# Aff Open Source — Harvard BH — NDT Round 1

# 1AC

## 1AC — Harvard BH

### 1AC — Citizen Petitioning

#### Advantage 1 is Citizen Petitions

#### An expansive *Noerr-Pennington* doctrine immunizes anticompetitive citizen petitions aimed at delaying generic drugs approval

Kobayashi 20 (Bruce H. Kobayashi, Professor of Law, George Mason University, Antonin Scalia Law School, Antitrust Exemptions and Immunities in the Digital Economy, 10-4,

<https://gaidigitalreport.com/2020/10/04/exemptions-and-immunities/>, y2k)

The Hatch-Waxman Act created a distinct regulatory scheme for securing FDA approval for pharmaceutical drugs—a scheme further complicated by patent and antitrust overlays.[175] The citizen petition process, which allows interested parties to comment on drug applications, may be used anticompetitively, much like sham litigation.

Pharmaceutical companies must obtain FDA approval before marketing new drugs. To market a new drug, a company must file a New Drug Application (NDA).[176] The NDA contains a list of patents associated with the new drug.[177] Subsequently, a generic manufacturer may file an Abbreviated New Drug Application (ANDA).[178] During the ANDA process, the generic manufacturer often selects what is called Paragraph IV certification—an attestation that the brand name drug’s patents are invalid, thus generic entry is unhindered.[179] Importantly, Paragraph IV certification is incentivized by a 180-day exclusivity window granted to the first ANDA applicant.[180]

Obviously, the patent holders (brand name drugs) accrue significant profits during the life of their patents. An early challenge to those patents threatens to cut off substantial amounts of revenue. Not surprisingly, then, brand name manufacturers employ various techniques to extend this period of exclusivity. One such technique is the filing of citizen petitions to the FDA, a process grounded in the right to petition and the Administrative Procedure Act.[181] The FDA receives comments on ANDA applications and some brand name manufacturers have used this process to attempt to delay generic entry.[182] In addition to citizen petitions, a brand name manufacturer may file a patent infringement lawsuit against the party who filed the Paragraph IV certification. In fact, the decision to do so triggers a thirty-month stay, incentivizing brand name manufacturers to file lawsuits defending their patents.

When considering an ANDA, the FDA must assess whether the proposed generic drug is a bioequivalent to the brand name drug.[183] Thus, some brand name manufacturers use the citizen petition process to argue that the generic drug is not bioequivalent. In some cases, these petitions are frivolous.[184] Clearly, the brand name manufacturer’s aim is to delay the entry of generic competition;[185] yet, this practice is presumptively immunized by Noerr-Pennington. Importantly, the FDA must resolve citizen petitions within 180 days—a timeline intended to limit the dilatory effect of citizen petitions—though it does not always meet the deadline.[186] And although federal law allows the FDA to disregard blatantly dilatory petitions, in 2013, it had yet to do so.[187]

Noerr-Pennington broadly protects brand name manufacturers who attempt to forestall generic entry by filing citizen petitions. The sham exception only activates when the petition is objectively baseless. But this standard is elusive.

For example, in Louisiana Wholesale Drug Co. v. Sanofi-Aventis, the district judge instructed the jury that a citizen petition was not objectively baseless if “a reasonable pharmaceutical manufacturer could have realistically expected the FDA to grant [the] relief sought.”[188] Reviewing Sanofi-Aventis’ motion for judgment as a matter of law, the district court concluded that a reasonable jury could have found that the petition was not objectively baseless.[189] As this case illustrates, whether a petition is baseless will often be an inquiry purely decided by the factfinder.

Given the fact-intensive nature of citizen-petition sham analysis, a brand name manufacturer who files a citizen petition with a sound scientific basis is less likely to face antitrust liability.[190] On the flip side, if a citizen petition contains unsupported or faulty scientific evidence, the citizen petition is more likely to be found a sham.[191]

Another pivotal aspect of the sham analysis for citizen petitions centers on the second prong of the PRE test, which focuses on the defendant’s intent. Therefore, business documents discussing the citizen petition and the impetus for its submission will often be influential.[192]

Brand name manufacturers may also file patent infringement suits to challenge generic manufacturers that file Paragraph IV certifications. If the brand name manufacturer chooses to sue within 45 days, a 30-month stay halts the ANDA unless the patent expires or a court holds the patent invalid.[193] When faced with a patent infringement suit, some generic manufacturers respond with antitrust counterclaims. Presumably, the brand-name manufacturer’s lawsuit is immunized by Noerr-Pennington, but the PRE test still applies, determining whether the litigation falls within the sham exception.

Recently, the Third Circuit discussed the sham exception within the ANDA context, noting that, in some ways, it is more difficult to establish it in the ANDA context.[194] In FTC v. AbbVie, Inc., the court observed that Paragraph IV certifications are, by definition, infringing acts, thus a suit in response “could only be objectively baseless if no reasonable person could disagree with the assertions of noninfringement or invalidity in the certification.”[195] Further, the court recognized that the Hatch-Waxman Act deliberately incentivizes brand-name manufacturers to sue, thereby reducing the likelihood that serial lawsuits by brand-name manufacturers were brought with anticompetitive intent. In sum, the Hatch-Waxman Act creates a nuanced regulatory environment where Noerr-Pennington still applies but presents additional hurdles for antitrust plaintiffs seeking to overcome immunity.

#### Citizen petitions are a key avenue to delay drugs for years

Feldman et al. 2018. Robin Feldman - Harry & Lillian Hastings Professor of Law & Director of the Institute for Innovation Law, University of California Hastings College of the Law. John Gray - Program Associate, Institute for Innovation Law, University of California Hastings College of the Law. Giora Ashkenazi - Research Fellow, Institute for Innovation Law, University of California Hastings College of the Law. “Empirical Evidence of Drug Companies Using Citizen Petitions to Hold Off Competition” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3116986>

IV.RESULTS The results of the study provide empirical evidence that the citizen petition process at the FDA has become a **key avenue** for strategic behavior by pharmaceutical companies to delay entry of generic competition. A. Rise in Citizen Petitions with the Potential to Delay As seen in Table I below, a notable percent of citizen petitions seems to have the potential to delay generic entry. Looking at the overall number of citizen petitions filed at the FDA on any topic, fourteen percent have the potential to delay a generic drug application, climbing to roughly twenty percent in some years. That means one in five of all citizen petitions to the FDA – not just those concerning pharmaceuticals – have the potential to delay generic competition in some years. This table also shows that starting around 2003 and 2004, petitions rose in popularity as a way to delay generics or raise issues about generics. Not only did the number of citizen petitions rise noticeably after 2002, but the number of delay-related petitions also sharply increased as a proportion of all petitions. [Table Omitted] B. When are Citizen Petitions Filed in Relation to Final Approval? The results also demonstrate that many drug companies are filing citizen petitions as a last-ditch effort in the period immediately before generic approval. Moreover, the timing suggests that **many of these citizen petitions appear to be the very last barriers standing in the way of final generic approval**. These implications emerged when we graphed the amount of time between when a citizen petition was filed and when the generic application was approved. In particular, our original hypothesis was that if citizen petitions are being used systematically to delay the approval of generics, petitions might be deployed most effectively for that purpose near the end of a generic approval cycle. If filed earlier, the petition could merely introduce a review process running parallel to the rest of the generic approval process. The data confirm this hypothesis. As seen in Figure I below, there is a clear trend in favor of citizen petitions filed shortly before the FDA approves a generic. In fact, the most common category was “0–6 months,” with 33 petitions, or 21 percent of the total,15 filed with up to six months or less remaining before the FDA approved the generic. Considering that **the average length of time from generic filing to approval is roughly four years**, this category occurs most often during the last leg of the approval process. In other words, the trend is toward an increasing number of petitions as one moves closer to the final approval date. Thus, this histogram suggests that delay-related citizen petitions are often filed in the final stages of generic approval to raise concerns at the last minute, rather than early or midway through the process. This pattern potentially extends the length of the generic application approval process, thus delaying the market entry of generic competition. [Table Omitted]

#### And they’re a key driver of increased prices

Nadler 2020. American lawyer and politician serving as the U.S. Representative for New York's 10th congressional district since 2013. A member of the Democratic Party, he is in his 15th term in Congress. “Stop Significant And Time-Wasting Abuse Limiting Legitimate Innovation Of New Generics Act” <https://www.govinfo.gov/content/pkg/CRPT-116hrpt694/html/CRPT-116hrpt694.htm>

\*footnotes omitted\*

Background and Need for the Legislation The FDA's citizen petition procedures were established to provide concerned citizens with an opportunity to solicit agency action regarding health and safety policy.\1\ The process, which is open to anyone, allows individuals to request that the FDA ``issue, amend, or revoke a regulation, or order or take or refrain from taking any other form of administrative action.''\2\ While various entities have used the citizen petition process to raise a variety of necessary health and safety issues, certain brand-name drug manufacturers have manipulated the process to stifle generic competition. For example, some branded manufacturers have responded to applications for drug approval by generic competitors by filing citizen petitions that question the safety, efficacy, and bioequivalence standards for approving generic drugs.\3\ Because the FDA must review and respond to every citizen petition it receives, including supplements or amendments to petitions,\4\ makers of generic drugs accordingly report that unwarranted petitions may cause manufacturing stoppages or significant delays in the FDA approval process.\5\ Studies have concluded that **while these petitions often lack merit, they can be very effective at delaying the entry of lower-cost generic competitors**.\6\ According to the FTC, abuse of this system allows some drug companies to unlawfully maintain a monopoly by delaying generic entry.\7\ For example, this abusive tactic has allegedly been used to delay life-saving treatments for opioid addiction and gastrointestinal infections.\8\ **Leading healthcare experts also agree that sham petitions are a significant driver of high prescription drug prices**. Dr. Aaron Kesselheim of Harvard Medical School testified last Congress that this abusive conduct can ``substantially delay[] entry of a more affordable generic product.''\9\ Professor Robin Feldman of the University of California at Hastings also found ``empirical evidence that the citizen petition process at the FDA has become a key avenue for strategic behavior by pharmaceutical companies to delay entry of generic competition.''\10\ Several witnesses discussed this problem at a Subcommittee on Antitrust, Commercial, and Administrative Law hearing this Congress.\11\ Congress previously attempted to stem the abuse of the FDA's citizen petition process. In 2007, Congress amended the Federal Food, Drug, and Cosmetic Act (FDCA) to help prevent citizen petitions from being used to delay generic entry.\12\ The 2007 amendments authorized new regulations and required the FDA to respond to citizen petitions concerning generic applications within 180 days (shortened to 150 days in 2012);\13\ required that petition filers certify the petition's submission was not intentionally delayed; and authorized the FDA to summarily deny such petitions in certain circumstances.\14\ Although imposing a 150-day deadline for the FDA to respond may have reduced the length of delay, it--and other changes described above--have arguably failed with respect to deterring the behavior. The FDA recently reported to Congress that it ``continues to be concerned that section 505(q) does not discourage the submission of petitions that are intended primarily to delay the approval of competing drug products and do not raise valid scientific issues.''\15\ In support of this concern, based on data available in 2017, then-FDA Commissioner Scott Gottlieb suggested that the imposition of the 150-day deadline ``had limited impact in discouraging the submission of petitions intended primarily to block or delay generic competition.''\16\ The FTC has also tried to address the problem of sham citizen petitions. In 2017, the FTC filed a complaint alleging that Shire ViroPharma Inc. abused the citizen petition process to illegally maintain a monopoly on Vancocin Capsules, a drug used to treat a potentially life-threatening gastrointestinal infection.\17\ According to the FTC, ``[f]acing the threat of generic competition to its lucrative franchise, ViroPharma inundated the FDA with regulatory and court filings--forty-six in all--to delay the FDA's approval of generic Vancocin Capsules.''\18\ **The FTC complaint further states that** these ``**repetitive, serial, and meritless filings** lacked any supporting clinical data,'' but, nonetheless, ``**succeeded in delaying generic entry at a cost of hundreds of millions of dollars to patients and other purchasers**.''\19\ On March 20, 2018, the district court dismissed the complaint and, according to the FTC's appellate brief, ``held that no matter how egregious a defendant's past violation, the FTC cannot sue to enforce [section 13 of] the FTC Act unless it alleges facts showing that a further violation is not just reasonably likely but imminent.''\20\ On appeal, the Third Circuit Court of Appeals affirmed the district court's order of dismissal.\21\ The courts' narrow reading of section 13(b) could make it harder for the FTC to address wrongdoing by drug companies that have filed sham petitions. **Notably**, neither the district court nor the court of appeals reached the merits of whether ViroPharma's conduct violated antitrust law beyond the district court finding that the allegations, taken as true, **were sufficient to overcome the Noerr-Pennington presumption of antitrust immunity for government** petitions.\22\

#### Delays in generic competition contributes to soaring drugs and health care costs and undermines access to medications

Rome 20 (Dr. Benjamin Rome is a primary care physician and health policy researcher. He is currently a postdoctoral fellow study prescription drug pricing and utilization with the Program On Regulation, Therapeutics, And Law (PORTAL) at Brigham and Women’s Hospital and Harvard Medical School, To Cut Prescription Drug Spending, Stop Delays for Generic Competition, 7-24, <https://blog.petrieflom.law.harvard.edu/2020/07/24/prescription-drug-costs-generic-competition/>, y2k)

Prescription drug spending in the U.S. remains high and continues to rise, accounting for about 20% of national health expenditures. While generic competition is crucial for reducing drug prices, brand-name drug manufacturers can utilize several strategies to delay such competition by increasing the length of market exclusivity for their drugs.

Although brand-name drugs only account for 18% of all prescriptions filled, they comprise 78% of total drug spending. By contrast, equally-effective, interchangeable generic drugs can offer discounts of up to 80% off their brand-name drug counterparts.

Generic competitors can only be introduced after brand-name drugs have completed their period of market exclusivity, which typically lasts 12-16 years and is largely determined by the patents covering the drug. Brand-name pharmaceutical manufacturers have strong financial incentives to prolong this market exclusivity period and delay entry of generic products.

One commonly employed approach is for a brand-name manufacturer to obtain multiple patents—some issued after the original drug goes on the market—that protect different features of the same drug, such as how the drug is used, alternate chemical formulations, or delivery devices. This creates a thicket of intellectual property protections that generic manufacturers must challenge in court for their product to reach the market. These cases are often protracted and costly for generic manufacturers, but can also result in settlements, including some in which the brand-name manufacturer pays the generic manufacturer in cash or other deals to stave off generic entry (known commonly as “pay-for-delay” settlements).

In some cases, drug manufacturers introduce a slightly different version of their drug (like a long-acting formulation) with even more patent protections. Manufacturers then vigorously encourage physicians and patients to switch to the new version as time nears for generic entry of the original version, a strategy known as “product hopping.”

These strategies to delay generic competition have substantial consequences for patient out-of-pocket prescription drug costs and total prescription drug spending in the U.S. A recent study in Health Affairs found that Medicaid (which represents 10% of all US drug spending) spent an estimated $761 million over seven years on 31 drugs for which generic entry was delayed.

Perhaps more startling is how much the delay in generic competition for a single drug can cost the entire health system. In the case of glatiramer acetate, a commonly-used treatment for multiple sclerosis, the drug’s manufacturer effectively extended exclusivity of the brand-name drug by 2.5 years by introducing a new formulation with a different dosing regimen just before generic competition was supposed to begin. A new study in JAMA Internal Medicine found that this “product hop” resulted in $4.3 to $6.5 billion in excess U.S. health care spending since 2015.

As prescription drug spending continues to rise and concerns about patient affordability grow, ensuring that brand-name drugs face timely generic competition is essential to maintaining fair access to drugs at reasonable prices. Doing so will require policy changes that prevent manufacturers from unreasonably extending market exclusivity for their products while still encouraging incremental improvements to existing drugs that can improve patient care. So, what can be done?

The most obvious solutions involve re-examining the system that allows drug manufacturers to obtain numerous different patents on their drugs. This can be done a few different ways.

We know that many later-issued patents used to create thickets around prescription drugs end up being overturned in court (when there is no settlement). The U.S. Patent and Trademark Office, which reviews and approves patents, could reconsider its standards for issuing drug patents. An administrative procedure to review patents called inter partes review was created in 2011 to facilitate re-examination of patents after they have been issued. Firmer patent standards would make sure that new patents protect true innovations.

Another proposal would be to restrict drug manufacturers to only a single patent against generic entrants. This “one patent, one drug” option would still allow drug developers a monopoly period—during which they can recoup their research investments—but would prevent them from gaining additional patents to extend exclusivity once the drug is already on the market.

Delays in generic competition carry a sizeable financial burden for both patients and the health care system. This burden falls disproportionately upon certain patients who require high-cost, brand-name drugs. When generic competition is delayed, these drug prices remain high and access is restricted to only the patients who can afford them.

As a result, delayed generic competition can deepen already-existing health disparities. For example, mortality from opioid use disorder is associated with markers of lower socioeconomic status. Yet the manufacturer of Suboxone—a critical yet underused medication to treat opioid use disorder—delayed generic competition by heavily promoting a dissolvable film version over the original dissolvable tablet.

This move limited access to generic versions of the drug from 2013 until 2018, and Suboxone’s manufacturer recently agreed to a $1.4 billion settlement after the U.S. Justice Department filed charges that they had fraudulently promoted the film version as safer and less prone to abuse than the tablet version. This promotion led to continued use of the high-cost brand-name drug, and high costs may have contributed to underuse and non-adherence to this life-saving medication, particularly among socioeconomically-disadvantaged patients.

Timely generic competition will ensure fairer and more equitable access to prescription drugs at reasonable prices and that the benefits and burdens of innovation will be more fairly distributed without unduly harming certain patient populations.

Generic drugs have saved the U.S. health care system $1.6 trillion dollars over the last decade. However, to ensure these savings continue, generic drugs must be allowed to enter the market in a timely fashion, and current policies afford brand-name manufacturers a number of tools to undermine generic competition and sustain their monopoly periods.

Delays in generic competition are currently costing billions of dollars, harming patients, and increasing disparities and inequities in access to care. Changing patent policy to prevent manufacturers from using these strategies represents an important yet overlooked strategy to reverse rising drug prices and ameliorate the associated economic, clinical, and ethical ramifications.

#### Widely available generics prevent millions of deaths

WH 20 (West Health Citing study released today by the West Health Policy Center, “New Study Predicts More Than 1.1 Million Deaths Among Medicare Recipients Due to the Inability to Afford Their Medications”, https://www.westhealth.org/press-release/study-predicts-1-million-deaths-due-to-high-cost-prescription-drugs/)

WASHINGTON, DC and SAN DIEGO, CA – Nov. 19, 2020 – More than 1.1 million Medicare patients could die over the next decade because they cannot afford to pay for their prescription medications, according to a new study released today by the West Health Policy Center, a nonprofit and nonpartisan policy research group. If current drug pricing trends and associated cost-sharing continue, researchers estimate cost-related non-adherence to drug therapy will result in the premature deaths of [one hundred twelve thousand] 112,000 beneficiaries a year, making it a leading cause of death in the U.S., ahead of diabetes, influenza, pneumonia, and kidney disease. Millions more will suffer worsening health conditions and run up medical expenses that will cost Medicare an additional $177.4 billion by 2030 or $18 billion a year for the next 10 years. Researchers also modeled what would happen if Medicare was allowed to bring down drug prices for its beneficiaries through direct negotiation with drug companies, as described in H.R. 3, the Elijah E. Cummings Lower Drug Costs Now Act, passed by the U.S. House of Representatives last year. They found Medicare negotiation could result in 94,000 fewer deaths annually. Additionally, the model found that the policy would reduce Medicare spending by $475.9 billion by 2030. “One of the biggest contributors to poor health, hospital admissions, higher healthcare costs and preventable death is patients failing to take their medications as prescribed,” said Timothy Lash, President, West Health Policy Center. “Cost-related nonadherence is a significant and growing issue that is direct result of runaway drug prices and a failure to implement policies and regulations that make drugs more affordable.” The price of prescription medications has skyrocketed in recent years. Between 2007 and 2018, list prices for branded pharmaceutical products increased by 159% and there are few signs of it slowing.[i] According to the Centers for Medicare & Medicaid Services (CMS), spending on prescription drugs will grow faster than any other major medical good or service over the next several years.[ii]

#### Cost is key to widespread cell therapy during crisis

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Background Cell and gene therapy products belong to a diverse class of biopharmaceuticals known as advanced therapy medicinal products. Cell and gene therapy products are used for the treatment and prevention of diseases that until recently were only managed chronically. The objective of this study was to examine the characteristics of market authorizations, discontinuations and prices of cellular and gene therapy products worldwide. Data and Methods We conducted an electronic search of authorized cell, tissue engineered and gene therapy products from the databases of the main drug regulatory agencies. The analysis excluded hematopoietic progenitor cell cord blood products authorized by the US FDA. Price information was derived from the Red Book (Truven Health Analytics) for the US and from health technology assessment agencies, other public sector sources in Europe and company news. We also searched the scientific literature for authorizations, discontinuations and price information using MEDLINE/PubMed, Cochrane Library, Google Scholar, and EMBASE databases. All cost data were converted to US dollars. Descriptive analysis was conducted in this study. Results There were 52 different cell, tissue engineering and gene therapy products with 69 market authorizations in the world as of December 31, 2018. The products included 18 (34%) cell therapies, 23 (43.4%) tissue engineered products and 12 (22.6%) gene therapies. December 31, 2018. There were 21 (30.4% of all authorizations) cell therapy, 26 (37.7%) tissue engineered and 22 (31.9%) gene therapy market authorizations. The EMA withdrew the authorization for 2 tissue engineering products, 1 cell therapy and 1 gene therapy, and New Zealand lapsed approval of 1 cell therapy. Most products were first authorized after 2010, including 10 (83.3%) gene therapies, 13 (72.2%) cell therapies and 13 (56.5%) tissue engineered products. The treatment price for 4 allogenic cell therapies varied from $2,150 in India to $200,000 in Canada. The treatment price for 3 autologous cell therapies ranged from $61,500 in the UK to a listed price of $169,206 in the US. Tissue engineered treatment prices varied from $400 in South Korea to $123,154 in Japan. Gene therapy treatment prices ranged from $5,501 for tonogenchoncel‐L in South Korea to $1,398,321 for alipogene tiparvovec in Germany. Conclusions A significant number of new cell, tissue and gene therapies have been approved in the past decade. Most products were conditionally authorized and targeted rare cancers, genetic and other debilitating diseases. However, there are also products approved for cosmetic reasons. Cell, tissue and gene therapies are among the most expensive therapies available. Health care systems are not prepared to assume the cost of future therapies for a myriad of rare diseases and common diseases of epidemic proportions

#### Cell therapy is key to make cancer, tuberculosis, and drug resistance.

Off-target effects & dosage problems make small molecules inefficient for innovative R&D

Fischbach et al 13 – Michael A., Associate Professor of Bioengineering at Stanford University and a member of the California Institute for Quantitative Biosciences, Ph.D. in Chemistry and Chemical Biology from Harvard University (2007), working in Christopher T. Walsh’s laboratory at Harvard Medical School on iron acquisition in bacterial pathogens and the biochemistry of natural product biosynthesis Jeffrey A. Bluestone is a Professor of Metabolism and Endocrinology and the Director of the Hormone Research Institute in the Diabetes Center at the University of California, San Francisco. He earned his B.S. in Biology and M.S. in Microbiology from Rutgers University in 1974 and 1977 respectively and his Ph.D. in Immunology from Weill Cornell Graduate School of Medical Sciences in 1980 with Carlos Lopez. Wendell Lim Ph.D. is a Professor of Cellular and Molecular Pharmacology at University of California, San Francisco. He is the Director of the UCSF/UCB NIH Nanomedicine development center and director of the SynBERC. He earned his A.B. in Chemistry from Harvard University and his Ph.D in biochemistry and biophysics from Massachusetts Institute of Technology under the guidance of Bob Sauer.[2] He then did his postdoctoral work with Frederic Richards at Yale University ("Cell-based therapeutics: the next pillar of medicine." *Science translational medicine* 5.179 (2013): 179ps7-179ps7)

The advent of biologics—recombinant hormones, soluble receptors, and antibody-based drugs—transformed the pharmaceutical industry. Once supported largely by a single pillar—small-molecule drug discovery—the industry now had a second foundational structure. Biologics paved the way to a broad range of new targets, functional capabilities, and disease applications and now represent a large fraction of new medicines brought to market. Today, biomedical science stands poised at the threshold of another pharmaceutical frontier: cell-based therapies. In this Perspective, we discuss the potential power of this new pillar of human therapeutics. BUILDING A THIRD PILLAR Historically, the establishment of a new pillar in the drug industry has been preceded by the emergence of a foundational engineering science. The shift from the use of natural products in drug screens to the small-molecule industry of today required the development of synthetic organic chemistry as a foundational science. In this realm, the singular innovation of Big Pharma was their definition and mastery of the science of turning small molecules into drugs: discovering or designing and synthesizing lead compounds that bind biological targets of interest; optimizing a drug’s target-binding properties, pharmacokinetics (PK), and pharmacodynamics (PD); and mitigating toxicity. The first biological therapeutics were natural proteins, such as purified porcine insulin and largely uncharacterized polyclonal antibodies. The modern biologics industry (which began in the early 1980s) was built on the molecular biology revolution, the creation of monoclonal antibody technology, and the foundational science of protein engineering. But the development of biologics exploded only after key start-up companies such as Genentech, Genzyme, and Amgen developed world-class expertise in an area that was entirely distinct from that of Big Pharma: designing and producing highly functionally optimized recombinant proteins. Today, biomedical science sits on the cusp of another revolution: the use of human and microbial cells as therapeutic entities (1). In principle, cells have therapeutic capabilities that are distinct from those of small molecules and biologics and that extend beyond the regenerative-medicine arena. Part drug and part device, cells can sense diverse signals, move to specific sites in the body, integrate inputs to make decisions, and execute complex response behaviors—all in the context of a specific tissue environment. These attributes could potentially be harnessed to treat infections, autoimmunity, cancers, metabolic diseases, and tissue degeneration as well as realizing tissue repair and regeneration. Indeed, pioneering clinical trials have highlighted the benefits of using cells as therapeutic agents (2–7). However, the complexity of cells and the challenge of controlling their actions in a therapeutic setting provide daunting scientific, regulatory, economic, and cultural obstacles to the establishment of cells as a widespread and viable pharmaceutical platform. With our deep mechanistic understanding of cellular systems biology, researchers are poised to harness these intricate behaviors in new ways to generate an array of precisely regulated weapons against a broad range of diseases. However, a critical step that will enable the emergence of cells as the next therapeutic pillar is the development of cellular engineering as a foundational science. This will include mechanisms for editing and recoding genomes, the assembly of a toolkit of molecular parts and regulatory modules that behave predictably, and a systems-based theoretical framework that can provide strategies for tuning and optimizing cellular behaviors. HOW WHOLE CELLS TRUMP THEIR PARTS If small molecules and biologics are tools, then cells are carpenters—and architects and engineers as well. Of the three pillars, only cells sense their surroundings, make decisions, and exhibit varied and regulable behaviors (Table 1). Devices share some of these advantages; indeed, some abiotic therapeutic nanodevices mimic cellular behaviors, although these equally fascinating new therapeutic candidates will not be discussed here. Cells naturally perform therapeutic tasks The human body has three kinds of natural agents that perform the tasks we demand of therapeutics. The first two are small molecules (for example, neurotransmitters) and biologics (such as antibodies, growth factors, cytokines, and peptide hormones). Cells are the third—and the only ones that can perform complex biological functions. For example, macrophages engulf pathogens and recruit adaptive immune cells; hematopoietic stem cells give rise to myeloid and lymphoid lineages; chondrocytes produce a cartilaginous extracellular matrix; pancreatic β cells sense glucose and respond by producing insulin; and gut bacteria convert indigestible fibers into short-chain fatty acids that fuel intestinal epithelial cells. Cell behavior is exquisitely selective Most small molecules and biologics are always active; they do not have ON or OFF switches, and if they reach their target, they will bind it and exert a biological effect. In contrast, cells sense their environment and respond with an action only when in the presence of a specific array of molecular inputs. Thus, cells can have exquisite sensitivity and specificity, which impart a greater ability to limit off-target action. Engineering and controlling key cellular receptors and how their signals are processed could, in principle, allow customization of responses such that only therapeutically relevant signals trigger activation of a selected cellular behavior (8). Cells are special delivery agents PK and PD properties and metabolism determine where in the body small molecules and biologics distribute. The inability to limit their distribution to a single tissue or cell type often results in off-target effects, which can be serious enough to end a drug-development program, even at a costly late stage. For example, the insulin sensitization activity of rosiglitazone, a peroxisome proliferator-activated receptor (PPAR)–γ ligand, results from its activity in adipocytes, but the increased risk of myocardial infarction observed in some patients arises from the drug’s action in cardiac cells. Although rare, this outcome has had a chilling effect on drug sales and on the development of other PPAR-γ–targeted drugs. Cells are less likely to have off-target effects because they can selectively recognize and actively migrate toward specific signals and exert their effects in a highly targeted manner. One can imagine an ideal cellular agent that is engineered to produce a PPAR-γ ligand, but only in the local environment of adipocytes. Cells can handle human genetic variability Determining the right dose of a drug for a diverse patient population can be challenging. Common polymorphisms in genes that encode drug transporters or drug-metabolizing cytochromes P450 can tweak the transport of a small molecule in and out of cells or alter drug metabolism, respectively; as a result, the same dose of a small molecule can, in different individuals, result in widely varying amounts of the active metabolite reaching its target. For example, common polymorphisms in the gene that encodes organic cation transporter 1 (OCT1) lead to reduced uptake of the type 2 diabetes drug metformin, resulting in differences in the efficacy of metformin among individuals (9). In contrast, cells could potentially be engineered to automatically adjust to differences in host metabolism and transport by harboring a rheostat-like circuit that produces more of a molecule when needed and degrades the excess when a threshold concentration is exceeded. Thus, in principle, cells could yield therapeutic responses that are less variable in different individuals. Cell behaviors can be engineered To manage their disease, patients with autoimmune (type 1) diabetes (T1D) have to monitor their blood sugar, inject insulin, and limit their diets. Failure to control T1D can have grave consequences, including blindness, limb amputation, and death. Because T1D results from the autoimmune destruction of insulin-synthesizing pancreatic β cells, simply replacing these cells is not a viable therapeutic strategy. Instead, introducing a cell that has been engineered to perform an unnatural yet important task—for example, a T lymphocyte that has been modified to sense glucose and produce insulin—is a provocative alternative. Such a cell is potentially within the reach of synthetic biology and, if it relieved the insulin dependency of T1D patients, would represent a major therapeutic breakthrough. For the subset of T1D cases characterized by the presence of autoantibodies that recognize and destroy insulin, this cell might be engineered to produce an insulin derivative that recognizes and modulates the activity of insulin receptors but evades binding by insulin autoantibodies. KILLER APPS FOR CELL THERAPY Although small molecules and biologics will always have important therapeutic niches, there are applications for which cells are better equipped. This section explores critical unmet needs in human disease that cell-based therapeutics are uniquely well suited to address (Fig. 1). We focus on three specific cases, although there are arrays of other promising applications that are not discussed here, including stem cell and dendritic-cell therapeutics, which have been the subjects of numerous reviews (10–13). Two of these cases are built on recent pioneering examples of cell-based therapies that have demonstrated clinical efficacy: chimeric antigen receptor (CAR)–modified T cells and fecal transplantations. Immune cells that seek and destroy cancer The most effective new small-molecule (kinase inhibitors) and biologic (antibody) cancer therapies offer as little as 6 to 36 months of disease-free survival before cancer progression (14, 15). Therefore, one of the major challenges for cancer therapy is to block the growth of drug-tolerant or resistant cancer cells that underlie progression and to kill metastatic cells that have broken free of the primary tumor mass and intravasated into a blood or lymphatic vessel. Combination therapies that prevent the outgrowth of resistant cells are one possible therapeutic avenue, but small molecules and biologics have a difficult time being sentinels. They cannot turn themselves on and off, and so they rely entirely on specific molecular recognition to determine whether or not they act. And because the target cell can evolve resistance mechanisms (14), the therapeutically useful lifetime of a small molecule or biologic is limited. The job of detecting and destroying a shape-shifting cellular target may be better suited to a cell-based therapeutic. Recent clinical studies have shown the efficacy of using engineered T lymphocytes in treating chronic lymphoid leukemia (3, 4). The ex vivo-transformed T cells were modified to express a CAR in which the receptor extra-cellular targeting domain has been replaced by an single-chain antibody that recognizes a tumor-specific molecule. These and related studies: (7) (i) prove that it is possible to retarget immune cells to detect and respond to new, non-natural signals and (ii) establish T cells as a favorable chassis for engineering. Future versions of CAR-modified T cells may encode control circuits that enable them to be activated or deactivated in a small-molecule–dependent fashion and to produce a biologic that counteracts adverse side effects, such as cytokine storm (for example, an anti–IL-6 antibody). Establishment of drug resistance is less likely to be a problem for a sentinel cell therapeutic than for small molecules and biologics. A therapeutic cell could be engineered to recognize multiple features of a target cell so that changing any one of them would not be enough to evade detection (in effect, a combination therapy). Given the ability of a cell-based therapeutic to adapt to an evolving pathogen, cells may be a natural choice for other surveillance jobs as well, including seeking and destroying activated cells from chronic infections, such as a latent Mycobacterium tuberculosis population.

#### Disease causes extinction

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

#### Drug resistance overcomes burnout – resistance enables optimal virulence through horizontal gene transfer, which maximizes disease fitness

Schroeder et al 17 – Meredith Schroeder, PhD candidate, Department of Microbiological Sciences; North Dakota State University, Benjamin D. Brooks, PhD, Department of Electrical and Computer Engineering; North Dakota State University, and Amanda E. Brooks, PhD, Department of Pharmaceutical Sciences, North Dakota State University (“The Complex Relationship between Virulence and Antibiotic Resistance,” *Genes*, Vol. 8, No. 1, page 39, January 2017, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5295033/)

Antibiotic resistance, prompted by the overuse of antimicrobial agents, may arise from a variety of mechanisms, particularly horizontal gene transfer of virulence and antibiotic resistance genes, which is often facilitated by biofilm formation. The importance of phenotypic changes seen in a biofilm, which lead to genotypic alterations, cannot be overstated. Irrespective of if the biofilm is single microbe or polymicrobial, bacteria, protected within a biofilm from the external environment, communicate through signal transduction pathways (e.g., quorum sensing or two-component systems), leading to global changes in gene expression, enhancing virulence, and expediting the acquisition of antibiotic resistance. Thus, one must examine a genetic change in virulence and resistance not only in the context of the biofilm but also as inextricably linked pathologies. Observationally, it is clear that increased virulence and the advent of antibiotic resistance often arise almost simultaneously; however, their genetic connection has been relatively ignored. Although the complexities of genetic regulation in a multispecies community may obscure a causative relationship, uncovering key genetic interactions between virulence and resistance in biofilm bacteria is essential to identifying new druggable targets, ultimately providing a drug discovery and development pathway to improve treatment options for chronic and recurring infection.

1. Introduction

Until recently, conventional “antibiotic wisdom” suggesting the presence of a fitness cost associated with the development of antibiotic resistance that would eventually allow susceptible species to overtake resistant species was the predominating dogma in infectious diseases [1]. However, the ever-increasing threat of antibiotic resistant bacteria contradicts dogma and insinuates that the evolution of resistance may be associated with a fitness advantage, including enhanced virulence [2,3]. Although virulence has now been directly related to multidrug resistance in several animal infection models [2], the mechanism of virulence regulation in this climate of antibiotic resistance remains elusive. This review will explore the relationship between the mechanisms of acquired antibiotic resistance and enhanced virulence, a critical link in our war on the emergence of multidrug resistant bacteria.

**Anticompetitive petitions independently kill the cell-based meat market**

**Grafton 20** (Sean Grafton is a recently barred Washington, D.C. attorney with a background in genetic research. He currently works for the United States Court of Federal Claims as a law clerk, WELCOME TO THE WORLD OF TOMORROW: AN EXPLORATION OF CELL-BASED MEATS AND HOW THE FDA AND USDA MAY PROTECT INTELLECTUAL PROPERTY RIGHTS. Catholic University Journal of Law and Technology, 28, 175, y2k)

This tactic involves what is known as **an " 'eleventh hour' petition** because companies would file them 'on the **eve** of drug approval for the purpose of [\*208] delay.' " 351Citizen petitions are **long** and **complex**. 352Thus, the generic drug's approval is often delayed for the full one hundred and fifty days. 353 This tactic **effectively** delays the approval of generic drugs and **circumvents** the amended application process which Hatch-Waxman was designed to accelerate. 354 The concern for legislation protecting **cell-based meat** intellectual property and encouraging **competitors** to enter the market is that brand companies will use **citizen petitions** to **delay** the approval of any other "**generic**" version of **cell-based meat**. 355 Being delayed up to **half a year** has a **major effect on profits** that generic companies could **earn** and **profits** that brand companies could retain. 356 Any legislation would need to prevent or limit this stalling tactic in order to encourage fair market competition, to protect intellectual property rights, and to aid the consumer. 357

**Cultivated meat solves extinction**

**GFI 18** (Good Food Institute, “GROWING MEAT SUSTAINABLY: THE CULTIVATED MEAT REVOLUTION,” <https://www.gfi.org/files/sustainability_cultivated_meat.pdf>, y2k)

**Feeding the world’s growing population** with finite land and water resources will be one of the **greatest challenges** of the 21st century. United Nations scientists state that **animal agriculture** is one of the **major causes** of the world’s most **pressing** environmental problems, including **land degradation**, loss of **biod**iversity, **global warming**, and air and water **pollution** (FAO 2006). **Cultivated meat** could address these challenges by conserving **land** and **water**, preserving **habitat**, reducing greenhouse gas **emissions**, and preventing **manure pollution** and **antibiotic overuse**.

CULTIVATED MEAT IS MUCH BETTER FOR THE ENVIRONMENT

Like conventional meat, cultivated meat is made of animal cells. In a conventional system, meat comes from animals that must be fed, housed, and slaughtered. Cultivated meat comes from cells grown in cultivators to produce various cuts or varieties of meat. A cultivated meat supply chain will have some commonalities with conventional meat, like growing feed crops, operating farm equipment and buildings, and transporting products to supermarkets. But there are some crucial differences. Cultivated meat can be produced more quickly and efficiently, with little waste and no animals to slaughter. In the seven weeks it takes a farmer to raise a flock of 20,000 chickens, **a meat cultivation facility** could theoretically produce **a million times** as much meat from a starter culture the size of a **single** egg.1

Meat production is responsible for **most** of agriculture’s **environmental** impacts. More than three-quarters of agricultural land is used to support cows, pigs, and chickens, but animal products provide only 18% of global food calories and 25% of protein (Mottet et al. 2017). The impacts of conventional meat are difficult to reduce because they come from many different sources: fertilizer and feed crop production, transportation of grain and animals, manure, and the animals themselves. In its 2017 Sustainability Report, the U.S. Farmers & Ranchers Alliance reports a mere 2% improvement in energy use and greenhouse gas emissions across the beef supply chain between 2005 and 2011 (USFRA 2017). In contrast, simply running on **clean energy** would reduce the life cycle emissions of a meat cultivation facility by 40% to **80%**. So cultivated meat can provide a way to satisfy consumer demand for meat while easing **pressure** on the environment.

CULTIVATED MEAT CONSERVES LAND & WATER RESOURCES

Meat cultivation promises to be faster and less wasteful than raising animals. As a result, it will conserve **soil**, **water**, **habitat**, and other **critical resources**. Industrial animal agriculture requires massive quantities of **feed crops**. Most of those crops end up as **manure**, not meat. Studies show that cultivated meat would use land 60 to **300 percent more efficiently** than poultry and 2000 to 4000 percent more efficiently than beef (Hanna L. Tuomisto, Ellis, and Haastrup 2014; Mattick et al. 2015). For example, an acre of Iowa cropland can support the production of 1,000 pounds of chicken meat each year. That same acre would support 1,700 to 3,500 pounds of cultivated meat, freeing up cropland to produce grains, vegetables, or fruits for people.

Due to its efficiency, cultivated meat would also prevent and counteract one of humanity’s most **destructive** actions: clearing **forests** and **grasslands** for animal feed. Cultivated meat would allow producers to meet the growing demand for animal protein while eliminating the pressure to clear wild land for feed crops worldwide. This more **innovative approach** will also reduce the **unsustainable use** of synthetic fertilizers and help to prevent the “**biological annihilation**” of habitat for feed and pasture (Ceballos, Ehrlich, and Dirzo 2017). Losing **critical habitat** would not only cause a mass **extinction**, but also destabilize the **water cycle**, **climate**, and other global systems on which **humanity depends** (Steffen et al. 2015).

**The judicial revision of the sham litigation doctrine solves---it’s key to make regulations effective**

**Avery 13** (Associate at Pearson, Simon & Warshaw, LLP in San Francisco, The Antitrust Implications of Filing Sham Citizen Petitions with the FDA, 65 Hastings L.J. 113, y2k)

B. **JUDICIAL GUIDANCE**

A **judicial approach** to overseeing the **citizen petition** process should come from both **judicial deference** and **a new look at the sham exception** in light of the abuse of the petition process.249 The courts should generally defer to the FDA,50 which has broad discretion to establish and apply rules for public participation in Agency matters.25' This discretion gives the FDA broad authority to create and enforce its procedural rules on citizen petitions. The courts should also defer to the FDA when reviewing its factual determinations related to evaluating citizen petitions.

i. Reduce Judicial Participation

Courts may set aside agency action, findings, and conclusions if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. ' 52 In order to avoid such arbitrary and capricious rulings, the FDA should issue guidelines on the meaning of the terms "main purpose of delaying ANDA approval," "intent to delay," or "delaying petition," as discussed previously in Part VI.A.4. 53 Absent clear guidelines, any FDA decision would likely need to define the meaning of "intent to delay" in order to avoid being found arbitrary or capricious. Such guidelines would streamline FDA decisions and create a baseline for the courts to review citizen petitions under the antitrust laws.

Nonetheless, courts should not, in the interim, analyze such determinations to see whether they should be set aside. Agencies are granted broad deference because they are considered best equipped to respond to "changing circumstances."25' 4 **Recent cases** suggest, however, that courts have come to **ad hoc conclusions** regarding the merits of **eleventh-hour citizen petitions** and that **the sham exception is not consistently applied to Noerr-Pennington cases**. 55 It is possible that the current legal climate for citizen petitions consists of those "**changing** circumstances." ' 5

6 The fact that the **FDA** issued **a new rule** suggests that the Agency has been taking **notice** of the hole it needs to plug.5 7 Both judges and academics have pointed out the failings of the legislation currently in place."' If the **FDA** or **the legislature** pays greater attention to sham petitions and **delineates** the **difference** between what constitutes "**sham**" and "**not sham**," it could **speed up** the process in which **meritless petitions are deemed a sham**. Allowing the FDA to determine whether a petition constitutes a sham would shift the responsibilities to the **better-suited entity** and increase the efficiency and certainty of labeling petitions as sham. Given the FDA's greater expertise in evaluating scientific methodologies, **judicial deference** to FDA's determination of whether a petition is a sham creates **an effective system of deterrence**. 59 Alternatively, the FDA could promulgate clear guidelines regarding the definition of "sham," and courts could rely on those guidelines in their analysis of alleged sham petitions. Another possible policy would be to create **a rebuttable presumption** in **antitrust** disputes that a petition is a sham if the FDA finds any of the claims to be **late** or **suspicious**. This rule could be especially relevant in claims that include fraudulent or misleading concerns.' Such an approach would work in concert with the pre-screening processes proposed above in Part VI.A.i.

2. Define the Court's Role

Courts can **contribute** by **clarifying** the second step of the **P**rofessional **R**eal **E**state test, which looks at the subjective intent of the filer. The Professional Real Estate standard has been the subject of scholarly debate,26' and critics argue that the second prong is redundant and should be eliminated.62 The argument is that the subjective prong arose out of early cases discussing the sham exception in a legislative setting and was then folded into the general test for the sham exception. It is arguably redundant because if a claim is objectively baseless, then the act of filing a lawsuit or citizen petition already demonstrates a lack of good faith and improper purpose64 Until the courts can **manifest** a **clear** standard, **judicial guidance could lead to better regulation of sham petitions**. Similar to the FDA's rebuttable presumption proposed in Part VI.B.i, courts could develop a standard imposing strict liability on sham petitioners. For example, any citizen petition that fails to convince the FDA that it contains any scientifically valid arguments could be deemed a per se sham. **This rule would remove the courts from making actual determinations** as to the technical details contained in the petitions. **Incentives** like this will encourage petitioners to **back up** their submissions with **valid scientific** data, or not file them at all.

### 1AC — Patent Federalism

#### Advantage 2 is Patent Federalism

#### The strictness of Noerr-Pennington has created a rigid patent system that has an overly expansive definition of free speech. The plan returns the courts to the previous standard of good faith, striking the right balance

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In recent years, a small number of patent holders, often called “bottom feeder” patent trolls, have been abusing the U.S. patent system. These **patent holders blanket the country** **with thousands of letters** demanding that the recipients purchase a license for a few thousand dollars or else face an infringement suit. The letters are usually sent to small businesses and nonprofits that do not have the resources to defend against claims of patent infringement. And the letters often contain false or misleading statements designed to scare the recipient into purchasing a license without investigating the merits of the allegations. In response to this troubling behavior, legislatures in over thirty states have enacted statutes that outlaw assertions of patent infringement that are deceptive, false, or made in bad faith. **These statutes, however, may be unconstitutiona**l. The U.S. Court of Appeals for the Federal Circuit, which **has exclusive jurisdiction over appeals** **in** **patent** cases, has held that patent holders are immune from civil claims challenging acts of patent enforcement unless the patent holder knew its infringement allegations were objectively baseless. **This rule provides patent holders with** nearly complete immunity from liability **under the new statutes**. In fact, the rule has already immunized two notorious bottom feeders, Innovatio IP Ventures and MPHJ Technology Investments, from liability under state consumer protection and deceptive trade practices laws. Although the Federal Circuit has sometimes called the immunity afforded to patent holders a matter of the federal Patent Act’s “preemption” of state law, the court’s immunity doctrine also appears to limit the ability of the federal government to regulate patent enforcement behavior. This is because the Federal Circuit’s decisions are not grounded in the Constitution’s Supremacy Clause, which is the usual source of preemption doctrine, but in the First Amendment right to petition the government. Unlike the Supremacy Clause**, the First Amendment restricts the power of the federal government, not just state governments**. Accordingly, the Federal Circuit’s immunity doctrine also limits the ability of the Federal Trade Commission to bring unfair competition proceedings against patent trolls **and may thwart Congress’s efforts to outlaw** false or **misleading statements** made in patent demand letters. This chapter makes two main arguments. First, the Federal Circuit’s immunity doctrine is wrong as a matter of law, policy, and historical practice. Until the Federal Circuit adopted its “objective baselessness” requirement, **courts had, for nearly a century**, held that patent **enforcement conduct could be declared unlawful if it was simply “in bad faith.”** That flexible, equity-based immunity standard struck an appropriate balance between the goals of punishing extortionate schemes of patent enforcement and respecting patent holders’ rights to make legitimate allegations of infringement**. But the Federal Circuit has abandoned** **that standard** in the misguided belief that letters between private parties, such as demand letters sent by patent holders to alleged infringers, are protected by the First Amendment right to petition the government. **If the Federal Circuit reversed course in future cases**, both state governments and the federal government would be able to regulate letters that use deceptive or false statements to intimidate recipients into purchasing a license, even if the infringement allegations in the letters are not objectively baseless. **Second, state governments and the federal government should share** responsibility for regulating patent demand letters. Although patents are usually thought to be a matter for the federal government, not the states, the states have long regulated unfair and deceptive trade practices resembling the demand letters sent by bottom-feeder trolls. State governments also offer critical enforcement resources. They are more accessible to the small businesses, nonprofits, and local governments likely to be targeted by deceptive campaigns of patent enforcement, and the quantity of enforcement actions that could be pursued by numerous states’ attorneys general likely dwarfs what the federal government could do. At the same time, federal legislation on patent demand letters would provide a uniform standard for assessing the legality of patent enforcement conduct. Federal legislation could also clarify difficult jurisdictional issues that arise in disputes over the lawfulness of patent assertions.

#### Returning to good faith solves state innovation

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V. RETHINKING PETITIONING IMMUNITY IN PATENT CASES Although state governments and the federal government are increasingly interested in regulating patent enforcement, **the Federal** Circuit has left them powerless. Yet the court has offered no persuasive justification for extending the broad antitrust immunity conferred by Noerr to all civil claims challenging patent enforcement conduct. Accordingly, the Federal Circuit en banc or the Supreme Court should **force a return to a narrower, more flexible immunity standard** that accommodates the courts’ historical practice of condemning unfair and deceptive acts of patent enforcement. A. Returning to Good Faith Some scholars have argued that Noerr should never protect litigation conduct as petitioning activity. 355 They contend that Noerr immunity should be limited to its original context of petitions directed toward the legislative and executive branches. Under that view, the Supreme Court erred in cases such as California Motor Transport and Professional Real Estate Inventors, which immunized defendants from antitrust claims based on the pursuit of litigation. If that position is correct, then the Federal Circuit is almost certainly wrong in applying Noerr to claims that seek to impose civil liability based on patent enforcement activity. If documents that are actually filed in court are not protected by Noerr, then surely patent demand letters, which are ostensibly a precursor to the filing of litigation, should likewise not be entitled to Noerr immunity. But even if Noerr does protect litigation or litigation-related conduct as petitioning activity, there is, as discussed above, a reasonable argument that defendants should not be able to invoke Noerr as a defense against claims not grounded in antitrust.356 The holding in Noerr was “a construction of the Sherman Act” adopted to avoid “important . . . questions” about the right to petition, informed by the Sherman Act’s purpose to regulate “business activity,” not “political activity.”357 Most civil claims challenging patent enforcement are not asserted under the antitrust laws, however. And the purpose behind laws on wrongful civil proceedings and abuse of process—unlike antitrust law—is plainly to regulate litigation conduct. Likewise, laws governing unfair competition are designed to ensure the accuracy of information in the marketplace,358 and so are plausibly aimed at eliminating false or deceptive allegations of patent infringement that influence the market. Disparagement claims similarly target false statements intended to cause pecuniary harm,359 so it is conceivable that false allegations of patent infringement come within the purpose of that tort. And the intent of the new state patent assertion statutes is obviously to regulate litigationrelated conduct. Thus, the statutory justification for Noerr immunity, that is, that regulation of litigation conduct is outside the purpose of the Sherman Act, is absent in the context of many civil claims used to challenge patent enforcement, leaving defendants reliant solely on the First Amendment rights to petition and to free speech. Case law under those constitutional provisions—unlike the Noerr doctrine—permits courts and legislatures to condemn false and deceptive statements,360 even if those statements are attached to plausible legal claims.361 When it comes to claims based on statements made in pre-litigation communications, such as demand letters, the case for conferring Noerr immunity is even weaker. The basic reasoning for extending Noerr to pre-litigation communications has been clearly articulated by the Fifth Circuit: Given that petitioning immunity protects . . . litigation, it would be absurd to hold that it does not protect those acts reasonably and normally attendant upon effective litigation. The litigator should not be protected only when he strikes without warning. If litigation is in good faith, a token of that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute.362 Although pre-filing communications make it possible to resolve a dispute without calling on the public resources of the courts, there are reasons to pause before extending Noerr immunity to all pre-litigation communications. To begin with, there is the constitutional text. Assuming that Noerr immunity is based on the First Amendment, as the Federal Circuit has indicated,363 it is absurd to say that a letter between private parties is a “petition” to “the government” within the meaning of the Petition Clause.364 The Tenth Circuit, in a decision that represents a minority view, has held that “[a] letter from one private party to another private party simply does not implicate the right to petition.”365 But ignoring the constitutional text is usually justified based on the policy argument, embraced by the Fifth Circuit in the passage quoted above, that immunizing threats to sue encourages out-of-court settlement, saving the courts’ time and effort.366 If, however, the sender is using the threat itself to extract a payment and has no intention to actually file suit, then it is not clear that the threat should be protected.367 Similarly, even if the infringement allegations made in a demand letter are considered to constitute petitioning activity protected by the First Amendment, ancillary statements that have nothing to do with the infringement claim seem less worthy of immunity, particularly when those ancillary statements are false or misleading or are designed to induce the recipient to purchase a license without retain ing an attorney to investigate the infringement allegations.368 Punishing patent holders who send those types of letters will not discourage or inhibit patent holders who make assertions of patent infringement in a legitimate attempt to avoid going to court. **This is not to say that patent holders should have no leeway when making infringement allegations.** Indeed**, the law should protect patent holders who make plausible but unsuccessful allegations of infringement**, so long as the allegations are made in a way that is neither unfair nor deceptive. Fortunately, those goals can be attained without granting patent holders the broad immunity that Noerr confers on antitrust defendants. Rather, **courts can and should return to** first principles: **the flexible, equitable** good faith standard to which the Federal Circuit’s current immunity doctrine traces its roots. As discussed, pre-Federal Circuit decisions allowed patent holders to make legitimate assertions of patent infringement while also permitting injunctions against patent holders based on their bad faith. **That bad faith standard included both subjective considerations** (such as the patent holder’s lack of intent to file a threatened infringement suit) **and objective considerations** (such as the weakness of the infringement claim on the merits). **Returning to this flexible standard would allow governments**, both state and federal, **to condemn the assertions of infringement that are most troublesome**. For example, a patent holder who threatens numerous end users with an infringement suit, with no intent to actually file suit, could be subjected to civil liability. An illustrative pre-Federal Circuit case is Adriance, Platt & Co. v. National Harrow Co., in which the patent holder sent letters to the plaintiff’s customers, claiming that it would “sue all dealers” who purchased the allegedly infringing goods manufactured by the plaintiff and that it was “constantly bringing suits wherever these dealers are found” when, in fact, it had never actually filed an infringement suit.369 The Second Circuit enjoined the patent holder from sending additional letters, noting that the previous letters “were inspired by a purpose to intimidate the [plaintiff’s] customers, and [to] coerce the [plaintiff], by injuring its business, into becoming a licensee of the defendant.”370 “In view of its failure to bring an infringement action,” the court wrote, “the defendant cannot shelter itself behind the theory that its circulars and letters were merely legitimate notices of its rights.”371 Similarly, a patent holder who makes allegations of infringement without having investigated the supposed acts of infringement—as is almost certainly the case when a patent holder sends letters to thousands of alleged infringers—would not be entitled to immunity under the traditional bad faith standard. As the Federal Circuit noted in Mallinckrodt, under that standard, courts had enjoined infringement notices “when the patentee sent notices indiscriminately to all members of the trade.”372 **In more recent cases**, however, the Federal Circuit has prohibited plaintiffs from relying on the patent holder’s lack of investigation into the alleged infringement to prove bad faith.373 Furthermore, a return to the traditional standard would free courts from the Noerr-based principle, embraced in Innovatio and Activision, that any false statement must relate to the issues of validity or infringement to strip a patent holder of immunity. Pre-Federal Circuit decisions, for example, condemned patent holders who circulated notices that “falsely stated and pretended that certain patents owned by the [patent holder] ha[d] been adjudicated and sustained in contested cases.”374 **This change in the law would enable** private **plaintiffs and government law enforcers**, such as the FTC and state attorneys general, **to impose civil liability on unscrupulous patent holders without** having to take the difficult additional step of **disproving** **the merits of the underlying infringement claim.**

#### Innovation now is a sham! Narrowing immunity is essential to patent federalism. Dynamic IP innovation requires a state experimentation in a cooperative regulatory regime

Ford 17 (Ford, Roger Allan. Associate Professor of Law, University of New Hampshire School of Law; Faculty Fellow, Franklin Pierce Center for Intellectual Property. "The Uneasy Case for Patent Federalism." Wis. L. Rev. (2017): 551.)

If state patent laws suffer from the flaws described in the last Part, then the burden is high to justify state attempts to meddle in patent policy. This Part provides a substantive case for a limited form of patent federalism: Vermont-style laws that seek to make it harder to bring patent-infringement claims. This is concededly an outcome-driven argument, not one rooted in any principles of federalism. It stems from the premise that the federal patent system has not settled at the best balance between innovation and competition, or the best means of achieving that balance. Instead, it assumes, federal patent law is distorted in favor of patent holders and has chosen means that are too costly for accused infringers. If those premises are correct, then state anti-patent laws could help provide helpful reforms.

There is a near-consensus that the federal patent system has problems. The Patent Office routinely grants invalid patents; patent trolls routinely bring nuisance cases asserting those invalid patents; and juries routinely hand out enormous damage awards to patent holders who never really invented anything, at the expense of companies developing successful products that really do benefit society. Or, at least, that is a common narrative; and while this narrative may be overstated, it contains some truth. States, in turn, can help restore the balance between innovation and competition by moving the broader system closer to the optimal point.

A. The Flawed Federal Patent System

Most patent scholars agree that the modern patent system does an imperfect job of encouraging innovation. This section highlights four common critiques: that the Patent Office grants low-quality patents; that patent holders bring nuisance lawsuits designed to extract settlements rather than enforce legitimate patent rights; that patent trolls and other nonpracticing entities bring cases against productive companies, extracting royalties for products that owe little or nothing to the patentees’ work; and that patent holders bring claims against end users and other defendants with low bargaining power.

The goal of this section is not to show that these critiques are correct; rather, I take it as an assumption that they apply to the patent system, or at least to significant parts of that system. Rather, my aim is to highlight critiques that are especially relevant for state anti-patent laws. These are, of course, not the only criticisms of the patent system,86 but they are the ones that state anti-patent laws are designed to target and on which such laws are likely to have the greatest effect.

1. THE PATENT-QUALITY CRITIQUE

The patent system’s biggest problem may be patent quality, with examiners granting many problematic patents. These problems fall into various categories. Some patents cover inventions that are not actually new, or are not meaningfully different from what came before.87 Others claim inventions broader than what an inventor actually invented, or fail to inform practitioners how to make and use the claimed invention.88 Still others are vague about what they claim, or have claims that seem deliberately obfuscated or designed to be difficult to compare to real-world products.89 These quality problems are surprising at first glance, since patent law is the only major form of intellectual property in which obtaining rights requires a detailed, substantive examination by an expert examiner.90 Yet there are several reasons quality problems persist.

One set of factors stems from the examination process itself. Patent examination is an ex parte process, so examiners do not have the benefit of adversarial presentation by parties on both sides of a dispute; instead, they see only information and arguments tending to show that an applicant is entitled to a patent. Though examiners are supposed to conduct independent prior-art searches to overcome this limitation, they have limited time to do so. Examiners also have skewed incentives: they are rewarded (in productivity measures and bonuses) for granting patents and penalized (in increased workload) for rejecting patent applications. This stems from one of the stranger quirks of the United States patent system, under which an application can never be conclusively rejected by an examiner; instead, an applicant can always revive an application after rejection. So for examiners, the only certain way to get a file off one’s desk is to grant the application.91

These examination limitations are compounded by applicants’ incentives to obtain vague patents claims. Applicants want to obtain patents as quickly and cheaply as possible while also ensuring that those patents will prove valuable; both goals can be furthered by writing vague claims. Vague claims can help an application move quickly through examination, since they can make it harder to find relevant prior art or to know if that prior art would invalidate the claims. And they help an applicant respond when an examiner issues a rejection, since vague claims can be twisted or interpreted flexibly to overcome whatever prior art an examiner does find. Vague claims are most valuable, though, after a patent is granted, since they can be asserted against a broader array of products and services, and since they can be interpreted after the fact to track industry developments. Patent law’s indefiniteness doctrine is designed to prevent applicants from obtaining overly vague claims, but in practice imposes minor obstacles.92

There are also innocuous sources of low patent quality. Because patents by their very nature deal with the cutting edge, it may inherently be harder to precisely describe a new invention than something conventional, since terminology may not yet exist to describe the invention. And even when a patent originates in a longstanding field, words can rarely be stripped of all ambiguity; patent law has long assumed that language has inherent ambiguities that make it impossible to craft perfect patent claims, or at least that patent drafters have incentives to use such ambiguous language.93

These patent-quality problems also feed into the nuisance-litigation and patent-troll critiques, discussed below, because they make it easier to obtain and enforce patent rights, even when those patent rights are undeserved or that enforcement is abusive.

2. THE PATENT-TROLL CRITIQUE

The most common, and most commonly debated, critique of the patent system in recent years is that it is overrun with patent trolls, or nonpracticing entities, or licensing firms—all names for firms that assert patent rights without making anything themselves. These firms are a problem, the critique goes, because they extract judgments or settlements from companies producing products without contributing any value to those products, or to society.

To a significant degree, patent trolls may be symptoms of other problems in the patent system rather than a problem in their own right.94 For instance, they sometimes extract settlements by bringing nuisance litigation; then there is essentially no difference between the patent-troll critique and the nuisance-litigation critique addressed in the next section.95 Other times, trolls bring reasonably strong patent claims, and the critique must be rooted elsewhere. One possibility is some sort of asymmetry between trolls and practicing entities, for instance because practicing entities face constraints that trolls do not.96 Another possibility is that trolls are more likely to engage in abusive tactics or behave in ways that reveal other flaws in the patent system.97 Yet the evidence is weak that trolls behave differently from other patent holders, at least in the aggregate; instead, they appear to get more attention for essentially the same behavior that other patent holders undertake.98

Moreover, there are reasons to think that trolls can be socially beneficial. The troll label applies when a patent holder does not practice the claimed invention, but there is no reason to expect those who are good at inventing new technologies to also be good at commercializing those technologies. Just as specialization in the broader economy leads to gains from trade, patent trolls may efficiently separate invention from commercialization. Universities are the classic example: universities are very good at inventing new technologies, but they lack the expertise in operations, manufacturing, sales, and management to build those technologies into viable businesses. So they routinely license their intellectual property to others to commercialize, and they routinely assert those intellectual-property rights against nonlicensees. 99 And the same story can be told about other non-practicing entities. When an inventor develops a new technology but fails to commercialize it, she may nevertheless have created significant potential value—value that may be realized when others succeed in commercializing the invention.100

3. THE NUISANCE-LITIGATION CRITIQUE

A variant of the patent-troll critique focuses on the most problematic troll behavior: bringing nuisance litigation that is designed to exploit litigation costs and asymmetric bargaining power to extract nuisance settlements.

As I have discussed in previous work, a combination of features of the patent system encourages applicants to seek patents even when their primary value is nuisance value.101 Patent litigation is extraordinarily expensive—defending a case can cost hundreds of thousands or millions of dollars even in relatively simple cases.102 And because much of this cost comes from discovery, which can include wide-ranging discovery both into the technical details of the defendant’s products (for the merits of the patent case) and into the defendant’s sales, profitability, and licensing practices (for damages), it usually cannot be avoided through dismissal or summary judgment.103 So almost any patent lawsuit— including even a nakedly unmeritorious suit—has a nuisance settlement value in the tens or hundreds of thousands of dollars; even such a settlement would cost far less than litigating the case.104 At the same time, in general, it can cost $20,000 to $30,000 to prosecute a patent application, far less than the nuisance settlement value of a typical patent.105 So it is worth getting even a low-quality patent, and given the quality problems discussed in the last subsection, it is readily possible to do so.106

Empirical evidence suggests that nuisance litigation plays a role in the patent system, though it is hard to tell how significant that role is. One indicator that nuisance suits may represent a large fraction of patent cases is the number of cases that settle quickly, within 180 days of filing. Between 2000 and 2013, 33.3% of the 43,166 patent lawsuits filed were terminated in PACER within 180 days of filing.107 This is notable because six months is practically instantaneous in the time scale of high-stakes commercial litigation; patent cases that are resolved on the merits typically take two, three, or more years just to be resolved in the district court. So these quickly resolved cases generally represent settlements, walk-away agreements, or unilateral dismissals by plaintiffs. And the more quickly a case is settled, the more likely it is to be a nuisance settlement, since settlements that occur before significant discovery has taken place are more likely designed to avoid litigation costs and since the parties are less likely before discovery to have enough information to evaluate the merits of the case. The more cases that settle quickly, then, the more we should expect to see nuisance cases.

Another indicator of the role that nuisance suits play in the patent system comes from surveys of frequent patent defendants. For instance, RPX Corp., a firm that buys patents to prevent them from being asserted against corporate clients, has found in surveys of its clients that more than half of lawsuits brought by non-practicing entities were settled within six months.108 And in another RPX study, this one of patent settlements, the firm found that attorney fees and litigation costs exceeded settlement payments in all but the most expensive category of cases.109

4. THE END-USER-LITIGATION CRITIQUE

A related critique that has recently been made of the patent system is that it is too easy for patent holders to sue end users of a product rather than the company that makes and sells the product. Under American patent law, a patent holder has the choice of whom to sue, since making, using, selling, offering to sell, and importing a patent invention all constitute infringement.110 In the scanner-troll cases, for instance, the patent holders could have targeted the companies that made the scanners, or the stores that sold them; instead, they targeted the small businesses that used them to scan documents.111 As a matter of doctrine, there is nothing wrong with this; if the scanners embodied a patented invention, then using them is just as infringing as making and selling them would be.112

Even though it is perfectly legal, we should still be wary of enduser patent litigation because it should be less efficient than pursuing upstream manufacturers and sellers. If a patent holder has to sue thousands of small businesses that use networked scanners, for instance, that requires wasteful duplication of demand letters, complaint drafting, filing fees, and so forth. When a patent holder nevertheless elects to sue end users, we should ask why it is voluntarily taking on higher costs. And the likely answer is not good: suing end users suggests that the patent holder relies less on the underlying merits of the claim and more on asymmetric bargaining power to extract settlements. If the legal merits of the claim were strong, then a patent holder should be able to get the same damages suing the manufacturer as suing end users, since the usual measures of patent damages, lost profits and a reasonable royalty, generally scale linearly with the number of units sold.113 But if the goal is to use the threat of attorney fees to extract an early settlement, then measures that drive up those fees—like suing end users—work to a patent holder’s advantage. So does targeting defendants, like small businesses, who are more sensitive to those fees.114 And end-user defendants are likely to be easier targets for weak claims because they are often one-time players in the patent game and have less technical knowledge of the accused products or the asserted patents, and so are less equipped to defend suits on the merits.115

B. The Corresponding Benefits of State Anti-Patent Laws

Several of the state anti-patent laws that have been enacted are well tailored to address some of these critiques of the federal patent system. In particular, the laws may address portions of the patent-quality critique and are quite well suited to addressing the nuisance-litigation and end-user-litigation critiques. They are more poorly suited, however, to addressing the patent-troll critique, to the extent patent trolls are a problem independent of the other critiques.

First, the state laws help respond to the patent-quality critique by making it harder to enforce low-quality patents. They do this in several ways. Some state laws specifically consider the quality of the patent. The Vermont law, for instance, asks whether “[t]he claim or assertion of patent infringement is meritless, and the person knew, or should have known, that the claim or assertion is meritless”116 and whether the patent holder “offers to license the patent for an amount that is not based on a reasonable estimate of the value of the license.”117 If so, that weighs in favor of a bad-faith finding. State laws can also impose due diligence requirements that are hard to satisfy with a low-quality patent.

Vermont again, for instance, asks whether the patent holder “fails to conduct an analysis comparing the claims in the patent to the target’s products, services, and technology,” or when such an analysis was done, whether it “does not identify specific areas in which the products, services, and technology are covered by the claims in the patent.”118 It is difficult to provide a good-faith analysis of conduct infringing a lowquality patent. And state laws can ban false threats to sue, as Illinois has done; this has a disproportionate impact on low-quality patents, since patent holders who realize that their patents are vulnerable are much less likely to follow through on litigation threats.119

State laws are not, however, a perfect response to the patent quality critique, since instead of focusing on invalid patents, they focus on a patent holder’s investigation into a target’s allegedly infringing conduct. This is a key disconnect in the state laws: no state has gone after low-quality patents directly, such as by forcing patent holders to undertake validity analyses or to justify their patents’ validity in demand letters. Such laws would almost certainly be preempted, since federal law is clear that patents are entitled to a presumption of validity.120 And although the overlap between low-quality patents and the pre-suit behavior targeted by the state laws is high, it is not perfect; in particular, state laws do more to affect patent holders with weak infringement cases than with weak invalidity cases, due to that presumption of validity.

Second, states can respond to nuisance litigation and end-user litigation by increasing the cost of these mass-litigation strategies enough to make them uneconomical. MPHJ, the scanner troll, sent more than 16,000 demand letters to small businesses,121 and just like senders of spam email, MPHJ’s entire business model depended on the low cost of sending letters. If even a small percentage of recipients agreed to license the asserted patents, then that small upfront cost would be more than covered by licensing revenue. But if state law increases the cost of sending demand letters, then a company cannot adopt the spammer strategy. And other provisions have similar effects; for instance, provisions that ban false threats to sue, or inflated royalty demands, reduce the effectiveness of the strategy because they limit the patent holder’s ability to extract settlements.

State anti-patent laws are well suited to combatting these end-user and nuisance-litigation strategies. The scanner-troll cases that inspired states to get involved were classic end-user cases, for instance, brought against small businesses that had no role in designing or producing the allegedly infringing products. The state laws would make it significantly harder to bring such cases, since they would disproportionately raise the cost of bringing end-user cases. This is so because the pre-suit requirements imposed by the state laws impose costs—of investigating the defendant’s infringing activity, preparing infringement allegations, and so forth—that are essentially fixed per case. But end-user cases are likely to be smaller in scale, so these costs reflect a greater portion of the overall burden of bringing a patent case. If the scanner trolls had to satisfy the pre-suit requirements for each of their 16,000 end-user lawsuits, that would impose a much greater burden than if they sued a half dozen scanner manufacturers. So the state laws would make end-user litigation harder without formally targeting those cases. At the same time, state anti-patent laws only do so much to combat end-user litigation; they cannot ban it outright, or impose additional requirements on it, without clearly conflicting with federal law.

Nuisance litigation is similarly targeted. Because the settlement pressure of a nuisance suit is driven by litigation costs, a nuisance case can be brought without regard to the underlying merits, so long as the complaint can pass muster under Rule 11. So a nuisance plaintiff has no need to carefully analyze the defendant’s products, develop claim charts, or perform other extensive pre-litigation investigation. But failure to perform such an investigation is precisely the conduct targeted by most states. Vermont’s law, for instance, considers whether a patent holder identifies “factual allegations concerning the specific areas in which the target’s products, services, and technology infringe the patent or are covered by the claims in the patent,”122 or has “conduct[ed] an analysis comparing the claims in the patent to the target’s products, services, and technology.”123 Other laws target failure to inform a defendant of specific infringement allegations—which is only possible with a pre-suit investigation. So to the extent state antipatent laws have any effect on litigants’ behavior, they should affect the behavior of plaintiffs bringing nuisance cases. State anti-patent laws, then, are well suited to targeting the two most troubling kinds of patent litigation—the ones designed to extract undeserved settlements, not to enforce legitimate patent rights.

#### Increasing patent validity solves every existential risk

Rando 16 (Robert J. Rando, Founder and Lead Counsel of The Rando Law Firm P.C., Fellow of the Academy of Court-Appointed Masters, Treasurer for the New York Intellectual Property Law Association, Chair of the Federal Bar Association Intellectual Property Law Section, “America’s Need For Strong, Stable and Sound Intellectual Property Protection and Policies: Why It Really Matters”, IP Insight, June 2016, p. 12-14 [language modified] [abbreviations in brackets])

Robert F. Kennedy’s speech, which includes his reference to the oft-quoted “interesting times” curse, applies throughout history in many contexts and, indeed, with both negative and positive connotation. While he focused on the struggles for freedom and social justice, the requisite ascendancy of the individual over the state, and the institution and integration of those ideals for the greater good, he also promoted the goals of greater global unity, cooperation and communication, which were, and could be, achieved by advances in technology. And, as noted in the excerpt, he championed “the creative energy of men.”

Intellectual Property in “Interesting Times”

It is beyond question that starting with the last decade of the twentieth century and throughout the first two decades of the twenty-first century, when it comes to matters relating to intellectual property, we have been living in “interesting times.” Some may interpret these interesting times as defined by the curse and others may view it by the ordinary meaning of “interesting.” In either case, those of us that toil in the fields of patents, copyrights, trademarks, trade secrets, and privacy rights have experienced an unprecedented sea change in the way those rights are procured, protected and enforced. Likewise, and perhaps more importantly, even those of us that do not practice in these areas of law, as well as the general public, have been, and continue to be, impacted by the consequences of these changes (both positive and negative).

The Changes In Intellectual Property Law

Examples of some of the changes in intellectual property law are: the sweeping 2011 legislative changes to the patent laws under the America Invents Act (AIA), which impact is only beginning to be fully appreciated; the various proposals for patent law reform, on the heels of the AIA, beginning with the 113th and 114th Congress; the copyright laws Digital Millennium Copyright Act (DMCA) and numerous 114th Congressional proposed copyright law changes; the recently enacted federal trade secret law (Defend Trade Secrets Act of 2016 (DTSA))2; the impact of the internet, domain names and globalization on Trademark law; the intellectual property law harmonization requirements included in various global/regional trade agreements; and the proliferation of devices (both invasive and non-invasive) that defy any rational basis for believing we can still adhere to the republic’s libertarian understanding of the right to privacy.

Without engaging in “chicken and egg” analysis, it is sufficient to observe that technological advancement, societal needs, globalization, existential threats, economic realities, and political imperatives (or what James Madison referred to in the Federalist Papers No. 10 as factious governance), have combined to create the “interesting times” for the United States [IP] intellectual property laws.

What was said by Bobby Kennedy in 1966 remains true today. We live in dangerous and uncertain times. Many of the existential threats remain the same (nuclear war and proliferation, [genocides] ~~genocidal maniacs~~ and natural disease) and some are new ([hu]manmade disease, greater awareness of environmental changes and possibly human interrelationship factors, and the unintended consequences of genetic manipulation and robotic technologies). The danger and uncertainty that pervades changes in intellectual property laws, though not an existential threat of the same manner and kind, correlates with the threat and remains “more open to the creative energy of man than any other time in history.”

Apropos the creative energy of man, there is a non-coincidental congruence and convergence of activity across and among the three branches of government, occurring almost simultaneously with the congruence and convergence of the rapid developments of technological innovation across various scientific disciplines and the information age, reflected in the transformation of the [IP] intellectual property laws in the United States.

Patents

The passage of the AIA was a culmination of efforts spanning several years of Congressional efforts; and the product of a push by the companies at the forefront of the twenty-first century new technology business titans. The legislation brought about monumental changes in the patent law in the way that patents are procured (first inventor to file instead of first to invent) and how they are enforced (quasi-judicial challenges to patent validity through inter-party reviews at the Patent Trial and Appeals Board (PTAB)).

The 113th and 114th Congress grappled with newly proposed patent law reforms that, if enacted, may present additional tectonic shifts in the patent law. Major provisions of the proposals include: fee-shifting measures (requiring loser pays legal fees - counter to the American rule); strict detailed pleadings requirements, promulgated without the traditional Rules Enabling Act procedure, that exceed those of the Twombly/Iqbal standard applied to all other civil matters in federal courts, and the different standards applicable to patent claim interpretation in PTAB proceedings and district court litigation concerning patent validity.

The Executive and administrative branch has also been active in the patent law arena. President Obama was a strong supporter of the AIA3 and in his 2014 State Of The Union Address, essentially stated that, with respect to the proposed patent law reforms aimed at patent troll issues, we must innovate rather than litigate.4 Additionally, the USPTO has embarked upon an energetic overhaul of its operations in terms of patent quality and PTO performance in granting patents, and the PTAB has expanded to almost 250 Administrative Law Judges in concert with the AIA post-grant proceedings’ strict timetable requirements.

The Supreme Court, not to be outdone by the Articles I and II branches of the U.S. government, has raised the profile of patent cases to historical heights. From 1996 to the 2014-15 term there has been a steady increase in the number of patent cases decided by the SCOTUS5. The 2014-15 term occupied almost ten percent of the Court’s docket. Prior to the last two decades, the Supreme Court would rarely include more than one or two patent cases in a docket that was much larger than those we have become accustomed to from the Roberts’ Court6.

While the SCOTUS activity in patent cases is viewed by some as a counter-balance to the perceived Federal Circuit’s pro-patent and bright line decisions, it can just as assuredly be viewed as decisions rendered by a Court of final resort which does not function in a vacuum devoid of the social, economic and political winds of the times. In recognition of the effect new technologies have on the patent law, the politicization of intellectual property law matters, especially patent law (through factious governing principles of the political branches of the government), and the maturation of the Federal Circuit patent law jurisprudence, the SCOTUS has rendered opinions in cases that impact, and perhaps are/were intended to mitigate the concerns regarding, some of the vexing issues confronting the patent community today (e.g., non-practicing entities or in the politicized parlance “patent trolls,” the intersection of patent and antitrust laws in Hatch-Waxman so called “pay-for-delay” settlements between Branded and Generic pharma companies, and the fundamental tenets that comprise the very heart of what is patent eligible subject matter).

Copyrights

The advent and ubiquity of the internet, social media and digital technologies (MP3s, Napster, Facebook, YouTube, and Twitter) represents the impetus for changes in the Copyright laws. The DMCA addressed the issues presented by these advances or changes in the differing media and forms of artistic impressions. The proliferation of digital photos, graphic designs and publishing alternatives, as well as adherence to globalization harmonization have given rise to changes in the statutory law and jurisprudence in this area of intellectual property law. Additionally, there is an overlap of patent rights and copyrights for software driven by the ebb and flow of the strength of each respective intellectual property protection.

Notably, the Patent and Copyright Clause7, in addition to Author’s writings, has been viewed as discretely applying to two different types of creativity or innovation. When drafted the “sciences” referred not only to fields of modern scienctific inquiry but rather to all knowledge. And the “useful arts” does not refer to artistic endeavors, but rather to the work of artisans or people skilled in a manufacturing craft. Rather than result in ambiguity or confusion, perhaps the Framers were either quite prescient or, just coincidentally, these aspects of the Patent and Copyright Clause have converged.

For example, none other than the famous Crooner, Bing Crosby, benefited from both protections. Well-known as a prolific and popular recording artist he also benefited from his investments in the, then innovative, recording technologies. Similarly, the Beatles, Beach Boys, as well as many other rock and roll artists, experimental efforts in music performance, recording and production, helped to transform the music industry in both copyrightable artistic expression and patentable inventions. Similarly, film, literary and digital arts reap benefits at the crossroads of both copyright and patent protections.

Trademarks

Trademark laws have been impacted by numerous changes in the business landscape. They include the internet, Domain names, international rights in a global economy, different venues and avenues for branding, marketing and merchandising, global knock-offs from nations that have a less than stellar respect for intellectual property rights, and international trade agreements. More recently, politicization (or perhaps political correctness) has creeped into the trademark law arena pitting branding rights and protections against first amendment rights.

Trade Secrets

As with Copyright and Trademark law, trade secrets law includes some of the same issues related to trade agreements. TRIPS required members to have trade secret protection in place. Initially, the United States compliance with this requirement has relied upon the trade secret law of the individual states. That compliance may be supplanted by the recently enacted DTSA. Similarly, the Trans Pacific Partnership (TPP) trade agreement contains intellectual property rights provisions that will trigger required changes to United States statutory Intellectual Property Laws.

The proposed trade secret legislation also gives rise to several concerns. For instance, there is an absence of a specific definition for trade secret, as well as potential issues of federalism, conflict with state law precedent (despite no preemption), remedies, and the impact on employer/employee relations.

There is also a real concern that the strengthening of trade secret protection in conjunction with the perceived weakening of patent protection (e.g., high rate of invalidating patents in post-grant proceedings before the PTAB and strict limitations on what is patent eligible subject matter) may very-well have the unintended consequence of contravening the purpose behind the Patent and Copyright Clause: “to promote the progress of the sciences and the useful arts.” Moreover, the incentive to innovate may very well be usurped by the advantage of withholding patent law disclosure of highly beneficial scientific advancements that directly affect the human condition, alter life expectancies and the evolution of the human species (rather than by mere “natural selection”), and what is the very essence of a human being (for better or worse). Thus, crippling innovation and the progress of the sciences and useful arts.

Privacy Rights

It is increasingly more difficult to function “off the grid.” The invasive and non-invasive attributes of the internet, the reliance upon the multitude of devices, social media, and information age technologies, and access to big data, all contribute to the decrease in and dilution of the right to privacy. Wittingly or otherwise, the strong libertarian roots of the republic have been replaced by dependence upon these modes of an information-age life. Commentary on the benefits and deficits of this reality are beyond the subject and purpose of this writing. Suffice to acknowledge that the right to privacy has been significantly reduced. The laws that protect these rights are in a constant struggle to maintain those rights while yielding to the demands of the lifestyle and security concerns. Laws that relate to cybersecurity in the global and domestic space create interplay with privacy rights. Legislation, trade agreements and jurisprudence all impact this area of intellectual property. Cross-border theft of trade secrets, competitor espionage, and loss of control over personal data are all implicated in the intellectual property law arena.

America’s Need For Strong Intellectual Property Protection

The need for strong protection of intellectual property rights is greater now than it was at the dawn of our republic. Our Forefathers and the Framers of the U.S. Constitution recognized the need to secure those rights in Article 1, Section 8, Clause 8. James Madison provides insight for its significance in the Federalist Papers No. 43 (the only reference to the clause). It is contained in the first Article section dedicated to the enumerated powers of Congress. The clause recognizes the need for: uniformity of the protection of IP rights, securing those rights for the individual rather than the state; and, incentivizing innovation and creative aspirations.

Underlying this particular enumerated power of Congress is the same struggle that the Framers grappled with throughout the document for the new republic: how to promote a unified republic while protecting individual liberty. The fear of tyranny and protection of the “natural law” individual liberty is a driving theme for the Constitution and throughout the Federalist Papers. For example, in Federalist No. 10, James Madison articulated the important recognition of the “faction” impact on a democracy and a republic. In Federalist No. 51, Madison emphasized the importance of the separation of powers among the three branches of the republic. And in Federalist No. 78, Alexander Hamilton, provided his most significant essay, which described the judiciary as the weakest branch of government and sought the protection of its independence providing the underpinnings for judicial review as recognized thereafter in Marbury v. Madison.

All of these related themes are relevant to the Patent and Copyright Clause and at the center of the intellectual property protections then and now. The Federalist Papers No. 10 recognition that a faction may influence the law has been playing itself out in the halls of congress in the period of time leading up to the AIA and in connection with the current patent law reform debate. The large tech companies of the past, new tech, new patent-based financial business model entities, and pharma factions have been the drivers, proponents and opponents of certain of these efforts. To be sure, some change is inevitable, and both beneficial and necessary in an environment of rapidly changing technology where the law needs to evolve or conform to new realities. However, changes not premised upon the founding principles of the Constitution and the Patent and Copyright Clause (i.e., uniformity, secured rights for the individual, incentivizing innovation and protecting individual liberty) run afoul of the intended purpose of the constitutional guarantee.

Although the Sovereign does not benefit directly from the fruits of the innovator, enacting laws that empower the King, and enables the King to remain so, has the same effect as deprivation and diminishment of the individual’s rights and effectively confiscates them from him/her. Specifically, with respect to intellectual property rights, effecting change to the laws that do not adhere to these underlying principles, in favor of the faction that lobbies the most and the best in the quid pro quo of political gain to the governing body threatens to undermine the individual’s intellectual property rights and hinder the greatest economic driver and source of prosperity in the country.

It is also important to recognize that the social, political and economic impact of strong protections for intellectual property cannot be overstated. In the social context, the incentive for disclosure and innovation is critical. Solutions for sustainability and climate change (whether natural, man-made or mutually/marginally intertwined) rely upon this premise. Likewise, as we are on the precipice of the ultimate convergence in technologies from the hi-tech digital world and life sciences space, capturing the ability to cure many diseases and fatal illnesses and providing the true promise of extended longevity in good health and well-being, that is meaningful, productive, and purposeful; this incentive must be preserved.

In similar fashion, advancements in technologies related to the global economy and communications will enhance the possibilities for solutions to political and cultural conflicts that arise around the globe. Likewise, the United States economy has always benefited when it is at the forefront of innovation and achieves prosperity from its leadership role in technological advancements.

Conclusion

As was the case in 1966, how we move forward today, to solve the many problems facing our country and the broader global community in these “interesting times,” both within and without the laws affecting intellectual property rights, depends upon the “creative energy of man” which must prevail. An achievable goal, dependent on the strong, stable and sound protection of intellectual property rights.

#### Strong patent protections key to US ag

Moscona 21 (Jacob Moscona, Harvard University, “Flowers of Invention: Patent Protection and Productivity Growth in US Agriculture”, http://economics.mit.edu/files/18687)

Institutions that protect intellectual property are potentially of central importance for economic growth and development. The role of patent protection in spurring innovation features prominently in growth theory. However, since patent regimes are endogenously determined, our understanding of the impact of patent rights on technological progress or—of perhaps greater interest—the impact of patent rights on downstream productivity and profits, is limited. This paper investigates the impact of the introduction of patent rights on technological progress and productivity by exploiting unique features of plant biology and intellectual property protection in agricultural biotechnology. A plant having imperfect flowers facilitates the development of hybrid plant varieties, which have de facto intellectual property protection even in the absence of formal patent rights. This physiological difference across crop species, combined with the extension of patent rights to crop varieties in 1985, makes it possible to estimate the causal impact of patent rights on technology development and productivity in US agriculture. I find that the introduction of patent protection led to a substantial increase in novel variety development in treatment relative to control crops. This was driven predominantly by an increase in private research investment, had positive spillover effects on innovation in certain non-biological crop technologies, and increased crop yields. Patent rights were thus successful at providing ex ante incentives for technology development and growth in physical productivity. Patent rights, however, can come with significant trade-offs for consumers of technology, and an increase in technological progress is a necessary but insufficient condition for downstream benefits. I show, however, that counties that were more exposed to the change in patent law due to their crop composition experienced a large increase in agricultural land values and profits. The idea that patent rights are a source of productivity growth has been challenged in recent years, both in academic writing and across other outlets. While the costs of the patent system have been extensively reported, perhaps nowhere more than in the context of biotechnology, its benefits are more challenging to observe and the counterfactual level of technology in a world without patent rights more difficult to quantify. The present study stands in contrast to claims that patent rights are inconsequential by documenting that the extension of patent protection to plant biotechnology led to a dramatic increase in technology development and shaped patterns of productivity and profits across the US. Understanding the effects of patent protection outside of a high-income, research intensive country like the US, as well as the impact of patent protection on the characteristics and diversity of new technology, which could shape the longer-run consequences of patent incentives, are important goals for future research

#### Ag innovation stops nuclear war

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The United States faces many threats to our National Security. These threats include continuing wars with extremist elements such as ISIS and potential wars with rogue state North Korea or regional nuclear power Iran. The heated economic and diplomatic competition with Russia and a surging China could spiral out of control. Concurrently, we face threats to our future security posed by growing civil strife, famine, and refugee and migration challenges which create incubators for extremist and anti-American government factions. Our response cannot be one dimensional but instead must be a nuanced and comprehensive National Security Strategy combining all elements of National Power including a Food Security Strategy.

An American Food Security Strategy is an imperative factor in reducing the multiple threats impacting our National wellbeing. Recent history has shown that reliable food supplies and stable prices produce more stable and secure countries. Conversely, food insecurity, particularly in poorer countries, can lead to instability, unrest, and violence.

Food insecurity drives mass migration around the world from the Middle East, to Africa, to Southeast Asia, destabilizing neighboring populations, generating conflicts, and threatening our own security by disrupting our economic, military, and diplomatic relationships. Food system shocks from extreme food-price volatility can be correlated with protests and riots. Food price related protests toppled governments in Haiti and Madagascar in 2007 and 2008. In 2010 and in 2011, food prices and grievances related to food policy were one of the major drivers of the Arab Spring uprisings. Repeatedly, history has taught us that a strong agricultural sector is an unquestionable requirement for inclusive and sustainable growth, broad-based development progress, and long-term stability.

The impact can be remarkable and far reaching. Rising income, in addition to reducing the opportunities for an upsurge in extremism, leads to changes in diet, producing demand for more diverse and nutritious foods provided, in many cases, from American farmers and ranchers. Emerging markets currently purchase 20 percent of U.S. agriculture exports and that figure is expected to grow as populations boom.

Moving early to ensure stability in strategically significant regions requires long term planning and a disciplined, thoughtful strategy. To combat current threats and work to prevent future ones, our national leadership must employ the entire spectrum of our power including diplomatic, economic, and cultural elements. The best means to prevent future chaos and the resulting instability is positive engagement addressing the causes of instability before it occurs.

This is not rocket science. We know where the instability is most likely to occur. The world population will grow by 2.5 billion people by 2050. Unfortunately, this massive population boom is projected to occur primarily in the most fragile and food insecure countries. This alarming math is not just about total numbers. Projections show that the greatest increase is in the age groups most vulnerable to extremism. There are currently 200 million people in Africa between the ages of 15 and 24, with that number expected to double in the next 30 years. Already, 60% of the unemployed in Africa are young people.

Too often these situations deteriorate into shooting wars requiring the deployment of our military forces. We should be continually mindful that the price we pay for committing military forces is measured in our most precious national resource, the blood of those who serve. For those who live in rural America, this has a disproportionate impact. Fully 40% of those who serve in our military come from the farms, ranches, and non-urban communities that make up only 16% of our population.

Actions taken now to increase agricultural sector jobs can provide economic opportunity and stability for those unemployed youths while helping to feed people. A recent report by the Chicago Council on Global Affairs identifies agriculture development as the core essential for providing greater food security, economic growth, and population well-being.

Our active support for food security, including agriculture development, has helped stabilize key regions over the past 60 years. A robust food security strategy, as a part of our overall security strategy, can mitigate the growth of terrorism, build important relationships, and support continued American economic and agricultural prosperity while materially contributing to our Nation’s and the world’s security.

#### Clarity of the legal framework is key—solves water shortages

Esper 09 (Mark Esper, Executive Vice President of the U.S. Chamber of Commerce’s Global IP Center, “CLIMATE FOR INNOVATION: TECHNOLOGY AND INTELLECTUAL PROPERTY IN GLOBAL CLIMATE SOLUTIONS”, Hearing Before the Select Committee on Energy Independence and Global Warming House of Representatives, 7/29/2009, https://www.gpo.gov/fdsys/pkg/CHRG-111hhrg62451/html/CHRG-111hhrg62451.htm)

The Global IP Center and its members believe that strong intellectual property rights are integral to driving the innovation and creativity necessary to create jobs, save lives, advance economic growth and development around the world, and generate breakthrough solutions to global challenges such as climate change.

Our Nation's Founders recognized the link between strong IP rights and innovation more than 200 years ago and explicitly gave Congress the power to protect IP rights in the constitution. As a result, America has led the world in innovation for generations.

Today, the United States IP is worth between $5 and $5.5 trillion. IP accounts for more than half of all U.S. exports, helping drive 40 percent of the United States economic growth; and, as of 2008, IP-intensive industries employed more than 18 million Americans. But beyond driving job creating and economic growth, strong IP rights have created a secure framework for investment in research that led to solving some of the world's most difficult problems, from disease and famine to water scarcity and energy security, just to name a few.

In addition to protecting and incentivizing inventors, strong IP rights are also integral to promoting technology deployment and diffusion by providing a clear legal framework by which companies can transact business.

#### Water shortages go global AND nuclear

Wake 21 Bronwyn, Chief Editor, Nature Climate Change at Springer Nature, “Water Wars,” Nature Climate Change, vol. 11, no. 2, 2, Nature Publishing Group, 02/2021, pp. 84–84

Anthropogenic-driven changes to the hydroclimate will impact on water resources. For example, rainfall changes will affect crop yields and food production; snow and ice, which melt to feed major river systems, are at risk with warming. More than one-sixth of the global population rely on melt-fed river catchments, and this resource is at risk as climate change is likely to cause greater seasonal variability — higher winter flows, because of earlier melt, and reduced summer and autumn flows. Additionally, higher temperatures, and resultant increased biological activity, could lead to decreased water quality. All these changes could occur alongside increased populations and economic development, creating greater demand for a diminishing resource.

The potential for water resource scarcity to lead to conflict, particularly between nations, is the question Michael T. Klare of Hampshire College, Amherst, USA, considers by examining the available research. While within-country water conflicts have been considered and identified as climate change risk, international conflict has received less attention. Globally, many nations share river catchments, and these may not be covered by an agreed cooperative management framework. Conflict between nations over water could trigger secondary engagement from additional nations in an attempt to resolve the conflict.

Klare focuses on South Asia — where major river systems flow through a number of countries — as a significant risk. The region is highly populated, and the populations rely on the transboundary river systems for freshwater resources. Melt from the Himalayan glaciers feeds many of Asia’s major rivers, including the Indus, Ganges, Brahmaputra and Mekong rivers, in the dry season.

From any transboundary river system, high extraction by an upstream nation can result in reduced availability to downstream nations, with the potential for conflict over water rights. Pakistan is one example that Klare considers. It is a nation reliant on agriculture, fed by water from the Indus River, which is also used for electricity generation. The Indus originates in China with additional feeds from India, placing Pakistan as a downstream nation, with tensions previously arising over water rights.

If river flows reduce with climate change, and upstream extractions remain the same or upstream nations divert additional flow for their own benefit, there is the potential for conflict between Pakistan and India, as well as conflict within Pakistan. Syria is an example of where climate and water have contributed to domestic conflict (Weather Clim. Soc. 6, 331–340; 2014).

India and Pakistan have a history of dispute over the Kashmir region, and there have been threats to dam the tributaries of the Indus, which India has control over, in the past during tense periods. Both nations have nuclear capacity, and Klare outlines how any sign that nuclear weapons could fall into hostile parties’ possession (as a result of domestic conflict or coup) would invoke a response from the USA to prevent this outcome.

### 1AC — Plan

#### United States federal government should restrict Noerr-Pennington antitrust immunity.

### 1AC — Solvency

#### Good faith standard is essential to clarity.

Paul R. Gugliuzza 16. Professor of Law at Temple University. Professor Gugliuzza has testified before both the U.S. Senate and the U.S. House of Representatives on the topic of patent law, and his scholarship has been cited in over a dozen judicial opinions across all levels of the state and federal courts "Regulating Patent Assertions" https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2833548

By looking to history, the Federal Circuit could better balance the goals of protecting patent holders from liability when they make legitimate allegations of infringement and punishing patent holders when they employ unfair or deceptive tactics. At the time the Federal Circuit was created in 1982, **the lower federal courts had, for nearly a century, been addressing the precise question** of when a patent holder could be held liable for its enforcement conduct. **Those courts enjoined patent holders from making infringement assertions “in bad faith**” (see, e.g., Emack 1888) – precisely the behavior many of the new state statutes condemn. But the Federal Circuit has largely ignored that long line of decisions, instead demanding that anyone challenging patent enforcement conduct prove that the infringement allegations were objectively baseless (Gugliuzza 2015, 1624–27). Historically, the courts treated bad faith as a flexible standard with both subjective and objective components (Bicks 1977, 303–304). **Under this equity-based immunity standard – as opposed to the rigid “objective baselessness**” test mandated by the Federal Circuit – **the government could impose reasonable restrictions on patent enforcement**, enjoining enforcement campaigns when, for instance, the patent holder conducted no investigation into the alleged acts of infringement (e.g., Besser Manufacturing 1951), failed to follow its threats with actual lawsuits (e.g., Adriance, Platt 1903), or falsely claimed that a patent’s validity had previously been confirmed in court or in reexamination (e.g., A.B. Farquhar Co. 1900). At the same time, cases in which courts enjoined enforcement conduct under the bad faith standard **were usually egregious and often involved claims that were objectively weak on the merits** (e.g., Emack 1888). Accordingly, a bad faith immunity standard, as opposed to the Federal Circuit’s “objective baselessness” rule, would protect patent holders’ ability to provide legitimate notice of their patent rights while also offering the government some leeway to punish unfair or deceptive behavior.

#### Immunity standard gaps undermine overall confidence in IP protections

Paul R. Gugliuzza 15. Professor of Law at Temple University. Professor Gugliuzza has testified before both the U.S. Senate and the U.S. House of Representatives on the topic of patent law, and his scholarship has been cited in over a dozen judicial opinions across all levels of the state and federal courts.“Patent Trolls And Preemption” <https://www.virginialawreview.org/wp-content/uploads/2020/12/Gugliuzza_Online.pdf>

B. **Objections and Responses** One might reasonably be concerned that allowing governments more leeway to regulate assertions of patent infringement would compromise the rights of patent holders with legitimate claims. But, to be clear, **the cases in which courts should find bad faith are exceptional**. In the past, those cases often involved statements by patent holders that were plainly false,375 legal claims that were objectively weak on the merits,376 or both. **Thus, a good faith immunity standard would provide ample protection** **for** patent holders to provide **legitimate** notice of their patent **rights**. One might also object that state laws regulating unfair or deceptive patent enforcement are unnecessary because shake-down settlements are not particularly common. For instance, a draft complaint prepared by the FTC as part of its investigation into MPHJ claimed that, of the over 16,000 businesses that received a letter, only seventeen purchased licenses.377 If few people are in fact harmed by this activity, then it may not be worth rewriting the law. That said, MPHJ’s campaign is an extreme example because its dubious enforcement tactics were so heavily publicized, making it less likely that recipients would feel compelled to purchase a license. Many patent holders target relatively unsophisticated organizations on a smaller scale,378 and some of those patent holders actually pursue litigation in court as a source of further leverage.379 Data about patent settlements is hard to come by, in part because targets are usually not eager to publicize the fact that they have been accused of infringement or that they have paid to make the allegations go away.380 Furthermore, for patent disputes that are resolved out of court, there is no threat of judicial sanction for frivolous or abusive tactics,381 and legislative proposals to award prevailing parties their attorneys’ fees provide little help.382 **Thus, allowing governments to condemn unfair or deceptive enforcement practices** fills a regulatory gap, even if it is difficult to quantify the harm from those practices.383

#### All CPs will be struck down.

Paul R. Gugliuzza 16. Professor of Law at Temple University. Professor Gugliuzza has testified before both the U.S. Senate and the U.S. House of Representatives on the topic of patent law, and his scholarship has been cited in over a dozen judicial opinions across all levels of the state and federal courts "Regulating Patent Assertions" https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2833548

6.5 Conclusion Under the Federal Circuit’s current case law, no government body – state or federal; legislative, administrative, or judicial – will be able to meaningfully police unfair or deceptive patent enforcement. As this chapter has shown, however, the broad immunity the Federal Circuit has conferred on patent holders provides too much leeway for manipulation and harmful tactics. **Returning to the equitable, good faith immunity standard would respect a patent holder’s right to make legitimate allegations of infringement** **while not shielding the extortionate schemes recently deployed by bottom-feeder trolls.** Under a good faith standard, both the states and the federal government could play a useful role in regulating patent assertions. **An ideal regime would allow states** (and private parties) **to capitalize on their superior enforcement capabilities**, with the federal government providing a uniform substantive standard and clarifying the vexing jurisdictional matters that arise in legal challenges to patent enforcement conduct.

#### US tech innovation prevents nuclear wars

Jain 20 (Ash; 2020; Senior fellow with the Scowcroft Center for Strategy and Security; Strategic Studies Quarterly; “Present at the Re-Creation: A Global Strategy for Revitalizing, Adapting, and Defending a Rules-Based International System,” <https://www.atlanticcouncil.org/wp-content/uploads/2019/10/Present-at-the-Recreation.pdf>)

The system must also be adapted to deal with new issues that were not envisioned when the existing order was designed. Foremost among these issues is emerging and disruptive technology, including AI, additive manufacturing (or 3D printing), quantum computing, genetic engineering, robotics, directed energy, the Internet of things (IOT), 5G, space, cyber, and many others.

Like other disruptive technologies before them, these innovations promise great benefits, but also carry serious downside risks. For example, AI is already resulting in massive efficiencies and cost savings in the private sector. Routine tasks and other more complicated jobs, such as radiology, are already being automated. In the future, autonomous weapons systems may go to war against each other as human soldiers remain out of harm’s way.

Yet, AI is also transforming economies and societies, and generating new security challenges. Automation will lead to widespread unemployment. The final realization of driverless cars, for example, will put out of work millions of taxi, Uber, and long-haul truck drivers. Populist movements in the West have been driven by those disaffected by globalization and technology, and mass unemployment caused by automation will further grow those ranks and provide new fuel to grievance politics. Moreover, some fear that autonomous weapons systems will become “killer robots” that select and engage targets without human input, and could eventually turn on their creators, resulting in human extinction.

The other technologies on this list similarly balance great potential upside with great downside risk. 3D printing, for example, can be used to “make anything anywhere,” reducing costs for a wide range of manufactured goods and encouraging a return of local manufacturing industries.61 At the same time, advanced 3D printers can also be used by revisionist and rogue states to print component parts for advanced weapons systems or even WMD programs, spurring arms races and weapons proliferation.62 Genetic engineering can wipe out entire classes of disease through improved medicine, or wipe out entire classes of people through genetically engineered superbugs. Directed-energy missile defenses may defend against incoming missile attacks, while also undermining global strategic stability.

Perhaps the greatest risk to global strategic stability from new technology, however, comes from the risk that revisionist autocracies may win the new tech arms race. Throughout history, states that have dominated the commanding heights of technological progress have also dominated international relations. The United States has been the world’s innovation leader from Edison’s light bulb to nuclear weapons and the Internet. Accordingly, stability has been maintained in Europe and Asia for decades because the United States and its democratic allies possessed a favorable economic and military balance of power in those key regions. Many believe, however, that China may now have the lead in the new technologies of the twenty-first century, including AI, quantum, 5G, hypersonic missiles, and others. If China succeeds in mastering the technologies of the future before the democratic core, then this could lead to a drastic and rapid shift in the balance of power, upsetting global strategic stability, and the call for a democratic- led, rules-based system outlined in these pages.63

The United States and its democratic allies need to work with other major powers to develop a framework for harnessing emerging technology in a way that maximizes its upside potential, while mitigating against its downside risks, and also contributing to the maintenance of global stability. The existing international order contains a wide range of agreements for harnessing the technologies of the twentieth century, but they need to be updated for the twenty-first century. The world needs an entire new set of arms-control, nonproliferation, export-control, and other agreements to exploit new technology while mitigating downside risk. These agreements should seek to maintain global strategic stability among the major powers, and prevent the proliferation of dangerous weapons systems to hostile and revisionist states.

#### Uncertainty exists now

Joseffer 4-19-21. Daryl Joseffer. Daryl Joseffer is senior vice president and chief counsel at the U.S. Chamber Litigation Center, the litigation arm of the U.S. Chamber of Commerce. 4-19-21“Brief Of The Chamber Of Commerce Of The United States Of America As Amicus Curiae In Support Of Petitioners” <https://www.supremecourt.gov/DocketPDF/20/20-1293/176027/20210419132645500_Chamber%20of%20Commerce%20of%20the%20United%20States%20of%20America%20Amicus%20Curiae%20Brief.pdf>

C. **This Court Should Clarify The “Sham” Exception** **To The Noerr-Pennington Doctrine**. The Third Circuit’s decision is but one example of the difficulty courts have exhibited over the application of the “sham” litigation exception. Some courts, like the Third Circuit, articulate the correct standard but nonetheless err in its application. Take the Ninth Circuit. In Rickards v. Canine Eye Registration Foundation, it was alleged that a veterinary group violated the Sherman Act by engaging in a conspiracy to monopolize the market and by bringing a lawsuit which was baseless and a sham. 783 F.2d 1329, 1334 (9th Cir. 1986). Affirming that the “sham” litigation exception applied, the Ninth Circuit acknowledged that “[t]he application of the sham exception to single lawsuits may have a chilling effect on those who in good faith seek redress in the courts. The threat of treble damages may discourage the filing of meritorious claims, or preclude plaintiffs from asserting novel or cutting-edge theories of liability.” Id. However, despite its appreciation that courts “must apply the sham exception with caution,” the court nonetheless determined that the litigation before it presented the exceptional case despite “no evidence” the challenged conduct “cause[d] any cognizable [] injury.” Id. The Ninth Circuit’s reasoning evidences an appreciation that in certain contexts, such as “bet the business” litigation or attempts to advance or alter the jurisprudential landscape, “novel” or innovative does not necessarily mean “sham.” Yet, like the Third Circuit here**, the court nonetheless failed to faithfully apply these principles and mishandled the subjective intent inquiry**. As explained in the dissent, where “[t]he district court made no factual findings on the issue ... simply [holding] that the lawsuit was ‘baseless and a sham,’” Noerr Pennington immunity applies. Id. at 1336. The dissent rightly recognized that the majority opinion relied solely on “the concerted refusal to deal which showed the group’s ‘anticompetitive motivation[,]’ [b]ut the desire to harm a competitor does not make a lawsuit a sham.” Id. **Other courts have expressed dismay at the lack of clarity in the Noerr-Pennington doctrine** and the “chilling effect” on the exercise of First Amendment rights. See Mercatus Group, LLC v. Lake Forest Hosp., 641 F.3d 834, 846 (7th Cir. 2011). As the Court in Mercatus observed, “the greater the uncertainty, the more likely that laypeople will hesitate to seek redress, out of fear that their petitioning activity will subject them to legal liability.” Id.; see also Puerto Rico Tel. Co., Inc. v. San Juan Cable LLC, 874 F.3d 767, 771 (1st Cir. 2017) (“We find ourselves quite skeptical of the notion that a defendant’s willingness to file frivolous cases may render it liable for filing a series of only objectively reasonable cases.”). **Even the FTC itself acknowledged the lack of clarity** around the sham exception in a 2006 report: “[w]hat is not clear, however, are the exact boundaries of Noerr[-Pennington’s] protection ... and neither the Supreme Court case law nor federal appellate decisions provide a firm guide.”5 The FTC issued this 2006 report to “attempt[] to interpret the doctrine,” and provide “the viewpoint of FTC staff, who have grappled with these issues when faced with anticompetitive conduct in the form of communications with the government.” Id. **In light of lower courts’ and the FTC’s difficulty in interpreting and uniformly applying the “sham” exception, this Court’s intervention is necessary not only to correct the Third Circuit’s error, but also to clarify the boundaries of the First Amendment rights protected by Noerr-Pennington immunity**.

**Plan is net-better for enforcement---**

**Gugliuzza 15** (Paul R. Gugliuzza, PATENT TROLLS AND PREEMPTION, Virginia Law Review , October 2015, Vol. 101, No. 6 (October 2015), pp. 1579-1647, y2k)

Furthermore, a return to the **traditional** standard would **free courts** from the **Noerr**-based principle, embraced in Innovatio and Activision, that any false statement must relate to the issues of validity or infringement to strip a patent holder of immunity. Pre-Federal Circuit decisions, for example, condemned patent holders who circulated notices that "falsely stated and pretended that certain patents owned by the [patent holder] ha[d] been adjudicated and sustained in contested cases."374 This change in the law would enable **private plaintiffs** and government law enforcers, such as the FTC and **state attorneys general**, to **impose** civil liability on **unscrupulous patent holders** without **difficult additional step** of **disproving** the merits of the **underlying infringement claim**

#### We’ve been trying to do this for years

Harkrider 18 (John D. Harkrider is a partner at Axinn, Veltrop & Harkrider LLP, Antitrust in theTrump Administration: A Tough Enforcer That Believes in Limited Government,” Antitrust, Vol. 32, No. 3, Summer 2018, https://nysba.org/NYSBA/Meetings%20Department/2019%20Annual%20Meeting/Coursebooks/Antitrust%20Section/Panel%202%20Summer18-Harkrider%C2%A9.pdf)

Noerr-Pennington

Yet another example of the current administration’s seemingly stricter antitrust enforcement—at least relative to other Republican administrations—is the FTC’s stance on the Noerr-Pennington doctrine. In February 2017, the FTC filed a case against Shire ViroPharma seeking to narrow the immunity under Noerr-Pennington. 36 Part of the FTC’s reason for bringing this case is to further cement the California Motor 37 “pattern of petitioning” exception to the Professional Real Estate Investors decision’s “objectively baseless” test. 38 Narrowing the scope of immunity is very much in line with a policy objective Muris set out in the 1980s and early 2000s. With recent nominations of individuals who were at the FTC under Muris, the case against Shire ViroPharma is a good indication that the future full Commission will have a similar policy objective.

**Antitrust liability is key---it’s the only remedy that sufficiently deters**

**Zain 14** (Saami Zain, J.D., LLM (Antitrust); Assistant Attorney General, New York State Attorney General's Office, Antitrust Bureau. The views expressed here are those of the author and do not reflect those of the New York State Department of Law or the Antitrust Bureau, ANTITRUST LIABILITY FOR MAINTAINING BASELESS LITIGATION, 54 Santa Clara L. Rev. 729, y2k)

IV. Analysis

As evidenced by the cases discussed, **filing** and **maintaining baseless lawsuits** may have **anticompetitive** [\*756] effects. And while the cases focused primarily on initiation of litigation, it was recognized that maintaining the actions was also improper. Indeed, where maintaining baseless litigation has anticompetitive effects, there is no compelling rationale for creating a legal distinction between the filing and maintaining of a baseless action. 145 And in situations where a litigant is able to offer a questionable but potentially legitimate basis for filing an action (thereby making the suit unlikely to qualify as a sham), the greater need for imposing liability for continuing to litigate after it becomes clear that the action is meritless. Consequently, this section provides the argument for **antitrust liability** for maintaining baseless litigation.

A. Antitrust Sham Litigation for Maintaining Baseless Litigation is Good Policy

There are several justifications for imposing **antitrust** liability for continuing to litigate a baseless action for anticompetitive purposes. And where such litigation may cause anticompetitive effects - such as in Hatch-Waxman litigation - the potential for incurring antitrust liability may be an important deterrent.

First, **antitrust liability** is needed because laws **prohibiting** frivolous and bad faith litigation (such as Section 285 or Rule 11), are **inadequate deterrents** in many situations. Granting fees under Section 285 is largely within [\*757] a court's discretion, and thus a court may decline to impose fees in even egregious circumstances. 146 Similarly, Rule 11 is not only discretional, but several courts have interpreted it as only governing the filing of litigation and thereby rejected its application to conduct done in the course of litigation (including continuing to maintain a baseless action). 147 Moreover, **the remedies available** under these provisions - mostly **payment** of defendant's **fees** and **costs** - are **not** particularly **onerous** and thus not likely to **discourage frivolous litigation**. As **monopoly profits** may be quite **large**, a firm may well be quite **content** risking having to **pay fees** and **even sanctions** (in contrast to the risk of **treble damages for antitrust violations**).

Second, to the **extent** that **continuing** to litigate a **baseless** action is **anticompetitive**, there is no rational basis for **only** imposing liability on the **filing** of the action but not on **maintaining** it. And where the litigation circumvents legislative policies, such as those created by the Hatch-Waxman Act, it should be prevented to the fullest extent possible. Thus, imposing liability on **both** filing and maintaining baseless, anticompetitive litigation would likely have the **favorable** effect of further **deterring** such deleterious conduct.

# 2AC

## T — Antitrust Law

### 2AC — AT: T-Antitrust Law

**We meet! the plan applies to every company in the economy that is patent trolling**

**C/I - The “core” antitrust statutes are the Sherman Act, Clayton Act, and FTC Act**

Lisa **Kimmel 20**, Senior Counsel at Crowell & Moring, LLP in Washington, D.C., twenty years of experience as an antitrust lawyer and holds a Ph.D. in economics from the University of California at Berkeley; and Eric Fanchiang, associate in Crowell & Moring’s Irvine, CA office and a member of the firm’s antitrust and commercial litigation groups, 2020, “Antitrust and Intellectual Property Licensing,” in 2020 Licensing Update, Wolters Kluwer Legal & Regulatory U.S., https://www.crowell.com/files/20200401-Licensing-Update-Chapter-13.pdf

U.S. antitrust law is defined by federal and state statutes, as interpreted by the courts. The **core federal statutes** are the Sherman Act,1 passed by Congress in 1890, and the **F**ederal **T**rade **C**ommission2 and Clayton Acts,3 both passed in 1914. The United States Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC” or “Commission”) (together the “agencies”) share enforcement of most areas of federal antitrust law but with some differences in the scope of their authority. The FTC has sole authority to enforce Section 5 of FTC Act, which prohibits (1) unfair methods of competition and (2) unfair or deceptive acts or practices. The FTC almost always pursues claims for anticompetitive conduct as unfair methods of competition and reserves charges of unfair or deceptive acts or practices for consumer protection violations. Though the FTC's authority to challenge unfair methods of competition goes beyond conduct prohibited by the Sherman and Clayton Acts, in practice the FTC brings most unfair methods of competition cases under the same standards that courts apply to Sherman Act claims. The most prominent exception is the invitation to collude offense, which falls outside the scope of the Sherman Act (if the invitation is not accepted, there is no agreement). The FTC challenges invitations to collude as so-called “standalone” violations of Section 5.4 The DOJ has sole authority to pursue **criminal violations** of the antitrust laws. Most states have their own state antitrust and unfair competition statutes. State law follows federal law to some extent, though as discussed below, may differ from federal law in meaningful ways that vary state to state. State attorneys general and private parties can also typically file suit to enforce both federal and state antitrust law.

**Prefer it**

1. **AFF ground – their interp destroys viable affs – leads to pics and generic econ da’s every round – destroys any nuance**
2. **Predictability – their definition is defining antitrust laws in a “core sense” NOT core antitrust laws – that skews preparation**

**Functional limits solve – still get biz con, ftc, and states**

**Reasonability – good is good enough – competing interps cause a race to the bottom that skews substance**

## K — Cap

### 2AC — AT: Cap K

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

#### Perm do both—

#### System sustainable

Mark Budolfson 21. PhD in Philosophy. Assistant Professor in the Department of Environmental and Occupational Health and Justice at the Rutgers School of Public Health and Center for Population–Level Bioethics "Arguments for Well-Regulated Capitalism, and Implications for Global Ethics, Food, Environment, Climate Change, and Beyond". Cambridge Core. 5-7-2021. https://www-cambridge-org.proxy.library.emory.edu/core/journals/ethics-and-international-affairs/article/arguments-for-wellregulated-capitalism-and-implications-for-global-ethics-food-environment-climate-change-and-beyond/96F422D04E171EECDEF77312266AE9DD

Discourse on food ethics often advocates the anti-capitalist idea that we need less capitalism, less growth, and less globalization if we want to make the world a better and more equitable place, with arguments focused on applications to food, globalization, and a just society. For example, arguments for this anti-capitalist view are at the core of some chapters in nearly every handbook and edited volume in the rapidly expanding subdiscipline of food ethics. None of these volumes (or any article published in this subdiscipline broadly construed) focuses on a defense of globalized capitalism.1

More generally, discourse on global ethics, environment, and political theory in much of academia—and in society—increasingly features this anti-capitalist idea as well.2 The idea is especially prominent in discourse surrounding the environment, climate, and global poverty, where we face a nexus of problems of which capitalism is a key driver, including climate change, air and water pollution, the challenge of feeding the world, ensuring sustainable development for the world's poorest, and other interrelated challenges.

It is therefore important to ask whether this anti-capitalist idea is justified by reason and evidence that is as strong as the degree of confidence placed in it by activists and many commentators on food ethics, global ethics, and political theory, more generally.

In fact, many experts argue that this anti-capitalist idea is not supported by reason and argument and is actually wrong. The main contribution of this essay is to explain the structure of the leading arguments against the anti-capitalist idea, and in favor of the opposite conclusion. I begin by focusing on the general argument in favor of well-regulated globalized capitalism as the key to a just, flourishing, and environmentally healthy world. This is the most important of all of the arguments in terms of its consequences for health, wellbeing, and justice, and it is endorsed by experts in the empirically minded disciplines best placed to analyze the issue, including experts in long-run global development, human health, wellbeing, economics, law, public policy, and other related disciplines. On the basis of the arguments outlined below, well-regulated capitalism has been endorsed by recent Democratic presidents of the United States such as Barack Obama, and by progressive Nobel laureates who have devoted their lives to human development and more equitable societies, as well as by a wide range of experts in government and leading nongovernmental organizations.

The goal of this essay is to make the structure and importance of these arguments clear, and thereby highlight that discourse on global ethics and political theory should engage carefully with them. The goal is not to endorse them as necessarily sound and correct. The essay will begin by examining general arguments for and against capitalism, and then turn to implications for food, the environment, climate change, and beyond.

Arguments for and against Forms of Capitalism

The Argument against Capitalism

Capitalism is often argued to be a key driver of many of society's ills: inequalities, pollution, land use changes, and incentives that cause people to live differently than in their ideal dreams. Capitalism can sometimes deepen injustices. These negative consequences are easy to see—resting, as they do, at the center of many of society's greatest challenges.3

And at the same time, it is often difficult to see the positive consequences of capitalism.4 What are the positive consequences of allowing private interests to clear-cut forests and plant crops, especially if those private interests are rich multinational corporations and the forests are in poor, developing countries whose citizens do not receive the profits from deforestation? Why give private companies the right to exploit resources at all, since exploitation almost always has some negative consequences such as those listed above? These are the right questions to ask, and they highlight genuine challenges to capitalism. And in light of these challenges, it is reasonable to consider the possibility that perhaps a different economic system altogether would be more equitable and beneficial to the global population.

The Argument for Well-Regulated Capitalism

However, things are more complicated than the arguments above would suggest, and the benefits of capitalism, especially for the world's poorest and most vulnerable people, are in fact myriad and significant. In addition, as we will see in this section, many experts argue that capitalism is not the fundamental cause of the previously described problems but rather an essential component of the best solutions to them and of the best methods for promoting our goals of health, well-being, and justice.

To see where the defenders of capitalism are coming from, consider an analogy involving a response to a pandemic: if a country administered a rushed and untested vaccine to its population that ended up killing people, we would not say that vaccines were the problem. Instead, the problem would be the flawed and sloppy policies of vaccine implementation. Vaccines might easily remain absolutely essential to the correct response to such a pandemic and could also be essential to promoting health and flourishing, more generally.

The argument is similar with capitalism according to the leading mainstream arguments in favor of it: Capitalism is an essential part of the best society we could have, just like vaccines are an essential part of the best response to a pandemic such as COVID-19. But of course both capitalism and vaccines can be implemented poorly, and can even do harm, especially when combined with other incorrect policy decisions. But that does not mean that we should turn against them—quite the opposite. Instead, we should embrace them as essential to the best and most just outcomes for society, and educate ourselves and others on their importance and on how they must be properly designed and implemented with other policies in order to best help us all. In fact, the argument in favor of capitalism is even more dramatic because it claims that much more is at stake than even what is at stake in response to a global pandemic—what is at stake with capitalism is nothing less than whether the world's poorest and most vulnerable billion people will remain in conditions of poverty and oppression, or if they will instead finally gain access to what is minimally necessary for basic health and wellbeing and become increasingly affluent and empowered. The argument in favor of capitalism proceeds as follows:

Premise 1. Development and the past. Over the course of recorded human history, the majority of historical increases in health, wellbeing, and justice have occurred in the last two centuries, largely as a result of societies adopting or moving toward capitalism. Capitalism is a relevant cause of these improvements, in the sense that they could not have happened to such a degree if it were not for capitalism and would not have happened to the same degree under any alternative noncapitalist approach to structuring society. The argument in support of this premise relies on observed relationships across societies and centuries between indicators of degree of capitalism, wealth, investments in public goods, and outcomes for health, wellbeing, and justice, together with econometric analysis in support of the conclusion that the best explanation of these correlations and the underlying mechanism is that large increases in health, wellbeing, and justice are largely driven by increasing investments in public goods. The scale of increased wealth necessary to maximize these investments requires capitalism. Thus, as capitalist societies have become dramatically wealthier over the past hundred years (and wealthier than societies with alternative systems), this has allowed larger investments in public goods, which simply has not been possible in a sustained way in societies without the greater wealth that capitalism makes possible. Important investments in public goods include investments in basic medical knowledge, in health and nutrition programs, and in the institutional capacity and know-how to regulate society and capitalism itself. As a result, capitalism is a primary driver of positive outcomes in health and wellbeing (such as increased life expectancy, lowered child and maternal mortality, adequate calories per day, minimized infectious disease rates, a lower percentage and number of people in poverty, and more reported happiness);5 and in justice (such as reduced deaths from war and homicide; higher rankings in human rights indices; the reduced prevalence of racist, sexist, homophobic opinions in surveys; and higher literacy rates).6 These quantifiable positive consequences of global capitalism dramatically outweigh the negative consequences (such as deaths from pollution in the course of development), with the result that the net benefits from capitalism in terms of health, wellbeing, and justice have been greater than they would have been under any known noncapitalist approach to structuring society.7

Premise 2. Economics, ethics, and policy. Although capitalism has often been ill-regulated and therefore failed to maximize net benefits for health, wellbeing, and justice, it can become well-regulated so that it maximizes these societal goals, by including mechanisms identified by economists and other policy experts that do the following:

* optimally8 regulate negative effects such as pollution and monopoly power, and invest in public goods such as education, basic healthcare, and fundamental research including biomedical knowledge (more generally, policies that correct the failures of free markets that economists have long recognized will arise from “externalities” in the absence of regulation);9
* ensure equity and distributive justice (for example, via wealth redistribution);10
* ensure basic rights, justice, and the rule of law independent of the market (for example, by an independent judiciary, bill of rights, property rights, and redistribution and other legislation to correct historical injustices due to colonialism, racism, and correct current and historical distortions that have prevented markets from being fair);11 and
* ensure that there is no alternative way of structuring society that is more efficient or better promotes the equity, justice, and fairness goals outlined above (by allowing free exchange given the regulations mentioned).12

To summarize the implication of the first two premises, well-regulated capitalism is essential to best achieving our ethical goals—which is true even though capitalism has certainly not always been well regulated historically. Society can still do much better and remove the large deficits in terms of health, wellbeing, and justice that exist under the current inferior and imperfect versions of capitalism.

Premise 3. Development and the future. If the global spread of capitalism is allowed to continue, desperate poverty can be essentially eliminated in our lifetimes. Furthermore, this can be accomplished faster and in a more just way via well-regulated global capitalism than by any alternatives. If we instead opt for less capitalism, less growth, and less globalization, then desperate poverty will continue to exist for a significant portion of the world's population into the further future, and the world will be a worse and less equitable place than it would have been with more capitalism. For example, in a world with less capitalism, there would be more overpopulation, food insecurity, air pollution, ill health, injustice, and other problems. In part, this is because of the factors identified by premise 1, which connect a turn away from capitalism with a turn away from continuing improvements in health, wellbeing, and justice, especially for the developing world. In addition, fertility declines are also a consequence of increased wealth, and the size of the population is a primary determinant of food demand and other environmental stressors.13 Finally, as discussed at length in the next section of the essay, capitalism can be naturally combined with optimal environmental regulations.14 Even bracketing anything like optimal regulation, it remains true that sufficiently wealthy nations reduce environmental degradation as they become wealthier, whereas developing nations that are nearing peak degradation will remain stuck at the worst levels of degradation if we stall growth, rather than allowing them to transition to less and less degradation in the future via capitalism and economic growth.15 In contrast, well-regulated capitalism is a key part of the best way of coping with these problems, as well as a key part of dealing with climate change, global food production, and other specific challenges, as argued at length in the next section. Here it is important to stress that we should favor well-regulated capitalism that includes correct investments in public goods over other capitalist systems such as the neoliberalism of the recent past that promoted inadequately regulated capitalism with inadequate concern for externalities, equity, and background distortions and injustices.16

Conclusion. Therefore, we should be in favor of capitalism over noncapitalism, and we should especially favor well-regulated capitalism, which is the ethically optimal economic system and is essential to any just basic structure for society.

This argument is impressive because, as stated earlier in the essay, it is based on evidence that is so striking that it leads a bipartisan range of open-minded thinkers and activists to endorse well-regulated capitalism, including many of those who were not initially attracted to the view because of a reasonable concern for the societal ills with which we began. To better understand why such a range of thinkers could agree that well-regulated capitalism is best, it may help to clarify some things that are not assumed or implied by the argument for it, which could be invoked by other bad arguments for capitalism.

One thing the argument above does not assume is that health, wellbeing, or justice are the same thing as wealth, because, in fact, they are not. Instead, the argument above relies on well-accepted, measurable indicators of health and wellbeing, such as increased lifespan; decreased early childhood mortality; adequate nutrition; and other empirically measurable leading indicators of health, wellbeing, and justice.17 Similarly, the argument that capitalism promotes justice, peace, freedom, human rights, and tolerance relies on empirical metrics for each of these.18

Furthermore, the argument does not assume that because these indicators of health, wellbeing, and justice are highly correlated with high degrees of capitalism, that therefore capitalism is the direct cause of these good outcomes. Rather, the analyses suggest instead that something other than capitalism is the direct cause of societal improvements (such as improvements in knowledge and technology, public infrastructure, and good governance), and that capitalism is simply a necessary condition for these improvements to happen.19 In other words, the richer a society is, the more it is able to invest in all of these and other things that are the direct causes of health, wellbeing, and justice. But, to maximize investment in these things societies need well-regulated capitalism.

As part of these analyses, it is often stressed that current forms of capitalism around the world are highly defective and must be reformed in the direction of well-regulated capitalism because they lack investments in public goods, such as basic knowledge, healthcare, nutrition, other safety nets, and good governance.20 In this way, an argument for a particular kind of progressive reformism is an essential part of the analyses that lead many to endorse the more general argument for well-regulated capitalism.

Although these analyses are nuanced, and appropriately so, it remains the case that the things that directly lead to health, wellbeing, and justice require resources, and the best path toward generating those resources is well-regulated capitalism. And on the flip side, according to the analyses behind premise 1 described above, an anti-capitalist system would not produce the resources that are needed, and would thus be a disaster, especially for the poorest billion people who are most desperately in need of the resources that capitalism can create and direct, to escape from extreme poverty.21

#### Alternatives built on opposition fail to gain leverage, concessions, and creates space necessary for truly radical politics. Only the perm solves

Vassallo 11/4/21 (Justin, writer and researcher who specializes in party systems and ideology, political economy, American political development, and modern Europe. “Radical Movements and Political Power”, <https://bostonreview.net/politics/justin-h-vassallo-radical-movements-and-political-power>) Neolefitism “an attempt within leftwing groups to “prefigure . . . the kind of participatory democracy and popular control that they expected from a future, postcapitalist society” in order to preempt a turn toward oligarchy within their own movements.”

At the same time, Renaud does not shy away from evaluating neoleftists’ shortcomings, including frustrating instances of myopia and, sometimes, the dissociation from concrete political goals and conditions, despite—or perhaps because of—their own experiences of state violence and exile. Perhaps ironically, both Leninists and moderate social democrats would criticize neoleftists for their “infantile” and romantic anti-capitalism. But as New Lefts amply documents, neoleftists, by virtue of the intermediate position they carved out between Social Democracy and Soviet Communism, generated powerful new insights about political institutions, culture, sex, gender, and imperialism that the usual party forms and traditional party insiders could not produce.

On the perennially thorny issue of pragmatism and reform, New Lefts mostly withholds final judgments about the lessons activists and policy oriented leftists today might draw from the legacy of mid-twentieth century new lefts. Renaud stresses that “political power was never the main goal. . . . Young militants . . . were not interested in building a new parliamentary coalition.” He adds, “Seizing the state was peripheral to the neoleftist project, despite what antileftists might have feared.”

For many, however, this neoleftist fixation on “renewal” will come across as excessively romantic and, perversely, borderline anti-political. In retrospect, at a moment when the right has only strengthened its grip across the United States and parts of Europe, this refusal to pursue specifically political—as opposed to social or cultural—power will look to some like a grave mistake. New Lefts imparts a feeling that neoleftists, at peak moments of direct action and grassroots democracy, were consumed by the rapture of anticipation—of a cataclysm, or even total social revolution. Yet their reflexive opposition to the party form impeded greater leverage, and thus the recognition that some concessions from capital and the state are worth getting, that better conditions need not come at the expense of still more radical goals. It is undeniable, furthermore, that the welfare state made it possible for the sixties New Left to emerge as it did and occupy the cultural and political space it chose. This does not mean its critiques were unfounded; on the contrary, they were absolutely essential. But one must be clear-eyed about the limits of rejecting the pursuit of political power.

Today, far-sighted activists will have to discern how to weave in and out of institutions, building power in one key while nurturing the fire of radicals in another.

Though it is not a conclusion New Lefts pursues explicitly, a lesson one might draw from Renaud’s book is that the central problem for a radicalism committed foremost to critique rather than to political power is that actually implementable welfare state programs for distributional change and decommodification begin to appear objectionably conciliatory or reformist. This orientation runs the risk of leaving the world as it is, perpetually deferring a better world to a time that never comes. In this sense, any leftism without a concrete policy agenda—and the tactical focus needed to win the formal power to implement it—is ultimately a betrayal of its overriding aim: to create a more just world. An ideology of strict opposition, legible only to fervent insiders, ultimately abandons the practice of world-building to others, from those who circumscribe and redefine human rights to suit maximal market freedom to those who recreate a fortress nation-state along chauvinist ethnocultural lines.

In his epilogue, Renaud suggests that contemporary social movements, particularly the wave of Black Lives Matter protests over the summer of 2020, are channeling the most vibrant aspects of previous new lefts. The boundaries between radicals and institutions, civic or political, do appear more porous than they have been in a long time. In the United States, there are once again elected progressives in the mold of social democrats—Alexandria Ocasio-Cortez, Rashida Tlaib, Ilhan Omar, Pramila Jayapal, and Cori Bush, among others—and they have been empowered through diverse constituencies and a multitude of strategies, in turn amplifying ideas that were once only aired in a university, small radical book club, marginal nonprofit, or underground magazine or blog.

Some observers, of course, will conclude that the modern course of electoral and legislative politics in the United States confirms that a neoliberal logic of social and fiscal discipline will prevail over even highly pragmatic reforms. The steady erosion, thus far, of Biden’s economic agenda by intransigent centrist Democrats is only the latest reflection of the Democratic Party’s decades-long capacity for self-inflicted damage, Senators Joe Manchin and Kyrsten Sinema only the most visible of the stubborn obstacles preventing the party “realignment” once envisioned by the authors of the Port Huron Statement. At all levels of government there are Democratic defenders of the status quo that the left must contend with, and still other institutional obstacles—from the Supreme Court to gerrymandering—besides. Nor are the obstacles unique to the United States. In Germany’s recent parliamentary elections, Die Linke’s disappointing results underscore that leftwing infighting and a lack of clearly defined political objectives continue to harm the broader public’s reception to progressive challenges to the status quo.

Still, there is some cause for optimism—and it will be needed, given the immense challenges before us. Through a still-evolving mix of grassroots mobilization and electoral politics, the U.S. left has accrued influence it simply did not have even ten years ago, raising the profile of social democracy in the process. Indeed, the idea of Bernie Sanders serving as chairman of the Senate Budget Committee would have been inconceivable before his 2016 campaign. Any young European leftist must welcome the possibility that a true break from neoliberalism in the United States might consequently alter perceptions in Europe. In that case, the U.S. left could justly be credited with helping to dismantle an international policy regime that has fueled inequality and maintained poverty across much of the globe for decades. And while it is necessary to closely scrutinize the tempo of change and the actual policy results, it is at the very least clear, through the rhetoric of American progressives, that crucial links between egalitarian economic goals and other forms of social justice have been reestablished.

The amalgamation of putatively non-party and coalition-building strategies further reflects the unprecedented transnational, multiracial character of modern lefts in the West. While many factors might lead one to conclude that they are incurably weak and incapable of transformative agency, the prominence of nonwhite leftists—who know the difficult legacies of racialized and stratified welfare states but nonetheless seek to retrieve and update their best mechanisms—signals that social democracy has the potential to be reborn, as it was in Europe’s apocalyptic landscape of 1945. In this context, New Lefts reminds us that world-building can take many forms. But at the same time, it also reminds us that neither a position defined through the negative—such as antifascism—nor a political-economic blueprint can suffice on its own. In the face of the climate crisis and rampant social and economic inequality, far-sighted activists will have to discern how to weave in and out of institutions, building power in one key while nurturing the fire of radicals in another.

**Strong patents are key to innovation, tech diffusion, and cross-fertilization---every study is strongly Neg**

David **Kline 14**, Pulitzer Prize Winning Journalist and Strategic Communications Strategist, “Do Patents Truly Promote Innovation?”, IP WatchDog, 4/15/2014, http://www.ipwatchdog.com/2014/04/15/do-patents-truly-promote-innovation/id=48768/

In recent years, a **great many studies** of the real-world impact of patenting on innovation and economic growth (many available for free on ssrn.com) point to its **beneficial effects**. Arrow (1962), Griliches (1963), Schmookler (1966), Kitch (1977), Reinganum (1981), Tirole (1988), Klemperer (1990), Romer (1990), Giulbert and Shapiro (1990), Grossman and Helpman (1991), Aghion and Howitt (1992), Scotchmer (1999), and Gallini (2002) **all** found that patents foster ex ante innovation — meaning, they induce people to invent because of the prospect of reward.

Invention, it has been shown, is driven primarily not by genius or happenstance but rather by markets and the **expectation of the profit** that can be gained by securing the patent rights to new technologies. Zorina Khan of Bowdoin College and the late Kenneth Sokoloff at UCLA found that among the “great inventors” of the 19th century, “their patterns of patenting were procyclical [and] responded to expected profit opportunities.” And as Khan noted elsewhere, “Ordinary people [are] stimulated by higher perceived returns or demand-side incentives to make long-term commitments to inventive activity.”

By contrast, in countries without patent rights, Barro (1995) found that people have an “excessive incentive to copy” and insufficient incentive to invent for themselves. Moser (2004), meanwhile, reported that “inventors in countries without patent laws focus on a small set of industries … while innovation in countries with patent laws [is] much more diversified.”

The evidence that patents foster innovation is not confined solely to the U.S. or even to developed countries. In 2008, a study by the Organization for Economic Co-operation and Development (OECD) found that “stronger levels of patent protection are **positively** and **significantly** associated with inflows of high-tech product [and] expenditures on R&D.”

And in a study that attracted wide attention, Shih-Tse Lo of Concordia University in Montreal reported that the reforms strengthening the Taiwanese patent system in 1986 “stimulated additional inventive activity, especially in industries where patent protection is generally regarded as an effective strategy for extracting returns, and in industries which are more R&D intensive. The reforms also seemed to induce additional foreign direct investment in Taiwan.” But such benefits did not accrue across all sectors of the economy. “For industries that chiefly use other mechanisms to extract returns from their innovations, such as [trade] secrecy, the strengthening of patent rights had little effect on their inventive activity.”

In addition to encouraging ex ante innovation, Acemoglu, Bimpikis, and Ozdaglar (2008) discovered that “patents [also] improve the allocation of resources by encouraging **rapid experimentation** and **efficient ex post transfer** of knowledge across firms.”

Given that patents grant exclusionary rights, some will be surprised to learn that the patent system is actually one of the most effective tools for **knowledge-sharing** and **technology transfer** ever devised. A 2006 study by French economists Francois Leveque and Yann Meniere found that 88 percent of U.S., European, and Japanese businesses rely upon the **information disclosed in patents** to keep up with technology advances and direct their own R&D efforts.

This is hardly a new phenomenon. The inventor Elias E. Reis reported that when he read in the Official Gazette in 1886 about a patent issued to Elihu Thomson for a new method of electric welding, “there immediately opened up to my mind a field of new applications to which I saw I could apply my system of producing heat in large quantities.” And Thomas Edison was known to frequent the patent office to study other inventors’ patents and spark ideas of his own.

Indeed, new research published last year found that rather than blocking development, Thomas Edison’s seminal 1880 incandescent lamp patent (No. 223,898) actually “**stimulated downstream development work**” that resulted in “new technologies of commercial significance [including] the Tesla coil, hermetically sealed connectors, chemical vapor deposition process, tungsten lamp filaments and phosphorescent lighting that led to today’s fluorescent lamps.”

As Sokoloff and Naomi Lamoreaux at Yale (1997) observe, “The very act of establishing exclusive property rights in invention not only protected patentees but also **promoted the diffusion of information** about technology. To see why, imagine a world in which there was no patent system to guarantee inventors property rights to their discoveries. In such a world, inventors would have **every incentive to be secretive and to guard jealously** their discoveries from competitors [because those discoveries] could, of course, be copied with impunity.

“By contrast,” they noted, “in a world where property rights in invention were protected, the situation would be very different. Inventors would now **feel free to promote their discoveries** as widely as possible so as to maximize returns either from commercializing their ideas themselves or from [licensing] rights to the idea to others. The protections offered by the patent system would thus be an **important stimulus** to the exchange of technological information in and of themselves. Moreover, it is likely that the **cross-fertilization** that resulted from these information flows would be a **potent stimulus** to technological change.”

#### Unchecked Noerr immunity sanctions dirty climate advocacy

Wu 20 (Tim, Tim Wu is an Isidor and Seville Sulzbacher Professor of Law at Columbia Law School. Wu joined the Law School in 2006 and teaches antitrust, intellectual property and law related to the media and Internet industries. Best known for pioneering "Net Neutrality," he is also the author of two widely-acclaimed books: The Master Switch and The Attention Merchants. Wu served as a law clerk for Judge Richard Posner and for Justice Stephen Breyer, and has also worked at the Federal Trade Commission, the New York Attorney General's Office, and the National Economic Council in the White House. In 2013 he was named one of America's 100 Most Influential Lawyers, and in 2017 he was named to the American Academy of Arts & Sciences, and he is also a contributing opinion writer for The New York Times. “Antitrust and Corruption: Overruling Noerr”, https://knightcolumbia.org/content/antitrust-and-corruption-overruling-noerr)

Imagine that the coal industry were concerned with the rise of wind power, an obvious competitor. It might react in more than one way. First, the coal industry or its owners might distribute information (here assumed to be factual) showing that wind power, in fact, creates its own waste problems or is more expensive than generally thought. It might distribute information suggesting that coal is not actually as polluting as widely believed, promoting the concept of “clean coal.” And it might formally petition government with economic arguments for abandoning the subsidization of wind power.

These activities are all within the core of First Amendment protection. By providing information to government and the public relevant to an important debate, they serve the process of democratic self-government, both through the formation of public opinion and the provision of information necessary to making important public decisions. 41. See Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Vincent Blasi, Learned Hand and the Self-Government Theory of the First Amendment: Masses Publishing Co. v. Patten, 61 U. Colo. L. Rev. 1 (1990).It is true that the volume of speech that the coal industry can afford might be said to give its speech an unfair advantage; yet as it stands, the First Amendment has stood for the premise that more is better in that context.42. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., dissenting) (“[T]he fitting remedy for evil counsels is good ones.”); Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment[.]”); accord Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 350 (2010).

So much for a “clean” campaign of political influence that relies on the publication of factual information, correctly attributed. What about when the campaign becomes increasingly deceptive, corrupt, and abusive? The answer is that the First Amendment interests weaken until, at some point, they disappear entirely. This is key to understanding the First Amendment-antitrust analysis and a point largely neglected by Noerr and its Supreme Court progeny: not all the techniques of political influence are “speech” or petitioning at all.

The coal industry might, as in Noerr, use front groups who lie about their funding to present its criticism of wind power, thereby deceiving the public and government as to the source of the critiques. Industry might also publish demonstrably false or even defamatory information, such as the suggestion that wind turbines are highly harmful to human health (“wind power syndrome”). 43. Jeffrey Ellenbogen et al., Wind Turbine Health Impact Study: Report of Independent Expert Panel (2012) (“There is insufficient evidence that the noise from wind turbines is directly [...] causing health problems or disease.”).Finally, the coal industry might intentionally and maliciously present false information—say, false pricing information or the defamation of individuals involved in wind—in its petitions to government. It might file endless procedural challenges to block the approval of wind farms by local authorities. Finally, it might give cash bribes to government officials in exchange for a local ban on wind power. At the extreme, it might hire thugs to sabotage wind turbines under the cover of darkness.

As we run through these increasingly dirty advocacy campaigns, the First Amendment interests become progressively weaker to the point of being nonexistent. Laws that ban bribery, defamation, deception of government, and sabotage have all survived First Amendment challenges, either based on the strength of the government interest or the idea that there really is no protected speech at issue, but merely conduct.44. United States v. Halloran, 821 F.3d 321, 340 (2d Cir. 2016) (holding that the First Amendment does not protect bribery); United States v. Yermian, 468 U.S. 63 (1984) (never suggesting that 18 U.S.C. §1001, which makes it a federal crime to knowingly lie to the government, poses First Amendment issues). See also Bill Johnson’s Restaurants, Inc. v. NLRB, 461 U.S. 731, 732 (1983) (“A baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by the [NLRA is] ... not within the scope of First Amendment protection[.]”).

On the antitrust side of the ledger, the strength of the government’s interests would similarly seem to depend on deception through outright corruption. Despite occasional academic suggestions that the antitrust laws should be indifferent to anticompetitive intent or malicious conduct, the nature of the conduct matters, as evidenced by case law condemning intentional monopolization, 45. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).deception, 46. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Circuit 2001); Walker Process Equip., Inc. v. Food Mach. & Chemical Corp., 382 U.S. 172 (1965). See also In re Union Oil Co. of Cal. (Unocal), FTC Dkt. No. 9305, slip op. at 16 (2004).and other tortious conduct like fraud or sabotage.

What is needed, is something that courts do regularly, namely, balance the respective interests protected by the First Amendment and antitrust laws, respectively.

And that is what is completely lacking in Noerr: any consideration of the relative strengths of the First Amendment and antitrust interests. And as we shall see, it has led the courts—especially district courts—to extend Noerr immunity beyond any defensible boundary.

#### Turns their impact

Tucker 12 (William C. Tucker, A.B. cum laude Harvard College, J.D. Northeastern U. School of Law, is an Assistant Regional Counsel, U.S. Environmental Protection Agency, Region II. Deceitful Tongues: Is Climate Change Denial a Crime?, 39 Ecology L.Q. 831, y2k)

Although there are expected to be mitigation costs associated with weaning the world from fossil fuels and moving towards an economy of sustainable growth, incurrence of those costs is inevitable. The energy industry cannot continue with "business as usual" indefinitely owing to the inevitable depletion of fossil fuels in another century or so. 414 In the interim, the increasing scarcity of oil, gas, and coal reserves will drive the industry to adopt more extreme measures to extract them, running increasingly costly environmental risks in doing so. And the longer we wait, the higher the costs will be to humankind, since in addition to costs of mitigation those costs will also include the significant and escalating costs of climate change adaptation. Yet there are some who, for profit, would recklessly gamble with the future of humanity and the Earth. As a strong global consensus began to emerge in the 1990s among climate scientists that anthropogenic global warming posed a grave threat to humankind, some in the fossil fuel industry began an extensive public relations campaign to keep that knowledge from the public and governmental officials. This campaign has been highly successful. Conservative politicians in the United States today are almost united in opposition both to domestic GHG regulation and international cooperation in reducing GHG worldwide. Thus, not only has the U.S. government failed to respond to the crisis, but the ability of the United States to provide international leadership on climate change has been severely eroded. The denial campaign is designed for one purpose alone: to deceive. Its purpose is to prevent government regulation of CO<2> emissions by creating out of whole cloth a monumental illusion: that a controversy exists among climatologists about the basic facts, as well as the climate implications, of global warming. To create the impression in the public mind of such a controversy, the denial campaign deliberately set out to create a vast artificial edifice, a Hollywood set of false facades and roads leading nowhere complete with lab-coated actors mouthing carefully tested and scripted messages. The [\*893] purpose is to hide from the public the dangers of the conspirators' principal product, fossil fuels, by creating a soothing alternate reality to cast doubt upon the looming threat of global environmental catastrophe predicted by mainstream climate science. It is fundamentally deceptive in purpose, conception and execution. Yet, one may say, though this plan of deception may be morally repugnant, why focus on criminality when other legal means may be available through government regulation or in tort to curb GHG emissions? The answer to this question is that freedom of speech - both individual and corporate - and the reverence with which it is regarded in our society notwithstanding, we cannot allow fraudulent or deceptive speech to ~~paralyze~~ destroy the public debate on a subject no less important than the survival of the human species and the future of the Earth itself. We punish fraud with a vengeance in the myriad and ingenious ways it manifests itself in such mundane matters as payment of taxes, banking and other financial transactions, consumer advertising, internet malfeasance, applications for licenses, and other contractual undertakings. And fraud is a broadly defined crime, encompassing not just the outright lie, but deception, misrepresentation, concealment, factual omissions and other "badges" or indications of fraud, any of which may be evidence of both the scheme to defraud itself and the defrauder's criminal intent. One may well wonder why this essential weapon of the prosecutor's arsenal, thought to be vitally necessary to protect all our financial, cultural and governmental institutions from deceit in both small and large matters, is ineffective to prevent a massive deception pressed upon the general public of such scope and effect as to endanger the future of humankind itself. Furthermore, establishing liability under criminal fraud statutes can serve as a basis for civil claims, such as the RICO action in Philip Morris, through which the government or private parties may seek court-ordered relief to enjoin or sanction further fraudulent activity by the corporations and individuals concerned. 415 Anthropogenic climate change may be the greatest trial humankind has faced in all its brief, 200-millenium sojourn on this planet. 416 Yet we must not forget that it is our science, only relatively recently developed, that has brought us both prosperity and crisis: unprecedented wealth and comfort, but at a grievous cost - unprecedented harm to our fragile environment. 417 We cannot expect to profit so from science but discard it when it becomes inconvenient, when it counsels frugality in the avoidance of catastrophic harm. Science remains our best survival tool. And yet there are those who would discard that tool by taking us into a new dark age, who urge upon us an illusion of greater and greater affluence through unrestrained exploitation of the Earth's resources, while attempting to hide from us the devastating environmental consequences [\*894] of their predations. If we remain blinded by that shimmering mirage, ignoring the environmental dangers facing us, science is warning us that as a species we are in peril. The alternative is also before us: sustainability and enduring prosperity. 418 Let us choose wisely, with open eyes.

## DA — FTC Tradeoff

### 2AC — AT: FTC DA

**Antitrust enforcement is significantly rising across the board, including Noerr cases---any one of these sufficiently thump**

**Koenig 1-3** (Bryan Koenig, Senior Competition Reporter @ Law360, The Antitrust Conduct Cases To Watch In 2022, <https://media2.mofo.com/documents/220103-antitrust-conduct-cases-to-watch.pdf>)

U.S. **antitrust enforcers** carried out **dramatic efforts** to combat anticompetitive conduct last year, and all signs show that the **aggressive efforts** will continue in **2022**. Among the **areas** to watch will be criminal and civil cases accusing companies of anticompetitive **collusion** to restrict their workers' **wages** and mobility. Important developments in the cases against **Big Tech** and a key decision on the **i**ntellectual **p**roperty strategies of **pharma**ceutical giants are also expected. Here, Law360 looks at the major antitrust conduct cases to watch in 2022. A Labor Of Enforcement Like 2021 before it, 2022 is expected to see major developments in labor-side antitrust enforcement. After years of promising that it was no longer satisfied with purely civil enforcement and would be pursuing labor-side criminal enforcement as well, the Department of Justice declared the first such indictment in late 2020. The department has also brought charges against alleged wage-fixing, with most charges so far brought in the healthcare space. In December, the DOJ also crucially announced a major expansion of its prosecutions in the form of criminal charges beyond the healthcare space, accusing an apparent former Pratt & Whitney global engineering services director of participating in a conspiracy to restrict the hiring of engineers and other skilled laborers working for engineering services suppliers. Some of the DOJ's new criminal prosecutions will go to trial in 2022. UnitedHealth Group unit Surgical Care Affiliates, for instance, is scheduled to go to trial in May in the DOJ's first criminal case targeting "no-poach" deals between direct competitors restricting the recruitment and hiring of each other's workers. Of particular interest there is whether the Texas federal judge will deem alleged nonsolicitation agreements a per se, or automatic, antitrust violation, which would allow the DOJ to continue pursuing the case criminally. As a matter of policy, the department only pursues harder-to-prove rule of reason cases, which balance allegedly anticompetitive conduct against outcomes and consumer prices, through civil litigation. So far, the DOJ has managed to get per se treatment in at least one wage-fixing case — scheduled for trial in April — but nonsolicitation agreements may be trickier. "DOJ's authority to bring no-poach cases under its criminal authority I think will be tested in the next year," said Megan Gerking of Morrison & Foerster LLP. Beyond Criminal Cases The DOJ likely won't be alone in targeting labor-side conduct as anticompetitive in the new year. The Federal Trade Commission has similarly expressed an interest in protecting workers, including through rulemakings. Davis Wright Tremaine LLP's David Maas said **enforcers** have shown **every sign** they're **not** done with **labor-side enforcement**, which has worked its way into **major policy** statements at both **the DOJ** and **FTC**. "**They're very active** in the space," Maas said. "I would expect to see **significant enforcement** actions." The efforts to expand labor-side enforcement is driven by President Joe Biden's summer executive order aimed at bolstering competition across the economy. David Shaw of Morrison & Foerster notes that the executive order also called for initiatives by other government agencies, too, imposing mandates on and making requests of "a whole bunch of regulators and offices scattered throughout the executive branch." Nor are government agencies the only ones making a mark in labor-side enforcement. State attorneys general and private plaintiffs have been making waves for several years now against major franchisors, especially chain restaurants, accused of baking into their no-poach agreements language restricting individual franchisees from recruiting and hiring from others within the chain. Dozens of chains have sworn off the practice under pressure from state enforcers. In terms of private cases, Christopher G. Renner of Jenner & Block LLP is watching the Eleventh Circuit, where a proposed class of Burger King workers is trying to revive a suit over no-poach provisions in the chain's franchise agreements. The court heard oral arguments in September. According to Renner, the case is one of the first that could shed light on key questions, including the district judge's findings that a franchisor and franchisee are legally incapable of conspiring over the terms of their franchise agreement. Tech Cases Moving Forward The new year is certain to see **important developments** in the **array of litigation** moving forward against **online platforms**, amid a broader reckoning over the power of Big Tech and the ability of antitrust law as written to keep it in check. Practitioners will also be watching Capitol Hill closely for what if any legislation lawmakers manage to finalize as part of that reckoning. The litigation includes the various state and federal enforcement actions against Google and Facebook, as well as the D.C. Attorney General's solo suit against Amazon. Also important is the private litigation against Apple, especially the competing Ninth Circuit appeals from the iPhone-maker and Epic Games after a California federal judge said that Apple wasn't a "monopolist" but barred it from enforcing "anti-steering" provisions meant to keep purchases within the App Store and thus subject to Apple's commissions of up to 30%. The ruling against the anti-steering provisions has been put on hold pending the appeal. Michael Murray of Paul Hastings LLP said that the Ninth Circuit case is "very important for the business community in terms of understanding the relationship of state law to federal law." The reason: U.S. District Judge Yvonne Gonzalez Rogers found that, under federal law, Epic hadn't made out its case, concluding that only under California's Unfair Competition Law could the anti-steering provisions be deemed anticompetitive for their rules barring app developers from telling users about, or directing them to, alternative payment options beyond the App Store. Most of the government enforcement actions against Google will not see trial in the new year. However, one suit from state enforcers consolidated with Epic's claims and proposed classes of Android consumers and developers of apps for the Play Store is eyeing trial in the Fall of 2022 over the search giant's Play Store policies, although that timing could change. A separate group of state attorneys general led by Texas had been eying trial for March or April 2022 on allegations centered on Google's facilitation of and alleged control over the market for placing ads displayed on third-party websites, well ahead of the private lawsuits or other enforcement actions, including one by the DOJ targeting Google's search and search advertising business. But the consolidation of the Texas-led suit with private cases in New York federal court, at least for pretrial purposes, has likely upended those plans, setting back the trial clock significantly. Nevertheless, there is still likely to be a great deal of progress in the cases in 2022, including the continuously contentious discovery process in the DOJ and state attorneys general case accusing Google of monopolizing search and search advertising through a web of contracts with phone companies and others. Evidence gleaned from third parties, according to Jim Mutchnik of Kirkland & Ellis LLP, "can take these cases in a variety of directions." Kirkland's Andrea Agathoklis Murino agrees. Third-party discovery, she said, helps "shine the spotlight." Even so, according to Murino, "the most compelling evidence is from the parties themselves," evidence Mutchnik said enforcers likely already gleaned from their pre-suit investigations. Waiting On The 7th Circuit's **'Patent Thicket' Decision** Almost a year after a Seventh Circuit panel heard oral arguments, a decision could come at any time on whether to revive Humira buyers' suit accusing AbbVie of using a "patent thicket" to illegally shield the blockbuster immunosuppressant from competition. The Humira purchasers launched their first-of-its-kind suit in March 2019, alleging that AbbVie's colossal "patent thicket" had empowered it to block less-expensive versions of the biologic treatment, called biosimilars, in violation of antitrust law. According to the suit, AbbVie also convinced companies such as Amgen Inc. and Sandoz Inc. to drop patent litigation over Humira and stay out of the U.S. until 2023 by giving them access to the $4 billion European market in October 2018. U.S. District Judge Manish Shah tossed the suit in June 2020 after finding AbbVie's patent litigation was **not objectively baseless** and was largely protected by the **Noerr-Pennington doctrine**, which shields certain activity intended to influence legislation or the enforcement of existing laws. The judge also found that AbbVie's settlements with potential biosimilar competitors were lawful because they allowed immediate entry in Europe in exchange for staying out of the U.S., and that the buyers failed to prove they were injured by the alleged activity. The closely watched appeal could send important signals about the legal footing for biologics' patent practices. Buyers seemed to encounter a divided panel in February oral arguments, with Circuit Judge Frank H. Easterbrook pressing plaintiffs to explain how they can accuse AbbVie of protecting the world's bestselling drug with a thicket containing many allegedly "overlapping and non-inventive" patents even though they were granted by the U.S. Patent Office. Conversely, Circuit Judge Diane P. Wood noted that, given the limited selection of patents from the thicket asserted in a given biosimilar case, it wouldn't matter if a patent outside that group was invalid. The plaintiffs argue it's enough to show that at least one company trying to produce a substitute biosimilar version would have prevailed in a challenge to Humira's exclusivity if not for the thicket comprised of some 132 patents — which appears to be the largest of any biologic treatment. That thicket, according to the plaintiffs, forced biosimilar companies, several of which are also **being sued in the current case**, to cut deals allowing earlier entry in European markets in 2018 — access valued in the hundreds of millions of dollars — in exchange for delaying entry into U.S. markets until 2023.

#### FTC has been trying the aff since 80s that’s Harkrider

#### Gugliuzza – plan leads to state enforcement

#### Third Circuit Decision thumps

**Other entities enforce the aff**

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

C. Improving Capability: Agency Cooperation and Project Selection The U.S. antitrust system is famous for its **decentralization of the power to prosecute**, giving **many entities** – **public agencies** (at both the **federal and state levels**), **consumers**, and **businesses** – competence to **enforce the federal antitrust laws**. The federal enforcement regime also coexists with state antitrust laws and with sectoral regulation, at the national and state levels, that include competition policy mandates. The **extraordinary decentralization** and **multiplicity of enforcement mechanisms** supply **valuable possibilities** for experimentation and **provide safeguards in case any single enforcement agent is ~~disabled~~** **[hamstringed](**e.g., **due to capture**, **resource austerity**, or **corruption**).75 Among public agencies, there is also the possibility that **federal** and **state** government institutions, while preserving the benefits of experimentation and redundancy, could improve performance through cooperation that allows them to perform tasks collectively that each could accomplish with great difficulty, or not at all, if they act in isolation. In the discussion below, we suggest approaches that preserve the multiplicity of actors in the existing U.S. regime but also promise to improve the performance of the entire system through better inter-agency cooperation – to integrate operations more fully “by contract” rather than a formal consolidation of functions in a smaller number of institutions.

**That’s specifically true with plan---it’s all done via private enforcement**

James D. **Hurwitz 85**, J.D., University of California (Berkeley) Law School, 1972; LL.M., University of London School of Economics and Political Science, 1973; Senior Staff Attorney, Federal Trade Commission, Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr. \*, 74 Geo. L.J. 65

Second, even assuming **Noerr's** boundaries are **perfectly drawn**, there nonetheless remain significant policy, **resource**, and practical **constraints** on the ability of **federal antitrust agencies** to redress abusive invocations of governmental process. Antitrust enforcement agencies **do not** and cannot commence litigation **every time** they observe likely antitrust violations. The agencies should limit themselves to situations in which, ideally: there is a demonstrable violation of antitrust law; there is harm is competition, as opposed to specific competitors; less adversarial and resource-intensive forms of enforcement (such as voluntary restraints or consent agreements) appear inappropriate or unpromising; there is a remedy within the agency's jurisdiction; 262 and application of that remedy will advance competition policy. 263 In addition, considerations of comity may inhibit antitrust enforcement agencies from bringing actions against abuses of another agency's processes. Such a case, if not artfully selected, prepared, and articulated, may suggest that the agency whose processes are abused cannot protect the integrity of its own proceedings, or that the antitrust agency has a greater ability to determine what constitutes an abuse than the petitioned agency's own procedural and substantive specialists. The fact that an agency does not act against an alleged abuse of its procedures should raise an inference that there was no abuse. Conversely, if an agency penalizes an abuse, it presumably applies the remedy it deems most appropriate to redress the situation. With the resulting harm minimal in either event, arguably the federal antitrust authorities should leave further action to private enforcement efforts. There will be exceptions, of course, such as when an agency is derelict in protecting its own processes or lacks sufficiently stringent or comprehensive remedial authority, but these situations probably will arise infrequently. **Thus**, shifting the **contours** of the **Noerr** doctrine will **not** predictably **jeopardize** or enhance the contributions **antitrust enforcement agencies** can make in forestalling or correcting abuses of administrative agency processes. Of course, it may be **necessary** to **contract** or expand Noerr in order to achieve **an optimal level of private enforcement**. It is not clear, however, that the present mix of public and private competition policy enforcement is undesirable or, assuming changes are needed, what specific doctrinal alterations would accomplish those changes without creating additional problems.

### 2AC — FTC Tradeoff Turn

**Noerr causes FTC trolling**

**Jurata 14** (John "Jay" Jurata, Jr. and Amisha R. Patel, 17TH ANNUAL ANTITRUST SYMPOSIUM: TAMING THE TROLLS: WHY ANTITRUST IS NOT A VIABLE SOLUTION FOR STOPPING PATENT ASSERTION ENTITIES, 21 Geo. Mason L. Rev. 1251)

While no consensus exists on whether Section 5 treatment is appropriate for PAEs under an unfair competition theory of liability, 233 there is less controversy regarding the FTC's authority to pursue claims against deceptive conduct. 234 Earlier this year, well-known **patent troll** MPHJ Technology Investments, LLC ("MPHJ") filed **suit** against the **FTC** in the Western District of Texas in an attempt to **stop the FTC** from taking action against MPHJ under a Section 5 deceptive conduct theory of liability. 235 [Footnote 235] Complaint at 41, MPHJ Tech. Invs., LLC v. FTC, No. 6:14-cv-11, (W.D. Tex. Jan. 13, 2014). In its complaint, MPHJ also alleges that it is bound by Federal Rule of Civil Procedure Rule 11 to engage in presuit investigation (i.e., infringement due diligence) by sending out demand letters, which were designed to identify potential infringers. Id. at 21; see also Hoffman-La Roche Inc. v. Invamed Inc., 213 F.3d 1359, 1360-61 (Fed. Cir. 2000). As with **traditional allegations** of antitrust liability, the FTC faces the same **Noerr-Pennington** hurdles that **protect** PAE enforcement activity absent proof of "**sham litigation" efforts**. See supra Part II.C.2. [End] Several state attorneys general also have filed suit to stop MPHJ from sending deceptive demand letters to unsophisticated end users. 236 Regardless of the outcome of these disputes, the message is clear: if PAEs engage in activity that is deceptive, they may be held liable under consumer protection laws.

**Existing standards waste time and resources**

**Helsel 95** (Scott D. Helsel, attorney, Preventing predatory abuses in litigation between business competitors: Focusing on a litigant's reasons for initiating the litigation to ensure a balance between the constitutional right to petition and the Sherman act's guarantee of fair competition in business, 36 Wm. & Mary L. Rev. 1135)

Proposing **a Fairer Test** To Determine When the **Decision To Litigate** Should Create **Antitrust Liability** The Supreme Court's holding in Columbia Pictures completely immunizes meritorious litigation from antitrust liability, regardless of the plaintiff's purpose in initiating the litigation. 139 In practice, Columbia Pictures has **limited** courts' inquiries as to whether litigation was "**objectively baseless**." 140 However, at least one court refused to extend the Court's test further than the facts specific to Columbia Pictures. In USSPOSCO Industries v. Contra Costa County Building and Construction Trades Council, 141 the Ninth Circuit held that Columbia Pictures "provides a strict two-step analysis to assess whether a single action constitutes sham petitioning." 142 When the complaint alleges a series of lawsuits, however, the court held that "[t]he inquiry in such cases is prospective: Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?" 143 Although there is no reason to predicate the direct purpose/incidental effect test on the number of filings made, 144 the 0000\*1162 court's holding does recognize the central focus placed on a litigant's subjective intent. 145 At least two concerns punctuate the Court's decision in Columbia Pictures. First, **a subjective test** that looks only to the litigant's **subjective** motivations in bringing the litigation may punish unjustly litigants who **legitimately** bring suits seeking **a favorable outcome** and may **chill** potential litigants from asserting untested **legal claims**. 146 Second, "**[a] subjective test** also could cause a **tremendous increase** in **time** and **judicial resources** spent to **punish** the rare litigant who lacks any concern for the judicial outcome of a meritorious lawsuit." 147

## CP — Multilat

### 2AC — AT: Multilat CP

#### Perm Do both

#### Perm do the CP

**Prohibition is declaring an activity “unlawful” under antitrust laws**

**Cavanagh 13** (Edward D. Cavanagh, Professor of Law, St. John's University School of Law, Antitrust Law and Economic Theory: Finding a Balance, 45 Loy. U. Chi. L.J. 123)

"Antitrust [law] is **not** that complicated." 1 -Richard M. Steuer.

The **prohibitions** of the **antitrust laws** are **disarmingly simple**. Section 1 of the Sherman Act **declares unlawful** any "contract, combination … or conspiracy … in **restraint** of trade." 2 Section 2 bars "monopolization, attempted monopolization or conspiracy to monopolize." 3 Section 7 of the Clayton Act prohibits acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 4 Richard Steuer has suggested that these statutory prohibitions can be distilled down to two types of behavior: ganging up and bullying. 5

**Delay---triggers the aff in the interim**

**Sokol 9** (D. Daniel Sokol, Assistant Professor, University of Florida Levin College of Law, Limiting Anticompetitive Government Interventions That Benefit Special Interests, 17 GEO. Mason L. REV. 119 (2009), <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1121&context=facultypub>, y2k)

The proposed WTO solution is not an exclusive solution. In conjunction with soft law institutions, it should build domestic capacity to limit or remove public restraints. Hard law solutions are infrequent whereas soft law fosters day-to-day interaction between agencies. Thus, soft law institutions play a critical role in shaping antitrust norms. They can help to identify public restraints, develop better practices to reduce them, and serve to educate regulators and the public at large as to the anticompetitive aspects of public restraints. A **soft law** solution on its own would be **very gradual**, and in the near-to-medium term allow a **significant amount** of **anticompetitive** conduct to go **unchallenged**, because of the **reluctance** to take on **significant public restraints** due to public choice concerns. The increased use of the WTO would help solve what soft law harmonization and domestic approaches cannot do as effectively in the near-to-medium term--overcome the domestic political process. It is the domestic political process which has created antitrust immunities and anticompetitive public restraints. Thus, revitalizing antitrust regulation and taking action against such restraints may require an international solution.

**Harmonization is impossible---no will for reciprocal agreements**

**Stephan 3** (Paul B., Professor @ UVA, an expert on international business, international dispute resolution and comparative law, Competitive Competition Law? An Essay Against International Cooperation (Spring 2003). Univ. of Virginia Law & Econ Research Paper No. 03-3, https://ssrn.com/abstract=405542 or <http://dx.doi.org/10.2139/ssrn.405542>, y2k)

B. International **Coordination** of **Regulatory Jurisdiction**

Recognizing the many **obstacles** to **substantive harmonization** of competition law, some governments and commentators have considered **coordination of jurisdiction** as an alternative way of addressing the **overlapping** jurisdiction problem. 71 The ideal is universal acceptance of jurisdictional criteria that would submit transactions to one, and only one, regulatory authority. The search for jurisdictional stability underlay the forty-year struggle between the United States and its trading partners over the “effects” test for antitrust jurisdiction as well as justifying the various agreements between the Justice Department and other states on antitrust enforcement.

1. Allocations of Regulatory Jurisdiction

In a simpler world of mechanical and formalistic jurisdictional tests, overlapping regulatory authority did not pose a problem. Only the sovereign on whose territory a transaction occurred would impose its rules.72 But with the rise of multijurisdictional transactions, territoriality came under pressure. U.S. courts initially relaxed the traditional test by requiring that only some part of the transaction in question occur in U.S. territory.73 By the end of World War II, the lower courts cast aside even that constraint, instead applying U.S. antitrust law to any action that had direct and intended effects in the United States.74 Europe and the Commonwealth countries resisted this approach, but by the end of the 1980s the EC had incorporated the effects test into its own competition law.75 Almost as soon as the effects test emerged as the U.S. standard for international antitrust, some courts and commentators proposed to limit it. It is unclear whether the critics saw the potential costs of multiple regulation or simply disliked the foreign criticism that the test generated. For whatever reason, their efforts dominated most discussion of international antitrust during the 1970s and 1980s. The leading treatise on international antitrust proposed that courts use a “rule of reason,” base on multiple criteria, to limit U.S. jurisdiction in cases that satisfied the effects test. The Ninth Circuit embraced this standard, and the Third Restatement of the Foreign Relations Law of the United States proclaimed it the general rule.76 The campaign to limit antitrust jurisdiction suffered a setback in 1993, when, in Hartford Fire Insurance Co. v. California,77 a narrow majority of the Supreme Court both endorsed the effects test and rejected the rule-of-reason limitation. But poor argumentation in that majority’s opinion has enabled litigants to keep alive the prospect of the rule of reason’s reemergence.78

As this account illustrates, disputes over jurisdictional scope typically take place in the judicial arena. Legislators typically fail to address the issue of extraterritorial regulation, and courts conventionally craft choice-of-law rules to fill in statutory lacunae. In the case of antitrust, however, some **intergovernmental agreements** also seek to **distribute** regulatory jurisdiction. The U.S. Justice Department has negotiated compacts with Australia, Canada, the EC, Japan and Mexico, among others.79

**Superficially**, these agreements appear to **address** the problems of **overlapping regulation**. A review of their terms, **however**, reveals that **they do not even create soft law**. Rather, the bilateral agreements express only a **desire to consult** and **cooperate**, and **do not** limit the **discretion** of regulatory authorities in **any** jurisdiction. **None of these instruments** has terms that a U.S. court could enforce, and the EC agreement entails judicial enforcement only in the sense that it provides the EC Commission with an additional grounds for making demands of national regulators.80 Each purports to embrace the rule of reason as the basic concept for allocating regulatory jurisdiction, but all use a long list of unweighted criteria that have the effect of removing almost all exercises of regulator review from attack. Moreover, the agreements do not seek to coordinate merger approval, the area that has caused the greatest recent tension. If anything, the bilateral agreements illustrate the conflicting interests that jurisdictions have in imposing their competition law on international transactions, and the difficulties of surrendering regulatory discretion in spite of the potential costs caused by overlapping constraints on private transactors.

Finally, one should note the Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters.81 This multilateral instrument, if adopted, might limit the power of a signatory state to exercise some regulatory jurisdiction over extraterritorial transactions, and would make civil judgments produced by proceedings that conform to the convention subject to execution by all parties to the Convention. But no one who follows these negotiations seriously believes that the United States will sign the Convention or that Congress would accede to it. Rather, even this modest attempt to reach an international consensus on the allocation of regulatory jurisdiction seems an entirely academic exercise.

To summarize, the courts have supplied three different strategies for allocating regulatory jurisdiction. The territorial approach would severely limit the scope of competition law in cases where production took place offshore. The effects test maximizes a state’s regulatory power. The rule of reason muddles these two approaches. In theory states might agree to concrete and specific allocations of authority, but nothing achieved to date meets this description. To the contrary, the agreements we have suggest the difficulty of imposing significant constraints on national regulatory power.

2. Critique

The use of rules that allocate regulatory jurisdiction as a substitute for unification of substantive law is most closely associated with U.S. corporate law. During the last decade Roberta Romano has produced an influential reappraisal of this subject.82 Her work has developed a conceptual apparatus hat translates into other substantive areas and, in due course, has led to a rich and lively scholarly debate about regulatory competition generally.83

As Romano observes, the challenge is choosing jurisdictional criteria that will not promote a flight by transactions to a jurisdiction that permits significant externalization of the transactions’ costs. The traditional critique of the U.S. choice-of-law rule for corporate law (place of incorporation) asserts that managers incorporate in jurisdictions that maximize their opportunities to enrich themselves at the expense of investors. The “race to the bottom” metaphor arose in this context.84

Romano’s contribution involved a demonstration that managers often will have to internalize the costs associated with rules that enabled them to exploit investors, and thus should have a preference for rules that maximize firm value. She found in corporate law a virtuous race to the top, where her predecessors had seen only a regrettable regulatory collapse. Stephen Choi and Andrew Guzman extended her argument to the international arena, advocating a regime that would allow the issuers of securities to choose which jurisdiction would regulate their transactions.85

A consensus does not exist regarding the validity of Romano’s empirical claims about U.S. corporate law, much less Choi and Guzman’s extension. The debate focuses mostly on the supply rather than the demand side, involving arguments over the willingness of states to compete for corporate charters.86 Most scholars, however, agree with the analytics underlying Romano’s claim: The degree to which transactors should have the freedom to choose which rules will govern their transaction depends primarily on externalities. To the extent that the ratio of externalized costs to benefits matches that of those internalized, the transactors, at least if they meet minimum standards of competence, should have the freedom to choose their regulatory environment. Under these conditions, a race to the top can occur.

Using Romano’s framework, the argument that competition regulation is susceptible to a race to the bottom, and therefore should not be subject to transactor choice, is straightforward. At its heart competition law involves producer conduct, either unilateral or in concert, that may have harmful effects on consumers. Allowing producers to choose which regime will regulate the harm they impose on consumers would make sense only if consumers could boycott producers that choose consumerunfriendly regimes. But competition law, at least in theory, focuses on exactly the kinds of producer actions that reduce consumer choice. In most instances, producer choices about competition law should have no significance.87

Straightforward analysis also demonstrates that none of the three rules used by the courts for allocating state regulatory jurisdiction will produce optimal outcomes. First, a universal commitment to territoriality would prevent a state from regulating offshore producers intending inefficiently to limit competition in the state’s market. Barring all such desirable regulation can be justified only if one can demonstrate that on balance extraterritorial regulation would decrease welfare. Some instances of extraterritorial regulation probably are inefficient. States can use competition law as a form of protection for local producers or as a means of attacking changes in foreign producers’ organizational structure that greatly reduces production costs at the price of some reduced consumer welfare. But some states might limit competition rules to cases that both maximize efficiency and increase consumer welfare. Moreover, in industries where production is moveable, and firms thus can induce states to compete for their activities, producers probably would exploit a territoriality regime to increase opportunities for monopoly rents.

Symmetrical arguments expose the flaws in the effects test. That approach multiplies the number of states with jurisdiction over transactions and thus increases the likelihood that private organizational decisions will confront governmental resistance. As with the territorial rule, whether governmental intervention will increase welfare constitutes an empirical consideration. There is no categorical reason to believe that the benefits from desirable competition rules permitted by the effects test necessarily will be greater that the costs generated by inefficient regulation.88 The most one can claim for the effects test is that is maximizes sovereignty by allowing states to choose the scope of their regulation free of international constraints. But maximization of sovereign choice is not necessarily a good thing. Arguments for expanding individual choice do not translate to the level of the state.89

The one approach that seems unambiguously flawed is the rule of reason. William Dodge misstates the case when he characterizes this approach as producing the same outcome as the territorial method.90 Rather, the rule of reason only increases the likelihood that one state, presumably the place of production, will impose its competition rules. But unlike either the territoriality rule or the effects test, the rule of reason contains a high degree of instability and unpredictability. It allows courts to balance unweighted factors on an ex post basis, making reliable guesses about regulatory jurisdiction difficult if not impossible. It creates legal risk without necessarily eliminating the costs of either under-regulation or over-regulation.

If the judicially crafted formulas for allocating jurisdiction produce suboptimal outcomes, should governments enter into agreements to allocate regulatory jurisdiction? The extant agreements suggest that we already have reached the limits of state-to-state bargains. No state seems will to submit to serious and enforceable constraints on its regulatory jurisdiction. Two reasons for this reluctance suggest themselves. First, states will not surrender jurisdiction to regulate without some clear and reliable expectation of what substantive rules other states will apply. Second, and following from the first, states recognize that the jurisdiction issue simply recasts the question of preferences for substantive competition rules.

This last point also suggests why a global bargain to allocate competition policy jurisdiction may be undesirable as well as unattainable. On reflection, the jurisdictional question presents exactly the same issues and problems as does substantive harmonization. There is no **neutral** template for allocation that **transcends the interests** engaged by **competition law,** and **no reason** to believe that those interests would **not** affect the structure of **any** international bargain. In particular, giving an international agency responsibility for supervising how states exercise their jurisdiction would give rise to exactly the same agency problems discussed in the previous section.

### 2AC — Legitimacy DA

**Conditioning the court ruling undermines judicial impartiality and independence**

**Dinh 8** (Viet Dinh, Viet D. Dinh is professor of law and codirector of the Asian Law and Policy Studies Program at Georgetown University Law Center, Threats to judicial independence, real & imagined, <https://www.amacad.org/publication/threats-judicial-independence-real-imagined>)

Up to this point, I have voiced some doubts that public criticism of judges poses a severe threat to judicial independence. But there is one way in which pervasive criticism of judges’ decisions can compromise the independence of the courts, without offsetting benefits in the form of democratic participation or judicial restraint. **A real danger exists** that the **publicly stated views** of political elites – activists, the news media, and officeholders – will **condition** the environment in which **judges operate**, leading career-minded members of the federal judiciary to **tailor** their **rulings** to **conform** to the views of the politically influential.

The **process** by which career judges – those who seek promotion to higher or more prestigious courts – can **internalize** elite opinion is fairly straightforward. It is only natural that many state-court judges and judges on lower federal courts would seek to advance through the ranks. They know that presidents and senators historically have preferred to appoint judges who have previous judicial experience.38 They also know that judges whose prior rulings have proved unpalatable to presidents or senators have had a harder time being nominated and confirmed to new judicial posts. Such career judges thus will have an incentive to placate the officeholders who they anticipate would play a role in their future elevation (as well as the private opinion-makers who would hold forth on their nominations). Career judges will have reason to decide cases based **not** just on their **honest estimation** of what the law **actually** requires, but also, at the margins, on their sense of what **outcomes** the political elites may favor.

My sense is that the threat here largely comes from members of the elite: the presidents who nominate judges, the senators who decide whether to confirm them, the journalists and editorialists who cover the process, and the activists who bring pressure to bear on their allies in office. The threat to judicial independence does not come from criticisms leveled by ordinary members of the public (except insofar as those citizens have the power, either individually or collectively, to move elites). Judicial independence has more to fear from an editorial in The Washington Post than from a posting by an anonymous blogger.

A few qualifications are in order. This analysis is not meant to malign the integrity of American judges, who in my experience strive mightily to resolve legal disputes in good faith and seek to minimize the influence of external considerations when they decide cases. It is only to recognize that judges are human beings and that, as humans, they are susceptible to self-interest as everyone else. Note also that elite criticism sometimes can have the opposite effect. It can cause judges to dig in their heels and refuse to buckle in the face of public sentiment. The need to maintain judicial independence notwithstanding the views of powerful elements of the public was one of the reasons the Supreme Court in Planned Parenthood v. Casey cited as a basis for retaining Roe v. Wade.

How, then, do we counter (or at least minimize) the natural incentive to curry favor with elites that is experienced by judges who hope for elevation to a higher court? A good starting point would be to lower the temperature of the judicial-appointments process. Judges who have no reason to fear that the president or Senate will scrutinize their rulings, line by line, in a hunt for evidence of ideological orthodoxy (or heresy), will be less prone to craft those rulings to be amenable to elite opinion. This is not a call for the Senate to abdicate its historically robust and important role in the confirmation process. It is only a call to focus on nominees’ general judicial philosophies and interpretive methodologies in lieu of their preferred outcomes in particular cases.

Few would dispute that judges must be “free to make decisions according to the law, without regard to political or public pressure.”39 But **judicial independence is not a one-way street**. We **insulate** our judges from day-to-day public pressures not because we want them to function as platonic guardians of the public interest, but precisely because in our constitutional system their role is so **carefully circumscribed**. In other words, **the principal beneficiaries** of judicial **independence** are not the judges themselves, but the litigants who appear before them in the hopes of getting a fair shake, and, ultimately, the American people who **look to** their **courts** for **impartiality**. Seen in this light, public criticism of the courts does not invariably present a threat to judicial independence, but actually can play a key role in ensuring that the judiciary remains independent. Such critiques are a way of calling on judges to remain faithful to their role as detached expounders of the law, and to eschew irrelevancies such as their own predilections and public opinion when deciding cases. As Chief Justice William Howard Taft cautioned, “Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism.”40

**That’s death-knell for rule of law and democracy**

**Levi 20** (David F. Levi, Family Professor of Law and Judicial Studies and Director of the Bolch Judicial Institute, Protecting Fair and Impartial Courts: Reflections on Judicial Independence, Summer 2020, Volume 104 Number 2, https://judicature.duke.edu/articles/protecting-fair-and-impartial-courts-reflections-on-judicial-independence/)

Why are fair and **impartial courts** important? And how does judicial independence preserve fairness and impartiality in our courts?” Perhaps the questions are too obvious. If you are an originalist, the answers are easy. The Framers and the ratifiers considered that **a fair** and **impartial judiciary** — one that followed the law and was not biased, partisan, intimidated, or seeking preferment — was **central** to a republican form of **government**. They believed that judicial independence was critical to fairness and impartiality. They thought of judicial independence in its two facets: **the decisional independence** of the judge from outside **pressures** or **inducements** when deciding a case, and the independence of the judicial branch as a whole, as a separate branch of three.

The Declaration of Independence prominently featured King George III’s attacks on both the judicial branch and the individual judge in its bill of particulars: “He has obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers.” And: “He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.” The founders were steeped in Montesquieu and other thinkers of the late 17th and early 18th century, and they came to believe that a “fair and impartial” judiciary was only possible were it embodied in a separate judicial branch and were the judges protected in their tenure and compensation.

Article III of the Constitution reflects this view: It provides for a separate branch of judges who themselves are insulated from pressure by lifetime tenure during good behavior and by a guaranteed livelihood. The Framers did not provide that the judges would be entirely divorced from the ebb and flow of political life. Their initial appointment was through the political branches, and they could be impeached. Nor were they autonomous. They were confined by law and by the assent of the other branches. Moreover, for much of their activity, they would be sharing the judicial power with citizens through the jury trial, which has such a prominent place in the Bill of Rights and our traditions.

Federalist 78 celebrated the separation of powers and the independent judiciary in often quoted language. Alexander Hamilton famously said: “The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” And, he said: “[A]s liberty can have nothing to fear from the judiciary alone, [it] would have everything to fear from its union with either of the other departments” — which is why separation and independence were so important.

Hamilton’s comments speak to us even now. Judges should not by party or for any other reason be united to the other branches. Nor should they be involved on their own initiative and authority in the redirection of the wealth of the society. Hamilton understood that the judicial spirit of independence, the judicial culture, would be essential to the arduous task of resisting encroachments by the other branches. He also understood that judges would exercise discretion, but that there was a distinction between the exercise of judgment and the guided exercise of discretion on the one hand and the imposition of personal will and preference on the other. He saw the importance of courageous judges to the preservation of individual liberty and to the amelioration of oppressive legislation. Judges in this Republic, protected by life tenure, would unite integrity and fortitude to wisdom and knowledge of the law. And this knowledge of and fealty to the law, gained through practice and study, would be the bulwark against judicial overreaching.

Even if the authority of the founding generation were not enough, it seems that, in fact and over time, their beliefs have proven themselves: Indeed, it is **not** possible to have a **successful democracy** without a **fair** and **impartial judiciary**, and it is not possible to have a fair and impartial judiciary that lacks independence in both of its aspects. Are there examples of **successful democracies** where the judicial function is **dependent** or subsumed in the **other branches** such that the **judicial branch** lacks institutional independence? Are there successful democracies where the judges lack **decisional independence** but are routinely subject to pressure or external command or inducement? The answer is **“no.”**

Americans need to have faith in the independence, fairness, and impartiality of our judges because they **look to** our **courts** as the place where they can get **a fair shake** whether their complaint is with the government or a business or a neighbor. That is a huge entrustment. I draw the following principles or assertions from what I have covered so far:

First, **fair** and **impartial** courts are essential to **a successful democracy;**

Second, judicial independence is not for the personal benefit of the judicial officer but so that the judiciary may be fair and impartial;

Third, there are two primary aspects to judicial independence: decisional and institutional;

Fourth, the selection, compensation and tenure of judicial officers is important to their independence;

Fifth, the judicial culture, the independent spirit of the judiciary, is critical. Judges must be careful to guard the culture and be true to it;

Sixth, the judiciary must not be in league with either of the other branches and must not supplant the role of those branches or be supplanted by them;

Seventh, while there must be separation, there must also be collaboration. The judiciary depends heavily on the other branches for its support, the execution of its orders, and the substance and procedures of the law itself. We consider that **judicial independence** serves the **rule of law**, but this is **only** the case if the judiciaries’ **rulings** command **assent** and **respect** and if the **substance of the law** and the prescribed **procedures** are **consistent** with our common sense of **justice** and **fair play**. In other words, the ecology of judging is important and depends mostly on the other branches;

And finally, we acknowledge that the **appearance of fairness and impartiality is** almost as **important** as the reality, and the two are not easily separated.

When we depart from these principles, **we put ourselves at risk**.

## CP — NGA

### 2AC — AT: NGA CP

**It fails**

Heather **Gerken 17**, J. Skelly Wright Professor of Law at Yale Law School, JD from the University of Michigan Law School, AB from Princeton University, and Joshua Resevz, JD from Yale Law School, BA in Political Science from Yale University, now Civil Attorney with the Appellate Staff at the United States Department of Justice, “Progressive Federalism: A User’s Guide”, Democracy: A Journal of Ideas, Number 44, Spring 2017, https://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/

To be sure, **uncooperative federalism will not always result in a progressive victory**. If President Trump spends enough political capital, he’ll **surely win some of his battles** against blue cities and states. But he cannot win the war. The federal government doesn’t have the resources to carry out all of the new Congress’s proposals. Spending time and money to crack down on marijuana, for example, takes resources away from fights over immigration or climate change.

**Courts strike it down**

Michael J. **Glennon 16**, Professor of International Law at the Fletcher School of Law and Diplomacy at Tufts University, JD from the University of Minnesota, and Robert D. Sloan, Professor of Law at the Boston University College of Law, JD from Yale University School of Law, Diploma from the Hague Academy of International Law, Foreign Affairs Federalism: The Myth of National Exclusivity

Yet in recent years, the Supreme Court has **not** honored the long- standing presumption against preemption. We will suggest that preemption ought to be applied more narrowly than it has been in **recent** foreign- affairs federalism cases. We will also suggest that the Court ought not overturn what states do within the international realm— as it has recently— under the guise of enforcing an ill- conceived dormant foreign- affairs doctrine. Nor should it routinely invoke a broad conception of the dormant Foreign Commerce Clause to preempt state commercial regulations. We discuss these issues in Chapters 4 and 5, respectively. Perhaps, at the extreme margins, the Court should properly police these judgments in unusual cases that arise in unforeseeable circumstances and in the face of congressional and presidential silence. But as a rule, settled constitutional principles allocate such decisions to the political branches of the federal and state governments. We should be leery of giving the judiciary power to adjudicate the allocation of foreign affairs authority as between the federal and state governments under indeterminate or vague standards, because in so doing, even with the best of intentions, courts too often **wander out of their lane**. The difficulty in distinguishing foreign from domestic affairs, as others have pointed out, could **subject virtually any state law to judicial invalidation**, resulting in a massive transfer of lawmaking power to the federal courts at the expense of the states.25 The Court ought to decide these and other foreign affairs questions, not by giving controlling force to factitious distinctions— such as the notion that state activities can be classified as inherently international or domestic— but by considering, at the outset, whether as a practical matter the activity can and should be judicially controlled in a consistent and principled fashion.26 A paramount objective, we suggest, should be to simplify constitutional analysis— to provide greater predictability, giving everyone who cares as much notice as possible about what’s permissible and what’s not.

# 1AR

## Advantage 1

### 1AR — High Now

#### Sham litigation is at a decade-long high – specifically, the tech industry is at risk

Devin A. Kothari 20 et Al. Devin A. Kothari is a partner in the Intellectual Property; Digital Media, Technology & Privacy; Advertising, Marketing & Promotions; and Litigation Practice Groups of Davis & Gilbert. Marc J. Rachman is a partner in the Litigation and Intellectual Property Practice Groups of Davis & Gilbert. Kate Barry is an associate in the Advertising, Marketing & Promotions; Intellectual Property; Entertainment, Media & Sports; and Digital Media, Technology & Privacy Practice Groups of Davis & Gilbert. “Patents >> Patent Troll Activity Likely to Continue to Rise” <https://www.dglaw.com/press-alert-details.cfm?id=1138>

For nearly half a decade, patent troll suits have been on the decline. Indeed, as we reported last year, the Supreme Court has gone out of its way to curb the worst patent troll abuses in order to protect innovators and call the viability of many patent troll litigations into question. This started in 2014, with the seminal Alice v. CLS Bank (Alice) decision that questioned the patent eligibility of certain software and business methods. Then in 2018, the Supreme Court took aim at forum shopping by patent plaintiffs in TC Heartland v. Kraft Foods (TC Heartland). These two cases led to an overall decline in patent troll lawsuits over a period of years. However, **developments** from the Federal Circuit in 2019 **introduced** some **uncertainty into** the **patent landscape**, providing an opportunity for patent trolls to bring and maintain their litigations. For example, In Cellspin Soft v. Garmin USA (Cellspin), Garmin won its motion to dismiss the case on the ground that Cellspin Soft’s patent for uploading data from a device, such as a GPS tracker, was too abstract as a pure matter of law and, therefore, should be invalidated. However, the Federal Circuit court disagreed, holding that the patent eligibility analysis under Alice presented questions of fact. The case followed similar decisions from the court in Berkheimer v. HP and Aatrix Software v. Green Shades (Berkheimer), refusing to invalidate patents covering abstract ideas or intangible embodiments and showing a growing trend toward disallowing patent eligibility claims to be decided at the motion to dismiss or summary judgment stage. Despite hopes that the Supreme Court would provide additional guidance on Alice or TC Heartland, the Court has refused to take on cases addressing these issues. In January 2020, the Court denied the petitions for certiorari in Cellspin and Berkheimer, as well as several other patent eligibility cases, signaling that the Court is disinterested in providing additional clarity on these issues, or is hoping that Congress will address the issue through the legislative process. Draft bills introduced in Congress last year to codify and reform patent eligibility were also unsuccessful. In this environment of uncertainty, patent trolls have gained momentum in 2020, and the COVID-19 pandemic and resulting economic upheaval has done little to deter patent suits. In fact, **non-practicing entities have exploited the boom in Covid-related innovation**. In the first few months of the pandemic, **patent trolls targeted technology and healthcare companies** responding to the crisis, with the makers of tests and ventilators among those facing patent suits. Although public backlash led some patent plaintiffs to voluntarily drop their claims and offer royalty-free licenses for COVID-19-related uses, **the specter of patent litigation presents an ongoing concern** **for** companies involved in pandemic response efforts, and **innovators across all sectors**. Key Takeaways: The ability to quickly dismiss a patent troll lawsuit under Alice and TC Heartland has been curtailed, which may lead to increased costs in defending claims. COVID-19 has not slowed the tide of patent troll suits, which have continued to be filed at a steady pace. Companies should establish a comprehensive strategy to manage patent risk, including filing for and enforcing patents, identifying and clearing patent risks, instituting contractual strategies for risk-shifting, and defending allegations of patent infringement.

## K — Cap

### 1AR — War

#### Growth solves nuclear war.

Henricksen 17, \*Thomas H., emeritus senior fellow at the Hoover Institution; (March 23rd, 2017, “Post-American World Order,” Hoover Institution, <http://www.hoover.org/research/post-american-world-order>)

What Is To Be Done?

The first marching order is to dodge any kind of perpetual war of the sort that George Orwell outlined in  “1984,” which engulfed the three super states of Eastasia, Eurasia, and Oceania, and made possible the totalitarian Big Brother regime. A long-running Cold War-type confrontation would almost certainly take another form than the one that ran from 1945 until the downfall of the Soviet Union.

What prescriptions can be offered in the face of the escalating competition among the three global powers? First, by staying militarily and economically strong, the United States will have the resources to deter its peers’ hawkish behavior that might otherwise trigger a major conflict. Judging by the history of the Cold War, the coming strategic chess match with Russia and China will prove tense and demanding—since all the countries boast nuclear arms and long-range ballistic missiles. Next, the United States should widen and sustain willing coalitions of partners, something at which America excels, and at which China and Russia fail conspicuously.

There can be little room for error in fraught crises among nuclear-weaponized and hostile powers. Short- and long-term standoffs are likely, as they were during the Cold War. Thus, the playbook, in part, involves a waiting game in which each power looks to its rivals to suffer grievous internal problems which could entail a collapse, as happened to the Soviet Union.

Some Chinese and Russian experts predict grave domestic problems for each other. They also entertain similar thoughts about the United States, which they view as terminally decadent and catastrophically polarized over politics, ethnicity, and the future direction of the country. So, the brewing three-way struggle also involves a systemic contest, which will test the competitors’ economic and political institutions.

At this juncture, the world is entering a standoff among the three great and several not-so-great powers. Averting war, while defending our interests, will prove a challenge, calling for deft policy, political endurance, and economic growth, as well as sufficient military force to keep at bay aggressive states or prevail over them if ever a war breaks out.

#### Collapse causes violent nationalism, not a transition

Buchs, PhD, ’19 [Milena, Associate Professor in Sustainability, Economics and Low Carbon Transitions @University of Leeds, “Challenges for the degrowth transition: The debate about wellbeing,” *Futures*, Volume 105, 2019, pp. 155-165]

The social practices lens is also useful for thinking about possible wellbeing implications of rapid social change more generally, and a transition away from a growth-based economy specifically. While the concept of social practices inherently implies the pos- sibility of change (with its focus on agency and creativity), it equally strongly highlights the structural aspects of practices which provide stability and orientation. During times of rapid social transitions, social norms and ‘mental infrastructures’ often lag behind, creating disorientation, social conflict, and negative impacts on wellbeing (Büchs & Koch, 2017: ch. 6).

Stability of structural dimensions of social practices offers orientation and some extent of predictability of how oneself and other people are likely to act in the future, providing a framework within which flexibility and change are possible. This orienting function of structural dimensions of practices is likely to be an important condition for people to form reasonably stable identities and relationships – key ingredients for wellbeing. Examples from classical and contemporary sociological and psychological research suggest that different speeds of changing social structures can establish misalignments and disruptions of social practices which can, in turn, negatively influence health and other wellbeing outcomes. For instance, in his classical study, Durkheim presents suicide at least partly as an outcome of a failure of cultural resources to provide meaning and orientation in the context of other, more rapid social changes (Durkheim, 2006; Vega & Rumbaut, 1991: 375). This idea also links to Bourdieu’s concept of the “hysteresis effect”. Here, Bourdieu emphasises that, especially during phases of social transition, people’s habitus and “objective” social circumstances can become disjointed: as a result of hysteresis, dispositions can be “out of line with the field and with the ‘collective expectations’ which are constitutive of its normality. This is the case, in particular, when a field undergoes a major crisis and its regularities (even its rules) are profoundly changed” (Bourdieu, 2000: 160). This can contribute to a deterioration of people’s wellbeing as it makes them feel “out of place” or let them be perceived that way, “plung[ing] them deeper into failure” (Bourdieu, 2000: 161) because they cannot make use of new opportunities or are mistreated or socially excluded by others.

Empirical research which partly builds on the idea of hysteresis has shown that wide-ranging organisational change can have a range of negative effects on people’s health and mortality (Ferrie et al., 1998; McDonough & Polzer, 2012). One study found that across 174 countries, several measures of wellbeing and social performance, including life satisfaction, health, safety and trust, voice and accountability, were highest in periods of economic stability, but lower in times of GDP growth or contraction (O’Neill, 2015); and other studies concluded that life expectancy can be negatively affected by both rapid economic growth and contraction (Notzon et al., 1998; Szreter, 1999).

Several scholars have recently highlighted the potential for social conflict inherent in (rapid) social change. For instance, Maja Göpel (2016: 49) remarks: “Unsurprisingly, the navigation or transition phase in shifting paradigms as well as governance solutions is marked by chaos, politicization, unease and power-ridden struggles”. Wolfgang Streeck has issued similar warnings (Streeck et al., 2016: 169). It is not difficult to see how such scenarios bear the potential of undermining some of the fundamental conditions that are necessary for the satisfaction of basic needs as discussed above, and hence the danger of generating substantial wellbeing losses for current and near-future generations.

In the current context, it is very difficult to imagine that we might be able to observe a rapid and radical cultural change in which people adopt identities and related lifestyles that value intrinsically motivated activities over pursuing satisfaction and status through careers and consumption. Even more worryingly, political events in Europe, the United States and elsewhere since the ‘Great Crash’ of 2008 indicate that times of negative or stagnant growth can provide a breeding ground for populist, nationalistic and anti-democratic movements. Economic insecurity, a perceived threat of established identities through migrants, and deep mistrust against ‘elite’ politicians are amongst the main explanations for previously unimaginable events such as the Brexit vote, Trump presidency, and recent electoral successes for far right-wing parties in a range of European countries.

### 1AR — Alt

#### 2. transformation sucks—requires a long, drawn out, multigenerational struggle on a scale unseen since the 60s—The ALT causes right-wing populism.

Milena Büchs and Max Koch 19, Dr Milena Buchs is an environmental social scientist and specialises on sustainable welfare and wellbeing, Max Koch is Professor in the School of Social Work at Lund University, “Challenges for the degrowth transition: The debate about wellbeing,” Futures, Volume 105, January 2019, Pages 155-165, https://www.sciencedirect.com/science/article/pii/S0016328718300715

3.2. Implications of rapidly transforming social systems

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