of the effect of changes in a number of variables pertaining to how and what a state trades. Once it is established that changes in such variables may alter the effect of economic interdependence on the likelihood of conflict, Pinker’s statement (that the level of trade between the US and China makes conflict unlikely) can be considered to be an over-simplification. One variable is the relative levels of economic dependence. Some argue that asymmetry of trade can increase the chances of conflict if the trade is more important to one state than it is to the other; their resolve would not be reduced by the same degree. The less dependent state would be far more willing than its adversary to initiate a conflict.[13] An example is the possibility of the prevalent idea in China that ‘Japan needs China more than China needs Japan’ leading to China becoming more assertive in Senkaku/Diaoyu islands dispute.[14] It is important to recognize that all trade is asymmetric in one fashion or another. It is radical asymmetry that one has to fear, which at the moment does not appear to be the case in the China-Japan or US-China case. Another variable is the specifics of what is being traded. A study by Dorussen suggests that the pacifying effect of trade is less evident if the trade consists of raw materials and agriculture but stronger if the trade consists of manufactured goods. Even within the category of manufactured goods there are differences in effect. Mass consumer goods yield the strongest pacifying results whilst high-technology sectors such as electronics and highly capital-intensive sectors such as transport and metal industries tend to have a relatively weak effect.[15] If it is a sector with alternative trade avenues then embargos and boycotts as a result of conflict will have far less effect.[16] The rule is that the more inelastic the import demand, the higher the opportunity cost and the smaller the probability of conflict.[17] According to these studies, trade still generally reduces the likelihood of conflict however it is by no means homogeneous in its effects. Additionally, the opportunity costs are not the same for importers and exporters. Dorussen’s study suggests that increased trade in oil tends to make the exporters more hostile and the importers friendlier in relations to their foreign policy.[18] Taking this framework into account, in 2014 China’s top five exports to the US (computers, broadcasting equipment, telephones and office machine parts) all fell under the category of electronics,[19] whilst the US’s top five exports to China (air and/or spacecraft, soybeans, cars, integrated circuits and scrap copper) were all either high-capital intensive sectors or raw materials and agriculture.[20] According to Dorussen’s study, these exports should not yield the strongest possible conflict reducing results, which could impact the validity of Pinker’s statement. Copeland presents another variable, namely expectations of trade. Copeland argues that if a highly dependent state expects future trade to be high, decision makers will behave as many liberals predict and treat war as a less appealing option. However if there are low expectations of future trade, then a highly dependent state will attach a low or even negative value to continued peaceful relations and war would become more likely.[21] As an example, he points out that despite high levels of trade in 1914 German leaders believed that rival great powers would attempt to undermine this trade in the future, so a war to secure control over raw materials was in the interests of German long-term security.[22] Via this framework, if the US began to believe that in future years they would be less dependent on China’s economy, or if it became apparent that a US-China trade war was about to take place, there would be a sharp rise in the probability of conflict. The final variable this essay will discuss relates to the differences between status quo and revisionist states. Most empirical analyses of economic interdependence tend to group together states as different as the United States, Pakistan, Australia, Germany and China and assume that variations in their behaviour would be the same.[23] Papayoanou on the other hand, argues that when analysing the effects of economic interdependence it is useful to differentiate the effects on great power states and states with revisionist aspirations.[24] If a status quo power has strong economic ties with revisionist state there will be interest groups who advocate engagement and who believe that confrontational stances will threaten the political foundation of economic links. This will constrain the response of the status quo state.[25] One can see evidence of such an interest group in the US, a group Friedberg describes as the Shanghai coalition, who he argues advocate engagement with China at the expense of balancing.[26] A study by Fordham and Kleinberg backs up this argument as they find that US business elites who benefit from trade with China tend to see little benefit in limiting the growth of Chinese power.[27] A 21st Century revisionist power is far less likely to be a democracy, and therefore, interest groups will influence the leadership far less. This means an authoritarian revisionist power will be working under fewer constraints and will be able to take a more aggressive stance.[28] This appears to be the case in China where rather than having domestic constraints on taking an aggressive stance against Japan, one of their biggest trading partners, grassroots nationalism has made explicit cooperation a domestically risky option.[29] There are many indicators to suggest that China is a revisionist power willing to wage war. Lemke and Werner argue that an extraordinary growth of military expenditures’ reveals when a state is dissatisfied with the status quo.[30] Data provided by the Stockholm International Peace Research Institute certainly indicates that China qualifies as its military expenditure has nominally increased by 1270% between 1995 and 2015.[31] Additionally, the military modernization appears to be aimed at capabilities to contest US primacy in East Asia.[32] Much like German strategists recognized that Britain was operating under significant domestic constraints, China could realize the same of the US.[33] This is not to say that Chinese decision-makers would be cavalier about making a decision that would be to the detriment its economy. A crash in the Chinese economy due to the loss of exports to the US could potentially undermine the legitimacy of the Chinese Communist party and endanger the regime. However, the view that China is a revisionist power indicates that good trade relations alone will not result in a low probability of conflict. Realist Arguments Pertaining to Dominance of Strategic Interests Having established that if the pacifying effect of trade does exist, it can rise or fall depending on changes in a series of variables this essay proceeds to deal with realist theories arguing that trade has a negligible or even negative effect on the likelihood of conflict. Buzan argues that noneconomic factors contribute far more to major phenomena than liberal theorists usually cite to support their theory.[34] There is evidence of the primacy of strategic interests in Masterson’s 2012 study on the relationship between China’s economic interdependence and political relations with its neighbours. The study concluded that as economic interdependence with neighbouring states increased the likelihood of conflict did indeed decrease, but that the impact was minimal when compared to the impact of relative power capabilities. In other words, political and military issues dominated interstate relations. Growth in power disparities were associated with decreases in dyadic political relations that were greater than the increase caused by economic interdependence.[35] If the pacifying effect of trade can rise and fall so can the provocative effect of strategic interests. It is important to distinguish between the existence of a strategic interest and a situation of unbearable strategic vulnerability. China and the US have many opposing strategic interests, but neither is in a strategically vulnerable position. For example, China shares many borders, but none present the same threat of invasion that Tsarist Russia did to Imperial Germany as none of the current maritime tensions between China, Japan, and the US equate to a matter of national survival.[36] This is crucial as some believe that for a crisis to escalate to a major war an actor who is isolated and believes that history is conspiring against them is needed. Only this actor would take an existential risk to try and offset their strategic vulnerability.[37] Imperial Germany fit this description, but neither China nor the US does. This is largely due to the geography of the region. The tension between the US, China and Japan are over maritime regions. Maritime issues still relate to national interests but, as Krause points out, “Land armies are still the only forces that can conquer and hold territory.”[38] Taking this into account one can argue that the benefits of US-China trade are, for each state, currently greater than the benefits of pursing strategic benefits via force, but this situation will only remain as long as the situation does not become one of unbearable strategic vulnerability. Realist Arguments Pertaining to the Undermining of Deterrence Having established that scenarios exist where strategic interests and vulnerabilities have a greater effect on the likelihood of war than economic interdependence, this essay will now evaluate arguments that economic interdependence can increase the likelihood of conflict through the undermining of deterrence. The argument proceeds as follows: if economic interdependence constrains the ability or willingness of a state to use its military, security is lowered as the state now has a weakened ability to engage in deterrence and defensive alliances. Deterrence relies on the ability of a state to make credible threats and defensive alliances rely on credible promises to protect one’s allies.[39] Credibility is defined as the product of the operational capability to follow through with a threat and the communication of resolve to use force.[40] What is at risk here is that if economic interconnectivity interferes with the communication of resolve to use force then states may end up with a way that neither side expected or wanted. Some argue that it was such a failure to communicate resolve that resulted in the beginning of WW1. Indeed, Jolly claims that: “The Austrians had believed that vigorous actions against Serbia and a promise of German support would deter Russia: the Russians had believed that a show of strength against Austria would both check the Austrians and deter Germany. In both cases, the bluff had been called and the three countries were faced with the military consequences of their actions.”[41] The risk in the US-China case would be that the interest groups described earlier would prevent the US from effectively communicating its resolve to use force if China were to cross a redline. The flaw in this argument lies in the fact that whilst interest groups might push back against public statements outlining redlines; the US has many less overt options available to it to communicate resolve. Modern technology and the forms of interconnectivity have resulted in many more lines of communication between China and the US than adversaries had access to in 1914. Private meetings, electronic communication and numerous other methods of communication have the capability to be candid without being visible to interest groups. It is for this reason that this essay discounts the theory that Sino-American economic interdependence results in a reduction of deterrence and therefore increases the likelihood of conflict. Conclusion This essay has shown that the strength of the pacifying effect of economic interdependence is subject to change depending on a series of dynamic variables. It has also demonstrated that the strength of the conflict provoking effects of strategic interests can change depending on whether the strategic interest amounts to a situation of unbearable strategic vulnerability. It has discounted the theory that interdependence leads to a higher chance of conflict through an erosion of credibility. To sum up, trade does seem to reduce the likelihood of conflict but should not be seen as a deterministic factor as strategic interests, and vulnerabilities also have a large effect. There is no hard rule as to what will be the driving factor as the nature of economic interdependence and of strategic factors impact their relative values. Accordingly, Pinker’s statement that the trade between the US and China makes war exceptionally unlikely is simplistic and misleading because it fails to account for a wide array of variables that can radically change the likelihood of a Sino-American war. An intellectually honest thesis would insist upon a comprehensive approach in which the level of economic activity is simply one of many variables that is required.

#### Too many alt causes too tarde

Alden 21 (Edward, By Edward Alden, a columnist at Foreign Policy, a visiting professor at Western Washington University, and a senior fellow at the Council on Foreign Relations. “Free Trade Is Dead. Risky ‘Managed Trade’ Is Here.”)

For three quarters of a century, the growth of world trade—which has spread prosperity to much of the planet, including hundreds of millions of people in the developing world—has been underpinned by a simple commandment: Thou shalt not discriminate. In the years after World War II, most nations agreed, for the first time in history, they would treat foreign-made goods the same from almost every country. The United States would, for example, charge the same tariff on a sweater imported from Italy as on one imported from Bangladesh and impose no additional discriminatory regulations. First, this powerful principle allowed many poor countries, such as Bangladesh, to grow by exporting goods. Later, when advances in communications and logistics pushed globalization forward, it allowed companies to spread production around the globe, confident they could make goods in almost any country and export them to any other under identical rules.

But the nondiscrimination principle is now under the most sustained assault it has ever faced. On issues from national security to labor rights to the environment, the world’s largest economies are deciding that nondiscrimination—the bedrock principle of free trade and globalization—must take a back seat to more pressing concerns. The most dramatic abandonment is about to hit: Last week, the European Union unveiled its “Fit for 55” plan to reduce carbon emissions by 55 percent from 1990 levels by the end of this decade and to reach carbon neutrality by 2050—which will require the most sustained economic upheaval since the Industrial Revolution. Central to the EU’s plan is a carbon border tax, under which Europe plans to charge higher tariffs on imports of products made in ways that generate higher emissions than European producers will be permitted to generate for the same goods. The scheme will start by targeting carbon-intensive sectors such as concrete, steel, aluminum, and fertilizer. The U.S. Congress is developing a similar plan to tax carbon-intensive imports as part of the coming budget reconciliation package—although the details are still murky. Other new trade restrictions being imposed or considered on both sides of the Atlantic Ocean are based on compliance with labor protections, human rights, and other criteria. For many traded goods, nondiscrimination will become a quaint relic.

Most of these measures are eminently defensible, perhaps even critically necessary, but together, they are leading to an increasingly balkanized global economy—one divided by ideology, social values, and environmental commitments. It will be a less efficient world, one in which companies will need to tailor both investments and production decisions to the values of the countries they wish to sell to. And it will cause more economic conflict. The more these exceptions to the principle of nondiscrimination become entrenched, the easier it becomes to expand those exceptions in the future. As the world moves down this road to closely managed trade, it will need to step cautiously to avoid going too far—and slide back into damaging protectionism.

### 1NC – EU

#### The EU is doomed.

Timothy Less 18, leading the “New Intermarium” research project at the University of Cambridge, 10-17-2018, "The great schism that could pull the EU apart," Newstatesman, https://www.newstatesman.com/world/europe/2018/10/great-schism-could-pull-eu-apart

A Great Schism may seem far-fetched from the vantage point of 2018. But the political calculus will be very different come the start of the next decade when the EU confronts the next recession, which is inevitable. With the eurozone unreformed, interest rates already at zero and its weakest members sitting on a pile of new debt, the next crisis is likely to hit hard. What will happen when troublesome elements such as Italy and Greece once again find themselves in financial straits? Will the EU’s core members dig deep into their pockets, as they did before? That seems improbable. More likely is that the creditor states cut the Mediterranean loose and concentrate on shoring up their own defences. In the process, the EU will squeeze out recalcitrant non-eurozone members such as Hungary and Poland, by whatever means necessary. Already, the former head of the European Parliament, Martin Schulz, has proposed a compulsory referendum in every member state which offers just two choices – accept a political union or quit the EU. That would, of course, have massive geopolitical implications for the old periphery. Hungary and Italy would seek to balance internationally between the new reduced EU, Russia and China. Poland would focus its attention on the US and UK. New alliances would emerge in the region to replace the EU, encompassing not just central Europe but the Balkans, Belarus and Ukraine. And issues suppressed by EU membership would return to the fore, starting with Hungary’s unresolved grievance over the status of its regional diaspora. As for the rump EU, it may overcome the challenge emanating from the periphery by expelling its members, but its problems would not be over. It would still be faced with the shortcomings of liberalism – the threat to identities, the economic insecurity, and so on – that fuelled the populist uprising from the east. The core EU may defeat the external enemy by banishing it from the realm. But the challenge from within may prove even greater.

## Adv 2

### 1NC – Innovation High

#### U.S. innovation is high and globally dominant – big business is key.

Wolf ’21 [Martin; April 27; Chief Economics Commentator, M.A. in Economics from Oxford University; Financial Times, “China is wrong to think the US faces inevitable decline,” https://www.ft.com/content/8336169e-d1a8-4be8-b143-308e5b52e355]

The Chinese elite are convinced that the US is in irreversible decline. So reports Jude Blanchette of the Center for Strategic and International Studies, a respected Washington-based think-tank. What has been happening in the US in recent years, particularly in politics, supports this perspective. A stable liberal democracy would not elect Donald Trump — a man lacking all necessary qualities and abilities — to national leadership. Nevertheless, the notion of US decline is exaggerated. The US retains big assets, notably in economics.

For one and half centuries, the US has been the world’s most innovative economy. That has been the basis of its global power and influence. So how does its innovative power look today? The answer is: rather good, despite competition from China.

Stock markets are imperfect. But the value investors put on companies is at least a relatively impartial assessment of their prospects. At the end of last week, 7 of the 10 most valuable companies in the world and 14 of the top 20, were headquartered in the US.

If it were not for Saudi Arabian oil, the five most valuable companies in the world would be US technology giants: Apple, Microsoft, Amazon, Alphabet and Facebook. China has two valuable technology companies: Tencent (at seventh position) and Alibaba (at ninth). But those are China’s only companies in the top 20. The most valuable European company is LVMH at 17th. Yet LVMH is just a collection of established luxury brands. That ought to worry Europeans.

When we look only at technology companies, the US has 12 of the top 20; China (with Hong Kong but excluding Taiwan) has three; and there are two Dutch companies, one of which, ASML, is the largest manufacturer of machines that make integrated circuits. Taiwan has the Taiwan Semiconductor Manufacturing Company, the world’s biggest contract computer chipmaker, and South Korea has Samsung Electronics.

Life sciences are another crucial sector for future prosperity. Here there are seven European companies (with Switzerland and the UK included) in the top 20. But the US has seven of the top 10, and 11 of the top 20. There is also one Australian and one Japanese company, but no Chinese businesses.

In sum, US companies are globally dominant and nearly all the most valuable non-US firms are headquartered in allied countries.

### 1NC – Trolls Good

#### Patent trolls have a small downside but a big upside

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6. Conclusions and Implications Let us be clear about our claims. We are not saying that there are no patent trolls. We are also not claiming that no firm that licenses patents, rather than produces a product, has ever frustrated the development of a downstream firm. **The question is not,** however, **whether one can point to a firm that operates in the manner described by** Executive Office of the President (2013), FTC (2011, 2016), and a related academic literature, **but whether such firms are large and numerous enough to constitute a systemic problem. What, then, are we claiming?** The first takeaway of our study is that the magnitude of the transfers to the RPX-identified public PAEs plus the legal costs that might be associated with them are small compared to the size of the market in which they operate. T**his fact is not consistent with the** hypothesis that they impose a significant “**innovation tax”** that causes a deadweight loss. The small size of these firms as a group is also inconsistent, however, with the hypothesis that they are important intermediaries in the market for innovation. The second takeaway is that the RPX-identified public **PAEs**, as a group, **do not seem to be earning economic rents**. Most of them lose money, both on an accounting basis and as investments for their shareholders. **It is hard to reconcile these findings with the claim that PAEs assert low value IP** against defendants for nuisance-value settlements. This finding also explains why the revenues of these firms, as a group, are small compared to the market in which they operate: if there are no rents, there is little entry. **The third takeaway** of our study is that the RPX-identified public **PAEs tend to spend heavily on R&D**. It follows that the claims made in FTC (2011 and 2016), as well as some of the academic literature that has drawn on those reports, about the business model of PAEs require revision. Unless it is the case that there are numerous, large privately-held PAEs that operate very differently from the RPX-identified public PAEs, the high R&D intensity of the RPX-identified firms may imply that PAE, as a category of analysis, is not meaningful. **If a core characteristic of a group of firms is to invest heavily in research and development, then focusing** **on** the fact that they need to use **the legal system** to enforce their intellectual property rights, **may cause us to misunderstand**, **and hence mischaracterize, their role in the economy**. Whether or not this implication holds is a question for additional research.

#### Patent trolls creates a patent market and incentivize innovation

Abrams et al. 2019. David Abrams - Professor of Law, Business Economics, and Public Policy. David S. Abrams, Ufuk Akcigit, Gokhan Oz & Jeremy G. Pearce. “The Patent Troll: Benign Middleman or Stick-Up Artist?” <https://www.nber.org/papers/w25713>

7 Conclusion

What do non-practicing entities do, and how do they impact innovation and technological progress? Despite the heated debates on this issue in both academic and policy circles, the direct evidence on their business models is quite limited. In this paper, we attempt to answer these questions both empirically and theoretically. On the theoretical side, the model provides new insights into how NPEs operate. In line with standard approaches, the model allows for NPEs to purchase patents and license them to other firms without using those patents for production. **Our model highlights two crucial roles for the NPEs**: First, they can purchase patents that are more litigation-prone and use them to threaten other firms to extract more licensing revenue. While this is commonly associated with “trolling,” **there is a positive contribution of this role: NPEs create value by defending the intellectual property of small firms who do not have sufficient means to defend their patents**. While **this protection incentivizes small firms to innovate more,** the same action discourages large firms who might be infringing on small firm patents. **The second role of the NPEs have been as middleman in the market for patents**, **which suffer deeply from informational asymmetry**. By having access to the full broker network around the country, NPEs can allocate patents to better users. The elements in our model allow us to come up with a number of relevant and testable implications. We are able to evaluate these predictions by examining transaction-level data from large NPEs for the first time. We find that NPEs buy non-core patents from smaller originating entities, and especially litigation-prone patents. They pay more for patents that come from large firms and for those that are more core to the seller’s business. On the licensing side, NPEs attain higher fees for those patents that have smaller distance to the licensee. We also find that citations to NPE-held patents decline around the time of acquisition. This effect is not significant for low value patents, but is most pronounced for those with higher value. In our final exercise, we calibrate the model to attempt to estimate a net effect of NPEs on innovation. A crucial component of the model is the amount of patent infringement due to innovators and that due to producers who do not innovate. If a large amount of infringement comes from non-innovating producers, NPEs have a positive effect on innovation. If most infringement comes from downstream producers, NPEs generate a net negative effect. We believe that both the framework and new facts put forth in this paper can shed light on the debate of the role of NPEs for overall innovation. The welfare and innovation consequences of NPEs is a policy issue that continues to be relevant and much additional work is needed on this crucial topic. Our paper suggests further exploration is warranted. For instance, one important aspect noted in this paper is the degree to which infringement comes from producing entities as opposed to those who both produce and innovate. Another area is the degree to which infringement truly hampers the capability of small firms to protect their technology. We hope this paper can help provide a foundation for further research on these topics as intellectual property and its secondary market remain central to discussions of innovation.

### 1NC – No Impact

#### China prefers peaceful rise

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But this policy mantra has two fundamental problems: it mischaracterizes China’s strategic intentions in the region, and it is based on a U.S. strategic objective that is probably no longer achievable. First, China is pursuing hegemony in East Asia, but not an exclusive hostile hegemony. It is not trying to extrude the United States from the region or deny American access there. The Chinese have long recognized the utility—and the benefits to China itself—of U.S. engagement with the region, and they have indicated receptivity to peaceful coexistence and overlapping spheres of influence with the United States there. Moreover, China is not trying to impose its political or economic system on its neighbors, and it does not seek to obstruct commercial freedom of navigation in the region (because no country is more dependent on freedom of the seas than China itself). In short, Beijing wants to extend its power and influence within East Asia, but not as part of a “winner-take-all” contest. China does have unsettled and vexing sovereignty claims over Taiwan, most of the islands and other features in the East and South China Seas, and their adjacent waters. Although Beijing has demonstrated a willingness to use force in defense or pursuit of these claims, it is not looking for excuses to do so. Whether these disputes can be managed or resolved in a way that is mutually acceptable to the relevant parties and consistent with U.S. interests in the region is an open, long-term question. But that possibility should not be ruled out on the basis of—or made more difficult by—false assumptions of irreconcilable interests. On the contrary, it should be pursued on the basis of a recognition that all the parties want to avoid conflict—and that the sovereignty disputes in the region ultimately are not military problems requiring military solutions. And since Washington has never been opposed in principle to reunification between China and Taiwan as long as it is peaceful, and similarly takes no position on the ultimate sovereignty of the other disputed features, their long-term disposition need not be the litmus test of either U.S. or Chinese hegemony in the region. Of course, China would prefer not to have forward-deployed U.S. military forces in the Western Pacific that could be used against it, but Beijing has long tolerated and arguably could indefinitely tolerate an American military presence in the region—unless that presence is clearly and exclusively aimed at coercing or containing China. It is also true that Beijing disagrees with American principles of military freedom of navigation in the region; and this constitutes a significant challenge in waters where China claims territorial jurisdiction in violation of the UN Commission on the Law of the Sea. But this should not be conflated with a Chinese desire or intention to exclusively “control” all the waters within the first island chain in the Western Pacific. The Chinese almost certainly recognize that exclusive control or “domination” of the neighborhood is not achievable at any reasonable cost, and that pursuing it would be counterproductive by inviting pushback and challenges that would negate the objective. So what would Chinese “hegemony” in East Asia mean or look like? Beijing probably thinks in terms of something much like American primacy in the Western Hemisphere: a model in which China is generally recognized and acknowledged as the de facto central or primary power in the region, but has little need or incentive for militarily adventurism because the mutual benefits of economic interdependence prevail and the neighbors have no reason—and inherent disincentives—to challenge China’s vital interests or security. And as a parallel to China’s economic and diplomatic engagement in Latin America, Beijing would neither exclude nor be hostile to continued U.S. engagement in East Asia. A standard counterargument to this relatively benign scenario is that Beijing would not be content with it for long because China’s strategic ambitions will expand as its capabilities grow. This is a valid hypothesis, but it usually overlooks the greater possibility that China’s external ambitions will expand not because its inherent capabilities have grown, but because Beijing sees the need to be more assertive in response to external challenges to Chinese interests or security. Indeed, much of China’s “assertiveness” within East Asia over the past decade—when Beijing probably would prefer to focus on domestic priorities—has been a reaction to such perceived challenges. Accordingly, Beijing’s willingness to settle for a narrowly-defined, peaceable version of regional preeminence will depend heavily on whether it perceives other countries—especially the United States—as trying to deny China this option and instead obstruct Chinese interests or security in the region.

### 1NC – Tech

#### Tech fear mongering is always wrong

Brad Allenby, December 2015. Lincoln Professor of Engineering and Ethics; President’s Professor of Civil, Environmental, and Sustainable Engineering, and of Law; and founding chair of the Consortium for Emerging Technologies, Military Operations and National Security at Arizona State University. “Emerging technologies and the future of humanity.” Bulletin of the Atomic Scientists 71(6): 29-38. Emory Libraries.

Although it was not clear at the time, Bill Joy’s article warning of the dangers of emerging technologies was to spawn a veritable “dystopia industry.” More recent contributions have tended to focus on artificial intelligence, or AI; electric car and space technology entrepreneur Elon Musk has warned that AI is “summoning the demon” (Mack, 2015), while physicist Stephen Hawking has argued that “the development of full artificial intelligence could spell the end of the human race” (Cellan-Jones, 2014). The Future of Life Institute (2015) recently released an open letter signed by many scientific and research notables urging a ban on “offensive autonomous weapons beyond meaningful human control.” Meanwhile, the UN holds conferences and European activists mount campaigns against what they characterize as “killer robots” (see, e.g., Human Rights Watch, 2012). Headlines reinforce a sense of existential crisis; in the military and security domain, cyber conflict runs rampant, with hackers accessing millions of US personnel records, including sensitive security clearance documents. Technologies such as uncrewed aerial vehicles, commonly referred to as “drones,” are highly contentious in both civil and conflict environments, for many different reasons. A recent US Army Research Laboratory report foresees genetically and technologically enhanced soldiers networked with their battlespace robotic partners and remarks that “the presence of super humans on the battlefield in the 2050 timeframe is highly likely because the various components needed to enable this development already exist and are undergoing rapid evolution” (Kott et al., 2015: 19). How is one to think about this outpouring of analysis, hypothesis, events, and existential angst? A useful first step is to realize that there are three levels to such discussions of technology.2 Level I is the instrumental level: a gun shoots a bullet and kills someone; a watch is used to tell time; a vaccine is used to prime an individual’s immune system to protect against a disease. Level II is the systems level: an uncrewed aerial vehicle conducting surveillance is part of a battlefield intelligence system; watches function in a globally standardized time system that was only institutionalized in the United States by an act of Congress in 1918; vaccinations are part of a public health system. Level III, the effect of a technology on individual psychology, society and culture, economic patterns, geopolitical status, and other Earth systems, is unpredictable and uncertain. One of the major drivers for standardized time, for example, was railroad technology, which was certainly not foreseen by those who first began developing steam locomotives. It is important to remember, however, that even if the specifics of Level III impacts cannot be predicted a priori, they will occur. Level I effects are usually not difficult to figure out: They are the reasons that a technology is commercialized. For example, the Level I effect of a bomb-dismantling robot is clear: It helps save the lives of soldiers who would otherwise have to be doing that job. Level II effects can be more complex and may point in different directions than first-order effects. A robotic hummingbird surveillance device may have entirely beneficial effects if used in counterinsurgency, because it can improve targeting and thus reduce collateral damage (Level I effect). But if the same technology becomes widely available to political parties and divorce lawyers, it could have very negative effects on privacy and public discourse (a Level II effect). And, hypothetically, robotic bugs and hummingbirds, combined with data-mining software and massive databases, could become important tools of techno-totalitarian elites, a possible, but hypothetical, Level III effect. This distinction among Level I, Level II, and Level III is useful because much of the confusion regarding emerging technologies comes from conflating relatively predictable Level I aspects of an emerging technology with highly unpredictable Level III hypotheticals, and treating them as equally valid insights into future technological trajectories. Not so. A concern about the use of drones to attack human targets in countries that are not participants in a conflict is qualitatively different than polemics against “killer robots,” and while conflating the two for purposes of argumentation may be effective, it is profoundly misleading. We have historical and operational data that enable us to evaluate the former; we don’t even know what a “killer robot” really is, except as an evocative term, and virtually no idea what would happen if such technologies became widespread in the real world. An analogous analytical mistake occurs when a particular use of a technology is treated as if it were separable from the technology itself. A medical advance in computer-brain interfaces in prosthetics, for example, is the same technology that might be used in the near future to directly connect a soldier to a remote weapons system. Any effort to ban “military AI” will fail because “military AI” is not a relevant technology category; rather, it is the advance of the underlying technology as a whole that ensures at some point that AI will be integrated into military devices. (Notably and presumably unintentionally, the proselytizing against “military AI” fails to admit that such a policy implicitly favors powers, such as Russia and ISIS, that are operating under doctrines of asymmetric warfare that privilege non-traditional tactics, technologies, and conflict.) It is precisely this confusion that one notes in the language used in many of the comments on and critiques of emerging technologies, including some of the examples given above. It is not so much a question of whether these popular dystopian visions are accurate predictions: They almost certainly are not, because the ability to predict the future paths and implications of complex and powerful technology systems is simply nonexistent. Level I assertions of knowledge are being extended to inherently unpredictable Level III systems without understanding that an important conceptual shark has been jumped. But it is useful to explore the assumptions underneath the current rage for dystopian visions of emerging technologies, which are not as implausible as some have suggested. To reduce such confusion, let me be clear from the beginning. Because much recent commentary regarding emerging technologies is generic and apocalyptic, that is what this essay will focus on. In other words, I will not concern myself with whether a particular weapon system, or smart phone app, or cyber worm, or AI tool is good or bad or competitively successful, a Level I question. Nor will I address the foreseeable Level II effects, an analysis which, as in the case of Level I, would focus on particular technological artifacts or applications and their systemic effects. Rather, since apocalyptic tends to be Level III stuff, that’s where we’ll go. Emerging technologies as an Earth system The first question to ask about emerging technologies is deceptively simple: Is today really that different? Is there something about today’s emerging technologies—which for purposes of this analysis include nanotechnology, biotechnology, information and communication technology (ICT), robotics, applied cognitive science, humtech (design and engineering of the human as a foundational emerging technology), and their various combinations and permutations—that is qualitatively different from those that characterized other eras of technological change? If there isn’t, much of today’s dramatic language can be understood as simply a reflection of the emphasis that all humans give to the particular era and landscape and culture within which they exist. Each generation tends to overemphasize the degree of change that it experiences, partly because of the immediacy of the stresses to which it is exposed, and partly because it is easy to underestimate how difficult and unpredictable life was in the past**,** since when one looks back at history it seems to flow logically and necessarily. Indeed, apocalyptic fears have been common when many major technology systems first emerged because of this immediacy, even as subsequent generations grew to view the technology as banal, even boring. In the early days of railroads, for example, there was a widespread belief that traveling at the heretofore unimaginable speed of 25 miles per hour would kill the passengers, in part because such technology was against the obvious will of God. As an Ohio school board put it, If God had designed that His intelligent creatures should travel at the frightful speed of 15 miles an hour by steam, He would have foretold it through His holy prophets. It is a device of Satan to lead immortal souls down to Hell. (Nye, 1994: 57)3 In this case, however, a strong argument can be made that emerging technologies today are different not just in degree, but in kind, from those of the past. To begin with, the scope, scale, and speed of technological change are unprecedented. Where previous waves of technological change have involved a few core technologies, such as railroads or electrification, today technological evolution is occurring across the entire technological frontier. Partially as a result of such technologies rippling across a population of seven billion people, we now live on a terraformed planet, the first world we know of anywhere that has been shaped by the deliberate activities of a single species. That is not a discontinuous process, but it is qualitatively new. Moreover, as the discussion of the engineered warrior of 2050 suggests, the human itself has become a design space. It is certainly true that people have always changed themselves in many ways, from consuming intoxicants of all kinds, to medicine, to education, but there is little question that the direct interventions that are now possible, combined with accelerating advances in fields such as neuroscience, genetics and molecular biology, and prosthetics, make virtually all aspects of the human, including cognitive and psychological domains, potentially subject to design. That the designer is not just engineering external systems, but him- or herself, adds a degree of reflexivity, nonlinearity, and complexity that makes simple predictions about particular technologies tangential and irrelevant at best. It is worth emphasizing in passing that the argument that humans are at risk from emerging technologies is in an important sense circular. Humans are increasingly both designer and designed; they are, in other words, increasingly an emerging technology in their own right. People are many things, but they are now, and certainly will be in the future, a design project. Thus, in a meaningful way the argument that people are at risk from emerging technologies becomes the argument that emerging technologies are at risk from emerging technologies, which makes little sense, and isn’t very helpful analytically, or in guiding policy or practice. Additionally, technological evolution is accelerating, which has significant implications. Past rates of technological change were slow enough that psychological, social, and institutional adjustments were possible, but today technology changes so rapidly that technology systems decouple from governance mechanisms of all kinds. All these factors, operating together, synergistically increase the impact, speed, and depth of change. Any technology potent enough to be interesting will inevitably destabilize existing institutions, power relationships, social structures, reigning economic and technological systems, and cultural assumptions. Previous waves of technological change—from steam and coal, to electricity, to rail and automotive technologies—have destabilized and restructured human and natural systems at all scales, interacting unpredictably with contemporary natural, human, and built systems. Railroads, for example, opened up continental interiors, creating the underlying transportation infrastructure necessary to support industrialized agriculture, which, coupled to advances in production of artificial fertilizers and innovation in farm machinery, created the potential for dramatic increases in global human population. It also dramatically changed ecologies and landscapes; the American Midwest is an agricultural breadbasket, not a large swamp, because railroads provided the link between that farming region and the demand of the East Coast and, via steamship, Europe. The Earth’s atmosphere has been in part restructured by development of internal combustion engine technology coupled to a psychologically potent automotive technology, which is in turn based on a massive fossil fuel infrastructure. Proposals to address climate change through so-called “geoengineering technologies,” from designing the atmosphere to reflect incoming sunlight to deploying devices that capture carbon dioxide in the atmosphere, are explicitly intended to engineer major natural systems and cycles. In short, major new technologies are not just about artifacts; rather, they represent an unpredictable, sometimes apparently discontinuous, shift in the structure of integrated Earth systems. Moreover, these shifts are not predictable a priori; railroads, for example, required new systems of time, of communication, and, more subtly, of finance and of corporate management. Development of a mass consumption economy, with washing machines from new merchandising giants and cars from Detroit, required innovation in the development of consumer credit, and massive coupled innovation in everything from road systems to supply-chain management. Widespread consumer credit, in turn, generated an ability to consume, and a concomitant quality of life, that was beyond imagining for those generations of humans that lived prior to the 20th century. It is thus highly likely that the first implicit assumption of the dystopian perspective is correct: Things are indeed different today, and the difference is fundamental and qualitative, not simply one of degree. Emerging technologies are making everything from individual molecules, to the human, to the planet itself, design spaces. Moreover, it is also likely that technological evolution, and all the concomitant changes in coupled institutional, social, economic, and cultural systems, will be more challenging and complex than anything humans have yet experienced. The remaining two issues, then, are: First, what can we do about it; and second, is this the end of humanity? What can we do about it? Precisely because new technologies are disruptive, they inevitably call forth opposition, both by conservative social forces and by threatened economic interests. Historical examples abound. With railroad technology, for example, conservative states such as the Austro-Hungarian Empire and Russia resisted rapid deployment, in part because it was feared that railroads might create social unrest in the still somewhat feudal and highly stratified cultures that characterized such countries; the French held back because of concerns it would destroy rural culture. The predictable result was that modernizing states that realized the commercial and military potential of railroad technology, such as Prussia, rapidly overtook the laggards in building rail infrastructure, with an eventual shift in geopolitical stature. In the United States, railroads were bitterly opposed by river transportation interests; in fact, Abraham Lincoln, when still a practicing lawyer, argued and won the seminal case for the Rock Island Railroad.4 (River shippers at the time were arguing that any railroad bridge over a river was an unlawful obstruction of commerce; had they been successful, railroads would have been limited to operating between rivers and streams, but not crossing them.) A more recent example is provided by the thousands of people sued by the Recording Industry Association of America in its vain effort to defend a technologically obsolete business model for the distribution of music. There are plenty of reasons, in other words, why emerging technologies might be regarded as dangerous and disruptive, and thus worth stifling. History, however, indicates that while local opposition can be successful, it will not halt the evolution of technology. Consider, for example, the Japanese attempt to limit gunpowder technology to preserve traditional Samurai culture; successful in the short term, it left Japan open to subjugation by Western naval forces with gunpowder technology. Similarly, environmentalists and governments in Europe have aggressively opposed genetic engineering (GMOs, or “genetically modified organisms”) in agriculture. Outside Europe, however, GMO technology has been one of the most rapidly adopted agricultural technologies in history. Efforts to regulate the proliferation of nuclear weapon technology have been somewhat successful, but it appears unrealistic to assume that the technology can be uninvented. Especially given today’s globalized culture, and the strategic and military advantages that emerging technologies can provide, it is highly unlikely that meaningful constraints on technological evolution, whether derived from cultural, competitive, or religious foundations, will be successful. That is particularly true as all players in the global Great Game understand that leadership in science and technology domains is a necessary, if not sufficient, prerequisite for dominance. Moreover, given the complexity of many emerging technology systems, especially as they co-evolve with other natural, built, and human systems, it is unfortunately also likely that projecting their effects and evolutionary paths before they are actually adopted and become embedded in their social and cultural context is not just hard, but for all practical purposes impossible. One can, and should, generate scenarios. But exhortations that purport to elevate hypotheticals to predictions and implications of certainty about future states are misplaced. In short, there is no certainty, and the genie is well and truly out of the bottle. However, that doesn’t necessarily imply that we can’t modulate future technological evolution, but that the way we think about it today may be too simple, and our institutions too slow and maladaptive, to be up to the task. Beyond simplistic dystopianism This analysis suggests that, as dystopians might argue, emerging technologies are indeed potent, and that, especially as the human is becoming an active design space, if AI doesn’t destroy humanity, something will. But this is a grossly incomplete perspective. Humanity, as it appears at any particular time, is always doomed. Foragers and hunter-gatherers were doomed, as were the serfs of medieval Europe with their small plots and lives lived within a radius of a few miles of where they were born. And so, in our turn, are we. Doom is, in other words, evolution, and it is unlikely that we will stop it—or, really, that we should want to. In fact, the images that we cling to, personally and institutionally and culturally, are already obsolete. The ethics and values that we insist we will impose on the future are not only historically and culturally contingent, but already obsolete as well. We want the physical and cultural landscape we live in now to propagate into tomorrow, because we all unconsciously privilege the present, but that is not how complex systems work. They evolve, and indeed our world is evolving at a remarkable and accelerating clip. The fallacy of the dystopians, then, is not in their analysis of the power of technology, or the accelerating and destabilizing rates of change. The fallacy is in equating evolution with dystopia, and, without admitting it, privileging the present over the promise and inevitability of the future. What is at risk is the limited mental model of “human” that all of us carry with us, not “humans” as an ongoing process. This is actually a common category mistake in modern discourse: Sustainability advocates and environmental activists often claim that “the planet is at risk,” but of course it is not. The planet is a large mass of rock and a film of various carbon compounds, and that is not at risk at all. What is at risk is a particular mental model of what the world should look like, a constructed snapshot. That does not mean that there aren’t many environmental issues that require attention; of course there are. But, as in the case of the emerging technology discourse, it does mean that existential catastrophe language is not only invalid, but can actually prevent seeking constructive adaptations to accelerating change. Our only recourse is neither technological fatalism nor ethical relativism. It is true that we have not yet appreciated, much less begun to respond to, the challenge of a future that will indeed be more complex and difficult than anything we have experienced as a species. Nonetheless, we can already identify several important principles. For example, we need to stop thinking of “problems” with “solutions,” and think more in terms of “conditions” that will require long-term, adaptive management. Challenges such as ISIS and climate change will not be solved, but they can and must be managed in light of other relevant goals. In this, the experience with nuclear weapons is instructive: They are not a problem that can be unmade, but they are a condition that can be, and has so far been, relatively successfully managed. We also need to focus on creating option spaces—portfolios of social, institutional, and technological choices that can be adaptively and flexibly deployed in complex environments. Similarly, we need to play with scenarios: If dystopian pronouncements are instead taken as scenarios—“What would you do if…?”—they are far more useful and informative than suggestions of doom. Socially and institutionally, we need to become more agile and adaptive. This is uncomfortable for many, because it implies a degree of contingency and uncertainty, but that is precisely why such skills are necessary. The rate of technological change is unforgiving and has already decoupled to a large extent from traditional governance mechanisms. So we need to develop new ones. Individually, we need to become far more humble about our ability to visualize and prognosticate on a complex and dynamic future. Cautionary scenarios and hypotheticals are welcome exercises in practicing to adjust to the unknowable that lies in front of us, but they are not appropriate foundations for policy or legal action in the present. Nightmares are seldom reality, and when bad things do happen they are seldom the ones we thought about. Fear and anger in the face of change are popular responses—witness the rise of far right and far left factions, and fundamentalisms of all stripes, around the world—but they are maladaptive, and those in responsible positions at least cannot afford such luxuries.

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