## 1AC

**Plan**

**The United States federal government should narrow the Noerr-Pennington antitrust immunity.**

**1AC – Lobbying**

**Noerr-Pennington is an antitrust doctrine that immunizes government petitioning as free speech. This expansion has given corporations a blank-check for lobbying**

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We live in a time when concerns about influence over the American political process by powerful private interests have reached an apogee, both on the left and on the right. Among the laws originally intended to fight excessive private influence over republican institutions were the antitrust laws of the 1890–1914 period, whose sponsors were concerned with monopoly, particularly its influence over legislatures and politicians. While no one would claim that the antitrust laws were meant to be comprehensive anticorruption laws, there can be little question that they were passed with concerns about the political influence of powerful firms and industry cartels. Since the 1960s, however, antitrust law’s **scrutiny** of corrupt and deceptive political practices has **been sharply limited by** the **Noerr**-Pennington doctrine,1 which provides immunity to antitrust liability for conduct that can be described as political or legal advocacy. The doctrine was created through apparent First Amendment avoidance, based on the premise that the Sherman Act could not have been intended to interfere with a right to petition government.2 The Noerr decision, dating from 1961, was strained when it was decided and has not aged well. As an interpretation of the antitrust laws, it ignored Congressional concern with political mischief undertaken by conspiracy or monopoly. Its legitimacy has always rested on avoidance of the First Amendment, and while Noerr itself may have legitimately reflected such avoidance, the subsequent growth of a Noerr immunity has blown past any First Amendment-driven defense of its existence. For that reason, others have suggested a reformulation of the doctrine.3 The better answer is that, lacking constitutional or statutory foundation, Noerr should be overruled. The First Amendment guarantees freedom of speech, assembly, and “to petition the government for a redress of grievances.” It therefore protects efforts to influence political debate as well as legitimate petitioning in the legislative, judicial or administrative processes.4 The First Amendment does not, however create a right to bribe government officials, deceive agencies, file false statements, or abuse government process through repeated filings designed only to injure a competitor. **Nonetheless, each of these activities has,** in some courts at least, **been granted immunity under** the overgrown **Noerr** immunity.5 It is an extraconstitutional outlier ripe for reexamination. The case for overruling Noerr is buttressed by the fact that, since its decision, Noerr’s theoretical foundations have weakened,6 and are “wobbly and moth-eaten.” 7 Written before the dawn of public choice theory or contemporary understanding of interest group influence, it relies on an exceptionally stylized model of politics that understates the potential for corruption and denial of majority will. Moreover, several decades of experience with a judge-made immunity have shown a pronounced tendency for doctrinal creep -- a well-known problem for doctrines anchored in avoidance (so-called “avoidance creep.”). 8 Constitutional avoidance, as Charlotte Garden argues, yields decisions that deliberately interpret the statute in a manner at odds with Congressional intent. Subsequent decisions building on that interpretation can easily leave behind both Congressional intent and the original justifications for the original reason for the avoidance.9 The result is a free-floating doctrine, as with Noerr, that becomes untethered to either statutory goals or Constitutional principle. Overruling Noerr would not make political petitioning illegal. It would, instead, require defendants to rely on the First Amendment when seeking to defend what would otherwise be conduct that is illegal under the antitrust laws. Doctrinally, this is to force courts to address whether conduct in question is actually an antitrust violation, and if, so whether it is protected by the First Amendment or not, drawing on an established jurisprudence for some of the problems presented in the Noerr context. For example, while the First Amendment protects false statements in some contexts,10 it has never protected perjury, or the making of false statements to government agencies.11 It should take no great leap of insight to conclude that the First Amendment might be the superior vehicle for adjudging a defendant’s First Amendment interests.12 Noerr could be overruled by the Supreme Court in an appropriate case. It could also be overruled by Congress. The legislature, of course, is not in a position to overrule the aspects of Noerr immunity that are anchored in the First Amendment.13 But Congress could do what this article calls for, namely, return the immunities granted political speech and petitioning to their Constitutional limits, while reaffirming the purposes of the antitrust laws. Part I outlines where Noerr itself went wrong; Part II, details the problem of doctrinal creep; Part III argues that Noerr should be overruled; and Part IV details what a First Amendment replacement would look like. **I. Where Noerr went wrong** The Noerr litigation arose out of a long-running battle over the 1930s through 1950s between two natural competitors: the railroad and the trucking industry, whose mutual animosity was the stuff of legend. The railroads were the older of the two industries, and had already had many run-ins with the antitrust laws.14 By the 1930s the railroads began to suffer from the competitive inroads being made by the newer trucking industry. In response, the railroads began a series of anti-truck campaigns to hold their market position by any means necessary. The railroads began using a technique then relatively new to the business world: a public relations campaign piloted through front groups and promulgated through the mass media. Among the front groups used were “the Empire State Transport League” the “Save Our Highways Clubs,” and the “New Jersey Tax Foundation.” 15 These groups portrayed truckers as villainous creatures whose driving of heavy vehicles destroyed bridges, fractured roads, and created other public dangers. As the trial court found, the campaign was “made to appear as spontaneously expressed views of independent persons and civic groups when, in fact, it was largely prepared and produced by [a PR firm] and paid for by the railroads.”16 The court summarized the approach as a "deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information.”17 The trial judge wrote that “I prefer to treat the whole procedure in its true light, which is the technique of the ‘Big Lie.’”18 If unseemly, however, the campaigns were unquestionably legislative campaigns. The railroads had clear, if anticompetitive, political goals: to lower the statutory weight limits that kept truckers out of heavy transport and to increase the taxes they paid. To that end, the front groups presented data (allegedly false, though we don’t know for sure) that, they claimed, revealed the damage done by trucks to roads and bridges. The other main deception, at least as found by the district court, concerned the question of just whom was presenting the information.19 As suggested already, the complaints were made to seem as if they were from disinterested third parties, concerned citizens, when in fact, they were not. As a First Amendment case, Noerr is not an easy one. The railroads have in their favor that they were associating to engage in political speech, to present information relevant to government, and ask for changes in the law. As the Supreme Court put it “No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices.”20 The core speech at issue, moreover, if not impartial, was of value, expressing, as it did, the view that the truckers damaged public roads. More generally, as the Court held, a rule that would “disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information.”21 The trickier part comes from the deception: the use of the front groups to deceive government as to the source of the information presented, and the allegation that some of the information provided was false. No one has ever suggested that bans on impersonation in an official context violate the First Amendment, and the crime of making false statements to government is routinely prosecuted.22 The First Amendment defense is particularly challenging if it is true that plaintiffs intentionally and maliciously submitted false information to achieve an anticompetitive result — fraud on the legislature — and therefore were like the applicant who submits false information to obtain a patent.23 But if Noerr was just a case of creating a false impression of public support, something which is certainly unethical but happens with distressing regularity in public discourse, the question remains difficult. But leaving the First Amendment aside, what was the proper construction of the Sherman Act? Imagine the same case without government as the target of the campaign. It seems implausible that the Sherman Act would grant an automatic immunity in a case where an industry conspires **to exclude a competitor** by manipulating a body with the power to determine the conditions of competition. An effort to hamstring a rival by rigging a process to set exclusionary standards was the kind of thing condemned in cases like Allied Tube and Broadcom Corp. v. Qualcomm Inc.24 It is the kind of thing meant for a rule of reason analysis: as Justice Brandeis wrote in Chicago Board of Trade, the question would be whether the conduct is such that “promotes competition, or whether it is such as may suppress or even destroy competition….”25 Perhaps the railroads would have argued the weight-limits were competition enhancing in some way, yet it seems more likely that they were more of a bad-faith effort to exclude their competitors. But Noerr did involve bodies of government, and not a standard setting body. That could lead some to believe that the campaigns, even if deceptive, are still not the kind of thing that the Sherman Act or other antitrust laws were intended to have jurisdiction over. Yet even the quickest tour of the history of the passage of the Sherman, Clayton and FTC Acts reveals that this is a grossly mistaken view of what Congress was concerned with when it passed the antitrust laws. The famous editorial cartoons of the Standard Oil Octopus always have its tentacles encircling legislatures.26 More specifically, among the abuses of which companies like Standard Oil, and later, J.P. Morgan’s New Haven railroad were accused was the bribing of public officials to disadvantage smaller competitors, or to wrongly grant monopolies.27 The legislative history is replete with evidence of such concerns.28 As Robert Faulker writes, “there is nothing on the face of the [Sherman] Act to suggest that the Fifty-first Congress wanted to exempt concerted, unethical and anti-competitive activity.”29 He adds that it would be strange to do so “on the ironic premise that the Act permits a business combination to destroy or do grievous harm to a competitor by applying large sums of money to deceive elected officials.”30 The best reading of the Sherman and Clayton Act is that the framers had an overarching concern about monopoly influence over democratic institutions, but also a more specific concern with the obtaining or maintaining monopoly through corrupt means, and especially through bribery or fraud.31 For that reason, whether in pursuit of monopolization or the restraint of trade, corruption and fraud on the government ought to be understood as one form of prohibited conduct. If that’s so, it leads to the conclusion that Noerr must be understood as an exercise in constitutional avoidance, a conclusion many other scholars have also reached; or alternatively, that the deception wasn’t quite bad enough to amount to fraud on the legislature.32 That ambiguity is what makes the case frustrating, for despite Justice Black’s bold writing, **the Noerr opinion, by inventing an immunity instead of resolving the question, took the easy way out.** At this point we need briefly address an alternative view of Noerr that has nothing to do with the First Amendment but has shown up in Supreme Court opinions. That view holds Noerr to be a necessary implication of Parker immunity (and therefore, potentially, independent of the First Amendment). Parker stands for the proposition that state action is immune from antitrust scrutiny.33 Hence, if the federal government, or even the states, decide to establish a monopoly, that is nonetheless not a violation of the antitrust laws. That has led some — most notably Justice Scalia — to suggest that Noerr immunity is simply “a corollary to Parker” because as it is within the rights of government act anticompetitively, “the federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government.”34 If superficially appealing, this logic evaporates on further inspection. To pursue monopoly is not the same thing as to pursue it corruptly, but the view just described brushes over the difference. As already discussed the framers of the Sherman Act considered the activity of corruptly seeking of a state-granted monopolies to be within the concerns of the law, especially through bribery, threats or deception. Even if government can override the antitrust laws, it does not necessarily follow that the courts need immunize efforts to obtain state action, especially if they should go beyond the normal protections for advocacy provided by the First Amendment. This conclusion is reinforced by examining immunities outside of the antitrust context there is no such blanket “corollary” to be found. The government, unlike a private citizen, has special immunities when it puts people to death or seizes property. Yet those seeking to convince government to use those powers enjoy no special immunity to bribery laws, lobbying laws, or other criminal prohibitions. They have, instead, only the protections for political advocacy that come from the First Amendment. The existence of a government power has, outside of antitrust, never been read as a license to pursue it using independently illegal means. **It all returns to question of what the First Amendment protects**, which returns us to the case for overruling Noerr. These are conclusions that are further buttressed by the Court’s recognition of a sham exception in Noerr.35 Were Noerr meant to be the perfect mirror image of Parker, it might be thought that any purported effort to influence government, no matter how distasteful, might be thought to be immunized. But the sham exception better suggests First Amendment avoidance, because it tracks the well-known position that the First Amendment has limits, and does not protect everything that might plausibly be described as speech or petitioning. The sham exception looks very much like a placeholder for the limits of the First Amendment. Just like conduct falsely claiming to be speech is not protected by the First Amendment, **anti-competitive activity falsely claiming to be political petitioning is not afforded undue protection.** 36 Finally, the idea that Noerr was constitutional avoidance is buttressed by other cases finding fraud on the government to be actionable under the antitrust laws. In Walker Process, a party was alleged to have intentionally lied to the patent office about the state of the “prior art” so as to obtain a patent.37 The Court declined to create any special immunity for such conduct, instead stating that “the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present.”38 That result impeaches any idea that the Sherman Act was not meant to reach efforts to defraud government for anticompetitive purpose. All this suggests that while constitutional avoidance may be appropriate in some cases, it was mistaken in Noerr, because Noerr was hardly a one-off. It gave birth to a judge-made immunity, and in the process left a critical matter undetermined: **it would always be unclear whether a court**, **invoking Noerr, need rely on Constitutional avoidance** to do so, and thereby conduct a First Amendment analysis; **or whether it was free to just invoke Noerr as a free-floating immunity**. That would, in time, allow the immunity to expand far beyond any constitutional or statutory mandate. A different way of stating the critique is this: Noerr does not give the courts the tools or mandate to address the competing values of the First Amendment and the Antitrust laws in the cases it addresses. Unlike, say, the overlap between patent and antitrust, where the conflict is made explicit, it was instead buried by constitutional avoidance. **That burial would lead the courts to expand the immunity in directions entirely unrelated to First Amendment value**, a matter to which we now turn. The Relationship between the First Amendment and Antitrust Laws The antitrust laws and the First Amendment have shared goals. Both laws envision open societies and have their anchor in liberty. Both take as their device the promotion of competition in actual or metaphorical markets. And both have been justified as means for preventing abuses of power, whether by government or the monopolist. There is even some similarity in their methods: what is censorship if not the exclusion of a competitor from the marketplace of ideas?39 As laws serving roughly the same ends with similar philosophies, it might seem unlikely that the laws might come into conflict. But the tension we’ve seen arises from the fact that, as Noerr and similar cases show, the Firest Amendment blesses conduct -- petitioning -- that can be used to obtain anti-competitive ends. However, the First Amendment does not protect everything that might conceivably be called “speech,” suggesting it might be important to take a closer look at just what speech values are implicated in political influence campaigns. 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 “dirty” as widely believed (“clean coal”). And it might formally petition government with economic arguments for abandoning its subsidies of wind power. These activities are all within the core of First Amendment protection. The strongest argument for their protection is that, by providing information to government and the public relevant to an important debate, they serve the process of democratic selfgovernment, 40 both through the formation of public opinion and the provision of information necessary to making important public decisions. 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 more in that context. 41 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 they, at some point, they disappear entirely. This point 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. It might, next, publish demonstrably false, or even defamatory information, such as the suggestion that wind turbines are highly harmful to human health (“wind power syndrome”).42 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. Or it, at the extreme, 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 non-existent. 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.43 On the antitrust side of the ledger, the strength of the government’s interests would similarly seem to depend on the spectrum of 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 both by case law condemning intentional monopolization,44 deception, 45 and other tortious conduct, like fraud or sabotage. This short section cannot capture every conceivable type of advocacy campaign. But what is notably lacking in Noerr is any consideration of the relative strength 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 justifiable boundary.** II. Leaving behind the Constitution If it might originally have been defended as an exercise in Constitutional avoidance, over the decades the Noerr doctrine has grown into its own creature, too unconnected and insensitive to the competing concerns of antitrust policy and the First Amendment. At its worst, **it has provided immunities to** classes of conduct, like **bribery**, **abuse of government process**, **and lying to government** which it seems clear that the antitrust laws were meant to punish and for which there are no constitutional protections. The 1991 decision City of Columbia v. Omni Outdoor Advertising, Inc did the most to make the doctrine insensitive to the competing concerns in this area.46 The jury, at trial, had found a corrupt conspiracy between the city of Columbia and a billboard company. Despite the fact that the First Amendment does not generally protect conspiracies, **Justice Scalia’s majority** nonetheless **held the conduct protected by Noerr.47** The key doctrinal move in Omni was to limit **Noerr’s sham exception** — **which**, as we’ve seen **can be understood as a proxy for the First Amendment’s limits**. The Court limited it to one category of sham, bad faith abuse of the political process, and declined to find any other possible exceptions, such as the “conspiracy” exception found by the court of appeals. Given that the sham exception can be understood as standing in for the limits of the First Amendment, **Omni gave courts an open door to use Noerr to protect conduct that would not be protected by the First Amendment.** Since that time, Noerr has, in lower courts, come to protect a range of conduct that would not be protected by the First Amendment, **including** not just **conspiracy**, but **bribery, false statements to government, deceit, and even abuse of process**—so long as some political objective can be claimed. Over-broad Noerr immunity and an underinclusive sham exception made courts reluctant to recognize areas of clearly anticompetitive action that should not enjoy any constitutional protection. Consider the following example of how Noerr is invoked to immunize bribery. In 2001, a district court in Louisiana heard allegations that a riverboat company was bribing government officials so as to prevent competitors from obtaining a license to operate.48 The court rejected the idea that “bribery, extortion and corruption” would “abrogate antitrust immunity.”49 It did so based on the premise that even corrupt and criminal activity is immune from antitrust scrutiny, under Omni, so long as the ultimate object is a favorable political outcome.50 In another departure from First Amendment principle, some courts have also interpreted Noerr to protect the making of false statements to government. For example, in a 2013 dispute between two asphalt firms, one alleged the other had lied to municipal governments about the relevant regulations so as to trick the governments into excluding rivals.48 When targeted in an antitrust suit the court upheld immunity,51 despite the analogy to obtaining a fraudulent patent condemned in Walker Process,52 evidence of effects on competition, and the fact the First Amendment, with rare exceptions, does not protect false statements made to government. Finally, there are **courts** that **have**, unaccountably, **immunized conduct that is nearly impossible to describe as political speech or petitioning**. Conduct that Noerr itself named as unprotected — the use of political process as an anticompetitive weapon (such as through repetitive, baseless filings). 53 Even when the goal of the filing is for “the principle purpose of harming [a] competitor,” courts have refused to consider the filing a sham.54 Courts have protected series of filings that petitioners never expected to win on.55 Similarly they have fully ignored distinction between standards for single and multiple filings and insisted on firm proof of “objective unreasonableness” for each action despite the obvious increased harm that comes from fielding many specious claims.56 Other examples of dubious extensions to Noerr include an immunity premised on the communication of a list of school accreditation to the state, 57 private and secret meetings at a governor’s mansion,58 and even boycotting competitors.59 At the risk of stating the obvious, the First Amendment goals served by immunizing these forms of conduct is unclear at best. It is worth pointing out that not every court has ignored the First Amendment foundations of the Noerr doctrine. 60 Courts have sometimes insisted on a First Amendment analysis prior to granting Noerr immunity. For example, consider litigation from the early 2000s, centered on allegations that a drug manufacturer sought to delay the entry of competitive generic drugs by wrongly listing its patent in the FDA’s orange book. In rejecting a Noerr defense, the district court agreed with the FTC that the listing was not a petition protected by the First Amendment, and therefore not entitled to Noerr immunity. It did so on the premise that, as the FTC argued, the FDA’s actions were ministerial, as opposed to discretionary: there is no Noerr immunity when the “government does not perform any independent review of the validity of the statements, does not make or issue any intervening judgment and instead acts in direct reliance on the private party's representations.” 61 Similarly, the FTC, at least, believes that misrepresentative communications to government are not protected by the First Amendment, and also not protected by Noerr.62

**The plan solves by restricting the exemption, making lobbying subject to antitrust scrutiny**

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IV. RETURNING TO THE MISTAKE AND CONSEQUENCES OF THEME PROMOTIONS With the understanding that Noerr-Pennington is primarily a doctrine based on an interpretation of Federal Antitrust law, it is now possible to see how **courts may be extending** constitutional **protections** **for** **petitioning** activity **outside** the context of **antitrust law** based on a misinterpretation of Supreme Court precedent. Returning to the example from the introduction of this Article, recall that in Theme Promotions,Inc. v. News Am. Mktg. FS1153 the Ninth Circuit was presented with a novel question of law: to what extent should defendants in common law tort suits be afforded petitioning immunity?154 The court somewhat summarily determined that the Noerr-Pennington doctrine should apply to the exact same extent as in the antitrust context where it was developed: "'There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right ofpetition than can a statutory claim such as antitrust.' ... [W]e hold that the Noerr-Pennington doctrine applies to Theme's state law tortious interference with prospective economic advantage claims." 155 Under a statutory interpretation reading of Noerr, this reasoning is mistaken. While it may be the case that a common-law tort doctrine may "abridge or chill the constitutional right of petition" to the same extent as an antitrust claim, the Noerr-Pennington doctrine **is not a statement** by the Supreme Court as to the level of protection the First Amendment right to petition mandates in antitrust law, but rather is a doctrine which delineates a greater level of protection for petitioning activity in the context of antitrust claims based on an interpretation of federal antitrust law. In fact, the closest the Court has come to making a statement regarding the scope of protection afforded by the FirstAmendment was in three cases which held that Noerr was inapplicable or distinguishable: NAACP. v. Claiborne HardwareCo.,'56 F.T.C. v. Superior Court TrialLawyers Ass'n.,157 and Allied Tube & Conduit Corp. v. Indian Head,Inc.158 Therefore, even if petitioning activity should be afforded the same level of constitutional protection from a common-law tort suit as an antitrust cause of action, the Noerr-Penningtondoctrine does not determine that level of protection. Mistakes like the one made by the court in Theme Promotions can result in a number of errors. **First, the court may provide too much protection for petitioning activity**. As a result of this type of error **plaintiffs who are harmed by a defendant's petitioning activities may be wrongfully denied redress for those harms**. In cases where the plaintiff would have ultimately been successful, this means the plaintiff will have to **unjustly** bear the cost of the defendant's petitioning activity, which can entail very high damages. The tort claims dismissed by the Theme Promotions court on appeal, for example, had received an $833,345 award for actual damages and a $2,500,000 award for punitive damages from a jury.' 59 Even in cases where the plaintiff would not have ultimately prevailed, simply having the case resolved before an impartial tribunal has its own 0 inherent benefits.16 Also, **because Noerr-Pennington provides such a high level of protection for petitioning activity, some petitioning activity that may be socially undesirable will go unpunished**. **In** **our** **representative system** of government, **which requires government officials to heavily rely on information** it receives **from interested parties**, **there is a strong incentive for those parties to do whatever it takes to convince the government that their desired course of action is the best course of action**. The problem presented by such an incentive can be seen, for example, in jurisdictions that do not recognize a "misrepresentation" exception to the Noerr-Pennington doctrine. 61 In these jurisdictions parties have a huge incentive to deliberately mislead government bodies, knowing that their deceitful petitioning activities will receive full immunity. The second type of error that may occur is not an error in result, but an error in reasoning. If the "proper" level of protection for petitioning activity in a non-antitrust cause of action happens to be the same level that would be required by the Noerr-Pennington doctrine, then while courts may reach the correct outcome by transposing the Noerr-Pennington doctrine outside the context of antitrust law, these courts will base this result on an improper analysis. Even though this is a mistake in reasoning and not in result, there still may be consequences. For example, courts which make this mistake may be avoiding constitutional questions concerning the proper scope and application of the First Amendment right to petition when they should be addressing them. This can occur because the Noerr-Pennington doctrine is primarily based on an interpretation of federal antitrust statutes and therefore it is imbued with statutory interpretation principles. **These principles require courts to take a cautious approach** **and to be hesitant to attribute an intent to infringe or chill constitutionally protected freedoms** to the legislature. For example, in Noerr, the Court **avoided** "difficult constitutional questions" by refusing to interpret the Sherman Act as **imposing antitrust liability for political activities**, noting that Congress had traditionally been hesitant to regulate such activities. 62 These statutory interpretation principles, however, are not applicable in petitioning immunity cases based on common law causes of action. The common law is the sole province of the judicial branch. By imputing these statutory interpretation principles into the realm of common law, courts, like the one in Theme Promotions,a shirking their institutional responsibility to address the "difficult constitutional questions" posed by petitioning immunity suits that are based on common law causes of action.163 As a result, the right to petition, an already underdeveloped area of law, will continue to be neglected, potentially compounding these problems in future petitioning immunity cases.

**Anticompetitive lobbying entrenches governmental distrust and enables anti-democratic tendencies**

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For years, the residents of Oxford, Massachusetts, seethed with anger at the company that controlled the local water supply. The company, locals complained, charged inflated prices and provided terrible service. But unless the town’s residents wanted to get by without running water, they had to pay up, again and again. The people of Oxford resolved to buy the company out. At a town meeting in the local high-school auditorium, an overwhelming majority of residents voted to raise the millions of dollars that would be required for the purchase. It took years, but in May 2014, the deal was nearly done: One last vote stood between the small town and its long-awaited goal. The company, however, was not going down without a fight. It mounted a campaign against the buyout. On the day of the crucial vote, the high-school auditorium swelled to capacity. Locals who had toiled on the issue for years noticed many newcomers—residents who hadn’t showed up to previous town meetings about the buyout. When the vote was called, the measure failed—the company, called Aquarion, would remain the town’s water supplier. Supporters of the buyout mounted a last-ditch effort to take a second vote, but before it could be organized, a lobbyist for Aquarion pulled a fire alarm. The building had to be evacuated, and the meeting adjourned. Aquarion retains control of Oxford’s water system to this day. The company denied that the lobbyist was acting on its behalf when he pulled the alarm; it also denies that its rates were abnormally high or that it provides poor service. Some Oxford residents supported Aquarion, and others opposed the buyout because they feared the cost and complication of the town running its own water company. But many residents, liberal and conservative, were frustrated by the process. The vote, they felt, hadn’t taken place on a level playing field. “It was a violation of the sanctity of our local government by big money,” Jen Caissie, a former chairman of the board of selectmen in Oxford, told me. “Their messiah is their bottom line, not the health of the local community. And I say that as a Republican, someone who is in favor of local business.” A New England town meeting would seem to be one of the oldest and purest expressions of the American style of government. Yet even in this bastion of deliberation and direct democracy, a nasty suspicion had taken hold: that the levers of power are not controlled by the people. It’s a suspicion stoked by the fact that, across a range of issues, public policy does not reflect the preferences of the majority of Americans. If it did, the country would look radically different: Marijuana would be legal and campaign contributions more tightly regulated; paid parental leave would be the law of the land and public colleges free; the minimum wage would be higher and gun control much stricter; abortions would be more accessible in the early stages of pregnancy and illegal in the third trimester. The subversion of the people’s preferences in our supposedly democratic system was explored in a 2014 study by the political scientists Martin Gilens of Princeton and Benjamin I. Page of Northwestern. Four broad theories have long sought to answer a fundamental question about our government: Who rules? One theory, the one we teach our children in civics classes, holds that the views of average people are decisive. Another theory suggests that mass-based interest groups such as the AARP have the power. A third theory predicts that business groups such as the Independent Insurance Agents and Brokers of America and the National Beer Wholesalers Association carry the day. A fourth theory holds that policy reflects the views of the economic elite. Gilens and Page tested those theories by tracking how well the preferences of various groups predicted the way that Congress and the executive branch would act on 1,779 policy issues over a span of two decades. The results were shocking. Economic elites and narrow interest groups were very influential: They succeeded in getting their favored policies adopted about half of the time, and in stopping legislation to which they were opposed nearly all of the time. Mass-based interest groups, meanwhile, had little effect on public policy. As for the views of ordinary citizens, they had virtually no independent effect at all. “When the preferences of economic elites and the stands of organized interest groups are controlled for, the preferences of the average American appear to have only a minuscule, near-zero, statistically non-significant impact upon public policy,” Gilens and Page wrote. Outlets from The Washington Post to Breitbart News cited this explosive finding as evidence of what overeager headline writers called American oligarchy. Subsequent studies critiqued some of the authors’ assumptions and questioned whether the political system is quite as insulated from the views of ordinary people as Gilens and Page found. The most breathless claims made on the basis of their study were clearly exaggerations. Yet their work is another serious indication of a creeping democratic deficit in the land of liberty. To some degree, of course, the unresponsiveness of America’s political system is by design. The United States was founded as a republic, not a democracy. As Alexander Hamilton and James Madison made clear in the Federalist Papers, the essence of this republic would consist—their emphasis—“IN THE TOTAL EXCLUSION OF THE PEOPLE, IN THEIR COLLECTIVE CAPACITY, from any share” in the government. Instead, popular views would be translated into public policy through the election of representatives “whose wisdom may,” in Madison’s words, “best discern the true interest of their country.” That this radically curtailed the degree to which the people could directly influence the government was no accident. Only over the course of the 19th century did a set of entrepreneurial thinkers begin to dress an ideologically self-conscious republic up in the unaccustomed robes of a democracy. Throughout America, the old social hierarchies were being upended by rapid industrialization, mass immigration, westward expansion, and civil war. Egalitarian sentiment was rising. The idea that the people should rule came to seem appealing and even natural. The same institutions that had once been designed to exclude the people from government were now commended for facilitating government “of the people, by the people, for the people.” The shifting justification for our political system inspired important reforms. In 1913, the Seventeenth Amendment stipulated that senators had to be elected directly by the people, not by state legislatures. In 1920, the Nineteenth Amendment gave women the vote. In 1965, the Voting Rights Act, drawing on the Fifteenth Amendment, set out to protect the vote of black Americans. The once-peculiar claim that the United States was a democracy slowly came to have some basis in reality. That basis is now crumbling, and the people have taken notice. In no small part that’s because the long era during which average Americans grew more wealthy has come to a sputtering stop. People who are asked how well they are doing economically frequently compare their own standard of living with that of their parents. Until recently, this comparison was heartening. At the age of 30, more than nine in 10 Americans born in 1940 were earning more than their parents had at the same stage of their lives. But according to eye-popping research led by the economist Raj Chetty and his co-authors, many Millennials do not share in this age-old American experience of improving fortunes. Among those Americans born in the early 1980s, only half earn more than their parents did at a similar age. Americans have never loved their politicians or thought of Washington as a repository of moral virtue. But so long as the system worked for them—so long as they were wealthier than their parents had been and could expect that their kids would be better off than them—people trusted that politicians were ultimately on their side. Not anymore. The rise of digital media, meanwhile, has given ordinary Americans, especially younger ones, an instinctive feel for direct democracy. Whether they’re stuffing the electronic ballot boxes of The Voice and Dancing With the Stars, liking a post on Facebook, or up-voting a comment on Reddit, they are seeing what it looks like when their vote makes an immediate difference. Compared with these digital plebiscites, the work of the United States government seems sluggish, outmoded, and shockingly unresponsive. As a result, average voters feel more alienated from traditional political institutions than perhaps ever before. When they look at decisions made by politicians, they don’t see their preferences reflected in them. For good reason, they are growing as disenchanted with democracy as the people of Oxford, Massachusetts, did. The politician who best intuited this discontent—and most loudly promised to remedy it—is Donald Trump. The claim that he would channel the voice of the people to combat a corrupt and unresponsive elite was at the very core of his candidacy. “I am your voice,” Trump promised as he accepted his party’s nomination at the Republican National Convention. “Today, we are not merely transferring power from one administration to another or from one party to another,” he proclaimed in his inaugural address, “but we are transferring power from Washington, D.C., and giving it back to you, the people.” Donald Trump won the presidency for many reasons, including racial animus, concerns over immigration, and a widening divide between urban and rural areas. But public-opinion data suggest that a deep feeling of powerlessness among voters was also important. I analyzed 2016 data from the American National Election Studies. Those who voted for Trump in the Republican primaries, more than those who supported his competition, said that they “don’t have any say about what the government does,” that “public officials don’t care much what people like me think,” and that “most politicians care only about the interests of the rich and powerful.” Trump has no real intention of devolving power back to the people. He’s filled his administration with members of the same elite he disparaged on the campaign trail. His biggest legislative success, the tax bill, has handed gifts to corporations and the donor class. A little more than a year after America rebelled against political elites by electing a self-proclaimed champion of the people, its government is more deeply in the pockets of lobbyists and billionaires than ever before. It would be easy to draw the wrong lesson from this: If the American electorate can be duped by a figure like Trump, it can’t be trusted with whatever power it does retain. To avoid further damage to the rule of law and the rights of the most-vulnerable Americans, traditional elites should appropriate even more power for themselves. But that response plays into the populist narrative: The political class dislikes Trump because he threatens to take its power away. It also refuses to recognize that the people have a point. **America does have a democracy problem**. If we want to address the root causes of populism, we need to start by taking an honest accounting of the ways in which power has slipped out of the people’s hands, and think more honestly about the ways in which we can—and cannot—put the people back in control. Matt Dorfman At the height of the Mexican–American War, Nicholas Trist traveled to Mexico and negotiated the Treaty of Guadalupe Hidalgo, which ended the hostilities between the two nations and helped delineate America’s southern border. Two decades later, the U.S. government still hadn’t paid him for his services. Too old and weak to travel to Washington to collect the money himself, Trist hired a prominent lawyer by the name of Linus Child to act on his behalf, promising him 25 percent of his recovered earnings. Congress finally appropriated the money to settle its debt. But now it was Trist who refused to pay up, even after his lawyer sued for his share. Though the contract between Trist and Child hardly seems untoward by today’s standards, the Supreme Court refused to uphold it out of fear that it might provide a legal basis for the activities of lobbyists: If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption. Extreme as this case may appear, it was far from idiosyncratic. In her book Corruption in America, the legal scholar Zephyr Teachout notes that the institutions of the United States were explicitly designed to counter the myriad ways in which people might seek to sway political decisions for their own personal gain. Many forms of lobbying were banned throughout the 19th century. In Georgia, the state constitution at one time read that “lobbying is declared to be a crime.” In California, it was a felony. Over the course of the 20th century, lobbying gradually lost the stench of the illicit. But even once the activity became normalized, businesses remained reluctant to exert their influence. As late as the 1960s, major corporations did not lobby directly on their own behalf. Instead, they relied on collectives such as the U.S. Chamber of Commerce, which had a weaker voice in Washington than labor unions or public-interest groups. “As every business executive knows,” the future Supreme Court Justice Lewis F. Powell Jr. complained in 1971, “few elements of American society today have as little influence in government as the American businessman.” All of this began to change in the early 1970s. Determined to fight rising wages and stricter labor and environmental standards, which would bring higher costs, CEOs of companies like General Electric and General Motors banded together to expand their power on Capitol Hill. At first, their activities were mostly defensive: The goal was to stop legislation that might harm their interests. But as the political influence of big corporations grew, and their profits soared, a new class of professional lobbyists managed to convince the nation’s CEOs that, in the words of Lee Drutman, the author of the 2015 book The Business of America Is Lobbying, their activity “was not just about keeping the government far away—it could also be about drawing government close.” Today, corporations wield immense power in Washington: “For every dollar spent on lobbying by labor unions and public-interest groups,” Drutman shows, “large corporations and their associations now spend $34. Of the 100 organizations that spend the most on lobbying, 95 consistently represent business.” (Read about a principal architect of the lobbying industry—Paul Manafort—in our March 2018 cover story.) The work of K Street lobbyists, and the violation of our government by big money, has fundamentally transformed the work—and the lives—of the people’s supposed representatives. Steve Israel, a Democratic congressman from Long Island, was a consummate moneyman. Over the course of his 16 years on Capitol Hill, he arranged 1,600 fund-raisers for himself, averaging one every four days. Israel cited fund-raising as one of the main reasons he decided to retire from Congress, in 2016: “I don’t think I can spend another day in another call room making another call begging for money,” he told The New York Times. “I always knew the system was dysfunctional. Now it is beyond broken.” A model schedule for freshman members of Congress prepared a few years ago by the Democratic Congressional Campaign Committee instructs them to spend about four hours every day cold-calling donors for cash. The party encourages so many phone calls because the phone calls work. Total spending on American elections has grown to unprecedented levels. From 2000 to 2012, reported federal campaign spending doubled. It’s no surprise, then, that a majority of Americans now believe Congress to be corrupt, according to a 2015 Gallup poll. As Israel memorably put it to HBO’s John Oliver, the hours he had spent raising money had been “a form of torture—and the real victims of this torture have become the American people, because they believe that they don’t have a voice in this system.” Big donors and large corporations use their largesse to sway political decisions. But their influence goes far beyond those instances in which legislators knowingly sacrifice their constituents’ interests to stay on the right side of their financial backers. The people we spend time with day in and day out shape our tastes, our assumptions, and our values. The imperative to raise so much money means that members of Congress log more time with donors and lobbyists and less time with their constituents. Often, when faced with a vote on a bill of concern to their well-heeled backers, legislators don’t have to compromise their ideals—because they spend so much of their lives around donors and lobbyists, they have long ago come to share their views. The problem goes even deeper than that. In America’s imagined past, members of Congress had a strong sense of place. Democrats might have risen through the ranks of local trade unions or schoolhouses. Republicans might have been local business or community leaders. Members of both parties lived lives intertwined with those of their constituents. But spend some time reading the biographies of your representatives in Congress, and you’ll notice, as I did, that by the time they reach office, many politicians have already been socialized into a cultural, educational, and financial elite that sets them apart from average Americans. While some representatives do have strong roots in their district, for many others the connection is tenuous at best. Even for those members who were born and raised in the part of the country they represent, that place is for many of them not their true home. Educated at expensive colleges, likely on the coasts, they spend their 20s and 30s in the nation’s great metropolitan centers. After stints in law, business, or finance, or on Capitol Hill, they move to the hinterlands out of political ambition. Once they retire from Congress, even if they retain some kind of home in their district, few make it the center of their lives: They seem much more likely than their predecessors to pursue lucrative opportunities in cities such as New York, San Francisco, and, of course, Washington. By just about every metric—from life experience to education to net worth—these politicians are thoroughly disconnected from the rest of the population. The massive influence that money yields in Washington is hardly a secret. But another, equally important development has largely gone ignored: More and more issues have simply been taken out of democratic contestation. In many policy areas, the job of legislating has been supplanted by so-called independent agencies such as the Federal Communications Commission, the Securities and Exchange Commission, the Environmental Protection Agency, and the Consumer Financial Protection Bureau. Once they are founded by Congress, these organizations can formulate policy on their own. In fact, they are free from legislative oversight to a remarkable degree, even though they are often charged with settling issues that are not just technically complicated but politically controversial. In 2007, Congress enacted 138 public laws. In the same year, independent federal agencies finalized 2,926 rules. The range of crucial issues that these agencies have taken on testifies to their importance. From banning the use of the insecticide DDT to ensuring the quality of drinking water, for example, the EPA has been a key player in fights about environmental policy for almost 50 years; more recently, it has also made itself central to the American response to climate change, regulating pollutants and proposing limits on carbon-dioxide emissions from new power plants. While independent agencies occasionally generate big headlines, they often wield their real power in more obscure policy areas. They are now responsible for the vast majority of new federal regulations. A 2008 article in the California Law Review noted that, during the previous year, Congress had enacted 138 public laws. In the same year, federal agencies had finalized 2,926 rules. Such rules run the gamut from technical stipulations that affect only a few specialized businesses to substantial reforms that have a direct impact on the lives of millions. In October 2017, for example, the Consumer Financial Protection Bureau passed a rule that would require providers of payday loans to determine whether customers would actually be able to pay them back—potentially saving millions of people from exploitative fees, but also making it more difficult for them to access cash in an emergency. The rise of independent agencies such as the EPA is only a small piece of a larger trend in which government has grown less accountable to the people. In the latter half of the 20th century, the Federal Reserve won much greater independence from elected politicians and began to deploy far more powerful monetary tools. Trade treaties, from nafta to more-recent agreements with countries such as Australia, Morocco, and South Korea, have restricted Congress’s ability to set tariffs, subsidize domestic industries, and halt the inflow of certain categories of migrant workers. At one point I planned to count the number of treaties to which the United States is subject; I gave up when I realized that the State Department’s “List of Treaties and Other International Agreements of the United States” runs to 551 pages. Most of these treaties and agreements offer real benefits or help us confront urgent challenges. Whatever your view of their merit, however, there is no denying that they curtail the power of Congress in ways that also disempower American voters. Trade treaties, for example, can include obscure provisions about “investor–state dispute settlements,” which give international arbitration courts the right to award huge sums of money to corporations if they are harmed by labor or environmental standards—potentially making it riskier for Congress to pass such measures. This same tension between popular sovereignty and good governance is also evident in the debates over the power of the nine unelected justices of the Supreme Court. Since the early 1950s, the Supreme Court has ended legal segregation in schools and universities. It has ended and then reintroduced the death penalty. It has legalized abortion. It has limited censorship on television and the radio. It has decriminalized homosexuality and allowed same-sex marriage. It has struck down campaign-finance regulations and gun-control measures. It has determined whether millions of people get health insurance and whether millions of undocumented immigrants need to live in fear of being deported. Whether you see judicial review as interpreting the law or usurping the people’s power probably depends on your view of the outcome. The American right has long railed against “activist judges” while the American left, which enjoyed a majority on the Court for a long stretch during the postwar era, has claimed that justices were merely doing their job. Now that the Court has started to lean further right, these views are rapidly reversing. But regardless of your politics, there’s no question that the justices frequently play an outsize role in settling major political conflicts—and that many of their decisions serve to amplify undemocratic elements of the system. Take Citizens United. By overturning legislation that restricted campaign spending by corporations and other private groups, the Supreme Court issued a decision that was unpopular at the time and has remained unpopular since. (In a 2015 poll by Bloomberg, 78 percent of respondents disapproved of the ruling.) It also massively amplified the voice of moneyed interest groups, making it easier for the economic elite to override the preferences of the population for years to come. Donald Trump is the first president in the history of the United States to have served in no public capacity before entering to the White House. He belittles experts, seems to lack the most basic grasp of public policy, and loves to indulge the worst whims of his supporters. In all things, personal and political, Plato’s disdainful description of the “democratic man” fits the 45th president like a glove: Given to “false and braggart words and opinions,” he considers “insolence ‘good breeding,’ license ‘liberty,’ prodigality ‘magnificence,’ and shamelessness ‘manly spirit.’ ” It is little wonder, then, that Plato’s haughty complaint about democracy—its primary ill, he claimed, consists in “assigning a kind of equality indiscriminately to equals and unequals alike”—has made a remarkable comeback. As early as 2003, the journalist Fareed Zakaria argued, “There can be such a thing as too much democracy.” In the years since, many scholars have built this case: The political scientist Larry Bartels painstakingly demonstrated just how irrational ordinary voters are; the political philosopher Jason Brennan turned the premise that irrational or partisan voters are terrible decision makers into a book titled Against Democracy; and Parag Khanna, an inveterate defender of globalization, argued for a technocracy in which many decisions are made by “committees of accountable experts.” Writing near the end of the 2016 primary season, when Trump’s ascent to the Republican nomination already looked unstoppable, Andrew Sullivan offered the most forceful distillation of this line of antidemocratic laments: “Democracies end when they are too democratic,” the headline of his essay announced. “And right now, America is a breeding ground for tyranny.” The antidemocratic view gets at something real. What makes our political system uniquely legitimate, at least when it functions well, is that it manages to deliver on two key values at once: liberalism (the rule of law) and democracy (the rule of the people). With liberalism now under concerted attack from the Trump administration, which has declared war on independent institutions such as the FBI and has used the president’s pulpit to bully ethnic and religious minorities, it’s perhaps understandable that many thinkers are willing to give up a modicum of democracy to protect the rule of law and the country’s most vulnerable groups. If only it were that easy. As we saw in 2016, the feeling that power is slipping out of their hands makes citizens more, not less, likely to entrust their fate to a strongman leader who promises to smash the system. And as the examples of Egypt, Thailand, and other countries have demonstrated again and again, a political elite with less and less backing from the people ultimately has to resort to more and more repressive steps to hold on to its power; in the end, any serious attempt to sacrifice democracy in order to safeguard liberty is likely to culminate in an end to the rule of law as well as the rule of the people. The easy alternative is to lean in the other direction, to call for as much direct democracy as possible. The origins of the people’s displacement, the thinking goes, lie in a cynical power grab by financial and political elites. Large corporations and the superrich advocated independent central banks and business-friendly trade treaties to score big windfalls. Politicians, academics, and journalists favor a technocratic mode of governance because they think they know what’s best and don’t want the people to meddle. All of this selfishness is effectively cloaked in a pro-market ideology propagated by think tanks and research outfits that are funded by rich donors. Since the roots of the current situation are straightforwardly sinister, the solutions to it are equally simple: The people need to reclaim their power—and abolish technocratic institutions. This antitechnocratic view has currency on both ends of the political spectrum. On the far left, the late political scientist Peter Mair, writing about Europe, lamented the decline in “popular” democracy, which he contrasted with a more top-down “constitutional” democracy. The English sociologist Colin Crouch has argued that even anarchy and violence can serve a useful purpose if they seek to vanquish what he calls “post-democracy.” The far right puts more emphasis on nationalism, but otherwise agrees with this basic analysis. In the inaugural issue of the journal American Affairs, the self-styled intellectual home of the Trump movement, its founder Julius Krein decried “the existence of a transpartisan elite,” which sustains a pernicious “managerial consensus.” Steve Bannon, the former White House chief strategist, said his chief political objective was to return power to the people and advocated for the “deconstruction of the administrative state.” Mair and Crouch, Krein and Bannon are right to recognize that the people have less and less hold over the political system, an insight that can point the way to genuine reforms that would make our political system both more democratic and better functioning. One of the reasons well-intentioned politicians are so easily swayed by lobbyists, for example, is that their staffs lack the skills and experience to draft legislation or to understand highly complex policy issues. This could be addressed by boosting the woefully inadequate funding of Congress: If representatives and senators were able to attract—and retain—more knowledgeable and experienced staffers, they might be less tempted to let K Street lobbyists write their bills for them. Similarly, the rules that currently govern conflicts of interest are far too weak. There is no reason members of Congress should be allowed to lobby for the companies they were supposed to regulate so soon after they step down from office. It is time to jam the revolving door between politics and industry. Real change will also require an ambitious reform of campaign finance. Because of Citizens United, this is going to be extremely difficult. But the Supreme Court has had a change of heart in the past. As evidence that the current system threatens American democracy keeps piling up, the Court might finally recognize that stricter limits on campaign spending are desperately needed. For all that the enemies of technocracy get right, though, their view is ultimately as simplistic as the antidemocratic one. The world we now inhabit is extremely complex. We need to monitor hurricanes and inspect power plants, reduce global carbon emissions and contain the spread of nuclear weapons, regulate banks and enforce consumer-safety standards. All of these tasks require a tremendous amount of expertise and a great degree of coordination. It’s unrealistic to think that ordinary voters or even their representatives in Congress might become experts in what makes for a safe power plant, or that the world could find an effective response to climate change without entering cumbersome international agreements. If we simply abolish technocratic institutions, the future for most Americans will look more rather than less dangerous, and less rather than more affluent. It is true that to recover its citizens’ loyalty, our democracy needs to curb the power of unelected elites who seek only to pad their influence and line their pockets. But it is also true that to protect its citizens’ lives and promote their prosperity, our democracy needs institutions that are, by their nature, deeply elitist. This, to my mind, is the great dilemma that the United States—and other democracies around the world—will have to resolve if they wish to survive in the coming decades.

**Strength of US institutions solves conflict**

**Kasparov**, Chairman of the Human Rights Foundation, **2/16/2017**

Garry, “Democracy and Human Rights: The Case for U.S. Leadership” http://www.foreign.senate.gov/imo/media/doc/021617\_Kasparov\_%20Testimony.pdf

The Soviet Union was an existential threat, and this focused the attention of the world, and the American people. There existential threat today is not found on a map, but it is very real. The forces of the past are making steady progress **against the modern world order**. **Terrorist movements** in the Middle East, **extremist parties** across Europe, a paranoid tyrant in **North Korea** **threatening nuclear blackmail**, and, at the center of the web, an aggressive KGB dictator in **Russia**. They all want to **turn the world back to a dark past because their survival is threatened by the values of the free world,** epitomized by the United States. And they are thriving as the U.S. has retreated. The global freedom index has declined for ten consecutive years. No one like to talk about the United States as a global policeman, but this is what happens when there is no cop on the beat. American leadership **begins at home**, right here. America cannot lead the world on democracy and human rights **if there is no unity on the meaning and importance of these things**. Leadership is required to make that case clearly and powerfully. Right now, Americans are engaged in politics at a level not seen in decades. It is an opportunity for them to rediscover that making America great begins with believing America can be great. The Cold War was won on American values that were shared by both parties and nearly every American. Institutions that were created by a Democrat, Truman, were triumphant forty years later thanks to the courage of a Republican, Reagan. This bipartisan consistency created the decades of **strategic stability** **that is the great strength of democracies**. Strong institutions that outlast politicians **allow for long-range planning**. In contrast, dictators can operate only tactically, not strategically, because they are not constrained by the balance of powers**, but cannot afford to think beyond their own survival**. This is why a dictator like Putin has an advantage in chaos, the ability to move quickly. This can only be met by strategy, by long-term goals that are based on shared values, not on polls and cable news. The fear of making things worse has paralyzed the United States from trying to make things better. There will always be setbacks, but the United States cannot quit. The spread of democracy is the **only proven remedy for nearly every crisis that plagues the world today. War, famine, poverty, terrorism**–all are **generated and exacerbated by authoritarian regimes**. A policy of America First inevitably puts American security last. American leadership is required because there is no one else, and because it is good for America. There is no weapon or wall that is more powerful for security than America **being envied, imitated, and admired around the world**. Admired not for being perfect, but for having the exceptional courage to always try to be better. Thank you

**1AC – Brazil**

**Brazil models US Noerr-Pennington jurisprudence---the plan causes them to follow suit**

**Domingos 14** “Indirect Regulation and the Disinterested Official -- A Study on Sham Litigation in Brazil” Roberto Domingos Taufick - Largo de São Francisco Law School, University of Sao Paulo; University of São Paulo (USP), December 18, 2014, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2540341

The answers to both cases are tricky ones. First, because they incorporate in the definition of sham litigation the supremacy of the public interest that, despite already being analyzed in American case law and literature under the state action immunity, here may appear against the effectiveness of a petition to the government that confronts a public policy. Second, because although the involvement of public undertakings or the existence of public credit may struggle with the autonomy of the Competition Commission to decide against a public policy defined by the President of the Republic [conflict of interest], it is not an easy move to identify to what extent the market activities of the state should be perceived as private or commercial activity and the decision-making granting them antitrust immunity be characterized as financially interested. Third, **because neither the Supreme Court nor the lower courts have consistently delimited the Noerr-Pennington doctrine along the years and the evolvement of the petitioning immunity in Brazil has followed suit.**

Discussions involving **more objective rules** and how to deal with indirect regulation by market participation has been permanently absent in the academic papers that have addressed the petitioning immunity so far and one of the main reasons may be that entrepreneurship and long-run credit are essentially private in the United States -- the locus where the state action and the sham litigation doctrines have been conceived of and bloomed. As one might see from the decisions I will discuss in this paper, reference to market activity by the state in US case law is usually confined to the role of the government as a client or to non-commercial activity performed by government departments.

**Specifically, it solves pharma competition--- changing objective baseless standard key because it allows lawsuits against frivolous litigation**

**Rosenberg et al 12** “Antitrust Assessment of IP-Related Matters in Brazil: Recent Developments” Barbara Rosenberg, Luis Bernardo Coelho Cascco, Jose Carlos da Matta Berardo, COMPETITION LAW INTERNATIONAL August 2012, https://heinonline-org.proxy1.cl.msu.edu/HOL/Page?handle=hein.journals/cmpetion8&div=25&collection=journals

Another frequently raised topic is sham litigation, which has appeared frequently as a claim in complaints filed with the Brazilian antitrust authorities. There are some proceedings currently underway (initiated by the SDE between 2005 and 2009) in which research-based pharmaceutical companies were investigated for allegedly seeking to prevent the entry of generic products." The SDE has issued opinions recommending dismissal in two of these cases but none of them have been tried by CADE so far.

In 2011, there were additional developments in three administrative proceedings regarding this same issue. In one case, Eli Lilly is being investigated for initiating the patent litigation involving Gemzar®, a drug for cancer (Administrative Proceeding No 08012.011508/2007-91). In the other two, the SDE is investigating Lundbeck (Administrative Proceeding No 08012.006377/2010-25) and Genzyme (Administrative Proceeding No 08012.007147/2009- 40) for lawsuits they filed relating to data package protection and regulatory approvals procedures. **As yet, none of these cases regarding alleged sham litigation by pharmaceutical companies have been decided on the merits**.

In considering the likely outcome of these two cases, it is interesting to review CADE's earlier decision in the Administrative Proceeding No 08012.004484/2005-51 (Tachographs' case), the most significant precedent involving this doctrine. Relying on the US Supreme Court decision in Professional Real Estate Investors, Inc v Columbia Pictures Industries,2 the SDE stated that a finding of illegality for such lawsuits requires that the request (judicial or administrative) be **objectively baseless** and such a baseless request 'conceals "an attempt to interfere directly" with a competitor's business relationships'." 3 CADE's Commissioners agreed on these necessary characteristics, but former Commissioner Cesar Mattos added a third requirement: the request must be based on deceptive arguments, in which the claimant indeed pursues effective judicial relief but leads the decision-maker into error.

**Key to Brazilian generic pharma development and economic growth---Brazilian independent regulation fails**

**CSSD 13** “Brazil's Patent Reform: Innovation Towards National Competitiveness” Center for Strategic Studies and Debates, 2013, http://infojustice.org/wp-content/uploads/2013/09/Brazilian\_Patent\_Reform.pdf

The generic and similar medicines policy began in the United States in the 1980’s and has been growing exponentially, making a deep impact on the dynamics of the pharmaceutical market all over the world. The introduction of generics plays a **fundamental role in the expansion of and access to lower-priced medicines**, and consists on an important policy with profound social impact; especially for the low-income portion of the population.

It was not different in Brazil, and policies encouraging generic medicines were included in the Brazilian legislation through the following acts: Law no. 6.360/76 (on the sanitary guidelines to which medicines are subject), the Patent Act (no. 9279/96) and the most scathing, Law no. 9.787/99 (Generic Medicines Act).

In this context, beginning in 2000, the year generic medicines were launched, the generics market has been growing substantially (with rates of over 10% a year) and, consequently, increasing their penetration in the Brazilian market. Thus, the introduction of this kind of medicine has been playing a strategic role in encouraging competition and the development of the pharmaceutical sector, promoting less disparity in the pharmaceutical sector market.

An European study on the pharmaceutical industry outlined those changes in market dynamics and pointed to a reactive movement by the large pharmaceutical companies to block or inhibit the entry of generic medicines.235

This reactive movement against generic medicines is **well organized** and outlined, with lawsuits in the administrative, legal, regulatory and economic (competition) spheres. Almost all great pharmaceutical companies systematically and simultaneously use those lawsuits with the goal of trying to block the entry of generic medicines. Over the last few years there has been an intensification of those strategies, due to: i) generic sales increase, ii) expansion of competitive potential of manufacturers of generic medicines, iii) loss of market space by large pharmaceutical companies, iv) scarcity in the development of innovative medicine and, chiefly, v) the end of patent terms for highly relevant medicines.

The biggest and most visible issue caused by the practice of abusive lawsuits, also known as sham litigations, is the barrier it established against the full access to medicines, to the production of generics and to free competition.

With the end of the monopoly of great pharmaceutical industries, which generated significant advances in competition in the pharmaceutical market, consequently, there was a noticeable increase in the number of unfair competition lawsuits in the sector.

The Brazilian legislation that deals with abusive market practices has not been preventing the reckless and indiscriminate use of the Brazilian legal system in lawsuits aimed at stalling the entry of generic medicines in the market and has been causing **huge legal uncertainty** for manufacturers of generics. Therefore, the **limitation of competition in the pharmaceutical sector generates huge economic**, social and technological losses for the country, whether by maintaining abusive prices, or by inhibiting the development of national companies in the market.

Abuse through lawsuits is not exclusive to the pharmaceutical-chemical fi eld. The media has been reporting many disputes between Apple and Samsung regarding cellular telephone patents.

The Brazilian High Court of Justice (Superior Tribunal de Justiça – STJ) convicted Microsoft of abuse of surveillance rights. A technical services company was inspected upon Microsoft’s application, which claimed that the company used Microsoft software illegally. After the surveillance, however, there was no irregularity in the more than 300 computer software programs used in the company. The company did not even use Microsoft software. It was, therefore, a crass mistake on Microsoft’s part (Resp. 1114889).

The patent system was created as a means to encourage innovation and economic, social and technological development. As such, it must not be unduly employed to inhibit competition through reckless suits and/or abuse of rights.

**Continued stagnation causes rapid capital outflows from emerging market portfolios---collapses emerging and the global economy**

**Lachman 20** “Brazil's dark cloud over the global economy” Desmond Lachman - resident fellow at the American Enterprise Institute. formerly a deputy director in the International Monetary Fund's Policy Development and Review Department and the chief emerging market economic strategist at Salomon Smith Barney, 05/28/20, https://thehill.com/opinion/international/499817-brazils-dark-cloud-over-the-global-economy?rl=1

For the global economy, it would never be a good time for an economy as large as that of Brazil to have a political and economic crisis. But **now is a particularly inopportune time for such a crisis**. The world is in its deepest economic recession in the past 90 years, and other major emerging market economies too are facing severe coronavirus-induced economic challenges that would be exacerbated by a Brazilian crisis.

Brazil is not just another emerging market economy; rather, it accounts for around half of South America’s overall output, and it currently ranks as the world’s eighth largest economy. It also is a highly indebted country with a government debt that now totals around $2 trillion. With Brazilian debt being a major component of most emerging bond portfolios, a Brazilian economic crisis has the potential to **roil world financial markets.**

Even before the coronavirus crisis, the Brazilian economy was in the midst of a lost economic decade as its economy struggled to recover from its very deep 2014-2016 economic recession. Despite initial hopes that Jair Bolsonaro’s ascension to the presidency in October 2018 might bring much needed economic reform to the country, last year the Brazilian economy grew by barely 1 percent. That left Brazilian output well below its level some 10 years earlier.

Brazil’s sclerotic economy, coupled with its long delay in addressing its chronic public pension problem, has not been good for its public finances. Already before the pandemic, the persistence of large budget deficits raised serious questions about the country’s public debt sustainability. By the end of 2019, Brazil’s public debt had reached 80 percent of GDP, which is a very high level for an emerging market economy.

It would be a gross understatement to say that the coronavirus pandemic has considerably darkened an already gloomy Brazilian economic outlook. This has not least been because of the total state of denial in which Mr. Bolsonaro finds himself as to the seriousness of the pandemic and because of his gross incompetence in meeting this major health challenge.

Lacking any plan to address the pandemic’s spread, Brazil has now become the country with the third-largest number of coronavirus fatalities in the world with every indication that matters will get a lot worse before they get any better. It is also troubling that the pandemic seems set to further delay any meaningful economic reform in Brazil as the country’s domestic political crisis deepens and as calls for Bolsonaro’s impeachment grow ever louder.

All of this has heightened market doubts about Brazil’s ability to meet its debt service payments and has led to a 30 percent plunge in the Brazilian currency since the start of the year. It has also led the IMF to substantially downgrade its forecast of the Brazilian economy. The IMF now expects that the Brazilian economy will contract by more than 5 percent in 2020. That in turn will cause the Brazilian budget deficit to balloon to almost 10 percent of GDP and will contribute to a rise in the public debt to GDP ratio to almost 100 percent by the end of 2020.

A full-blown Brazilian debt crisis would be the last thing that a **fragile global economy** now needs. This would especially seem to be the case at time when other emerging market economies like Argentina, Ecuador, Lebanon and Venezuela have either defaulted or are well on their way to defaulting on their debt. It would also seem to be the case at a time when serious questions are being raised about debt sustainability in Italy, South Africa and Turkey.

With Brazil’s coronavirus pandemic showing every sign of spinning out of control and with Bolsonaro’s government showing every sign of crumbling, global economic policymakers would ignore Brazil’s troubling political and economic outlook at their peril. A Brazilian economic and financial crisis has the real potential of triggering a very much broader emerging market crisis by accelerating the rapid pace at which capital is already being withdrawn from the emerging market economies.

**EM growth key to ILO**

**Piccone 16** (Ted, is a nonresident senior fellow in the Center for Security, Strategy, and Technology in the Foreign Policy program at Brookings and the chief engagement officer at the World Justice Project. During his 11 years in residence at Brookings, he was a senior fellow and the Charles W. Robinson Chair, appointed the inaugural fellow of the Brookings-Robert Bosch Foundation Transatlantic Initiative in Berlin, and served as the acting vice president and director and deputy director of the Foreign Policy program, “Is the international liberal order dying? These five countries will decide”, https://www.brookings.edu/blog/order-from-chaos/2016/02/17/is-the-international-liberal-order-dying-these-five-countries-will-decide/)

The **S**ustainable **D**evelopment **G**oals approved by world leaders last September set forth a list of ambitious but achievable targets designed to build on these successes, and climate change is finally getting the collective attention and action it deserves. The international machinery to address human rights violations has never been more responsive to the growing demands for monitoring and accountability of abuses.

Despite these more positive features of the **i**nternational **l**iberal **o**rder, its fate has never felt more precarious. Various geopolitical and economic factors—aggressive moves by China and Russia to stifle dissent and disrupt international norms **as they cope with economic downshifts,** as well as the spreading instability and conflict in the Arab world—exacerbate fears that **we may be reaching a tipping point** in which our collective efforts to build a more peaceful, democratic, and prosperous world will be replaced by a much more **divisive and chaotic situation.**

NEW KIDS ON THE GLOBAL POWER BLOC

In this sea of uncertainty stand five rising democracies: India, Brazil, South Africa, Turkey, and Indonesia. Their fortunes will likely **play a decisive role in the world’s ability to sustain and strengthen the international liberal order.**

The good news is that each of these diverse countries—which collectively represent 25 percent of the world’s population—has emerged from painful periods of dictatorship, apartheid, and colonialism to embark on a path toward more open societies, improved human development, and more widespread prosperity. Their average GDP growth rates over the past 30 years have been consistently above the global average and until 2014 regularly outperformed China on a per capita basis. Since their respective transitions to more liberal and competitive systems of political and economic governance, they have made major strides in securing political rights and civil liberties. They’ve also reduced debt and controlled inflation, and made significant improvements in key dimensions of human development (defined as a long and healthy life, access to knowledge, and a decent standard of living). Life expectancy improved, poverty rates dropped, literacy grew, and infant and maternal mortality fell significantly. Most importantly, they achieved these outcomes in tandem with democratization, underscoring the virtuous circle of political and economic liberalization and offering a positive antidote to the restrictive model of China’s state-dominant development.

On the negative side, it is increasingly clear that all five countries have a long way to go to secure democratic stability for their growing populations. Recent indicators are indeed worrisome, particularly in Turkey under President Recep Tayyip Erdoğan, where significant backsliding in freedom of the media and Internet and reconciliation with the minority Kurdish population are well documented. The entrenched power of the African National Congress in South Africa is breeding corruption and popular frustration with dashed expectations. A twin political and economic crisis in Brazil is raising serious doubts that its fractious political system can keep the country on course. And Prime Minister Narendra Modi’s reluctance to keep his Hinduvta supporters in check and govern on behalf of all Indians is complicating the country’s otherwise resilient economy.

Overall, compared with other democracies, these five are neither shining stars nor declining laggards. A sustained deterioration of their otherwise positive trajectories, however, **would send a very bad signal about the ability of liberal democracies to deliver tangible benefits for their citizens**.

**Extinction**

**Harari ’18** [Yuval Noah; Professor of History @ Hebrew University of Jerusalem; “We need a post-liberal order now”; The Economist, https://www.economist.com/open-future/2018/09/26/we-need-a-post-liberal-order-now]

For several generations, the world has been governed by what today we call “the global liberal order”. Behind these lofty words is the idea that all humans share some core experiences, values and interests, and that no human group is inherently superior to all others. Cooperation is therefore more sensible than conflict. All humans should work together to protect their common values and advance their common interests. And the best way to foster such cooperation is to ease the movement of ideas, goods, money and people across the globe. Though the global liberal order has many faults and problems, it has proved superior to all alternatives. The liberal world of the early 21st century is more prosperous, healthy and peaceful than ever before. For the first time in human history, starvation kills fewer people than obesity; plagues kill fewer people than old age; and violence kills fewer people than accidents. When I was six months old I didn’t die in an epidemic, thanks to medicines discovered by foreign scientists in distant lands. When I was three I didn’t starve to death, thanks to wheat grown by foreign farmers thousands of kilometers away. And when I was eleven I wasn’t obliterated in a nuclear war, thanks to agreements signed by foreign leaders on the other side of the planet. If you think we should go back to some pre-liberal golden age, please name the year in which humankind was in better shape than in the early 21st century. Was it 1918? 1718? 1218? Nevertheless, people all over the world are **now losing faith in the liberal order**. Nationalist and religious views that privilege one human group over all others are back in vogue. Governments are increasingly restricting the flow of ideas, goods, money and people. Walls are popping up everywhere, both on the ground and in cyberspace. Immigration is out, tariffs are in. If the **liberal order is collapsing**, what new kind of global order might replace it? So far, those who challenge the liberal order do so mainly on a national level. They have many ideas about how to advance the interests of their particular country, but they don’t have a viable vision for how the world as a whole should function. For example, Russian nationalism can be a reasonable guide for running the affairs of Russia, but Russian nationalism has no plan for the rest of humanity. Unless, of course, nationalism morphs into imperialism, and calls for one nation to conquer and rule the entire world. A century ago, several nationalist movements indeed harboured such imperialist fantasies. Today’s nationalists, whether in Russia, Turkey, Italy or China, so far refrain from advocating global conquest. In place of violently establishing a global empire, some nationalists such as Steve Bannon, Viktor Orban, the Northern League in Italy and the British Brexiteers dream about a peaceful “Nationalist International”. They argue that all nations today face the same enemies. The bogeymen of globalism, multiculturalism and immigration are threatening to destroy the traditions and identities of all nations. Therefore nationalists across the world should make common cause in opposing these global forces. Hungarians, Italians, Turks and Israelis should build walls, erect fences and slow down the movement of people, goods, money and ideas. The world will then be divided into distinct nation-states, each with its own sacred identity and traditions. Based on mutual respect for these differing identities, all nation-states could cooperate and trade peacefully with one another. Hungary will be Hungarian, Turkey will be Turkish, Israel will be Israeli, and everyone will know who they are and what is their proper place in the world. It will be a world without immigration, without universal values, without multiculturalism, and without a global elite—but with peaceful international relations and some trade. In a word, the “Nationalist International” envisions the world as a network of walled-but-friendly fortresses. Many people would think this is quite a reasonable vision. Why isn’t it a viable alternative to the liberal order? Two things should be noted about it. First, it is still a comparatively liberal vision. It assumes that no human group is superior to all others, that no nation should dominate its peers, and that international cooperation is better than conflict. In fact, liberalism and nationalism were originally closely aligned with one another. The 19th century liberal nationalists, such as Giuseppe Garibaldi and Giuseppe Mazzini in Italy, and Adam Mickiewicz in Poland, dreamt about precisely such an international liberal order of peacefully-coexisting nations. The second thing to note about this vision of friendly fortresses is that it **has been tried**—and it **failed spectacularly**. **All attempts** to divide the world into clear-cut nations have so far **resulted in war and genocide**. When the heirs of Garibaldi, Mazzini and Mickiewicz managed to overthrow the multi-ethnic Habsburg Empire, it proved impossible to find a clear line dividing Italians from Slovenes or Poles from Ukrainians. This had set the stage for the second world war. The key problem with the network of fortresses is that each national fortress wants a bit more land, security and prosperity for itself at the expense of the neighbors, and without the help of universal values and global organisations, rival fortresses cannot agree on any common rules. Walled fortresses are seldom friendly. But if you happen to live inside a particularly strong fortress, such as America or Russia, why should you care? Some nationalists indeed adopt a more extreme isolationist position. They don’t believe in either a global empire or in a global network of fortresses. Instead, they deny the necessity of any global order whatsoever. “Our fortress should just raise the drawbridges,” they say, “and the rest of the world can go to hell. We should refuse entry to foreign people, foreign ideas and foreign goods, and as long as our walls are stout and the guards are loyal, who cares what happens to the foreigners?” Such extreme isolationism, however, is completely divorced from economic realities. Without a global trade network, all existing national economies will collapse—including that of North Korea. Many countries will not be able even to feed themselves without imports, and prices of almost all products will skyrocket. The made-in-China shirt I am wearing cost me about $5. If it had been produced by Israeli workers from Israeli-grown cotton using Israeli-made machines powered by non-existing Israeli oil, it may well have cost ten times as much. Nationalist leaders from Donald Trump to Vladimir Putin may therefore heap abuse on the global trade network, but none thinks seriously of taking their country completely out of that network. And we cannot have a global trade network without some global order that sets the rules of the game. Even more importantly, whether people like it or not, humankind today faces three common problems that make a mockery of all national borders, and that can **only be solved through global cooperation**. These are **nuclear war, climate change and technological disruption**. You cannot build a wall against nuclear winter or against global warming, and no nation can regulate artificial intelligence (AI) or bioengineering single-handedly. It won’t be enough if only the European Union forbids producing killer robots or only America bans genetically-engineering human babies. Due to the immense potential of such disruptive technologies, if even one country decides to pursue these high-risk high-gain paths, other countries will be forced to follow its dangerous lead for fear of being left behind. An **AI arms race** or a **biotechnological arms race** almost **guarantees the worst outcome**. Whoever wins the arms race, **the loser will likely be humanity itself**. For in an arms race, all regulations will collapse. Consider, for example, conducting genetic-engineering experiments on human babies. Every country will say: “We don’t want to conduct such experiments—we are the good guys. But how do we know our rivals are not doing it? We cannot afford to remain behind. So we must do it before them.” Similarly, consider developing autonomous-weapon systems, that can decide for themselves whether to shoot and kill people. Again, every country will say: “This is a very dangerous technology, and it should be regulated carefully. But we don’t trust our rivals to regulate it, so we must develop it first”. The **only thing** that can prevent such destructive arms races is **greater trust between countries**. This is **not an impossible mission**. If today the Germans promise the French: “Trust us, we aren’t developing killer robots in a secret laboratory under the Bavarian Alps,” the French are likely to believe the Germans, despite the terrible history of these two countries. We need to build such trust globally. We need to reach a point when Americans and Chinese can trust one another like the French and Germans. Similarly, we need to create a global safety-net to protect humans against the economic shocks that AI is likely to cause. Automation will create immense new wealth in high-tech hubs such as Silicon Valley, while the worst effects will be felt in developing countries whose economies depend on cheap manual labor. There will be more jobs to software engineers in California, but fewer jobs to Mexican factory workers and truck drivers. We now have a global economy, but politics is still very national. Unless we find solutions on a global level to the disruptions caused by AI, entire countries might collapse, and the resulting chaos, violence and waves of immigration will **destabilise the entire world**. This is the proper perspective to look at recent developments such as Brexit. In itself, Brexit isn’t necessarily a bad idea. But is this what Britain and the EU should be dealing with right now? How does Brexit help prevent nuclear war? How does Brexit help prevent climate change? How does Brexit help regulate artificial intelligence and bioengineering? Instead of helping, Brexit makes it harder to solve all of these problems. Every minute that Britain and the EU spend on Brexit is one less minute they spend on preventing climate change and on regulating AI. In order **to survive** and flourish in the 21st century, humankind needs **effective global cooperation**, and so far the **only viable blueprint** for such cooperation is offered by **liberalism**. Nevertheless, governments all over the world are undermining the foundations of the liberal order, and the world is turning into a network of fortresses. The first to feel the impact are the weakest members of humanity, who find themselves without any fortress willing to protect them: refugees, illegal migrants, persecuted minorities. But if the walls keep rising, eventually **the whole of humankind will feel the squeeze**.

**Global decline cascades---nuclear war**

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

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

INTRODUCTION

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

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

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

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

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

METHODOLOGY

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

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

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

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

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

ECONOMY

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

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

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

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

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

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

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

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

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

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

ENVIRONMENTAL

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

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

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

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

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

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

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

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

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

GEOPOLITICAL

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

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

**1AC – Citizen Petitioning**

**An expansive *Noerr-Pennington* doctrine immunizes anticompetitive FDA 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 **H**atch-**W**axman **A**ct 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 **A**bbreviated **N**ew **D**rug **A**pplication (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 **A**dministrative **P**rocedure **A**ct.[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 **H**atch-**W**axman **A**ct 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 **H**atch-**W**axman **A**ct 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**

**Shulka et al 19** (Vaishali Shukla Chapman University Enrique Seoane-Vazquez Chapman University, seoanevazquez@chapman.edu Souhiela Fawaz Chapman University, sfawaz@chapman.edu Lawrence M. Brown Chapman University, lbbrown@chapman.edu Rosa Rodriguez-Monguio University of California, San Francisco, “The Landscape of Cellular and Gene Therapy Products: Cost, Approvals, and Discontinuation”, https://digitalcommons.chapman.edu/cgi/viewcontent.cgi?article=1644&context=pharmacy\_articles)

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.

**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.

**Solvency**

**The “objectively baseless” standard is unwinnable – the aff brings the two Supreme Court standards in line by lowering the first prong of the PRE standard**

**Fulbright 2019.** Paul W. Fulbright. Assistant Professor of Business Law, University of Houston. “Antitrust Law, Entrepreneurship, And The “Patent Bully”: The “Sham” Exception To Noerrpennington Petitioning Immunity In Patent Infringement Litigation After The Professional Real Estate Decision” proquest.com/scholarly-journals/antitrust-law-entrepreneurship-patent-bully-sham/docview/2298280771/se-2

IV. THE WAY FORWARD: MOVING TOWARDS A CLARIFICATION OF PRE In the hypothetical problem presented at the opening of this paper, John Smith, the CEO of BigCorp, has proposed filing a lawsuit against a startup competitor even though its objective prospects for success are extremely poor. “I don’t care about the merits of the case,” said John. “I just want to pick the best patents we can and file suit, even if we have a 95% chance of losing the lawsuit. Winning or losing the lawsuit doesn’t matter. By filing suit now, we’ll do two things. First, it’s entirely possible that we’ll scare off WhiteKnight. I mean, after all, who wants to invest in a lawsuit? Second, without WhiteKnight’s funding, we’ll be able to bury SmallCorp in legal bills. The cost of the lawsuit alone, to say nothing of the effect it will have on SmallCorp’s customers, will likely drive it into the grave.” Unfortunately, when his general counsel performs her due diligence and consults with experienced antitrust and patent counsel, she is likely to be advised that, under the current state of the law, the strategy may very well succeed. **This is contrary to the substantive goal of antitrust**: to encourage competitors to compete on the basis of the quality and pricing of the goods and services that they offer, and, in the case of a monopolist, to ensure that it doesn’t engage in unreasonable anticompetitive exclusionary conduct. Here, CEO Smith is trying to arrange for his monopolist corporation to compete not on the basis of its superior products and services, but, rather, on the basis of filing a meritless lawsuit against a less-well-funded startup in the hope that the litigation costs and uncertainty can exclude / destroy this competitor. The question is: what can be done to discourage this kind of game-playing in the future?

A. The Door to Improvement of the PRE Test – A Finding of Ambiguity As stated hereinabove, the PRE “objectively baseless” objective test suffers from two maladies: (a) it is ambiguously framed; and (b) to the extent that a single test is discernible from the express text of the decision, it is likely a sub-optimal test, a variant of the “objectively baseless” archetype. Although this undoubtedly causes great heartache to the clients and attorneys dealing with the Noerr-Pennington “sham” exception in the field (the courtroom), there is a silver lining. Court decisions create ambiguous tests, and court decisions can eliminate them.116 So **the** practical **path** **forward** for curing the infirmities of PRE **is a future U.S.** **Supreme Court decision** **that** clarifies or **corrects117 PRE.** What is the preferred clarifying formulation? An objective test that constitutes a variant of the “objectively unreasonable” archetype seems best.

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C. **A Proposed Clarification** to the PRE Objective Test Several guidelines can now be enumerated regarding the contours of a clarification to the PRE objective test. The overall two-part structure for identifying “sham” claims, utilizing both subjective and objective tests, and how those tests interrelate (as shown in the matrix in Exhibit 1), remains unchanged. First, and foremost, the clarifying **court should** **clarify** that the **PRE objective test is in fact a variant of the “objectively unreasonable**” **archetype**. Language of the following sort could be profitably employed: A “sham” claim is an objectively unreasonable claim; **it lacks any reasonable chance of success in producing a reasonably favorable outcome**, based on the nature of the claim, from the vantage point of the reasonable prudent claimant. A “genuine” claim has a reasonable chance of succeeding in producing a reasonably favorable outcome, based on the nature of the claim, from the vantage point of the reasonable prudent claimant. Second, after clarifying the general nature of the PRE objective test, **the court could** **seize the opportunity to re-affirm various subsidiary matters relating to that test** (as described in relation to the court decisions referenced herein).121

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121 For example, the court could re-affirm that: (1) the objective reasonableness of asserting a claim is evaluated based upon the totality of the circumstances known to the claimant at the time of filing; (2) the duty to only pursue objectively reasonable claims is a continuing one (so that, if a litigant becomes aware of facts or law that converts what was once a genuine petition for redress into a sham, the citizen has an affirmative duty to timely correct the matter (including, potentially, discontinuing the proceeding)); and (3) the considerations bearing on objective reasonableness would include, but not be limited to, the following: (a) the evidentiary basis for any factual contentions upon which the suit is based; (b) the legal basis upon which the claim and prayer for relief are based; (c) the diligence of the claimant in ascertaining, prior to filing and throughout the prosecution of the matter, whether it has reasonable grounds to sue; (d) the presence or absence of effective legal advice from competent counsel; and (e) the likelihood, nature, and expected magnitude of success (considering both financial and non-financial measures of success), and the risk-adjusted cost, that a reasonable prudent person would perceive in relation to the litigation.

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Third, **the clarifying court could re-affirm that**, **only if challenged litigation is objectively unreasonable** **may a court examine the litigant’s subjective motivation.** Sham litigation is litigation motivated by something other than a genuine prayer for relief, and the litigant’s subjective motivation may be proven by direct or circumstantial evidence. The court should focus on whether the unreasonable lawsuit conceals an attempt to violate the Sherman Act through the use of the governmental process – as opposed to the outcome of that process – as an anticompetitive weapon. **Fourth, the clarifying court could harmonize and unify the PRE and Walker Process lines of authority** through the use of language along the following lines: “Fraudulent and objectively baseless claims are claims presented in bad faith and are objectively unreasonable. Claims depending upon close questions of law, or claims warranted by a reasonable argument for the extension, modification, or reversal of existing law, are not.” It is respectfully suggested that **formulations along the lines described above**, consistently applied in litigation everywhere and, in particular, in the patent field, **would dramatically increase the utility and predictability of the Noerr-Pennington** standard by capitalizing on all that has been learned since PRE was originally decided.

**Circuit courts are split now on what constitutes sham litigation. Supreme court resolution is necessary to tip the balance against sham petitioning**

**Carson and Russell 21.** Dylan Carson and Scott Russell. February 2021. Dylan Carson is a Partner at Faegre Drinker Biddle & Reath LLP. From 2015–2020, Mr. Carson served as Trial Attorney in the Media, Entertainment, and Communications Section of the Antitrust Division of the U.S. Department of Justice. Scott Russell is an antitrust attorney who has practiced in Washington, DC and California over the past 20 years. “Circuits Reinforce Split over When Noerr-Pennington Shields Serial Litigants” https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/2021/feb-2021/atsource-feb2021-carson.pdf

**Supreme Court Will Have to Resolve Split** over When a Pattern of Petitions Constitutes a Sham Every year, Noerr-Pennington immunity arises in a wide array of contexts.98 California Motor established that a pattern of petitions brought “**with or without** probable cause, and regardless of the merits of the cases” **could deprive** a petitioner of Noerr-Pennington **immunity**. PRE held that a petition brought **with probable cause is**, by definition, objectively reasonable and not a sham, and therefore excepted from antitrust scrutiny. **Lower courts**, however, **have split** **over whether** the Supreme Court’s decision in California Motor means that **there are separate standards**: one for sham petitioning when multiple petitions are at issue (California Motor) and one for sham petitioning when there is only a single claim (PRE). On one side of the split, five circuits have embraced California Motor’s “flexible” test for a pattern of petitioning by looking holistically at the subjective purpose and effect of the overall pattern, without an inspection of the objective merit of each individual petition, to determine whether serial litigation “without regard to the merits” has been improperly used as an economic weapon and is a sham subject to antitrust scrutiny. These circuits hew more closely to the concurrence by Justice Stevens in PRE that “[r]epetitive filings, some of which are successful and some unsuccessful, may support an inference that the process is being misused,” and, therefore, that a different rule should “govern the decision of difficult cases, some of which may involve abuse of the judicial process,” since “objectively reasonable lawsuits may still break the law.”99 On the other side of the split, two circuits, following PRE, appear to require that at least one petition in a pattern must be considered objectively baseless for serial petitioning to lose antitrust immunity. According to PRTC, a litigant can lose every petition and still be shielded from antitrust scrutiny so long as each of those petitions is not objectively baseless. Of note, both federal antitrust enforcement agencies have referred to PRE and California Motor as providing separate and distinct standards for invoking the Noerr-Pennington doctrine, based on whether a single or a series of petitions are challenged. The DOJ, in a December 2020 amicus brief in a recent Seventh Circuit appeal, noted that “drawing on California Motor, some courts have applied a separate standard when the alleged anticompetitive conduct consists of a series of petitions, instead of a single petition.”100 The DOJ’s brief quoted three of the circuits which have invoked the California Motor test for serial petitioning, but did not opine on the propriety of those courts’ application of that test instead of PRE. In 2006, the FTC staff issued a report supporting the California Motor standard, and stated that “a pattern of repetitive petitions filed without regard to merit and for the sole purpose of using the government process, rather than the outcome of the process, to harm directly marketplace rivals and suppress competition should be subject to antitrust liability without the requirement that each underlying filing meet PRE’s standard for objective baselessness.”101 The Supreme Court missed the opportunity to resolve the circuit split when certiorari was denied in the PRTC case and not sought by the losing side in U.S. Futures Exchange. Predictions about how the circuit split will be resolved, should cert be granted, are beyond the purview of this article. **Until the Supreme Court explains whether a pattern of petitions can be considered sham litigation** **even where none of the petitions are objectively baseless, a competitor that determines that the benefits from filing repetitive but reasonable petitions outweighs the litigation costs will have an incentive to engage in serial petitioning**. Meanwhile, antitrust plaintiffs who anticipate that serial petitioners will raise a Noerr-Pennington defense will likely center their claims in the five federal circuits which have accepted that the California Motor sham test applies to a series of petitions because in those jurisdictions, as the Third Circuit has noted, a plaintiff can “more easily overcome Noerr-Pennington immunity when the defendant ha[s] engaged in multiple legal actions against the plaintiff,” given the “more flexible standard” and “holistic review” of the California Motor test compared with PRE’s “exacting two-step test.”102

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## 2AC

**2AC – T Per Se**

**Rule of reason is a prohibition – the distinction is arbitrary**

Sarah E. **Light 19**, Assistant Professor of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania, “The Law of the Corporation as Environmental Law,” 71 Stan. L. Rev. 137, Lexis

While antitrust law can serve as an environmental mandate by prohibiting collusive behavior that keeps environmentally preferable goods from the market, there is also conflict between antitrust law's goals of promoting competition and environmental law's goals of promoting [\*177] conservation. 192 Because **antitrust** law**'s** **per se** rule and **rule of reason** operate on a somewhat **fluid continuum**, 193 this Subpart discusses the two doctrines together. The **per se** rule operates as a **prohibition**, whereas the **rule of reason** operates as **both a prohibition and a disincentive**.

As noted above, antitrust law generally **prohibits certain types of market activity** - price fixing, horizontal boycotts, and output limitations - as illegal **per se**, and harm to competition is **presumed**. 194 For example, if an industry association declines to award a seal of approval necessary for a product's sale without any good faith attempt to test the product's performance, but rather simply because that product is manufactured by a competitor, such an action would be illegal per se. 195 Under this Article's framework, a **per se** violation is **thus a prohibition**.

The more fact-intensive inquiry under the **rule of reason** tests "whether the restraint imposed is such as merely **regulates** and perhaps thereby **promote**s competition or whether it is such as may **suppress** or even **destroy** competition." 196 While this extremely broad statement might suggest that **any fact** is relevant to the inquiry, the salient facts under the rule of reason are "those that tend to establish whether a restraint increases or decreases output, or decreases or increases prices." 197 **If** an **anticompetitive effect is found**, **then the action is illegal** and the rule of reason **operates, like the per se rule, as a prohibition**. 198 The rule of reason can also operate as a disincentive, even if no [\*178] court finds an anticompetitive effect, as uncertainty and litigation risk may discourage firms from undertaking legally permissible, environmentally positive industry collaborations. 199

**C/I Prohibit can mean ‘severely hinder’---doesn’t necessitate a ban.**

**Washington Court of Appeals 19** (KORSMO-judge. Opinion in State v. Kimball, No. 35441-5-III (Wash. Ct. App. Apr. 2, 2019). Google scholar caselaw. Date accessed 7/13/21).

His argument runs counter to the meaning of the word "prohibit." It means "1. To forbid by law. 2. To prevent, preclude, or severely hinder." BLACK'S LAW DICTIONARY 1405 (10th ed. 2014). As **"severely hinder"** suggests, a "prohibition" **need not be** an all or nothing proposition.

**Anticompetitive practices means business practices aimed at reducing competition**

**OECD 3** (Glossary of Industrial Organisation Economics and Competition Law, compiled by R. S. Khemani and D. M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, 1993, <https://stats.oecd.org/glossary/detail.asp?ID=3145>, y2k)

Definition:

**Anticompetitive practices** refer to a wide range of **business practices** in which a firm or group of firms may engage in order to **restrict** inter-firm **competition** to maintain or increase their relative market position and profits without necessarily providing goods and services at a lower cost or of higher quality.

**.**

**2AC – Cap K**

**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.

**Aff key to prevent crony capitalism—Noerr has been extended to give corporations a blank-check for lobbying, bribery, etc. that enables the worst expanses of corporate influence**

**Zerotheft 1/28/21** (Political movement that seeks to eradicate theft from the U.S economy. “Defining Crony Capitalism & How It Affected the U.S. Economy”, https://zerotheft.net/crony-capitalism-and-how-it-affected-the-u-s-economy/)

Crony capitalism can infiltrate the corporate-political world in numerous ways. The oldest form of cronyism (as old as elections actually) does not involve money at all. A political candidate can provide whatever a corporation requests (e.g. drafting legislation that benefits the business), and the corporation returns the favor with public support and votes. Lobbying, protected under the First Amendment of the Constitution, refers to when the public advocates for or against a position to their elected officials. Some of the lobbyings involve the non-self-interested communication of key information to busy non-specialist legislators and Congressional staffers. Individuals will champion what they deeply believe to be in the public interest. Corporations can also express their perspectives to make sure legislators know their side. The freedom to communicate your side is a fundamental part of democracy, but **crony capitalism has twisted this right**. Over time, corporations have turned to hire a professional lobbyist firm to do the influencing for them. This trend has created a multi-billion dollar industry that has generated trillions for corporations, according to the Sunlight Foundation. Professional lobbyists often get hired due to their extensive political connections and knowledge of how the federal government works. The people who get these jobs are, therefore, ex-government officials, Congressional staffers (who often ‘audition’ for lobbying jobs), policy experts, etc. As opposed to the average American expressing their opinion on a political issue, a lobbyist has the backing of their corporate client. That means better financing and better access due to prior relationships during their time in politics. This has created what’s known as the ‘revolving door’—where lobbyists essentially switch jobs with legislators/regulators and vice-versa. It’s arguably a kind of elite club, where members exchange favors for each other’s benefit. Except those **favors result in vast economic inequality**, keeping countless Americans down. A Mutually Beneficial Relationship So what’s it all about? Why engage in crony capitalism? **Money**. More wealth itself, or what wealth can get you. How Crony Capitalism Benefits Government Workers Successful campaigns for all levels of the public office often require some degree of financing. The advertisements, the travel, the events, the fundraisers themselves often create costs. This has made politicians more dependent on raising campaign financing and less focused on solving the nation’s problems. The Center for Responsive Politics found that, in 2020, candidates who spent the most money won elections 87% of the time for Congress, 71% for Senate. Maplight, a nonprofit, nonpartisan organization dedicated to defending democracy, conducted an analysis discovering that House members, on average, each raised $1,689,580, an average of $2,315 every day during the 2012 cycle. Senators, on average, each raised $10,476,451, an average of $14,351 every day during the 2012 cycle. These figures do not prove that money alone wins elections, but it undoubtedly helps. What we have is a two-sided **Pay to Play system**. Pay to Play for individuals/lobbyists because donating money or providing favors to the elected official will increase your chances of getting meeting time and influencing legislative decisions. But it’s also Pay to Play for the elected official who needs funding to compete in elections. Alternatively, elected officials and Congressional staffers looking to change careers have monetary incentives to engage in crony capitalism. Lobbyists can offer lucrative positions at their firm or their clients in exchange for favorable legislation, tax cuts, etc. Public Citizen has reported that 59% of Congress members from the 2017-2019 classwork for lobbying firms. How Crony Capitalism Benefits Corporations The corporate rationale for engaging in crony capitalism can be quite simple. It comes down to one simple question: will we do anything to maximize profits, even if it requires doing something unethical? Corporations have the man and financial power to make a genuine lobbying campaign. Their side gets disproportionately represented, potentially muting critics or opponents. This can especially become a problem when you have a rent-seeking official. Institutions that can afford lobbyists too often **dominate legislative consideration of issues that affect those that cannot afford lobbying** (although businesses most subject to government intervention might need to lobby so that their real-world perspectives will be brought into “the formulation of public policy). Crony capitalism can lead to **massive businesses monopolizing markets**, preventing competition, and consequent price reductions. Corrupt and powerful corporations have even allegedly drafted the legislation they want enacted. Proposed Examples of Crony Capitalism Several highly debated cases of crony capitalism across the U.S. economy have emerged over the years. It’s important to remember that economic rigging could be happening in many different industries/sectors. We’ll quickly cover just a few potential examples here. Bailouts The Federal Reserve served as the lender of last resort, making major bailouts for the Long Term Capital Management (LTCM) collapse, the savings and loan crisis, and the 2008 financial crisis. These Fed-funded (i.e. taxpayer-funded) bailouts, in short, reward corporations that take on excessive risk. In some cases, corporate executives received handsome returns for tanking the economy. For example, in the aftermath of the 2008 financial crisis, the cronies on Wall Street responsible for the economic disaster made killings while many Main street investors (the average American with a retirement fund) have never truly recovered. Pharmaceutical/Healthcare In 2019, the pharmaceutical/healthcare industry spent close to $600 million on lobbying, making it the sector with the highest lobbying spend. Drug prices in the U.S., on average, end up costing citizens four times more than citizens of other similarly developed countries spend for the same medicine. Furthermore, corporations have used pay-for-delay deals to stop competitors from releasing their biosimilar version of a drug. One particularly contentious debate around crony capitalism in the pharmaceutical industry involves the non-interference clause in Medicare Part D. The clause legally prevents the government from negotiating prices for drugs offered through Medicare Part D. Lobbyists and elected officials allegedly had a major part in not only adding the non-interference clause to Medicare Part D but making sure it remained enacted. **Taxes** Turns out the saying death and taxes are the only two certainties may not be true. With tax havens and low capital gains tax rates, wealthy individuals and corporations have many ways to reduce the amount of taxes they pay. According to the White House’s figures, individuals paid about 89% of the government’s revenues (tax) in 2019. Businesses paid around 7%. When you factor in that major corporations have allegedly avoided paying taxes altogether, you would be justified in thinking much of the 7% is being paid by ethically run businesses. Summarizing the Harmful Effects of Crony Capitalism While numerous examples of healthy public-private partnerships exist, the effects of crony capitalism cannot go ignored any longer. It has taken a considerable toll on countless hard-working Americans trying to live a good and honest life. Crony capitalism has arguably: Impeded necessary economic and political changes, which could in principle yield equity and efficiency gains for American citizens. Reduced market competition by enabling antitrust behavior and has given advantages to established entities over new players Resulted in subsidies or tax breaks that benefit economic elites and corporations at the expense of the general public. Promoted rent-seeking behavior in politics, shifting the focus away from protecting public interests If left unchecked, **crony capitalism will continue to widen the chasm of economic inequality**. If we don’t address it ASAP, injustice and corruption will just continue to grow more entrenched in our financial and political system. So let’s do something about it. Starting now.

**System sustainable**

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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 **n**on**g**overnmental **o**rganization**s**.

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

**2AC – Regulations CP**

**It’s about consistency of precedent which only the aff solves**

**Domingos 14** “Indirect Regulation and the Disinterested Official -- A Study on Sham Litigation in Brazil” Roberto Domingos Taufick - Largo de São Francisco Law School, University of Sao Paulo; University of São Paulo (USP), December 18, 2014, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2540341

First, although consistent with the general contours of the rights abuse and bad faith litigation doctrines, the decisions have shifted considerably within the large scope of those cornerstones. When applying them to Competition Law -- **task in which the large American experience in building Noerr-Pennington could be of great help --** the Competition Commission has failed to -- in a backward looking approach -- collect parameters that would be objectively applied in every single case. This failure can be partially assigned to the absence of a strong culture of precedents that impairs the ability of the Commission to follow its own decisions. Another significant part can be assigned to the **uneven treatment of the petitioning immunity in the US**, that has given room to a wide range of interpretations by both American lower courts76 and in Brazil. Last but not least, the Commission has not debated over the issues that have triggered the decisions by the American courts and which could show how some criteria still invoked in Brazil have been overly criticized in the US. This is the case, for instance, of treatment given to the claims that aim at shielding the petitioner from competition. As we will see, the application of this standard in desirably competitive markets may lead to a situation where no claim will be accepted at all, for every market player should in principle be interested in the doom of the opponent [Noerr]. Also, this criterion involves an analysis of intent and is therefore rather subjective.

Second, the Commission has never taken into consideration bias that is expected in cases involving public undertakings in countries where state direct participation on the market and public credit from development banks still play a prominent role in the economy. And no one has ever analyzed the effect of said bias over private investment, especially in IP intensive sectors. As we shall see, bias can be diluted by the imposition of clear parameters as those proposed by the functional process approach. So I shall first go through the American experience in the petitioning immunity and in the sham exception set forth in the Walker Process and Handgards standards. Only then shall I go forth and exploit the parameters proposed back in 1992 by Professor Elhauge's functional approach.

I will conclude with the suggestion of a model that by **increasing consistency and lowering bias should provide more reliable decision-making --** and thereafter create a friendlier environment to private investment and innovation.

**Reforming citizen petition causes court review AND a flood of litigation – IF they say they fiat through this, they link to our democracy da**

**Liu 17** (Franklin Liu, Associate at Kirkland & Ellis LLP, JD, Boston College of Law, ARTICLE: WEAPONIZING CITIZEN SUITS: SECOND CIRCUIT REVISES THE BURDEN OF PROOF FOR PROVING SHAM CITIZEN SUITS IN APOTEX v. ACORDA THERAPEUTICS, 58 B.C. L. Rev. E. Supp. 147, y2k)

II. PHARMACEUTICAL DRUG ANTITRUST LITIGATION IN THE SECOND CIRCUIT

The **pharma**ceutical industry is particularly **ripe** for **antitrust** claims and counterclaims given the **statutorily created monopolies** that brand-name drug companies enjoy by **virtue of** their **exclusivity periods**. 55 In May 2016, in *Apotex* Inc. v. Acorda Therapeutics, Inc., the United States Court of Appeals for the **S**econd **C**ircuit **refused** to extend antitrust liability to Acorda, a brand-name drug manufacturer that had allegedly filed **a citizen petition** to delay approval of Apotex's competing generic. 56 Section A of this Part discusses [\*157] prior Second Circuit precedent applying antitrust principles to citizen petitions, and the FDA's recent interpretative guidance ("Guidance for Industry"). 57 Section B discusses the Second Circuit's evaluation of the FDA Guidance for Industry and the reasoning in Apotex behind its holding that the evidence at bar was insufficient to state a claim for an antitrust violation under Section Two of the Sherman Act. 58

A. In re DDAVP and the FDA Guidance for Industry on Citizen Petitions

The *Noerr-Pennington* antitrust immunity doctrine **does not** protect sham litigation and indeed, the Second Circuit has specifically held that sham citizen suits can be analogized to **sham litigation** and form the **basis** of a claim for a violation of Section Two of the Sherman Act. 59 In 2009, in In re DDAVP Direct Purchaser Antitrust Litigation, the U.S. Court of Appeals for the Second Circuit heard a case with very similar facts to Apotex that involved a generic drug application that the FDA approved on the same day that the FDA denied the citizen petition, leading to the inference that the petition had played a role in delaying approval of the generic. 60

In re DDAVP involved a suit by a class of direct purchasers who alleged that the defendant manufacturer, a licensee of antidiuretic DDAVP tablets, suppressed generic competition by filing a sham citizen petition to delay a generic competitor's ANDA, all for the purpose of inflating the price the defendant could charge for DDAVP. 61 The Second Circuit held that the plaintiffs presented sufficient evidence to state a claim for antitrust liability based on a theory that the defendant's citizen petition was a sham. 62

In November 2014, after In re DDAVP, the FDA released Guidance for Industry, a document that the Second Circuit deemed persuasive in reaching its decisions in Apotex. 63 The **FDA Guidance** for Industry outlines the **FDA's interpretation** of Section 355(q) of the FDCA with respect to **citizen** [\*158] **petitions** and, in particular, how citizen petitions related to a pending ANDA are to be evaluated. 64 Guidance for Industry states that, with respect to the **timing** of an ANDA review and a citizen petition, the FDA's priority is to protect the **procedural rights** of ANDA applicants to challenge adverse agency decisions with respect to their application, including notice of an opportunity for a hearing. 65 Because a ruling on a citizen petition is considered final agency action **reviewable only by the courts**, a FDA ruling on a citizen petition before a FDA decision on whether to grant an ANDA would leave the ANDA applicant unable to challenge the FDA's finding at the agency level. 66 Thus, according to Guidance for Industry, the FDA prefers to wait to decide on a citizen petition until after it renders a decision on the ANDA application at issue. 67

B. The Second Circuit's Reasoning in Apotex

In Apotex, the **S**econd **C**ircuit **unanimously** affirmed the district court's decision after a de novo review, denying **generic** drug **manufacturer** Apotex's claim that brand-name drug manufacturer Acorda had filed a **sham citizen petition** in violation of U.S. antitrust law. 68 The **key issue** in Apotex was whether the **brand**-name **manufacturer's** citizen petition was **objectively and subjectively baseless** and therefore **a sham litigation** that could serve as the **sole basis of an antitrust claim**

**. 69**

The Second Circuit held that Apotex had failed to meet the first prong of the test because it had not shown that Acorda's citizen petition was objectively baseless. 70 Because both prongs of the test need to be satisfied in order to show litigation is a sham, it was therefore unnecessary for the Second Circuit to go on to consider whether the citizen suit also constituted a subjective sham. 71

In light of the Guidance, the Second Circuit held that the FDA's actions with respect to approving the ANDA application and ruling on the [\*159] brand-name manufacturer's citizen suit reflected a concerted effort by the FDA to protect the generic manufacturer's procedural rights with respect to its ANDA application. 72 Because the FDA Guidance suggests that the FDA prefers to rule on citizen suits and the implicated ANDA application contemporaneously in order to protect ANDA applicants' review rights, the Second Circuit held that it was significantly less likely for Acorda's citizen petition to have been a sham and used in an anticompetitive fashion. 73 Thus, the Second Circuit ultimately ruled that the generic manufacturer had not stated a claim under Section Two of the Sherman Act and that the district court did not abuse its discretion in its disposition of the case. 74

III. THE SECOND CIRCUIT'S ANALYSIS OF FDA GUIDANCE MISAPPLIES U.S. ANTITRUST LAW AND INCENTIVIZES DILATORY SHAM LITIGATION

Despite the factual similarity to its own precedent, the U.S. Court of Appeals for the Second Circuit in 2016, in Apotex Inc. v. Acorda Therapeutics, Inc., dismissed a generic drug manufacturer's claim that a brand-name drug manufacturer violated U.S. antitrust law by filing a sham citizen suit to delay the FDA's approval of the generic. 75 In so deciding, the Second Circuit effectively raised the **burden of proof** for showing a **particular** citizen suit is a sham by reducing the **presumptive weight** it had previously afforded to the **timing of the FDA's decisions**. 76 After Apotex, the significance of the timing of the FDA's review of an ANDA and its disposition of a related citizen suit has been **downgraded** from sufficient to state a claim of sham litigation to **merely relevant** in that assessment. 77 Despite the fact that the Second Circuit had held that the petitioners in 2009 in In re DDAVP Direct [\*160] Purchaser Antitrust Litigation had stated a claim for sham litigation based purely on the timing of the FDA's actions, the Second Circuit in Apotex suggested that such evidence is not enough and that plaintiffs must plead additional facts that the petition is **baseless** in order to **survive a motion to dismiss**. 78

Although the FDA Guidance that the Second Circuit relied on is certainly **persuasive** authority, it is, by its own terms, **nonbinding**. 79 Even assuming, arguendo, that the Second Circuit's interpretation of the FDA Guidance was **correct**, its decision in Apotex risks **undermining the very goals that the Sherman Act** and the Hatch-Waxman Act were designed to achieve. 80 The Sherman Act, like the other U.S. antitrust laws, was enacted to protect competition and consumer welfare and ensure that businesses have sufficient incentives to compete on both price and quality. 81 The Hatch-Waxman Act was designed in part to provide the public with access to lower cost drugs upon the expiration of a brand-name drug's exclusivity period. 82 Both statutes were therefore designed specifically to help promote free competition in furtherance of the public welfare. 83

Generics are not only much cheaper than brand-name drugs, but each generic that enters the market puts additional downward pressure on the price of the incumbent brand-name drug. 84 The Second Circuit's ruling that [\*161] there was insufficient evidence to infer that Acorda's citizen petition was being deployed as **an anticompetitive weapon** against Apotex risks harming not only the health and viability of generic drug manufacturers like Apotex going forward, but the American public as well. 85 The Second Circuit's ruling in Apotex will hurt generic manufacturers in the **short** and **long-run**, because brand-name manufacturers, **seeing the increased degree of difficulty** facing generic manufacturers to prove **sham suits**, may choose to **follow Acorda's** lead and **file** their own **citizen suits** whenever generic manufacturers attempt to enter the market. 86 The purpose of the brand-name manufacturer's citizen suit would be to extend its exclusivity period, which would undermine generic competition in contravention of the goals of the Hatch-Waxman Act. 87 Should that reality come to pass, the public will be harmed, as they will be forced to pay for high-priced brand-name drugs longer than the law intends. 88

CONCLUSION

The U.S. Court of Appeals for the Second Circuit's 2016 decision in Apotex Inc. v. Acorda Therapeutics, Inc.--that the FDA's simultaneous granting of a generic ANDA and denial of a brand-name's citizen petition is insufficient evidence to infer that the citizen petition was deployed as an anticompetitive weapon--risks harming not only the health and viability of generic drug manufacturers, but the American public as well. By devaluing **the presumptive weight** previously afforded to the precise timing of the FDA's disposition of citizen suits and ANDA approvals, the Second Circuit has made it considerably more **difficult** for parties to prove that a particular citizen suit is a sham and thus **an anticompetitive weapon of the type prohibited by the Sherman Act.**

The Second Circuit's ruling creates a **perverse incentive** that may **induce** other brand-name drug companies seeking to **extend the life of** their **monopolies** to file their own **citizen suits** with the sole purpose of undermining their generic competitors. In such circumstances, the public will be [\*162] forced to continue to pay for higher-priced brand-name drugs, as there will be no other choices in the absence of generic competitors.

Apotex not only represents a stark departure from recent case precedent, but the Second Circuit's holding is also contrary to the intent of Congress in enacting the Hatch-Waxman Act and the Sherman Act, both of which were intended to protect the public by ensuring unfettered operation of the free market system and preservation of consumer choice. In the context of the prescription **drug market** and given the public health ramifications, it is especially **vital** that U.S. courts consider the underlying policies of the statutes they are interpreting or else **risk greater harm to the public** by their oversight.

**2AC – RICO CP**

**Zero net benefit, Noerr is constitutionalized now!**

Michael **Pemstein 14.** Attorney, Quinn Emanuel Urquhart & Sullivan, LLP. “The Basis For Noerr-Pennington Immunity: An Argument That Federal Antitrust Law, Not The First Amendment, Defines The Boundaries Of Noerr-Pennington” <https://heinonline.org/HOL/LandingPage?handle=hein.journals/thurlr40&div=9&id=&page=>

The second type of error that may occur is not an error in result, but an error in reasoning. If the "proper" level of protection for petitioning activity in a non-antitrust cause of action happens to be the same level that would be required by the Noerr-Pennington doctrine, then while courts may reach the correct outcome by transposing the Noerr-Pennington doctrine outside the context of antitrust law, these courts will base this result on an improper analysis. Even though this is a mistake in reasoning and not in result, there still may be consequences. For example, courts which make this mistake may be avoiding constitutional questions concerning the proper scope and application of the First Amendment right to petition when they should be addressing them. This can occur because the Noerr-Pennington doctrine is primarily based on an interpretation of federal antitrust statutes and therefore it is imbued with **statutory interpretation principles**. These principles require courts to take a cautious approach and to be hesitant to attribute an intent to infringe or chill constitutionally protected freedoms to the legislature. For example, in Noerr, the Court avoided "difficult constitutional questions" by refusing to interpret the Sherman Act as imposing antitrust liability for political activities, noting that Congress had traditionally been hesitant to regulate such activities. 62 These statutory interpretation principles, however, are not applicable in petitioning immunity cases based on common law causes of action. The common law is the sole province of the judicial branch. By imputing these statutory interpretation principles into the realm of common law, courts, like the one in Theme Promotions,are shirking their institutional responsibility to address the "difficult constitutional questions" posed by petitioning immunity suits that are based on common law causes of action.163 As a result, the right to petition, an already underdeveloped area of law, will continue to be neglected, potentially compounding these problems in future petitioning immunity cases. Another consequence to this error in reasoning is that it attributes constitutional status to levels of protection which were primarily based on non-constitutional considerations**. As a result it entirely precludes Congress from changing the levels of protection afforded to petitioning activity in areas of law governed by statute.** **Any changes to those levels of protection would have to come by way of constitutional amendment or court decision.**

**Civil RICO when applied to first amendment triggers a wave of uncertainty**

**Herbst 04** (Daniel Z. Herbst J.D. Candidate, May 2005, The Catholic University of America, Columbus School of Law. , Injunctive Relief and Civil Rico: After Scheidler v. National Organization for Women, Inc., https://scholarship.law.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1242&context=lawreview)

Rico's Scope and Remedies Require Reevaluation, 53 Cath. U. L. Rev. 1125 (2004).Scheidler not only failed to clarify the racketeering requirement, but it also failed to resolve the availability of injunctive relief." Upon determining that no underlying RICO claim existed, the Court dismissed the action, stating that it "need not address" the issue of injunctive relief. 7 9 Since the Ninth Circuit decided Wollersheim in 1986, federal courts have generally followed its prohibition of injunctive relief to private civil RICO claimants, with the exception of pendant state claims, which do provide for injunctive relief.""' Due to its contradictory reading of the statute and rejection of Wollersheim, the Seventh Circuit Scheidler opinion created a need for Supreme Court review.'' With such **uncertainty** regarding the elements of the RICO private action,' 2 determining the **scope** of available remedies to private litigants **virtually ensures forum shopping**, **uncertain pleading**, **and issues of constitutional** 183 **vagueness**.

On a practical level, injunctive relief serves as an important weapon for plaintiffs in many types of RICO actions. 84 RICO plaintiffs often use injunctions to induce large settlements, well beyond alleged damages, and to eliminate competitors."" Scheidler illustrates that injunctions also prove useful in halting alleged racketeering activities of noneconomically motivated enterprises."'" However, the Court's unrestrained interpretations, which extend injunctive relief to private plaintiffs, may implicate constitutional concerns, especially when applied to organizations with political motives.8 7 The district court's nationwide injunction against anti-abortion protesters in Scheidler exemplifies the danger of this remedy." " In this context, several commentators and judges raised concerns regarding RICO's injunctive remedies' **infringement on First Amendment freedoms**. 9 While private injunctive relief may compensate some plaintiffs when monetary damages fail to fully remedy,'90 injunctive power under RICO clearly **has the potential to cause substantial mischief**.'9'

**Constitutionalizing Noerr makes the CP unworkable! blocks civil RICO**

**Astrada 18** (Marvin L. Astrada,M.A., Ph.D., Florida International University; J.D., Rutgers University Law School; M.A., C.A.S., Wesleyan University, Examining the Present Security-Liberty Nexus: Civil RICO - Remedy to Procure Security or Threat to Civil Liberty?, 36 Quinnipiac L. Rev. 357)

In *Savage*, the court found that the suit at bar presented the following **First Amendment issue**; i.e., the issue of **Noerr**-Pennington protection vis-a-vis **freedom of speech**. 233 The court found that "although the Supreme Court has not extended the Noerr-Pennington doctrine to speech-related activities other than petitioning, the doctrine [\*405] demonstrates that **defendants** may use the **First Amendment** as a **shield** to **defend against** claims alleging **antitrust** and **civil RICO violations**." 234 The First Amendment may be **used as a "shield**" to protect parties engaged in "**petitioning**" via civil lawsuits and pre-litigation **demand letters**. 235 In Savage, the court found that applying **civil RICO** would indeed chill the defendant's freedom to **respond** to the plaintiff's initial allegations of it being a terrorist organization by filing lawsuits. 236 "To the extent the actions complained of involve defendants' filing of lawsuits … defendants are entitled to Noerr-Pennington protection… . [a] **RICO claim may not be sustained** on the basis of [defendant filing] lawsuits and pre-litigation demand letters." 237

**2AC – FTC DA**

**FTC overload now.**

**Burke ’21** [Henry and Andrea; May 28; B.A. in Political Science and Labor Studies from the University of California at Los Angeles; Research Assistant, B.A. in Economics from the University of Maryland; Revolving Door Project, “Hobbled FTC Lacks Budget to Combat Corporate Buying Spree,” <https://therevolvingdoorproject.org/hobbled-ftc-lacks-budget-to-combat-corporate-buying-spree/>]

Even if the **will** to stop it exists, the FTC doesn’t have the **funding** to stop this boom. In fact, it hasn’t had the funding to **keep up** with a **steady uptick** in mergers in **years**. Aside from the recent spike, the **total** number of premerger filings [**increased**](https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf) by **80 percent** over the last 10 years. In 2010, corporations filed 1166 premerger notifications. By 2019, yearly filings almost **doubled** to 2089.

While the **number** of transactions the FTC is charged with regulating has **increased** steadily, the **number** of enforcement actions — challenges to anticompetitive mergers or conduct — has **stagnated**.  A 2020 paper from Equitable Growth showed that while the number of [enforcement actions](https://equitablegrowth.org/wp-content/uploads/2020/11/111920-antitrust-report.pdf) from both the FTC and DOJ hovered at about 40 challenges per year from 2010 to 2019, even as the number of corporations seeking merger approval grew. The FTC’s enforcement actions over the past ten years show the agency hasn’t kept up with increased HSR filings: while FY 2010 saw **22** enforcement actions for **1166** reported mergers, a ratio of approximately one enforcement action for every 53 mergers, FY 2019 saw a mere 21 enforcement actions for **2089 mergers**, meaning there was **only one** FTC enforcement action for **every 99** mergers.

Overall **funding** and **staffing levels** at the FTC have similarly **stagnated**. Then-FTC commissioner Rebecca Slaughter said in 2020 that it is an “[**indisputable**](https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf)” fact that FTC funding has **not kept up** with market demands; according to Slaughter, the FTC budget has only increased by **13%** since 2010 and the employee headcount **decreased**. This budget increase has not come from increased discretionary appropriations from Congress however, but from a massive increase in merger filings and their accompanying fees. Startlingly, Slaughter notes that “the FTC had roughly **50% more** full-time employees at the beginning of the **Reagan** Administration than it does today.” The situation has become so dire that increased budgets for the enforcement agencies has become a rare [bipartisan](https://www.law360.com/articles/1368496/klobuchar-says-congress-has-rare-shot-at-antitrust-overhaul) issue in the Senate.

**Litigation - the FTC has been locked since 2011 over Abbvie and will keep going after patent trolls**

**Brachmann 5-25**. Steve Brachmann. Freelance journalist located in Buffalo, New York. He has worked professionally as a freelancer for more than a decade. He writes about technology and innovation. His work has been published by The Buffalo News, The Hamburg Sun, USAToday.com, Chron.com, Motley Fool and OpenLettersMonthly.com. “Federal Trade Commission Urges SCOTUS to Deny AbbVie Petition” <https://www.ipwatchdog.com/2021/05/25/federal-trade-commission-urges-scotus-deny-abbvie-petition/id=133880/>

On Wednesday, May 19, the response brief of the Federal Trade Commission (FTC) was filed with the U.S. Supreme Court in AbbVie v. FTC. The petition for writ of certiorari filed by AbbVie asks the nation’s highest court to decide whether lower courts erred in finding that AbbVie’s Hatch-Waxman district court litigation involving patents covering its AndroGel testosterone treatment met the sham litigation exception to Noerr-Pennington doctrine. The FTC’s brief urged the Supreme Court to deny AbbVie’s petition for writ, a decision that arguably could cast into doubt pharmaceutical firms’ ability to enforce their patent rights under decades-old legislation meant to balance the economic interests of innovative drug developers with the public interests served by generic drug makers.

AbbVie Faces FTC Antitrust Action After Settling Hatch-Waxman Suits Against Teva and Perrigo

**The present appeal stems back to patent infringement litigation** **filed** by AbbVie **in 2011** against generic drug makers Teva Pharmaceuticals and Perrigo Company over Paragraph IV certifications those companies made in their abbreviated new drug applications (ANDAs) for generic versions of AbbVie’s AndroGel that Teva and Perrigo filed with the U.S. Food and Drug Administration (FDA). By certifying to the FDA that their generic testosterone treatments would not infringe AbbVie’s AndroGel patents, or in the alternative that those patents were invalid, Teva and Perrigo provoked district court litigation under the Hatch-Waxman Act, legislation implemented by Congress in 1984 to incentivize branded drugmakers to quickly bring suits to adjudicate infringement claims after a Paragraph IV certification. The Paragraph IV certifications filed by Teva and Perrigo noted that their generic testosterone treatment didn’t literally infringe AbbVie’s Androgel patent claims, which covered the use of isopropyl myristate, and that any doctrine of equivalents argument advanced by AbbVie would be overcome by prosecution history estoppel as AbbVie had amended its patent from claiming the use of any penetration enhancer to claim only isopropyl myristate.

Although both the Teva and Perrigo suits were ultimately settled by AbbVie, the FTC filed a September 2014 lawsuit in the Eastern District of Pennsylvania alleging that AbbVie’s lawsuits were sham lawsuits **meant purely to delay** the market entry of generic versions of AndroGel. The district court ordered AbbVie to pay $448 million in disgorgement, finding that the lawsuits met the sham exception to Noerr-Pennington doctrine, which immunizes private companies from federal antitrust suits under an interpretation of the First Amendment when those companies are litigating valid rights that create anticompetitive effects. The sham litigation exception to Noerr-Pennington required the FTC to prove (1) that AbbVie’s lawsuits were objectively meritless; and (2) that AbbVie’s subjective intent in filing the suits was only to interfere with the business interests of its competitors.

The district court found objective baselessness in AbbVie’s suits as AbbVie had “no plausible argument to overcome… the application of prosecution history estoppel” as argued by Teva and Perrigo in their FDA filings. Although there was no direct evidence of AbbVie’s subjective intent, the district court inferred subjective intent from the fact that AbbVie’s lawyers were very experienced with patent matters and would know that litigation would delay generic competition. On appeal to the U.S. Court of Appeals for the Third Circuit, the district court’s ruling was upheld in part on the reasoning that the objective and subjective elements of the sham litigation exception are interrelated and the objective baselessness of the suit, coupled with the experience of AbbVie’s attorneys, satisfied the subjective element.

FTC Argues Proper Application of Noerr-Pennington Sham Litigation Exception **Should Prevent Appeal**

In the agency’s brief in opposition, counsel for the FTC argued that the Supreme **Court could simply deny AbbVie’s petition** based on the Court’s regular practice of denying interlocutory review in cases where further lower court proceedings could affect the issues in AbbVie’s petition. Although the Third Circuit affirmed the district court’s sham litigation finding, it reversed the finding that AbbVie’s settlement with Teva constituted an illegal reverse-payment agreement and remanded for further proceedings on that claim. “The current interlocutory posture of the case is a sufficient reason to deny the petition for a writ of certiorari,” the FTC argued.

Should the Supreme Court disagree on that point, the FTC argues that both the district and circuit courts properly found subjective intent in the circumstantial evidence of the case, including AbbVie’s lawyers’ knowledge of prosecution history estoppel, their knowledge of AndroGel’s commercial success, and the regulatory context in which AbbVie’s Hatch-Waxman suit triggered an automatic 30-month stay of FDA approval for generic competitors. The FTC also addressed AbbVie’s arguments on petition that the lower courts’ application of the Noerr-Pennington sham litigation exception conflicted with Supreme Court precedent. Lower courts were free to credit objective baselessness as having evidentiary weight for the subjective prong of the test, the FTC argued, and that the collateral injury inflicted by the 30-month stay under the Hatch-Waxman framework was evidence that AbbVie was abusing a governmental process to directly interfere with competitors’ business relationships. Even if AbbVie is correct that the subject prong of the sham litigation exception required evidence of actual knowledge or belief of the meritless nature of the Teva and Perrigo suits, the FTC noted that the district court ruled that AbbVie acted with “actual knowledge that the suits lacked merit” and “with no expectation of prevailing.” Further, there was no conflict with circuit court precedent because the Federal Circuit’s presumption that patent suits are brought in good faith can be overcome by circumstantial evidence of acting in bad faith.

The FTC’s response brief also mitigated concerns raised by AbbVie’s petitions that the lower courts’ decisions would harm innovation by impacting patent rights negatively and undermine attorney-client privilege. AbbVie’s petition noted that 10% of all patent litigation filed in U.S. district courts is filed under the Hatch-Waxman regulatory process and by relying on objective evidence upon which reasonable decisionmakers could disagree, pharmaceutical firms now face heightened antitrust scrutiny diminishing their incentive to innovate even if they subjectively believe that their patent suit has merit. As well, the court of appeals shifted the burden onto AbbVie to prove subjective intent by presenting evidence of the opinions and mental impressions of AbbVie’s patent lawyers, which would have required the waiving of privilege. In response, the FTC contended that AbbVie raised no argument that the vast majority of Hatch-Waxman litigation would be objectively baseless. Further, AbbVie’s privilege argument relies on the unusually facts of the underlying case, in which no business executives signed off on the Teva and Perrigo lawsuits. While attorney-client privilege is an important concern to balance, the FTC argued that barring courts from inferring subjective intent could lead pharmaceutical firms to simply delegate all legal decisions to in-house attorneys in order to invoke privilege.

FTC Enforcement Actions Against AbbVie Are Far from Over

AbbVie’s patent portfolio has taken a great deal of flak in Washington in recent weeks, especially regarding the company’s blockbuster anti-inflammatory drug Humira. On May 18, a group of House Democrats called for an FTC inquiry into AbbVie’s patent practices which have delayed market entry for a generic version of Humira, and the House Oversight Committee grilled AbbVie CEO Richard Gonzalez on those same practices. “We want drug companies to be successful, but abusive, unfair pricing and anticompetitive practices mean these medicines **are out of reach** for too many Americans,” said Representative Carolyn Maloney (D-NY), one of the House Democrats calling for an FTC investigation into AbbVie’s Humira, at the House Oversight Committee hearing. Although President Biden has yet to nominate someone for FTC Chair, Acting Chair Rebecca Kelly Slaughter’s comments surrounding Qualcomm’s successful appeal of antitrust enforcement against that company’s patent licensing practices indicates that the FTC under President Biden may become very active in raising antitrust charges against patent owners.

**2AC – Data Collection DA**

**Other protections solve –** 1st amendment and petitioning right -  **and sham litigation internal link turns free speech**

**Bieszczat 2017**. Steven Bieszczat. J.D., University of Illinois College of Law. “First Amendment Protection For Unfair Labor Practices?: Reexamining The Noerr-Pennington Doctrine” <https://www.illinoislawreview.org/wp-content/uploads/2017/08/Bieszczat-2.pdf>

Regarding protection of petition rights, the **Noerr**-Pennington doctrine **does not serve as the only basis for protection**. As previously noted, the Petition Clause itself provides independent protection for petition rights,277 and petition rights can still be protected by maintaining nonrepugnant statutory constructions or amending the sham petition requirements.278 While it is true that the Noerr-Pennington doctrine likely provides stronger protection for petition rights than the alternatives proffered here would, **the problems created by Noerr-Pennington in a nonantitrust context outweigh its benefits**. As noted in this Section, overprotecting petition rights with heightened Noerr-Pennington immunity will elevate petition-like speech activities to a constitutional status unjustifiably higher than those of other protected speech activities.279 In addition, **due to the burden of proof allocation in proving a “sham petition,”280 Noerr-Pennington will necessarily protect a variety of conduct undertaken with the intent to abuse process simply for lack of evidence** regarding the petitioner’s actual intent. In doing so, **it will make lawful deservedly proscribed behavior and allow actors to use their petitions to abuse judicial processes**. These problems can be avoided if petition rights in non-antitrust cases are protected by means other than NoerrPennington.

**Noerr has gone beyond 1st amendment protection---limiting the exception solves constitutional abuse**

**Wu 20** “Antitrust and Corruption: Overruling Noerr” TIM WU - Isidor and Seville Sulzbacher Professor of Law at Columbia Law School., 10/20/2020, https://knightcolumbia.org/content/antitrust-and-corruption-overruling-noerr

The Noerr case was strained when it was decided, and it has not aged well. As an interpretation of the antitrust laws, it ignored congressional concern with political mischief undertaken by conspiracy or monopoly. Its legitimacy has always rested on avoidance of the First Amendment, and while Noerr itself may have legitimately reflected such avoidance, the subsequent growth of a Noerr immunity has blown past any First Amendment–driven defense of its existence. **For that reason, some have suggested a reformulation of the doctrine**. 3. For critiques of the Noerr doctrine, see Maureen K. Ohlhausen, et al., FTC, Enforcement Perspectives on the Noerr-Pennington Doctrine (2006) [hereinafter FTC Staff Report]; Marina Lao, Reforming the Noerr-Pennington Antitrust Immunity Doctrine,55 Rutgers L. Rev. 965, 1011 (2003); Karen Roche, Deference or Destruction? Reining in the Noerr-Pennington and State Action Doctrines, 45 Loy. L.A. L. Rev. 1295, 1341 (2012). See also, Robert P. Faulkner, The Foundations of Noerr-Pennington and the Burden of Proving Sham Petitioning: The Historical-Constitutional Argument in Favor of A “Clear and Convincing” Standard, 28 U.S.F. L. Rev. 681, 696 (1994).The better answer is that, lacking constitutional or statutory foundation, Noerr should be overruled.

The First Amendment guarantees freedom of speech, assembly, and “to petition the government for a redress of grievances.” 4. U.S. Const. Amend. I.It therefore protects efforts to influence political debate as well as legitimate petitioning in legislative, judicial, or administrative processes. 5. Not all authorities agree that lawsuits are “petitions.” See Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 403 (2011) (Scalia, J., concurring in part and dissenting in part) (“I find the proposition that a lawsuit is a constitutionally protected ‘Petition’ quite doubtful.”); U.S. Const. amend. I (“Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).The First Amendment does not, however, create a right to **bribe government officials**, **deceive agencies**, **file false statements**, **or abuse government process through repeated filing**

**s** designed only to injure a competitor. Nonetheless, each of these activities has, in some courts at least, been granted immunity under the overgrown Noerr immunity. 6. See infra text and accompanying notes 37– 55.For these reasons, it **is an extraconstitutional outlier ripe for reexamination.**

The case for overruling Noerr is buttressed by the fact that, since its decision, Noerr’s theoretical foundations have become “wobbly” and “moth-eaten.” 7. Cf. Khan v. State Oil Co., 93 F.3d 1358, 1363 (7th Cir. 1996).Written before the dawn of public choice theory or contemporary understanding of interest group influence, Noerr relies on an exceptionally stylized model of politics that understates the potential for corruption and the denial of majority will. 8. See Gary Minda, Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine, 41 Hastings L.J. 905, 910 (1990).

After several decades, moreover, the judge-made immunity has begun to creep far beyond its original justifications—a well-known problem for doctrines anchored in avoidance (so-called “avoidance creep”). 9. Charlotte Garden, Avoidance Creep, 168 U. Penn. L. Rev. 331 (2020).Constitutional avoidance, as Charlotte Garden argues, yields decisions that deliberately interpret the statute in a manner at odds with congressional intent. Subsequent decisions building on that interpretation can easily leave behind both congressional intent and the original justifications for the avoidance. 10. Id.The result is a free-floating doctrine, as with Noerr, that becomes untethered to both statutory goals and constitutional principle.

Overruling Noerr would not make political petitioning illegal. It would, instead, require defendants to rely on the First Amendment itself (and not Noerr) when seeking to defend what would otherwise be conduct that is illegal under the antitrust laws. Doctrinally, this is to force courts to address whether conduct in question is actually an antitrust violation and, if so, whether it is protected by the First Amendment or not, drawing on an established jurisprudence for some of the problems presented in the Noerr context. For example, while the First Amendment protects false statements in some contexts, 11. See, e.g., United States v. Alvarez, 567 U.S. 709 (2012) (protecting speech of defendant who lied about recipience of military medal).it has never protected perjury or the making of false statements to government agencies. 12. Id. at 720 (suggesting that criminalization of false statements to the government and perjury are constitutional); United States v. Gilliland, 312 U.S. 86 (1941) (criminalizing fraudulent statements to government agencies).It should take no great leap of insight to conclude that the First Amendment might be the superior vehicle for adjudging a defendant’s First Amendment interests.

**Zero risk of AI impact**

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One of the **most extraordinary claims** that is oft-repeated, is that AI is somehow a danger to humankind, even an “existential threat”. Some claim that an AI might somehow develop spontaneously and ferociously like some exponentially brilliant cancer. We might start with something simple, but the intelligence improves itself out of our control. Before we know it, the whole human race is fighting for its survival (Barrat, 2015). It all sounds absolutely terrifying (which is why many science fiction movies use this as a theme). But despite earnest commentators, philosophers, and people who should know better than spreading these stories, the ideas are **pure fantasy**. The **truth is the opposite**: AI – like all intelligence – **can only develop slowly**, under arduous and painful circumstances. It’s not easy becoming clever. There have always been two types of AI: reality and fiction. Real AI is what we have all around us – the voice-recognising Siri or Echo, the hidden fraud detection systems of our banks, even the number-plate reading systems used by the police (Aron, 2011; Siegel, 2013; Anagnostopoulos, 2014). The reality of AI is that we build hundreds of different and highly-specialised types of smart software to solve a million different problems in different products. This has been happening since the birth of the field of AI, which is contemporary with the birth of computers (Bentley, 2012). AI technologies are already embedded within software and hardware all around us. But these technologies are simply clever tech. They are the computational equivalents to **cogs and springs** in mechanical devices. And like a broken cog or loose spring, if they fail then that particular product might fail. Just as a cog or spring cannot magically turn itself into a murderous killing robot, our smart software embedded within their products **cannot turn itself into a malevolent AI**. Real AI saves lives by helping to engage safety mechanisms (automatic braking in cars, or even selfdriving vehicles). Real AI helps us to optimise processes or predict failures, improving efficiency and reducing environmental waste. The only reason why hundreds of AI companies exist, and thousands of researchers and engineers study in this area, is because they aim to produce solutions that help people and improve our lives (Richardson, 2017). The other kind of AI – comprising those super-intelligent general AIs that will kill us all – is fiction. Research scientists tend to work on the former kind of AI. But because this article needs to provide balance in favour of rational common sense, the following sections will dispel several myths in this area. In this article, I will introduce “Three Laws of AI” as a way to explain why the myths are fantastical, if not ludicrous. These “Laws” are merely a summary of the results of many decades of scientific research in AI, simplified for the layperson. Myth 1: A self-modifying AI will make itself super-intelligent. Some commentators believe that there is some danger of an AI “getting loose” and “making itself superintelligent” (Häggström, 2016). The first law of AI tells us why this is not going to happen. First law of AI: Challenge begets intelligence. From our research in the field of artificial life (ALife) we observe that intelligence only exists in order to overcome urgent challenges

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For example, the automatic number plate recognition system used by police is a specialised form of AI designed to solve one specific challenge – reading car number plates. **Even if** some process were added to this simple AI to enable it to modify itself, it **would never increase its intelligence** without being set a new and complex challenge. Without an urgent need, intelligence is simply a waste of time and effort. Looking at the natural world this is illustrated in abundance – most challenges in nature do not require brains to solve them. Only very few organisms have needed to go to the extraordinary efforts needed to develop brains. Even fewer develop highly complex brains. The first law of AI tells us that artificial intelligence is a tremendously difficult goal, requiring exactly the right conditions and considerable effort. There will be **no runaway AIs**, there will be **no self-developing AIs out of our control**. There will be **no singularities**. AI will only be as intelligent as we encourage (or force) it to be, under duress. As an aside, **even if we could create a super-intelligence**, there is **no evidence** that such a superintelligent **AI would ever wish to harm us**. Such claims are **deeply flawed**, perhaps stemming from observations of human behaviour, which is indeed very violent. But **AIs will not have human intelligence**. Our real future will almost certainly be a continuation of the situation today: AIs will **coevolve with us**, and will be **designed to fit our needs**, in the same way that we have manipulated crops, cattle and pets to fit our needs (Thrall et al., 2010). Our cats and dogs are not planning to kill all humans. Likewise, a more advanced AI will fit us so closely that it will become integrated within us and our societies. **It would no more wish to kill us than it would kill itself**. Myth 2: With enough resources (neurons/computers/memory) an AI will be more intelligent than humans. Commentators claim that “more is better”. If a human brain has a hundred billion neurons, then an AI with a thousand billion simulated neurons will be more intelligent than a human. If a human brain is equivalent to all the computers of the Internet, then an AI loose in the Internet will have human intelligence. In reality, it is not the number that matters, it is how those resources are organised, as the second law of AI explains. Second law of AI: **Intelligence requires appropriate structure**. There is no “one size fits all” for brain structures. Each kind of challenge requires a new design to solve it. To understand what we see, we need a specific kind of neural structure. To move our muscles, we need another kind. To store memories, we need another. Biology shows us that you do not need many neurons to be amazingly clever. The trick is to organise them in the right way, building the optimal algorithm for each problem (Garner and Mayford, 2012). Why can’t we use maths to make AIs? We do use a lot of clever maths and because of this some Machine Learning methods **produce predictable results**, enabling us to understand exactly what these AIs can and cannot do. However, most practical solutions are unpredictable, because they are so complex and they may use randomness within their algorithms meaning that our mathematics cannot cope, and because they often receive unpredictable inputs. While we do not have mathematics to predict the capabilities of a new AI, we do have mathematics that tells us about the limits of computation. Alan Turing helped invent theoretical computer science by telling us about one kind of limit – we can never predict if any arbitrary algorithm (including an AI) will ever halt in its calculations or not (Turing, 1937). We also have the “No Free Lunch Theorem” which tells us there is no algorithm that will outperform all others for all problems – meaning we need a new AI algorithm tailored for each new problem if we want the most effective intelligence (Wolpert, 1996; Wolpert and Macready, 1997). We even have Rice’s Theorem which tells us that it is impossible for one algorithm to debug another algorithm perfectly – which means that, even if an AI can modify itself, it will never be able to tell if the modification works for all cases without empirical testing (Rice, 1953). To make an AI, we need to design new structures/algorithms that are specialised for each challenge faced by the AI. Different types of problem require different structures. A problem never faced before may require the development of a new structure never created before. There is no universal structure that will suit all problems – the No Free Lunch Theorem (Wolpert, 1996; Wolpert and Macready, 1997) tells us this (see box). Therefore, the creation of ever greater intelligence, or the ability to handle ever more different challenges, is a continual innovation process, with the invention of new structures required that are tailored to every new challenge. A big problem in AI research is figuring out which structures or algorithms solve which challenges. **Research is still in its infancy** in this area, which is why today all **AIs are extremely limited** in their intelligences. As we make our AIs cleverer (or if we ever manage to figure out how to make AIs that can keep altering themselves) we encounter yet more problems. We cannot design the intelligence in one go, because we have no mathematics to predict the capabilities of a new structure, and because we have insufficient understanding of how different structures/algorithms map to which challenges. Our only option in designing greater intelligences is an incremental, try-and-test approach. For each new structure, we need to incorporate it into the intelligence without disrupting existing structures. This is an extremely difficult thing to achieve, and may result in layer upon layer of new structures, each carefully working with earlier structures – as is visible in the human brain. If we want an even cleverer brain like ours, we can also add in the ability of some structures to repurpose themselves if others are damaged – changing their structures until they can at least partially take over the role of lost functions. We have little idea how to achieve this, either. The second law of AI tell us that resources are not enough. We still have to **design new algorithms and structures** within (and in support of) the AIs, for every new challenge that the AI faces. It is for these reasons that we cannot create general purpose intelligences using a single approach. There is no single AI on the planet (not even the fashionable “Deep Learning”) that can use the same method to process speech, drive a car, learn how to play a complex video game, control a robot to run along a busy city street, wash dishes in a sink, and plan a strategy to achieve investment for a company. When one human brain performs such tasks, it uses myriad different neural structures in different combinations, each designed to solve a different sub-problem. We do not have the capability to make such brains, so instead we build one specialised smart solution for each problem, and we use them in isolation from each other. Myth 3: As the speed of computers doubles every 18 months, AIs will exploit this computing power and grow exponentially cleverer. Commentators claim that sheer brute calculating speed will overcome all challenges in the creation of AI. Use computers that are fast enough and an AI will be able to learn and out-think us. Since the speed of computer processors has been doubling approximately every 18 months for decades, this is surely an inevitability. Sadly, this point of view fails to recognise the impact of an opposing exponential that works as a significant brake on the development of AIs: testing. Third law of AI: **Intelligence requires comprehensive testing**. Higher intelligence requires the most complex designs in the universe. But every tiny change made in an attempt to improve the design of an intelligence has the potential to destroy any or all of its existing capabilities. It doesn’t help that we have no mathematics capable of predicting the capabilities of a general intelligence (see box). For these reasons, every new design of intelligence needs **complete testing on all the problems** that it exists to solve. Partial testing is not sufficient - the intelligence must be tested on all likely permutations of the problem for its designed lifetime otherwise its capabilities may not be trustable. All AI researchers know this hard truth only too well: to make an AI, it is necessary to train it and test all its capabilities comprehensively in its intended environment at every stage of its design. As Marvin Minsky, founder of the field of AI said, “…there's so many stories of how things could go bad, but I don't see any way of taking them seriously because it's pretty hard to see why anybody would install them on a large scale without a lot of testing.”(Achenbach, 2016) More than any other aspect, it is the process of testing that **requires the most time**. This time constraint produces a brake to the process of designing intelligence. At worst, the level of testing is exponential for each incremental gain in intelligence. To understand why, imagine an intelligence that can recognise 10 different colours and needs to distinguish two types of object using this one feature, colour. In this case, the AI can understand at most 10 different kinds of item and classify them into two classes. If its capabilities are expanded to handle two features – say colour and 10 shades of brightness, then it can understand at most 100 different kinds of item. If it could handle 100 features, it can understand 10, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000 items. How do we know that the AI will classify them all correctly? This becomes a very important question for safety-critical applications. Imagine the AI is driving your car and the two classes of object are “road” and “obstacle”. In reality, it’s much more complex. Many biological intelligences can distinguish unimaginable numbers of items, using thousands or millions of features, each of which could take thousands or millions of values. The testing of these intelligences takes a very long time indeed. This should be no great surprise. Evolution creates its biological brains by testing countless trillions of brains in parallel in every possible scenario for thousands of millions of years, only permitting the successful brains to contribute to future brain designs. This is a highly efficient and effective method of testing that we can only dream of performing. The tremendous need to test AIs has significant implications. We cannot design better AIs without testing them at each stage. Google has performed years of testing for its self-driving cars, and continues to do so. (By June 2016, Google had test-driven their fleet of vehicles, in autonomous mode, a total of 2,777,585 km) (Google, 2016). All AI engineers and researchers know that we cannot make use of AIs in any safety-critical application until appropriate testing is performed. In the near future, we will also need certification so that we know exactly how well an AI performs for well-defined tasks. And if the AI continues to learn or it is updated, we cannot assume that because it passed one test earlier it will continue to do so – like a human pilot, any AI that continues to learn must be continuously retested to ensure it remains certified.1 The third law of AI tell us that as intelligence increases, the time required for testing may increase exponentially. Ultimately, testing may impose practical limits to achievable artificial intelligence, and trustable artificial intelligence. Just as it becomes harder and harder to go faster as we approach the speed of light, it becomes harder and harder to increase intelligence as we build cleverer brains. Again, this is a fundamental reason why AI research and application is dedicated to finding smart solutions to very specific problems.2

### 2AC – BBB DA

**No PC and nothing passes.**

**The Guardian 1-21**-22 lexis

A year into his term, **the Biden administration is in shambles**. Joe **Manchin** and Kyrsten **Sinema's** support for the legislative **filibuster** has killed the Democratic **voting rights** push. Biden's **Build Back Better** plan, a massive reconciliation package containing initiatives on issues from climate change to childcare is, for now, **dead in the water;** Manchin and Sinema will determine whether any of its provisions survive in attenuated form. Immigration reform and healthcare reform, both central to Democratic intra-party debates during the 2020 primaries, have fallen entirely off the radar. The US supreme court may overturn Roe v Wade in the coming months. The latest wave of the coronavirus pandemic is still ravaging the country thanks not only to Covid denialists and vaccine skeptics on the right, but an administration that has struggled to keep its pledges on easy access to tests. Abroad, Biden's courageous withdrawal from Afghanistan ?- a kept promise even the president's harshest critics on the left were willing to give him credit for ?- has been marred by economic sanctions that have left 23 million Afghans without enough to eat, and the media is already itching to blame Biden for a Russian invasion of Ukraine. None of this is to say that Biden's first year in office has been bereft of real accomplishments or positive press. But neither the bipartisan Infrastructure Investment and Jobs Act nor the American Rescue Plan ?- the president's two great legislative victories thus far ?- have resonated with the electorate. Biden now holds the **second lowest approval rating** of any president at this point in their term ?- the record is still held by his predecessor Donald Trump. It's clear across the polls that voters are **faulting Biden** for **inflation** and a supposed inattention to the economy. But elevated inflation has been a global phenomenon ?- and here, one of the proximate causes has been the strength of an economic recovery boosted by the American Rescue Plan. Really, Biden's been focused on the economy to the exclusion of nearly everything else on the Democratic agenda ?- his recent pivot to voting rights came only after the collapse of negotiations on the Build Back Better plan which, in its initial form , was easily the among the most ambitious economic packages ever proposed in Washington. Messaging on the plan plainly hasn't worked. The major individual components of Build Back Better are far more popular than the overall package ?- late last year, Politico and Morning Consult found that 47% of registered voters supported it, while increasing funding for affordable housing and expanding Medicaid to cover hearing services registered 65% and 75% support respectively. That's not terribly surprising given that voters have probably heard much more about the intractability of negotiations over the plan in Congress than they have about the plan's substance. While Manchin and Sinema bear most of the blame for this, some commentators have also taken Biden himself to task for **overpromising** on his legislative agenda and deviating from the centrism he'd been known for. "The president should remember that he won as a moderate and a unifier," the New York Times' Bret Stephens warned on Tuesday. "Biden would do better to move on from defeat and draft legislation with bipartisan appeal." But as these critics know full well, there's extremely little that both parties still agree on, and even modest bipartisan proposals like universal gun background checks have been doomed to failure by the legislative filibuster, which forces the 50-member Democratic caucus to win over not just some, but at least 10 Republicans to pass anything outside of budget reconciliation. Biden's supporters and his centrist critics both have an interest in framing him as a visionary. **But he isn't one** - the enlarged agenda the centrists disdain has been the fruit of internal party pressure and the sheer scale of our public health and economic crises. There's plenty of evidence that Biden still favors moderation and restraint, especially in the administration's executive actions and, on certain issues, executive inaction ?- there, the White House has spent the year frustrating party activists on issues including student debt, immigration and policing. The notion that American **unity** was within Biden's capacity to **achieve was simply a lie** ?- one of many he's told about the state of our country

**Courts shield the link**

Keith E. **Whittington 5**, Cromwell Professor of Politics – Princeton University, ““Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court”, American Political Science Review, 99(4), November, p. 585, 591-592

Political leaders in such a situation will have reason to support or, at minimum, tolerate the active exercise of judicial review. In the American context, the presidency is a particularly useful site for locating such behavior. The Constitution gives the president a powerful role in selecting and speaking to federal judges. As national party leaders, presidents and presidential candidates are both conscious of the fragmented nature of American political parties and sensitive to policy goals that will not be shared by all of the president’s putative partisan allies in Congress. We would expect political support for judicial review to make itself apparent in any of four fields of activity: (1) in the selection of “activist” judges, (2) in the encouragement of specific judicial action consistent with the political needs of coalition leaders, (3) in the **congenial reception** of judicial action after it has been taken, and (4) in the public expression of generalized support for judicial supremacy in the articulation of constitutional commitments. Although it might sometimes be the case that judges and elected officials **act in** more-or-less **explicit** **concert** to shift the politically appropriate decisions into the judicial arena for resolution, it is also the case that judges might act independently of elected officials but nonetheless in ways that elected officials find congenial to their own interests and are **willing** and able **to accommodate**. Although Attorney General Richard Olney and perhaps President Grover Cleveland thought the 1894 federal income tax was politically unwise and socially unjust, they did not necessarily therefore think judicial intervention was appropriate in the case considered in more detail later (Eggert 1974, 101– 14). If a majority of the justices and Cleveland-allies in and around the administration had more serious doubts about the constitutionality of the tax, however, the White House would hardly feel aggrieved. We should be equally interested in how judges might exploit the political space open to them to render **controversial decisions** and in how elected officials might anticipate the utility of future acts of judicial review to their own interests.¶ [CONTINUES]¶ There are some issues that politicians cannot easily handle. For individual legislators, their constituents may be sharply divided on a given issue or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including presidents and legislative leaders, must similarly sometimes manage deeply divided or cross-pressured coalitions. When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to **circumvent a paralyzed legislature** and **avoid the political fallout**

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that would come with taking direct a ction themselves. As Mark Graber (1993) has detailed in cases such as slavery and abortion, elected officials may prefer judicial resolution of disruptive political issues to direct legislative action, especially when the courts are believed to be sympathetic to the politician’s own substantive preferences but even when the attitude of the courts is uncertain or unfavorable (see also, Lovell 2003). Even when politicians do not invite judicial intervention, strategically minded courts will take into account not only the policy preferences of well-positioned policymakers but also the willingness of those potential policymakers to act if doing so means that they must assume responsibility for policy outcomes. For cross-pressured politicians and coalition leaders, **shifting blame** for controversial decisions to the Court and obscuring their own relationship to those decisions may preserve electoral support and coalition unity without threatening active judicial review (Arnold 1990; Fiorina 1986; Weaver 1986). The conditions for the exercise of judicial review may be relatively favorable when judicial invalidations of legislative policy can be managed to the electoral benefit of most legislators. In the cases considered previously, fractious coalitions produced legislation that presidents and party leaders deplored but were unwilling to block. Divisions within the governing coalition can also prevent legislative action that political leaders want taken, as illustrated in the following case.

## 1AR

### 1AR – Cap K

#### 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

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 possibility 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.

#### They systematically underestimate market ingenuity – the same reason every other historically similar argument was wrong – and answer resources

Rune **Westergård 18**. Entrepreneur, Engineer and Author, founder of the technical consulting company CITEC. 2018. “Real and Imagined Threats.” One Planet Is Enough, Springer International Publishing, pp. 71–80. CrossRef, doi:10.1007/978-3-319-60913-3\_7.

Threatening reports about our ability to create disasters and even exterminate ourselves are not a new idea. A standard example is the British national economist Thomas Malthus in the early 19th century, who predicted that population growth would come to a halt because of starvation. Malthus calculated that the available food in the world couldn’t feed more than one billion people. He extrapolated the development from a still picture of his own time and couldn’t fathom that food production would increase tremendously thanks to new knowledge and technology. Our present food production is sufficient for seven times as many. Malthus didn’t pay attention to the fact that we live in a continuously changing civilisation, and the same kind of miscalculations are still made today. There are people who have even achieved the status of media superstars by presenting various dystopias and catastrophe scenarios. As early as 1968, Professor Paul Erlichs at Stanford University published the bestseller The Population Bomb, where he predicted that an imminent population explosion would result in hundreds of millions of deaths by starvation in the 1970s and 80s. Basically, he made the same mistake as Malthus, i.e. he treated knowledge and technology as if they were static phenomena. The most widely read environment report in the world, State of the World, was a loud whistle-blower when it was first published in the early 1980s. The Swedish version, Tillståndet i världen, was published yearly from 1984 and some years into the 2000s by the Worldwatch Institute Norden; I still have some of the early issues left. This report contains many valuable observations and suggestions, but also several basic analytical mistakes. In other words, it acts as an eye-opener, but it suffers from being tainted by political ideology. Its main weakness is that it doesn’t take the intrinsic driving forces of progress into account. State of the World was translated into most major languages and is, as already mentioned, the world’s most widely read environmental report. It has affected us all, directly or indirectly, through school and media. Even if the Swedish version I refer to was written some years ago, it is still worthy of discussion, firstly because it maintains an appearance of scientific validity, and secondly because it has served as a trendsetter for the general ideology which has been adopted by many later books and reports on the subject at hand. It still lives on as an engraved pattern in our conception of the world. In the report we can, for instance, read the following: A world where human desires and needs are fulfilled without the destruction of natural systems demands an entirely new economic order, founded on the insight that a high consumption level, population growth, and poverty are the powers behind the devastation of the environment. The rich have to reduce their consumption of resources so that the poor can increase their standard of living. The global economy simply works against the attempts to reduce poverty and protect the environment. We stubbornly insist to regard economic growth as synonymous with development, even though it makes the poor even poorer. Even if we up to this point have mainly described the environment revolution in economic terms, it is, in its most fundamental meaning, a social revolution: to change our values. Massive threat scenarios are still presented, for instance in the British scientist Tim Jackson’s book Prosperity Without Growth from 2009, which is one of the most widely read and frequently quoted works in this area. Tim Jackson, who is an economist and professor in sustainable development, explains how we humans are indulging in a ruthless pursuit of new-fangled gadgets in a consumption society running at full speed towards its doom. He also claims that material things in themselves cannot help us to flourish; on the contrary, they may even restrain our welfare. In other words, we cannot build our hopes that the economy, technology or science can help us to escape from the trap of Anthropocene, which has brought us to the brink of an ecological disaster. There are hundreds on books on this theme, and they all agree that the general state of the world is pure misery; everything is getting worse, the resources are being depleted, and that man will soon have destroyed the entire planet. The apparent reason for this, of course, is due to the consumption culture and the present financial system—which exposes man as a greedy, ruthless and ultimately weak creature. This attitude may serve a purpose as an eye-opener. But it is not very credible, and it may even be counterproductive. Of course, we can see a lot of problems ahead of us; but to solve them, we need the correct diagnostics instead of dubious doomsday prophesies. Focus: The Problem Since the focus of attention is so profoundly fixated on the problems in the climate and environmental debate, the progress already made—and the opportunities at hand—are often overshadowed. The example below will help to illustrate this point: In the year 2014, the Nobel Prize in physics was awarded to three scientists who had invented blue light emitting diodes—a technology that has made high-bright and energy-efficient LED lighting possible. As lighting accounts for 20% of the world’s total electrical consumption, this invention has the potential to radically reduce energy consumption and greenhouse gas emissions. In an interview made by the major Swedish daily newspaper Dagens Nyheter, one of the prize winners, Hiroshi Amano, says the following about energy-efficient, inexpensive and high-bright LED lights: “They are now being used all over the world. Even children in the developing countries can use this lighting to read books and study in the evenings. This makes me very very happy”. Shortly after this announcement, the news headlines declared that LED lighting was a threat to the environment. This statement was based on a report showing that LED lighting could be hazardous to flies and moths, which in turn might disturb the eco system. This is a typical example of how progress pessimists and, not least the media, think and act. In this case, they focused on a potential problem associated with LED lighting, and ignored the tremendous possibilities that the new technology offered to dramatically reduce greenhouse gases and thus spare the eco system (not to mention all the other advantages). Books and reports of the kind mentioned above tell us repeatedly about disasters, threats, problems, collapses and famines. On the other hand, they are notoriously silent about the great improvements actually made—the reduction of extreme poverty (not only as a percentage but also in absolute numbers), longer lifespans, dramatic global progress in education and healthcare, etc. The lack of positive media coverage on the environment means that many people believe that too little is being done, which is quite understandable considering the one-sided nature of the information they are presented with. Alarmist reporting almost always reminds me of pirates: they are unreliable and half their vision is blocked by their eye patches. It is vital that the media not only one-sidedly focus on the misery without presenting the progress made and suggesting constructive courses of action. The quality of our decisions in all respects depends on our knowledge, insight and attitude. Real and Imagined Threats Many people are convinced that the climate and environmental problems are growing. It is certainly true that our planet has its limitations, but many of the predictions from alarmist literature have been proven false. In the 1980s, the forest dieback was a frequently discussed subject. To quote the well-known German news magazine Der Spiegel, an “ecological Hiroshima” was imminent. Most experts at the time claimed that a wide-spread forest death seemed unavoidable. Additionally, the general mood of impending doom was augmented by the threat of a nuclear disaster during the cold war. I remember the pessimistic discussions among friends and how frequently the gloomy reports appeared in Swedish and Finnish television. The future of humankind appeared to be depressingly bleak. But the forest dieback never happened. On the contrary, the forest area has been constantly expanding in Europe, even during the entire period when the forest was believed to be dying. Today, only two thirds of the yearly accretion in Europe are cut down, according to the Natural Resource Institute in Finland. There are different opinions as to why the large-scale forest dieback didn’t occur. One theory is that the researchers’ evidence and conclusions had been incomplete and too hasty; the forest was actually never in danger. Others suggest that the emission limitations implemented prevented the disaster. My point is that the environmental catastrophe did not happen. Some other environmental problems, exaggerated or not, that have concerned us during the last decades have also disappeared from the immediate agenda: overpopulation, DDT, the ozone hole, heavy metals, lead poisoning, soot particles, the waste mountain, and the acidification of our lakes. Unfortunately, some environmental problems, like soot particles and waste, still remain in some areas, especially in poorer countries, where there are other, even worse problems that have yet to be resolved. The conclusion is, however, that we and our society in most cases have handled threatening situations quite well. When alarming symptoms are noted, scientists and other experts are summoned, and we act according to their diagnoses. It is no big deal that the diagnoses are sometimes wrong, as long as the side effects are not too severe. The main thing is that we do our best to avoid disasters, and on the whole, humankind has succeeded rather well this far. As individuals, we react very differently to various kinds of threats. The closer and more tangible the threat is, the more violent are the reactions—while distant and invisible symptoms, like the depletion of the ozone layer, concern us less. In the latter cases, we have to trust the scientists’ and later the politicians’ reactions. Does this mean that disasters are avoided thanks to war headlines, threats, and anxiety? I don’t think that this is the most important explanation; rather, it is factual and science-based information that produces effective results. But if exaggerated threat scenarios and reports of misery are needed to inspire the necessary political opinion, acquire research funding and create behavioural changes, we will have to live with that. The most important thing to remember in this context is that the actions shouldn’t cause more harm than the original problem itself. The risk with exaggerated threat and misery reporting is that it may inspire an over-reaction based on misleading diagnoses, or the opposite—a paralysing feeling of helplessness. It is necessary to take threats against the climate and the environment seriously, but not to a degree where our ability to reason and act is blocked by fear or anxiety. Many environmental debaters claim that the fall of the Inca and Roman empires were caused by the same causes that are now threatening our present civilisation—a short-sighted over-exploitation and rape of nature. Easter Island is another popular example. However, in my opinion it is both worthless and irresponsible to judge the world situation of today by copying the outcome of earlier cultural endeavours in history. The inhabitants of the Inca empire and Easter Island didn’t have anything even remotely comparable with the organisations, technology, medicine or general knowledge of today. It would be like comparing a case of appendicitis in the past to a case today. In pre-modern times, it was a fatal condition. In this day and age, it is cured by a simple routine operation. Today, humankind is conscious of the climate changes and other ecological challenges. And we also have the knowledge and resources needed to act. Facts, Propaganda and Hidden Messages During all the years I have followed the development of technology and society, I have repeatedly observed how a mishmash of serious research, political propaganda, and the hidden agendas of individuals have been distributed more or less randomly by the media. There are of course many different kinds of alarmism— everything from well-founded research reports to exaggerated prophesies of doom. It is far from simple to separate the wheat from the chaff. The actions taken against ozone depletion, lead emissions and the toxic chemical, dioxin, are all examples of how research has shown the way to successful results. Today, greenhouse gas emissions top the list of issues deserving our gravest attention, as it is a global phenomenon—just as the depletion of the ozone layer once was. There are also a considerable number of local environmental problems, such as drought, air pollution, forest depletion and overfishing. All of these are real threats that have to be acted upon, even though they are not global. However, I am always disturbed when a single global environmental issue is bundled with an assortment of several local issues, rather like a simplified trademark advertisement for the negative consequences of civilisation. This makes the information abstract and inaccurate, ignoring the fact that different locales require different solutions. Fear and alarmism are natural reactions that once protected us when we were living at the mercy of nature—they are evolutionary relics from our life in the savanna. Today, the same properties can be significant drawbacks. The transition from a primitive, animal-like state to the society we have today must, on the whole, be counted as a great success. But many people regard the same world as over-exploited, depleted, unjust, war-ridden and balancing on the brink of destruction. How can people living in the same epoch have so entirely different views of the world? In the sustainability debate, there is one faction dealing with the natural resources and ecosystems, and another focusing on the redistribution of wealth. There is even a third faction discussing a minimalistic lifestyle; for example, downshifting, with less work and less material welfare. When all these ingredients are mixed without discretion, the result is an anxiety soup that many have choked on. In a situation like that, we cannot expect any constructive initiatives to materialise. Instead, it would be far better to explore, research and discuss each dimension separately. What Is the Real State of the Planet? It is easy to generalise and say that we over-exploit the planet’s resources and pollute the world with our waste. But how many care to examine these statements in detail and ask exactly which resources are over-exploited? • Are fish becoming extinct? It is true that overfishing occurs in many places, which is, of course, unsustainable. However, this is not an unavoidable threat to the world’s total food resources. Fortunately, there are several examples of fish stocks that have either recovered or started to replenish once the fishing effort has been eased. • Is the air being poisoned? Many are convinced that the air we breathe is becoming dirtier all the time. But that isn’t true, at least not in the Western world. From the year 1990, emissions of sulphur dioxide have been reduced by 80%, nitrogen oxides by 44%, volatile organic substances by 55%, and carbon monoxide by 62%. Despite these dramatic improvements, 64% of Europeans believe that pollution is increasing. • Are the forests dying? It is a general belief that the forests in the developed countries are dwindling. But that isn’t true; on the contrary, the wooded areas are expanding. However, the forests are decreasing in the poor countries, where forestry and farming are still major sources of income, as they once were in the industrialised countries. • Are we drowning in waste? There are many who believe that we are surrounded by constantly growing mountains of waste. In the developed countries, the truth is that increasing amounts of waste are being recycled and the landfills are decreasing. • Will there be enough phosphorus? Phosphorus is an important nutrient in farming, extracted from phosphate ore. Many scientists fear that the finite natural resource of phosphate ore will become depleted in the future, which may jeopardise the world’s food supply. But there are already working solutions for this problem, such as by reclaiming phosphorus through digestion residues and sewage sludge. There are also technological solutions for the chemical extraction of phosphorus from polluted water—the remediation of lakes and rainwater by removing phosphorus is already a common procedure. Here we achieve a win-win situation—phosphorus is collected while preventing the eutrophication of lakes. • Will there be enough energy to go around? A common statement is that the earth’s population is too large, and that we consume too much energy with respect to the climate. This is one of those issues where we have to think in terms of symptoms, diagnoses, and medication. The symptoms are there for all to see: climate change. On the other hand, the diagnosis that we consume too much energy is wrong. The correct diagnosis is that we are not using the right technology; i.e. energy efficient power production without harmful emissions. Consequently, the correct statement would be that we consume energy that is produced by technologies that are harmful to the climate. The difference in wording is important. As the first diagnosis is “too high energy consumption”, the remedy will be to use a different medication than a diagnosis based on “the wrong technology”. Alarmist reporting can inspire bad decisions if the statements aren’t systematically reviewed and evaluated. It can also be misguiding to express environmental threats in general terms. Actions must be based on precise specific symptoms with corresponding diagnoses. If the doctor discovers that the patient is lame and suffers from a high fever, it doesn’t help to predict imminent death. Maybe the lameness and the fever have different causes altogether! A successful cure would probably include two different diagnoses with separate medications. Several recent surveys of the general conception of the world have been made— one is Project Ignorance by Gapminder and Novus in Sweden. One of the questions asked was whether CO2 emissions per capita and year had increased or decreased in the world during the last 40 years. The surveyed group was large and representative in order to give a fairly accurate picture of the common opinion. No less than 90% believed that CO2 emissions had increased. The truth is that they haven’t increased at all. It is important that decision makers on all levels learn how to see the wood from the trees. Decisions based on false preconditions can halt technological development, and thus also the development of the economy, welfare, and a healthier environment. The flow of innovations in the climate and environmental areas is accelerating rapidly. This can be seen in the number of improvements that have occurred in recent years, which can be counted in the thousands. Such improvements have to be weighted on the same scale as the problems in this area. That is not to say the problems should be ignored—they need to be acted upon. But they should not be allowed to occupy our brains to the extent that our power to act is paralysed. Is the Notion of Sustainable Technology-Driven Growth Over-Optimistic? The development of a technological society has always been questioned. In the 19th century, critics claimed that the technological revolution would create poverty. In the 1970s, it was generally believed that the forest dieback would cause a disaster. In the 1980s, the acidification of lakes and throwaway mentality of society were regarded as manifestations of the devastating properties of growth and industrialisation. Today, many fear the environmental effects of air travel and the production of electronic devices. There are people who seriously wish to halt economic growth and wind back the clock to the society of the 1960s. They recall this time period as small-scaled and down-to-earth, stress-free and idyllic. But they tend to forget that the refrigerators of that time required 90% more electricity than today, and that our teeth were repaired with mercury fillings instead of plastic. There were no X-ray CT scanners and no medicines against ulcers. In addition, there were many more people living without electricity. There was also more widespread malnutrition, a higher infant mortality, and, in fact, more wars. Cars were fuelled by leaded petrol, and sulphur emissions were 90% higher than today. The acidification of lakes, as well as polluted streams and fields, were serious concerns. Since then, technological innovations have reduced sulphur emissions and removed the lead from car fuel. At any given point in history, there have been critics claiming that this was the time when we had reached the optimal point in the development of the modern society. But we hadn’t, not then and not now. And the more our countries are modernised, the greater our possibilities to care for animals and nature become. In the mid-1800s, the killing of large animals like sperm whales didn’t concern people to any significant degree, despite the cruel hunting methods using harpoons. The benefits of the whale fat, mainly used for lamp oil to facilitate reading in the evenings, overshadowed any empathic impulses. In the 1850s more than 70,000 people were employed by the American whaling industry. There were 900 ships in the world hunting whales, and during one of the most active years, 8000 whales were butchered, which provided more than 300,000 barrels of oil. The oil extracted from the head of the sperm whale, the so-called spermaceti oil, was especially sought-after. It was of very high quality and sold for 1.50 US dollars per litre in today’s monetary value. As a consequence, the number of sperm whales in the world rapidly dwindled. However, when oil drilling started in Pennsylvania in the year 1859, the price of whale oil began to fall. The fast transition to petroleum products for lighting and other applications is considered to have saved the last of the sperm whales. Thus, new technology can both contribute to the protection of threatened animal species and provide the wealth to make it affordable for us to even save predators. Imagine what would happen if we were able to bring back someone from the 19th century and tell them that today we move wolves though the air by helicopter in order to save the species and expand its habitat; our ancestor would probably rather go back to sleep than listen to such apparent stupidity. Pessimism Does not Support a Sustainable Development There is a lot of progress going on in the world today, but not without negative side effects. When improving the world and dealing with the side effects, an optimistic attitude provides us with a much better chance of success than a pessimistic view. The optimist carries a positive inner beacon to follow, while the pessimist is always looking for potential traps and drawbacks. As visions and conceptions of ideas often become self-fulfilling, it isn’t difficult to realise what’s most constructive. All decisions—big or small, conscious or not—are affected and guided by our inner beacon. When solving a problem, such as developing a new product for example, it is necessary to have a conception of a working solution in mind. As a product developer, it is of course necessary to review every minute step in the process and question the choices made. You have to ask yourself if there may be a better material or a smarter design. Strange as it seems, this continuous struggle in the mind of the developer may appear to be a kind of pessimism, as it is all about looking for weaknesses in the imagined solution. It is not dissimilar from the process a doctor follows when selecting a diagnosis and a remedy. You start with certain hypotheses, examine, exclude, test, question and verify until you are satisfied that you have made the correct diagnosis. Then the choice of medication becomes much simpler. It would be fatal if the doctor was pessimistic from the start and worked in the belief that it would be impossible to find a reason for the illness, or a working remedy. This could then be the conclusion that such a doctor would unconsciously try to verify. Would you like to have a doctor like that? The same is true for climate and environmental problems—we need optimists armed with critical thinking to solve them. There are also so-called climate change deniers, who believe that man hasn’t really affected the planet and its ecosystems to any significant degree. Some of them claim that the influence of the sun and other natural phenomena are so enormous that human activities have no bearing on global warming. Perhaps these deniers are so deeply pessimistic that they cannot imagine any possible solutions. For ages, man has harboured a certain distrust of his own species. Throughout history, various religions have emphasised human shortcomings and presented assorted consequential threats. During the last 30 years, such prophesies have increasingly often been introduced by environmental activists and some political groups, whose messages have been significantly supported by the media. The underlying conception of humanity isn’t flattering. The human race is considered to be fundamentally ruthless, greedy, short-sighted and evil. Threats against the climate and much other misery on earth are caused by human failure. However, if we take the time to study the progress that has been made by the human race throughout the ages, we actually get the opposite picture. Can it really be evil, greedy, and short-sighted beings who put their own lives at stake to treat people infected by Ebola or HIV in poor countries? Who are the ones that are continuously reducing the number of starving people on earth? Who are the ones that invent vaccines for the children of the world? Who are the ones that have developed a civilisation where an increasing number of people get educated, and who struggle to reduce the casualties of war? Why blame an entire species for atrocities that are actually committed by a mere fraction? Establishing a firm belief in humankind should be the first step on the road to sustainable development.

#### Yes absolute decoupling – prefer consilience of data and experts – their indictments don’t assume urbanization and peak car

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Abstract The decoupling of fossil fuels from economic growth has not been imaginable for most of the industrial era but is now underway. The data for this are presented for the world and for typical nations. The mechanisms behind this are outlined and suggest that climate change goals to end poverty and to achieve the phasing out of fossil fuels are achievable if the trends are mainstreamed. Keywords Cities, Decoupling, Decarbonisation, Disruption, Forecasting 1. Introduction In 2015/16 the world’s governments committed to two core sets of goals for the future: the Sustainable Development Goals (SDG’s) and the Paris Agreement on Climate Change action which essentially aims to phase out fossil fuels by 2100 and 80% by 2050. Inherent in the achievement of the SDG’s is the need for economic growth, especially in the dominant SDG1 “End poverty in all its forms everywhere”. Yet in the past this has led to increases in fossil fuels and hence greenhouse emissions. Are the SDG’s therefore inherently in conflict with the need for climate change action? Or can the world achieve decoupling of economic growth from fossil fuels and greenhouse gases? For some these two sets of goals are incompatible as GDP and fossil fuels, hence greenhouse gases or GHG, have been totally coupled for over a hundred years so climate change action can only be achieved by degrowth [1]. For others, especially the UNEP and IPCC, who are more positive about sustainable development achieving economic and environmental goals together, the agenda of decoupling GHG and GDP is critical [2] [3]. 2. Methods The data for wealth and economic growth are from the World Bank [4] and GHG are from the International Energy Agency [5]. GDP and GNI are very sim ilar measurements of economic growth and GNI was chosen due to greater availability. They are standardized to a date back in the 1990’s where it is possible to show how growth rates begin to separate out and indicate the level of decoupling. 3. Evidence In 2016 the International Energy Agency announced that the world had changed. For the first time in hundreds of years the world was producing less greenhouse emissions than the year before without this being caused by an economic crisis [5]. In 2015 the amount of GHG emitted to the world’s atmosphere decreased by around 0.5% whilst economic growth continued at more than 3%. A few scientists had predicted this but mostly the fossil fuel lobby had been in complete denial over its possibility [6]. Figure 1 shows that for the first time the industrial world was producing wealth without this meaning more fossil fuels and more emissions. Despite its huge implications for a world that has faced down the global climate issue for decades without much good news, the world’s media were virtually silent. Perhaps this was because the EIA (from the US Government Energy Information Administration) were more sanguine predicting a continued growth in GHG of 1%, though their data were only up to 2012 and in reality, they did not consider the possibility of major changes often picked up by groups such as Carbon Tracker [7] [8]. Indeed, Carbon Tracker has shown that the new trends in GHG are following the kind of projections made by the IPCC’s carbon emissions targets much more closely than any other conservative projections. The decoupling of greenhouse gas emissions (GHG) from wealth (usually measured as GDP or GNI, gross national income) has been a UN agenda for several decades [2] [3]. The first signs of decoupling began in the 1990’s as Figure 1 indicates and their trajectories have been separating out quite rapidly for most of the 21st century. For many commentators and scientists, such as the IPCC, this relative decoupling was not significant enough for a world needing less total GHG until the actual decline in global emissions began. Now we appear to have reached a point where this can be seen in a peak in global greenhouse emissions. We now have absolute decoupling for the first time. 3.1. Understanding the Causes The simplest explanation for decoupling is to see the mathematical relationship between GHG and GDP as: GHG GDP GHG Energy Energy GDP = × GHG/Energy is called the carbon intensity and Energy/GDP is called the energy intensity. GHG/GDP will lower as the national carbon intensity decreases from greater use of renewables and natural gas; energy intensity will decrease as energy efficiency increases. Thus the increased use of renewables and the increased energy efficiency result in a relative decoupling of GHG from wealth. This relative decoupling was set as the basis for many national goals rather than seeking actual absolute reductions in GHG, especially if the countries were growing fast economically (like China and India) and were expected to have low but rapidly expanding GHG. This was seen by coal companies as the reason why coal consumption would continue to rise [9] [10]. This paper will show some of the rationale for why this is happening faster than expected but in particular that it is being driven by the world’s cities. Because cities are rapidly growing we can expect decoupling will continue to rapidly phase out the world’s dependence on fossil fuels and continue its goals in ending poverty. Figure 1 shows that Gross National Income (a way of measuring global wealth) has decoupled from greenhouse gas emissions. The notion of decoupling is based on the same idea as the economic theory of Environmental Kuznets Curves (EKC) which shows that as wealth grows people begin to choose environmental quality increasingly once their basic needs have been met. Decoupling is however happening earlier than expected in many parts of the world and indicates that there is more to this process than just simply getting wealthier. Perhaps one very key finding by a 2012 ADB report [11] is that the EKC was related to how quickly urbanization is happening as it is in cities that the phenomenon is most easily observed. In Figure 2 we have begun to breakdown the GHG into its main components by looking at consumption of coal and oil which are the largest causes of GHG. The spurt in global coal growth in recent times was mostly due to China but as can be seen in Figure 3 that era is over and China declined in its coal consumption in 2015 for the first time. Oil has also begun to plateau in China. The driving forces behind this will be outlined later but it is important to see that the growth in China’s economy is no longer dependent on growth in fossil fuels; they are phasing out and yet China is becoming wealthier. Indeed it is important to see that the reduction in GHG has occurred after an extraordinary 15 years of economic growth that took China out of its extreme poverty. The global Millenium Goals that were agreed to by the world’s nations in 2000 for the period up to 2015 focused on how development could halve extreme poverty—defined as being less than $1.25 per day. Across the developing world people living in extreme poverty declined from 47% to 22% between 1990 and 2010—achieving the Millenium Goal 5 years ahead of time [12]. This was mostly due to rapid declines in extreme poverty in China and India with some improvement in Africa. This process has taken around 1 billion people out of extreme poverty in a 15 year period. It is also important to see that the rapid decline in poverty has mostly occurred within cities and that the extremely rapid urbanization in China (and now in India and Africa) is what fuels this dramatic change. It also clear that there was not as much concern in this rapid urbanization in the emerging world’s cities for achieving fossil fuel and GHG reductions; these cities were and are focusing on ending poverty. But the new trend in China which decoupling is now underway provides great hope that the process will now spread to the whole emerging world. China is probably going to show the way to decouple rapidly as they invested $90 billion in renewables in 2015 (more than 60% of their investment in energy) so much of their continuing growth will be based around solar and wind rather than the fossil fuel-based economic growth of the past 15 years. The data on developed nations below show that decoupling can be anticipated in all elements of economic growth as GHG decoupling has set in. The big question for the world is whether this process of absolute decoupling is likely to continue in places like China and India and Africa as they develop. In Figures 3-6 we have presented the data on decoupling for Australia, China, Denmark and the United States to show that the extent of absolute decoupling is now considerable and this indicates that the global decoupling process is likely to continue. The largest decoupling is in Denmark, where the absolute decoupling began back in 1994 and has continued since, with coal and oil in significant decline without impacting on their overall growth in wealth. The US and Australia are following this pattern though not as spectacularly as Denmark. Most European nations have similar trajectories to Denmark. The EIA data in Figure 7 on China and the US, which stops in 2012 and so is not as clear in recent times about absolute decoupling, is certainly showing the sources of the decoupling. The reduction in the ratio of GHG over GDP in cludes both energy efficiency and growth in renewables leading to a decoupling of GHG and GDP of around 60% over 22 years in China and nearly 50% in the US. Similar data is available on India, the fourth largest emitter of GHG, and they have made very significant commitments to solar and to electric rail as well as energy efficiency that could lead to their absolute decoupling well before EKC theory would have predicted [13]. Although many would not want to say that the battle is over, there is no doubt that the era of fossil fuel dependence is ending. It obviously needs to keep going and gain exponential decline momentum. Our book is written to help with that momentum through the powerful forces of change that are potentially available in our cities. 3.2. Causes of Decoupling The three primary sources of change are government, business and the community [14]. Each of these play a part in any change and will be briefly outlined here before showing how the power of cities to bring these together is what is really driving the world to decouple from fossil fuels. 3.2.1. Government The Paris agreement in December 2015 (COP21) was an historic accord signed by 196 nations. It was significantly easier for the nations of the world to sign than in Copenhagen in 2009 (COP15) as the world could now see that the changes being required on them were already underway without causing a decline in wealth generation, as outlined above in Figure 1 and in national data. Nevertheless it was a significant achievement and a lot of lobbying and government activity was required to demonstrate that it was now possible to commit more heavily to the journey of removing fossil fuel-based economies 100% by 2100. The follow-up commitments began in New York in April 2016 with a signing by 175 nations to ensure that climate change is “well below” the 2 degrees’ limit accepted by the world’s scientists. Each country must now deliver the ratification from their parliaments and begin the adoption of annual goals that are meant to be ratcheted up whenever the country feels able to do so. The role of government in providing regulations and infrastructure to enable higher energy efficiency and low carbon electricity, fuels, appliances, buildings and vehicles has been a driver of change over the past 30 years. This process is usually one of being a small step ahead and pushing the system to produce a better low carbon outcome without too much cost or change. However it is possible, that disruptive innovations will begin to take over markets much quicker than governments have allowed for. In our view the emergence of solar and battery storage is likely to rapidly displace coal and the reduction of car dependence and electrification of transport is likely to rapidly displace oil. This process will depend on whether business and the community can see the changes emerging and accept that new fossil fuel-free goals are achievable in their cities and towns and how they can use the opportunity to ride this new economic wave rather than try to prevent the change. 3.2.2. Business There is a lot of evidence that the next area of growth for business is the green economy and that there are large groups of businesses partially or totally funding green innovation, products and services as the basis of their future [15]. The most significant driver in the 21st century leading to the removal of coal (and gas) for electricity production has been investment in renewables. As shown in Figure 8 below there was a point around 2004 when investment in renewables by the world’s bankers and financiers outstripped fossil fuel-based power investment. In the most recent data from Bloomberg New Energy Finance the investment ratio is now 2:1 in favour of renewables. Business has often been seen to have very short term goals of a year or so in terms of their strategic plans for market gains. But investors from the financial community look to see how they will make profits right through the lending period which is usually 20 years. When governments are debating the world’s scientists about how quickly they can remove fossil fuels from the market place, then it is easy to see why they would not want to invest in potential stranded assets like coal-fired power stations when other options that governments and scientists want to see, are available. In the US in the past 5 to 8 years the phasing out of coal was made easier by the availability of natural gas. At the same time dramatic growth in solar and wind power was underway and now it is possible to see how the natural gas limits are being reached as renewables becomes the fuel of choice [17]. The combination of these two forces led to the collapse of coal consumption in the US and decline and fall of the largest coal company Peabody with many stranded assets. In Australia a similar process has been underway with gas as the preferred option over coal but in the past 5 years the dramatic growth in rooftop solar has created a significant market that was not considered likely for decades. 1.5 million homes purchased roof top solar in 5 years without any real subsidies like feed-in tariffs and in Perth this reached 25% of households. The 550 MW produced is the largest power station in Western Australia and has led to the Minis ter Energy saying growth will inevitably reach 70% of households by 2020 and the utilities will never again need to purchase a coal or gas-fired power station [18]. The implications for the cities and towns in Western Australia for how they manage a potentially carbon-free power future in the next decade are a journey they were not prepared for. Fossil fuel-based power stations are now likely to be stranded assets and the key questions are about how battery storage can make this transition seamless for business and households and how it can enable the electricity grid to be maintained as a way of equitably distributing solar electricity. This is likely to be different in different parts of the city as well as in different types of settlements in rural and remote locations, as will be discussed later. 3.2.3. Community The reasons why Perth grew so rapidly in adoption of solar include factors like easy access to Chinese mass produced PV cells (and now batteries) and the high price of electricity, but mostly it was driven by the community. In the 8 years from 2008 there was a significant economic boom in Western Australia when the rest of the world was frantically adapting to the GFC. For a period Perth became the wealthiest city in the world and the new money was flooding into many household bank accounts. Many chose to put it into a rooftop solar system because of their interest in long term sustainability (over 80% of the community want to see action on climate change) as well as having an investment that would pay for itself in 5 years. Community values can easily be underestimated when facing the future and the need to address complex matters like climate change. The majority of this rooftop solar has gone into the outer suburbs which in Australia are generally less wealthy though they often have bigger homes with bigger roofs and bigger power bills [19]. The inner suburbs are much higher socio-economically and have higher green intentions but in reality it was the outer suburbs who have made the majority of the investment in solar. It indicates that the mechanisms for decoupling economic growth and fossil fuels will vary between cities and within cities [20]. 3.3. What about Oil? The reduction in consumption of oil is another example of how cities have begun to drive the change to remove fossil fuels at a faster rate than many anticipated. It also is a combination of government, business and the community. The collapse in oil price as well as the collapse in coal price appears to be due to demand issues as well as supply issues. Demand for coal will continue to drop as renewables takes over; especially as battery storage becomes cheap. Demand for oil is expected to decline as vehicle fleets are electrified; however it has already gone down despite there being only a few percent of electric vehicles. The reason why this has happened appears to be a city issue: for the past 150 years cities have been moving out as they have followed first trains and trams then automobiles, but now they are coming back in [21]. Our work on cities has shown that there is an exponential relationship between urban density and car use/fuel use as in Figure 9. If cities have begun to increase in density rather than decrease then they will drop down the steep curve quite quickly creating exponential decline in car use. This is what we are now seeing in all the world’s developed cities and the phenomenon is being called ‘peak car’ as car use per capita has peaked and is in decline. Indeed it is very similar to the decoupling phenomenon described above. Many cities are now seeing that their economic growth is dependent on them reducing their car use. Hence cities like Washington DC and Portland, Oregon have demonstrated that their wealth is decoupling from car use (Figure 10). It should be no surprise that this strong decoupling is associated with cities that have invested in good urban rail systems in recent decades. The decoupling is closely associated with this as our data also shows that urban traffic is slowing in all the world’s cities and urban rail is now able to outcompete cars as they can go around, over or under the traffic [21]. Governments play a big part in generating this transition as they are needed to help plan, though not necessarily finance, such large scale infrastructure. However business and community are also critical as they are responding to a new economic process associated with the knowledge economy. Many businesses that are part of the new innovation economy are locating in city centres where they can have creative face-to-face contact with people from various backgrounds and professions [22] [23]. These new jobs are generally for the young Millenials and also older wealthier professionals. As a result they are the backbone of the social movement that has rediscovered inner and central city living. The market demand for dense urbanism that is not car dependent has therefore grown dramatically in the 21st century city. In more recent work the same phenomenon of peak car has been found in Shanghai and Beijing which are now carrying 8 and 9 million passengers a day on their new Metro systems enabling a significant reduction in the relative use of cars [24]. The rapid change into decoupling growth in wealth from growth in car use is happening in emerging cities because they have the urban fabric that is not suited to large scale growth in car use. The building of 81 electric urban rail systems in Chinese cities and 52 in Indian cities is indicative of how the switch away from oil is happening before many expected. 3.4. The Future A range of fossil fuel demand forecasts and the forecast just for renewables are set out in Figure 11. The nine organizations they used include the main fossil fuel companies and the main government-based forecasting bodies of the IEA and the EIA. The average growth from 2015 to 2050 is 580 EJ to 850 EJ with the oil companies suggesting well above these forecasts. The average for renewables goes from 80 EJ to 200 EJ with the fossil fuel companies suggesting much less than this. What this suggests is that based on historical trends global energy demand is forecast simply to grow in line with global population growth and growth in GDP. Owing to this, fossil fuel companies predict that due to the continued forecasted rise of energy consumption, their products will meet the majority of this demand with a small though growing proportion of renewables. This is business as usual. However, this paper has shown that decoupling of fossil fuel energy from GDP has become firmly established and is being driven by cities from across the world. What if the trends are setting in to be significantly faster than most of these forecasts dare to suggest? What could happen if we took seriously the kind of disruptive innovations in our cities that are likely to lead to rapid decline in fossil fuels and rapid growth in renewables? In order to separate out the components of GHG growth we have used the Kaye simplification (based on the old Paul Ehrlich simplification of Impact being a combination population, resource consumption per capita and technology efficiency per unit of resource consumption): GHG = carbon intensity per unit of energy (GHG/Energy) x energy intensity per unit of wealth (Energy/GDP) x wealth per capita (GDP/population) x population The carbon intensity of energy is going down globally and will increase rapidly as renewables increases its proportion. The decoupling of energy from wealth has been increasing with a 35% decoupling between 1990 and 2015 and from the above diagrams this will grow even more rapidly as the two separate out. Wealth per capita is likely to continue its gradual growth and population growth is predicted to continue but slow. The interactions between all these factors are complex for example urban population growth will help propel the economic processes that enable solar adoption and urban regeneration as well as being a factor in creating more GHG until these processes enable the phase out. The scenario considered most feasible will be something like the IPCC goal of 80% less GHG by 2050 as in Figure 12. 4. Conclusion The end of fossil fuel dependence is hard to imagine but it is getting easier because the trends show it is underway. This paper has shown the kind of exponential growth in renewables and decline in fossil fuels that we have just started to see could in fact decouple economic growth from fossil fuels much more rapidly than most have forecasted. The continuation of these trends will require a combination of different forms of solar-based power, different forms of electric transport and different forms of urban fabric. Most of this will be in cities. Government, business and the community will drive it in different ways in different

#### COVID will make capitalism more sustainable

Power 20 (Gordon Power is chief executive and chief investment officer of Earth Capital; 03-30-20; City A.M.; “A more sustainable capitalism will emerge from Covid-19”; https://www.cityam.com/a-more-sustainable-capitalism-will-emerge-from-covid-19/)

The main concern that is paralysing the financial markets right now is uncertainty. Investors and the business community are questioning how long this crisis will last, and when consumer and investor confidence will return, with no end in sight. But while none of us can predict the future, when it does return, one possible outcome is that the crisis could cause an unprecedented shift in capital — potentially for the better. Why? Because coronavirus is a test of which companies will be most resilient to another global crisis: climate change. Over the last few years, we have seen financial institutions and global companies promise to adopt environmental and social initiatives as the penny — the global climate threat — drops. Encouragingly, many of the world’s largest firms seem to be increasingly aware of the risk that climate change poses to their business models. Business news in the months leading up to the coronavirus crisis was dominated by pledges to cut emissions, promises to build sustainable portfolios, and the emergence of in-house ESG teams. But while progress has certainly been made, global emissions have continued to rise to the highest level on record. The clock is ticking to address the climate crisis. The required technology and awareness for change is already here: what is now needed is a wake-up call for this change to become reality. And Covid-19 could be that wake-up call. Capitalism in its current form threatens value — and is more vulnerable to losing it. Sustainable capitalism, on the contrary, creates value and has proved to be more resilient to systemic risks. As markets around the world have plunged in the last few weeks, one of the main losers from the economic consequences of the pandemic has been fossil fuel-intensive companies. In stark contrast, sustainable infrastructure has demonstrated stronger resilience in these challenging times. Once viewed with suspicion, funds with a sustainability mandate have proved their mettle, and now routinely outperform other funds. This could be the prompt that investors have been waiting for — a phenomenon that could see greater prevalence toward sustainable funds. Transitioning to a low-carbon economy means dealing with growing physical risks such as extreme weather events and investing today to avoid future risk scenarios developing. Covid-19 has shown our dependencies on fossil fuel-intensive companies and is providing an unexpected stress test, enabling us to see how prepared they — and, indeed, all companies — may be for the climate change shocks that are on the horizon. As environmental disasters, dramatic shifts in energy markets, and legislative changes emerge, those funds that have absorbed the Covid-19 shock are likely to demonstrate their resilience once again. Companies are sensitive to market signals, and as investors move to resilient low-carbon alternatives, all businesses will be forced down the same route regardless of size or sector. We estimate that about 70–80 per cent of the cost of achieving the net-zero emissions target must come from the private sector. It is a big spend, but also a big opportunity. Contributing to a low-carbon, sustainable future could provide a greater pay-off to investors over the long-term. The economic shock of coronavirus will have woken up investors to this new reality. When this devastating crisis is over, we can only hope that the world has learned the lessons necessary to ensure that our future is more sustainable — and more secure.

### 1AR – FTC DA

**Lacks the requisite resources now.**

Olive **Morris** 7/12/21. Policy analyst with The New Center. “Lina Khan Has Big Plans For Big Tech — But She Might Not Have the Tools.” https://www.realclearpolicy.com/articles/2021/07/12/lina\_khan\_has\_big\_plans\_for\_big\_tech\_\_but\_she\_might\_not\_have\_the\_tools\_785004.html

But the FTC may not be equipped for that fight. Cases taken up by the FTC cost the agency enormously in fees paid to outside consultants and economists, who can charge as much as $1,350 an hour. At the same time, corporate merger filing fees, which traditionally serve as a major cash flow for the agency, have fallen during the pandemic.

According to emails obtained by POLITICO, the lack of funding is also **taking its toll on FTC staffing and resources**. “[**W]e will either need to bring fewer expert intensive cases or significantly decrease our litigation costs** (e.g. experts, transcripts, litigation support contractors, etc.),” Executive Director David Robbins said in an October 29, 2020 email.

Robbins said in later emails that the agency would be freezing all hiring, promotions, and end-of-the-year bonuses indefinitely. The FTC may see more funding in 2021 if Congress passes bills like the U.S. Innovation and Competition Act, which would allow the agency to increase their merger filing fees. However, it’s still unclear how much these fees would be raised and when the new payment schedule could be applied.