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**Innovation**

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

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

**But, Circuit Court splits render the success of retaliation under Noerr-Pennington uncertain, making Supreme court action necessary**

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Although the Supreme Court expressly carved out a sham exception to Noerr-Pennington immunity, lower courts disagree over the applicable standard when multiple lawsuits are challenged as sham petitioning. In 2020, two cases solidified a 5-2 circuit split on this issue, but no cert petition was filed in either case. The majority of circuits—the Second, Third, Fourth, Ninth, and Tenth—have held that a different analysis applies when the legality of a pattern of lawsuits or petitions is challenged than when just a single petition is at issue. When multiple lawsuits are implicated, these courts have held antitrust immunity may be lost under the sham exception if the series of petitions demonstrates a pattern of filings made solely to inflict harm through burdensome process, without consideration of the merits or interest in the requested relief. As a result, the majority of circuits have held that the overall pattern of filings can qualify as a sham––therefore subject to antitrust scrutiny and damages––even if a small percentage of the petitions were objectively reasonable or ultimately proved successful. In contrast, two circuits—the First and Seventh––have held that a separate standard for immunity does not apply when scrutinizing a pattern of sham petitioning. In those circuits, every petition is subject to the same two-step test: (1) whether it was objectively baseless (i.e., had no reasonable chance of success) and if so, (2) whether the subjective intent of the petitioning was to harm a rival. Under this standard, only objectively baseless petitions can give rise to potential antitrust liability, and Noerr-Pennington shields a pattern of petitions which had merit, were successful, or at least were objectively reasonable. **As a result**, **an antitrust defendant** **who succeeds in barring entry** of a competitor or raising its rival’s costs **through** a long series of **unsuccessful lawsuits** or administrative petitions **may be immunized** from liability so long as each unsuccessful petition had a reasonable chance of success (even if achieving that success was not the purpose of the petitioning). With the split now covering more than half of the federal circuits, the issue of when the NoerrPennington doctrine shields litigants who file a series of lawsuits or regulatory petitions is ripe for Supreme Court resolution. In 2018, the Supreme Court declined to grant certiorari to review the First Circuit’s decision on the issue, and in 2020, the unsuccessful plaintiff declined to appeal the Seventh Circuit’s decision on the issue. **Until Supreme Court review occurs**, **antitrust practitioners** tussling with potential sham litigation claims—which frequently arise in pharmaceuticals, health care, telecommunications, and other patent-intensive sectors—**lack the certainty** **needed to advise historically litigious clients** **of the antitrust risk associated with filing additional lawsuits against rivals**. From the perspective of antitrust practitioners (and their clients) with a vested interest in the predictability of outcomes, this is unfortunate since “federal [antitrust] law, in its area of competence, is assumed to be nationally uniform, whether or not it is in fact.”7

**Unquestioned sham litigation has wide-ranging effects – makes firms legalistic rather than dynamic. That direclty makes firms less likely to invest in R&D, makes start-ups more risk averse, and reduces the incidence of break-through technology. Reducing uncertainty solves**

Filippo **Mezzanotti 20.** Associate Professor of Finance, Kellog School of Finance. “Roadblock to Innovation: The Role of Patent Litigation in Corporate R&D” <https://www.kellogg.northwestern.edu/faculty/mezzanotti/documents/innovation.pdf>

7 Conclusion This paper examines how patent rights affect innovation using the 2006 Supreme Court decision in“eBay v. MercExchange” as an exogenous shock to patent enforcement. The evidence provided suggests that this intervention had a positive effect on innovation. **Firms** that were more exposed to the change in rules – companies operating in areas where patents were more intensively litigated – **increased innovation output more after the decision.** Similarly, for a sub-sample of public firms, I found that **R&D intensity was positively affected**. This is consistent with the idea that patent litigation may have negative, distortive effects on firm investment in innovation. **The effects were large in magnitude, suggesting that these distortions can be substantial**. While the average quality of the patents did not change, firms more exposed to patent litigation **increased the likelihood of patenting breakthrough technology.** Similarly, firms exposed to the shock saw a lower increase in the share of defensive patents. Overall, these results are consistent with the idea that patent litigation may have negative, distortive effects on firm investment in innovation. Furthermore, I investigate the specific channels through which patent litigation reduced innovation. First, I show that patent litigation reduces innovation because it lowers the returns from performing R&D activities. Consistent with this idea, **firms partially reshuffled their portfolios toward patents with higher risk of lawsuits after the decision.** Second, I explore whether patent litigation also reduces investment in R&D because it diminishes the amount of internal resources available for productive activities, therefore exacerbating the financing problem of innovation (Brown et al., 2009; Hall and Lerner, 2010). In line with this hypothesis, I find that the increase in R&D is mostly concentrated in firms that are more likely to be financially constrained. There are several avenues for future research in this area. A primary question is to examine the effectiveness of recent policy interventions, such as the America Invents Act (2011). In addition, more work can be done to examine the role of patent litigation in start-up. The nature of my identification strategy focuses on established firms and therefore the results do not directly apply to start-up companies. However, there are good reasons to think ex-ante that the results on this set of companies should not be reversed. First, the importance of financial constraints in explaining the results suggests that the **litigation channel may have been relevant also for start-ups**, since these firms are generally more financially constrained that established companies. Second, aggregate evidence is also consistent with the fact that eBay did not significantly harm start-up investments. For instance, Mezzanotti and Simcoe (2019) suggest that VC investments and aggregate innovation did not slow down during this period (and if anything grew at a faster rate). The results presented in this paper support the idea that patent litigation can significantly affect companies’ innovation. **As a result, policies that mitigate the overhang of litigation can have beneficial effects on technology advancement**.**57 In particular, improvements in the quality of patent enforcement, which reduces the legal uncertainty around patents and limits abusive behaviors in this market, can increase firms’ ability and incentives to invest in R&D**. Recent efforts in the United States, such as the America Invents Act (2011) or Alice v. CLS (2014), have started to take steps in this direction. However, **more comprehensive policy work needs to be done** to further addresses the various problems in the patent system today.

**The tech sector is atrophying from frivolous litigation but district courts have set the bar too high for what counts as baseless litigation under Noerr**

Nicholas **Caspers 21**. 3-29-21. Associate Editor on the Michigan Technology Law Review . “Patent Trolls Show Immunity to Antitrust: Patent Trolls Unscathed by Antitrust Claims from Tech-Sector Companies” <https://mttlr.org/2021/03/patent-trolls-show-immunity-to-antitrust-patent-trolls-unscathed-by-antitrust-claims-from-tech-sector-companies/>

Patent trolls have become a prominent force to be reckoned with for tech-sector companies in the United States, and tech-sector companies’ recent failure in using antitrust law to combat patent trolls indicates a continuation of that prominence. **Patent trolls have been quite the thorn in the side of tech-sector companies**. The term “patent troll” is the pejorative pop culture title for the group of firms also known as non-practicing entities, patent assertion entities, and patent holding companies. These entities buy patents, not with the purpose of utilizing the patent’s technology, but with the purpose of suing companies for patent infringement. Patent trolls have made up around 85% of patent litigation against tech-sector companies in 2018. Moreover, in comparison to the first four months of 2018, **the first four months of 2020 saw a 30%** increase in patent litigation from patent trolls. At a high-level, antitrust law appears to be a proper tool for wrangling patent trolls. Antitrust law cracks down on anticompetitive agreements and monopolies for the sake of promoting consumer welfare. Patents are effectively legal monopolies over a claimed invention, and patent trolls use these legal monopolies to instigate frivolous patent infringement lawsuits on companies. Such lawsuits increase litigation and licensing costs for companies who can then push such costs, via increased product prices, onto the downstream consumer. In an attempt to go on the offensive, tech-sector companies have brought antitrust claims against patent trolls. The antitrust claims have operated on one of two theories. In Intellectual Ventures I LLC v. Capital One from 2017, Capital One counterclaimed antitrust remedies on the basis of a patent troll suing Capital One for patent infringement. More recently, Intel Corp. v. Fortress Investment Group LLC from 2021 entailed a motion to dismiss on Intel’s antitrust claims based on a patent troll’s accumulation of patents**. Both attempts have been thoroughly crushed in the district courts.** As indicated by Capital One, **the action by patent trolls of suing for patent infringement appears to be well-shielded by Noerr-Pennington immunity**. Noerr-Pennington immunity is immunity from antitrust claims for petitioning a government body. Suing a company for patent infringement is petitioning the judiciary and, therefore, falls under Noerr-Pennington immunity. However, lawsuits can be stripped of Noerr-Pennington immunity if the lawsuit constitutes sham litigation. Sham litigation entails litigation where no reasonable litigant could expect success on the merits and has the subjective intent to directly interfere with a competitor’s business relationships. **Capital One suggests that the most baseless lawsuits by patent trolls with the sole purpose of reaching a quick settlement are still unlikely to be sham litigation.** The opinion reiterated that the subjective prong requires the sued party to be a competitor, and patent trolls, who do not produce any products or services, are unlikely to be a competitor to sued companies who do produce products and services. As indicated by the dismissal of the antitrust claims at the pleading stage in Intel, an antitrust claim against the accumulation of patents by a patent troll has some inherent, potentially insurmountable, difficulties. Antitrust liability requires showing a relevant market followed by market power and a tendency towards anticompetitive effects or followed by direct evidence of anticompetitive effects. First, relevant markets for patents tend to be too broad, and broad relevant markets reduce the probability that a single entity wields enough market power to have an anticompetitive effect. With patent trolls, the relevant markets include the patent troll’s patents and any patents or technologies that are reasonably interchangeable with the patent troll’s patents. The set of reasonably interchangeable technologies is rather amorphous and large, given the multitude of ways in any area of technology to perform the same task and the total number of patents having surpassed ten million. Some of the relevant markets in Intel, such as “mobile device-to-device communication” and “device authorization,” were so broad as to make anticompetitive effects by the patent troll implausible. Second, even with a narrower market, a patent troll is unlikely to have market power. As suggested in Intel, the total set of patents and technology in the narrower market is likely far larger than the couple of patents being asserted by the patent troll. Third, evidence demonstrating that a patent troll creates anticompetitive effects is few and far between. Showing anticompetitive effects likely requires a combination of increased, supracompetitive prices and a drop in product output or quality. Showing that a patent troll creates a supracompetitive licensing price over a patent is difficult. As in Intel, the few licensing agreements for a patent troll’s patent are likely settlements from a patent troll’s previous assertions which are hidden by confidentiality. These recent decisions are only district court decisions. However, Capital One provides a strong, clear-cut view on Noerr-Pennington immunity for patent infringement suits by patent trolls, and Intel found that the antitrust claims against the accumulation of patents could not pass the low bar of plausibility in the pleading stage. With patent trolls’ exclusive existence in the instigation of patent infringement lawsuits and the accumulation of patents, **the recent decisions appear to significantly reduce the usefulness of antitrust law against the toll-taking patent trolls.**

**Innovation solves a litany of existential risks**

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Technological progress now offers us a vision of a remarkable future. The advances that have brought us onto an unsustainable pathway have also raised the quality of life dramatically for many, and have unlocked scientific directions that can lead us to a safer, cleaner, more sustainable world. With the right developments and applications of technology, in concert with advances in social, democratic, and distributional processes globally, progress can be made on all of the challenges discussed here. Advances in **renewable energy** and **related tech**nologies, and more **efficient energy use**—advances that are likely to be accelerated by progress in technologies such as **a**rtificial **i**ntelligence—can bring us to a point of **zero-carbon emissions**. New **manufacturing capabilities** provided by synthetic biology may provide cleaner ways of producing products and degrading waste. A greater scientific understanding of our natural world and the ecosystem services on which we rely will aid us in plotting a trajectory whereby **critical environmental systems are maintained** while allowing human flourishing. Even advances in education and women’s rights globally, which will play a role in achieving a stable global population, can be aided specifically by the information, coordination, and education tools that technology provides, and more generally by growing prosperity in the relevant parts of the world. There are **catastrophic** and **existential** risks that we will simply **not be able to overcome** **without advances in science and technology**. These include possible **pandemic outbreaks**, whether natural or engineered. The early **identification of incoming asteroids**, and approaches to shift their path, is a topic of active research at NASA and elsewhere. While currently there are no known techniques to prevent or mitigate a **supervolcanic** eruption, this may not be the case with the tools at our disposal a century from now. And in the longer run, a civilization that has **spread permanently beyond the earth**, enabled by advances in **spaceflight**, manufacturing, robotics, and terraforming, is one that is **much more likely to endure**. However, the breathtaking power of the tools we are developing is **not to be taken lightly**. We have been very lucky to muddle through the advent of nuclear weapons without a global catastrophe. And within this century, it is realistic to expect that we will be able to rewrite much of biology to our purposes, intervene deliberately and in a large-scale way in the workings of our global climate, and even develop agents with intelligence that is fundamentally alien to ours, and may vastly surpass our own in some or even most domains—a development that would have uniquely unpredictable consequences.

**Specifically, 5g is uniquely vulnerable because of the complexity of the products**

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Patent trolls have been a plague on innovators for too long. Patent trolls are entities that obtain patents (sometimes obscure patents) for the sole purpose of threatening or filing lawsuits in court and then using the prospect of costly litigation to extort unwarranted payouts from an innovative company. The risks and costs created by these entities are a clear and present danger to entrepreneurship and innovation. A goal of public policy should be to make it more costly for frivolous patent lawsuits to be filed, while still ensuring that legitimate patent rights are protected. Unfortunately, the current environment does not get this balance right, to the detriment of many cutting-edge firms and industries. The **tech**nology **industry**, **particularly** **companies inventing** and employing the next generation **5G** technologies, **is extremely vulnerable** **to** **this problem because a single IT product typically contains thousands of patents.** That is highly problematic for our economy. 5G technology enables higher capacity network connections that are faster, more reliable, and more responsive. The 5G revolution will improve the functionality of our current telecommunications system and facilitate significant business efficiencies that include faster communications and improved logistical operations. Through advances such as improved intelligence and new options for command and control, it will be invaluable for national defense. 5G technologies will also enable all types of new technologies to emerge, from self-driving cars to smart toothbrushes. The invention and rollout of 5G technologies are not cheap, however. The total spending on just the rollout of the cutting edge technologies runs into the trillions of dollars. **With so much on the line, it is** **imperative** that the **patent system** **protect the rights of patent holders** while preventing inappropriate patent litigation from becoming an unnecessary burden on the entrepreneurial companies driving the nation’s 5G revolution forward. Unfortunately, **the ability to launch litigation** through the U.S. International Trade Commission (ITC**) is throwing off this careful balance.** Take the current litigation between Ericsson and Samsung as an example. Ericsson and Samsung had a patent cross-license agreement for 5G technologies that recently expired. Such an arrangement is commonplace among high-tech companies that produce complex products. A renewal agreement does not require costly litigation. However, in practice, Ericsson has launched costly litigation against its contract partners each time an agreement is being re-upped. In the latest iteration of these tactics, Ericsson filed complaints right after the agreement expired in both the ITC and District Court in Texas, not to mention across Europe. The filing with the ITC is the most disconcerting, as its purpose seems to be to gain negotiating leverage. According to the ITC, its mission is to help domestic industries stave off problematic import competition, including “in proceedings involving imports claimed to injure a domestic industry or violate U.S. intellectual property rights”. The problem arises, however, because the scope of the complaints the ITC is willing to adjudicate is expanding, and the ITC’s failure to enforce the requirement of “legitimate domestic industry interests” means the hearings are unfairly tilted in favor of the complainant. In this case, Ericsson, a Swedish company, does not even make the products it is trying to block from the US market. As Bret Swanson from the American Enterprise Institute noted, the ITC can impose harsh penalties that include an “exclusion order” that would prohibit the respondent company from importing the infringing product into the U.S. until the dispute is resolved. The exceptionally large revenue losses that would result from a complete ban on the sale of a product pressure respondents to agree to terms that excessively favor the complainant. Not surprisingly, based on the ITC’s own data, **many patent trolls are using litigation** at the ITC **for precisely these goals.** According to the ITC data, non-practicing entities (NPEs, or entities that do not manufacturer products and many of whom are patent trolls) filed nearly one-fifth of all ITC investigations between 2007 and 2020. The incentives to use ITC litigation to gain leverage during licensing negotiations create large economic costs. Directly, **such litigation wastes millions of dollars** **that could otherwise be invested in** ushering in the **5G** revolution. Indirectly, the current litigation environment creates a feedback loop that encourages patent trolls to file more litigation. This obviously increases the amount of money wasted on frivolous litigation. **The risks from excessive litigation also hobble innovative firms** by causing them to operate in a manner that minimizes their litigation costs rather than maximizing their innovation efforts and technological efficiencies. Equally troubling, all the costs the ITC is currently imposing are unnecessary. The federal judiciary is well equipped to enforce the rights of valid patent holders. There is no reason to offer a second front to litigate private parties’ contract questions through the ITC, especially with the enormous risk of market preclusion hanging over the dispute. **Frivolous lawsuits have been a pall hanging over the innovative tech sector** for too long. Congress can help alleviate this problem by reforming ITC processes, limiting its scope, and increasing the costs for filing a frivolous lawsuit.

**That stops us from winning the 5g war**

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In March, the United States International Trade Commission (ITC) was asked to investigate an obscure patent complaint by a recently created foreign company **that has the potential to stall American advancement** **in the race to 5G** and provoke significant national security repercussions. Given that the development of **5G could transform the global distribution of power** by stimulating the fourth technological revolution, the United States has every incentive to dedicate their extensive resources to the race. This requires, however, that the ITC prioritize national security and U.S. needs in the 5G space over specious patent lawsuits. The ITC investigates imports that are accused of violating intellectual property (IP) rights. If the ITC determines that a product infringes on IP, it can issue an “exclusion order” and effectively ban all imports of the product category into the United States. The ITC’s **mission**, although commendable, **has been subject to misuse and manipulation**. Non-practicing entities (**NPEs**), or “patent trolls,” **are not creating new technology**, new products, or even new ideas, outside of how to churn up litigation against actual technology innovators and job creators. The NPE business model is to buy or acquire patents to bring patent infringement lawsuits in courts and the ITC, often in parallel. They want to try to make big money squeezing companies whose products involve very complex technologies. But if they are actually successful at the ITC, they would just get an import ban, something they really don’t want. This makes it perfectly clear that the NPEs are just using the ITC as a way to try to threaten companies into paying massive sums to avoid this terrible potential outcome. Increasingly, they are attacking major companies, from the auto industry to technology companies such as Apple, Samsung, or Amazon. The ITC’s **decisions** in pending cases **will have an enormous influence over who controls the next stage technology of 5G**. This technology promises to deliver speeds over 100 times faster than ever before experienced, and experts see widespread 5G coverage and adoption as necessary to the development and availability of important frontier technologies. The nation that leads the way in the race to 5G will solidify its status as the leader of the global economy in the future. It is therefore imperative that the United States is not left behind. Two recent ITC cases highlight the potential threat to America’s leadership in the race to 5G. Neodron, an Irish NPE, recently filed two similar complaints with the ITC for an alleged patent violation on touchscreen technology. If exclusion orders were granted, over 90 percent of tablets, smartphones, and touchscreen laptops would be banned from entering the United States, creating significant national security issues. An **adverse ruling in either case, let alone both, would open the door to Chinese providers**, such as Huawei and its many Chinese competitors, **to dominate the consumer electronics industry** in the United States, strengthening an aggressive economic competitor. **Without any effort, China would gain great advantage in the 5G race.** These companies would be given free rein without competition in the American market to build market share. Relying on 5G infrastructure developed and maintained by another nation would make the United States far more vulnerable — not just economically, but in its national security. Given that this infrastructure is essential to civilian, military, and business use, allowing our communication and smart devices to be made by a hostile foreign country opens the door to the threat of espionage, cyber-attacks, and even terrorism. China’s Huawei has been accused by the U.S. government and multiple foreign governments of espionage. In February, U.S. federal prosecutors indicted Huawei for installing surveillance equipment for the Iranian government. It was also alleged that Huawei was involved with numerous projects in support of North Korea. Given its questionable record, providing it or its Chinese competitors a strong foothold in the American market would be a tremendous threat to national security and would directly harm the American public in the long term. If Neodron succeeds in its mission to ban the devices that we rely on, the ITC will have failed its legal obligation to consider the public interest of American consumers when issuing remedies. The ITC should reject Neodron’s claims on the grounds of public interest to keep the United States competitive in the race to 5G and forestall Chinese progress and its accompanying threats. **Any other decision would be simply ruinous to America’s position as a global leader.**

**Falling behind means China will control 5G tech deployed in global markets---the PLA will weaponize information networks, which causes Taiwan war and cyberattacks**

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Chinese advances in 5G also contribute to military innovation. **The PLA** aims to leverage **emerging tech**nologies to achieve an advantage in future **military competition**. In his capacity as as commander-in-chief, Xi Jinping has called upon the PLA to become a “world-class” military (世界一流军队) by midcentury.82 **5G will be vital to** the process of **military “intelligentization”** (智能化), which involves the realization of **AI** in support of a range of applications and capabilities.83 5G could be critical to **info**rmation **support**,84 creating improvements in **data sharing**, new mechanisms for **c**ommand **and** **c**ontrol, and enhanced system construction to fulfill future operational requirements,85 such as the **military internet of things.**86 5G is anticipated to enable **machine-to-machine communication** among **sensors**, **drones**,87 or even **swarms** on the battlefield, as well as improvements in human-machine interaction.88 The potential for rapid integration of information and improved communications could provide key advantages for **situational awareness**. As China looks to construct a more integrated information and communications architecture across space-and ground-based systems, 5G could be incorporated.89 For instance, there are plans to integrate 5G with BeiDou, China’s dual-purpose competitor to GPS, to improve position, navigation, and timing capabilities.90 Beyond the battlefield, deployment of 5G could facilitate China’s model of national defense mobilization, providing for more “intelligent” approaches to **coordinate resources** and **logistical support** to fulfill the demands of wartime contingencies.91 For instance, when Jilin Province carried out a drill for national defense mobilization, 5G was used to support emergency communications.92 Already, some units in Chinese military and paramilitary forces have started to employ 5G for pilot programs, such as border security.93

China’s development of 5G will be shaped by the implementation of a national strategy of military-civil fusion (军民融合).94 There are certain synergies between military and commercial technologies, including advanced electronics in which elements of the Chinese defense industry, such as the China Electronics Technology Group Corp. (CETC), have particular proficiency.95 Even some military academic institutions, such as the PLA Strategic Support Force’s Information Engineering University, have noteworthy proficiency in relevant technological components, especially chips and advanced antennas.96 The Information Engineering University, which contributes to the Chinese military’s education and capabilities for information operations, is engaged in research on 5G network security, seemingly in collaboration with Huawei.97 Increasingly, a growing number of companies, including Shenzhen Kingsignal (金信诺),98 are pursuing opportunities for expansion into the military 5G market, including working on military projects.99 In November 2018, a number of industry players established the 5G Technology Military-Civil Fusion Applications Industry Alliance (5G技术军民融合应用产业联盟), including ZTE, China Unicom, and the China Aerospace Science and Industry Corp. (CASIC), a major defense conglomerate.100 This new partnership aims to foster collaboration and integration in military and civilian development of 5G.101 Some Chinese telecom companies are already supporting 5G pilot projects that appear to be intended for dual-use or military employment.102

5G Risks and Security Concerns

The U.S. government has actively sounded the alarm over the risks that Huawei may present, urging allies and partners to impose a ban against it in order to mitigate the threats of disruption or espionage through 5G networks.103 Huawei has faced pushback and scrutiny, and a growing number of countries have considered — or undertaken in the case of Japan, Australia, and the United States, among others — a ban or de facto exclusion of Huawei on the basis of varying rationales and mechanisms, which have predated U.S. action in some cases.104 There are also valid concerns that the outright **exclusion of Huawei** may **slow** and **increase the costs of 5G** deployment.105 What has often been characterized as **an American “campaign” targeting Huawei risks backfiring** if continued on its current trajectory, in which U.S. rationales have been perceived as shifting and inconsistent.106 However, a growing number of concerning incidents involving Huawei, including indicators of the insecurity of its equipment, accusations regarding its theft of intellectual property, and its involvement in providing surveillance capabilities to governments, continue to be exposed.107

China’s quest for 5G dominance has played out within a complex technological and geopolitical landscape.108 Indeed, different countries have their own security concerns and considerations, but not all share American assessments of the severity of these risks. Insofar as American policymakers see China as a great power rival and strategic competitor, **allowing Chinese companies** to play a key role in American **critical infrastructure**, or that of U.S. **allies** and partners, presents **grave threats** that are untenable and unacceptable for the United States, not only espionage but also outright subversion of this critical infrastructure.109 Yet Huawei has continued to expand its global presence, and the U.S. government has yet to present a **viable** and attractive **alternative** to working with Huawei. Many countries may have sunk costs and be “locked in” already to this choice based on earlier decisions, which raises concerns about not only security but also fair competition.110 However, it is encouraging to see emerging consensus among like-minded countries about potential principles and shared approaches to 5G security, particularly through the progress of a recent conference on 5G security in Prague.111

The age of 5G will present new risks and novel threats of disruption or exploitation. 5G involves far more than just new and faster wireless networks; it will be a **vital component** of future **critical infrastructure**. Consequently, the **cybersecurity** of 5G networks could prove uniquely **challenging**, considering the high levels of **complexity** and much **greater potential for damage** in the case of an attack. Not only the confidentiality of data on 5G networks but also questions of integrity and assurance will become urgent challenges. Whereas most cyberattacks to date have involved only data theft, an attack against future 5G networks could cause **massive damage** that might threaten public safety and critical industries in future smart cities.112 The often subpar security of IoT devices, of which there are an estimated 20 billion globally and growing, also presents serious reasons for concern. A high proportion of devices on the U.S. market have been made in China by companies with very poor track records on security.113 While vulnerabilities have been and remain a major concern in the telecom industry for 3G and 4G, the stakes will be even higher for securing 5G networks at all stages of their life cycles.114 In some cases, **supply chains could be weaponized** deliberately by adversaries that may prefer **to “win without fighting.”**115 The exclusion of high-risk vendors is an important measure to mitigate risk but does not constitute a complete solution.

5G must be designed and implemented with a holistic approach to security in mind from the start. The development of secure networks must entail more than simply excluding high-risk vendors, requiring rigorous, ongoing testing and screening. Indeed, careful scrutiny should be extended to all aspects of the production, construction, and management of these networks, involving screening of the security of all vendors and carriers. If an end-to-end approach to security is effectively implemented, 5G could prove more secure than our existing networks and critical infrastructure, but the consequences of insecurity would be far graver. In public debates on 5G security, the call and search for a “smoking gun” has been problematic. This framing of the issue has often distracted policymakers from thinking about the greater challenge of mitigating vulnerabilities that tend to be pervasive. Bugs can be just as problematic as backdoors. It is inherently challenging to differentiate an accidental vulnerability from one that is deliberately introduced. The primary difference is intent, which cannot be discerned from code alone. It is encouraging that the 3GPP’s SA3 working group is focusing on security, seeking to ensure that such security concerns will shape the development of standards.116 However, industry and government are just starting to grapple with the full range of issues in play.

Given the gravity of these security challenges, the apparent centrality of Chinese companies in the global development of 5G has raised intense concerns. There is a very real risk that vulnerabilities in networks, whether the result of poor security practices or deliberate introduction of backdoors, could be weaponized for leverage or coercive purposes, particularly in a crisis or conflict scenario. Considering China’s history of IP theft and cyberespionage, there is also a real risk such networks could be exploited for purposes of **espionage**.117 As a Chinese company, Huawei also would be subject to a number of legal demands, regulatory requirements, and mechanisms of coercion that are often ambiguous and expansive.118 Regardless of whether Huawei’s leadership may wish to disregard an order from the Chinese government, China lacks an independent judiciary system for company leaders to plead their case against the government, as Apple did in the United States when it fought an FBI order to unlock an iPhone. Huawei’s claims that it would “say no” to the Chinese government are not credible without indications of the company’s actual ability to do so.

Even if Huawei is given the full benefit of the doubt, despite its history and apparent involvement with the Chinese military and intelligence organizations, Huawei’s products and services have been assessed to be highly **insecure**, with a much greater prevalence of vulnerabilities relative to their primary competitors.119 Moreover, there are reasons to question whether **knowledge of** any **bugs** in its equipment could be **shared** more readily with China’s Ministry of State Security (MSS). This risk may be heightened given the influence of MSS in China’s vulnerabilities database, not to mention Huawei’s historical and continued linkages to the Chinese **P**eople’s **L**iberation **A**rmy, including military intelligence.120 For the United States, these risks and security concerns are **inextricable** from today’s **geopolitical exigencies**, insofar as the U.S.-China rivalry encompasses **scenarios for** which there is a nonzero probability of **conflict**, including over **Taiwan**. Consistently, **Chinese military writings** have highlighted the potential for **cyberattacks on critical infrastructure** as a **prelude to** outright **war**fare.121 The presence of equipment from high-risk vendors, such as **Huawei**, even in **rural telecoms** is concerning, considering that some of **these networks are near military bases**, which raises risks of espionage or exploitation.

5G security presents a global challenge that will demand creative and **cooperative solutions**. Huawei will likely remain a major player in 5G in a number of countries, including some U.S. allies and partners, that believe the benefits of partnering with it outweigh the risks. Although a criteria-based calculation of risk provides compelling arguments for exclusion of such highly risky players, many nations could still continue current collaborations with Huawei in ways that exacerbate global risks to this emergent ecosystem. **Even if** the **U**nited **S**tates were to succeed in **fully secur**ing its own 5G networks, U.S. data and entities may remain **reliant**, including for military and commercial activities, upon **overseas digital infrastructure** that could prove highly **vulnerable**.The presence of Huawei’s equipment in the critical infrastructure of U.S. **allies** and partners, whose support or **location** as a **staging ground** the U.S. military might require to fulfill its **treaty obligations** in the event of a crisis or **conflict**, also creates new risks, to an extent that could **undermine U.S.** capabilities for command and control and **power projection**. As Dan Coats, had warned during his time as director of national intelligence (DNI), “U.S. data will increasingly flow across foreign-produced equipment and foreign-controlled networks, raising the risk of **foreign access** and **denial of service**.”122

Consequently, it is in the U.S. interest to develop and promote collaborative approaches to 5G security with allied and partner nations. Certainly, robust testing and rigorous oversight, such as the Huawei Cyber Security Evaluation Center that was established in the United Kingdom and comparable mechanisms created in Berlin and Brussels, constitute one alternative for risk mitigation. However, **no** such **screening** can provide a complete or perfect **solution**, particularly considering the inherent **complexity** of 5G.123 Moreover, no amount of testing can enable full confidence, particularly when Huawei’s involvement in the operation and maintenance of 5G networks would provide **routine access** that could be **exploited**. Huawei’s apparent failure so far to meet these security standards and reports of the extent and severity of vulnerabilities in its equipment have not engendered confidence. There are reasons for skepticism that these paradigms will merit emulation.124 Given the stakes, security cannot—and must not—be an afterthought in the process, nor a consideration to be sacrificed for the sake of cost or speed. Those countries that choose less secure options or prioritize ease and rapidity of deployment may encounter higher risks and greater costs in the future.

**Cyberattacks cause extinction---false warnings, stealing nukes, and introducing vulnerability**

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The **Cyber Threat to Nuclear Weapons** and Related Systems

Cyber-based threats target all sectors of society—from the **financial sector** to the entertainment industry, from department stores to insurance companies. Governments face an even more critical challenge when it comes to cyberattacks on their most critical systems. **Attacks on critical infrastructure** could have extraordinary consequences, but a successful cyberattack3 on a **nuclear weapon** or related system—a nuclear weapon, **a delivery system**, or the related Nuclear Command, Control, and Communications (**NC3**) **systems**—could have **existential consequences**. Cyberattacks could **lead to false warnings** of attack, **interrupt critical communications** or access to information, **compromise nuclear planning** or delivery systems, or even allow an **adversary to take control of a nuclear weapon**.

Given the level of digitization of U.S. systems and the pace of the evolving cyber threat, one **cannot assume** that systems with digital components—**including nuclear weapons systems**—are not or will not be compromised. Among the reasons: nuclear weapons and delivery systems are **periodically upgraded**, which may include the incorporation of new digital systems or components. **Malware could be introduced** into digital systems during fabrication, much of which is not performed in secure foundries. In addition, there are a range of **external dependencies**, such as **connections to the electric grid**, that are outside the control of defense officials but directly affect nuclear systems. Finally, the possibility always exists that **an insider**, either purposefully or accidentally, could enable a cybersecurity lapse by introducing malware into a critical system.

Increased use of digital systems may also **adversely affect the survivability of nuclear systems**. New technologies can enhance reliability and performance, but they can also lead to **new vulnerabilities** in traditionally survivable systems, such as **submarines** or **mobile missile launchers**.4

**Petitioning**

**Noerr has been extended to give 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**

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=>

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.

**The sham exception was supposed to be the limiting principle on lobbying but it’s been interpreted too narrowly. That prevents liability and congressional regulation**

Maggie **Blackhawk 2016.** Climenko Fellow and Lecturer on Law, Harvard Law School. “Lobbying and the Petition Clause” https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2893&context=faculty\_scholarship

Finally, just a few months after Justice Black retired from the bench, the Court took what it saw as the next natural step under Johnson and expanded the Noerr-Pennington “**lobbying**” **exception** to reach advocacy directed at the courts and the executive.288 “Certainly,” Justice Douglas wrote in reliance on Johnson, “the right to petition extends to all departments of Government. The right of access to the courts is indeed but one aspect of the right to petition.”289 Belying this expansive interpretation, the facts of California Motor Transport Co. challenged the Court’s earlier absolute petition right. Rather than a simple antitrust claim involving allegations of judicial and administrative actions, the association in California Motor Transport Co. alleged that a competitor had initiated a flood of judicial and administrative actions as a means to crowd out and undermine the associations’ own pending actions.290 The competitor was functionally engaging with the courts and agencies as an advocate, but the alleged purpose of the actions was to blockade the court and agencies from the advocacy of others.291 Black’s literalist right to petition from Noerr that promised unfettered access to formal government institutions began to call out for a limiting principle.292 Unlike the marketplace of ideas for speech, access to these institutions was a finite resource, and the right to petition could not mean absolute access that disrupted the functioning of government and foreclosed the access of others.293 That the conduct was unethical, however, would not provide the limit. Noerr had confronted a large-scale public relations campaign where the railroad industry had organized fake advocacy associations and engaged in “third party technique” campaigns under the identities of wellknown and well-compensated experts, but the Court had still shielded the conduct from the antitrust laws.294 Later cases further emphasized that the exception in Noerr applied to any “concerted effort to influence public officials regardless of intent or purpose.”295 Maneuvering carefully around these earlier exceptions, the Court seized on some spare language in Noerr1 296 and crafted what is known as the sham exception to the Noerr-Pennington doctrine.297 Under this exception, the Court declined to shield the association’s executive and judicial actions on the ground that the actions were mere “shams”—i.e., not a “concerted effort to influence public officials” but **conduct aimed at blocking a competitor’s access to government**.298 The Court analogized the sham exception to abuse of government process in many other contexts—for example, obtaining a patent through fraud to block a competitor or bribing a government official.299 Contrary to Noerr1’s broad right to petition that shielded advocacy through formal process, the sham exception allowed liability for advocacy that had a tendency to “corrupt the administrative or judicial processes.”300 **The sham exception has failed to provide much of a limit.** Most notably and with some irony, **lower courts have declined to apply the sham exception to the context from which it derived in Noerr**—that is, **legislative petitioning**—**because abandonment of the formal petition process has left the courts without a baseline against which to gauge improper advocacy**.301 **To the Court, our lobbying system of today in Congress is seen as “no holds barred.”**

**The affirmatives clarity solves and allows the court to develop an independent framework in applying the petitioning right**

**Mckinley 2016**. Maggie McKinley. Climenko Fellow and Lecturer on Law, Harvard Law School. “Lobbying and the Petition Clause” http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2016/06/68\_McKinley\_-\_Stan.\_L.\_Rev.\_1131.pdf

Second, a contextualized petition right would force an unbundling of the activities we currently conflate into the term “lobbying.” A close interrogation reveals that lobbying is not one single practice but an amalgam of a broad range of advocacy practices, some triggering more constitutional concern than others.402 The conflation of these advocacy practices into a single term has led some scholars to suggest that “lobbying” ought to obtain strengthened First Amendment protection or, at the very least, protection under a First Amendment “penumbra” because a “bundle” of practices necessarily implicates a “bundle” of First Amendment protections. **Unbundling “lobbying”** **into a clear articulation** of what advocacy practice is at issue in a particular case could bring much-needed clarity to our scholarship and doctrine. In particular, unbundling could begin to clarify important distinctions between speech, petitioning, and lobbying. **Cases like Noerr,** which addressed the constitutional protections of a lobbying campaign directed at the public through speeches and the press,403 would fall under the Free Speech Clause, rather than the Petition Clause. Given that the Court has already conflated the speech and petition doctrines in these areas, the substantive impact of converting these to free speech cases, including the Noerr-Pennington doctrine, would be negligible. **Clarity in the doctrine could**, however, **allow** **the Court to develop an independent framework** **specific to the particular needs and functions of the petition right**. Second, a contextualized petition right could provide enough structure to support an independent Petition Clause doctrine. As in Guarnieri, the Court has often reflected on history in developing its First Amendment jurisprudence and the broader concerns structuring its free speech analysis often source from this historical reflection.404 **A contextualized petition right could** provide structure and a limiting principle to the doctrine and, most importantly, **prevent the Court from again conflating petitioning with speech**. Moreover, as noted, a distinct Petition Clause doctrine would provide the analytic space to articulate the relationship between the Petition and Free Speech Clauses, no longer assuming they are coextensive simply because of prior doctrinal conflation.

**Two scenarios**

**First is slow growth**

**Petitioning aimed at anti-competitive barriers to entry and government favoritism has been the cause of productivity slowdown**

Martin **Wolf 2019**. 11-13-19. Martin Wolf is chief economics commentator at the Financial Times, Londons “Why the US economy isn’t as competitive or free as you think” <https://www.ft.com/content/97be3f2c-00b1-11ea-b7bc-f3fa4e77dd47>

It began with a simple question: “Why on earth are US cell phone plans so expensive?” In pursuit of the answer, Thomas Philippon embarked on a detailed empirical analysis of how business actually operates in today’s America and finished up by overturning much of what almost everybody takes as read about the world’s biggest economy. Over the past two decades, competition and competition policy have atrophied, with dire consequences, Philippon writes in this superbly argued and important book. America is no longer the home of the free-market economy, competition is not more fierce there than in Europe, its regulators are not more proactive and its new crop of superstar companies not radically different from their predecessors. Philippon, a professor at New York University, is one of a list of brilliant economists of French origin now teaching in the US. Others include the recent Nobel-prize winner Esther Duflo, at the Massachusetts Institute of Technology, Olivier Blanchard, former chief economist of the IMF, and Emmanuel Saez and Gabriel Zucman, both now at Berkeley. It is not obvious, however, that these people share all that much, apart from their national origin and an inclination not to take free-market platitudes for granted. Sceptics of Philippon’s controversial thesis might assert that a French economist must be ideologically opposed to American capitalism. But Philippon insists that he believes passionately in the value of competition. Indeed, The Great Reversal contains a chapter arguing just that. Moreover, each step in his argument is based on meticulous analysis of the data. He crisply summarises the results: “First, US markets have become less competitive: concentration is high in many industries, leaders are entrenched, and their profit rates are excessive. Second, this lack of competition has hurt US consumers and workers: it has led to higher prices, lower investment and **lower productivity growth**. Third, and contrary to common wisdom, **the main explanation is political**, not technological**: I have traced the decrease in competition to increasing barriers** **to entry and weak antitrust enforcement**, **sustained by heavy lobbying and campaign contributions**.” All this is backed up by persuasive evidence. Those prices of broadband access in the US are, for example, roughly double what they are in comparable countries. Profits per passenger for airlines are also far higher in the US than in the EU. The analysis demonstrates, more broadly, that “market shares have become more concentrated and more persistent, and profits have increased.” Moreover, across industries, more concentration leads to higher profits. Overall, the effect is large: the post-tax profit share in US gross domestic product has almost doubled since the 1990s. There are a number of reasons for the increase in market concentration. In manufacturing, competition from China played a role by driving weaker domestic competitors out of the market. For the rest of the economy, we need other explanations. In the 1990s, superstar companies, including the retail giant Walmart, drove the rate of investment and productivity growth upwards. The reverse happened in the 2000s, however: rising market concentration drove the profits of entrenched companies up and both the investment rate and productivity growth down. This malignant form of increased concentration reflects significantly diminished entry of new businesses and greater tolerance of merger activity. In other words, the US economy has seen a significant reduction in competition and a corresponding rise in monopoly and oligopoly. To drive the argument home, the book turns to comparisons with the EU. Many readers will laugh: after all, isn’t the EU an economic disaster? When one compares changes in real gross domestic product per head, the answer, however, is: not really. From 1999 to 2017 real GDP per head rose by 21 per cent in the US, 25 per cent in the EU and 19 per cent even in the eurozone, despite the damage done by its ineptly handled financial crisis. Levels of inequality and trends in income distribution are also less adverse in the EU, so increases in incomes have been more evenly shared. In short, comparisons between the EU and the US are justifiable. These show that neither profit margins nor market concentration have exploded upwards in the EU as they have done in the US. The share of wages and salaries in the aggregate incomes — so-called “value-added” — of business has fallen by close to 6 percentage points in the US since 2000, but not at all in the eurozone. **This destroys the hypothesis that technology is the main driver of the downward shift** in the share of labour incomes. After all, technology (and international trade, as well) affected both sides of the Atlantic roughly equally. Note that Philippon is making a narrow claim about differences in product market competition. The EU economy is not stronger in all respects, he stresses. On the contrary, “The US has better universities and a stronger ecosystem for innovation, from venture capital to technological expertise.” Nevertheless, competition in product markets has become far more effective in the EU over the past two or three decades. This reflects purposeful deregul­ation within the single market — ironically, given the tragedy of Brexit, a UK-driven policy innovation that originated with Margaret Thatcher — and a more aggressive and independent competition policy. The two sides of the Atlantic have switched their focus on the need to preserve and promote competition. One fascinating proposition is that the EU has established more independent regulators than either its individual members or the US would do (or have done). This is a healthy result of mutual distrust within the EU. Individual states abhor the idea of being vulnerable to the whims of fellow members when it comes to regulation and so prefer fully independent institutions. This is particularly beneficial to countries with weak national regulators. **The independence of its regulators also makes returns to lobbying relatively low in the EU.** The evidence is clear. The higher an EU member country’s product market regulation in 1998, the bigger the sub­sequent decline in such regulation. The effect is also far stronger for members of the EU than for non-EU members. These developments reflect differences in politics. Lobbying, both against deregulation and for favourable regul­ation, is much fiercer in the US. Overall, **evidence strongly supports the notion that this lobbying,** which is inevitably dominated by big companies, **works**. Why else would people pay for it? The data on the role of money in US politics are even more dramatic. Members of Congress spend about 30 hours a week raising money. The Supreme Court’s perverse 2010 “Citizens United” decision held that companies are persons and money is speech. That has proved a big step on the journey of the US towards becoming a plutocracy. As former representative Mick Mulvaney (a man gaining a reputation for beguiling honesty) stated in April 2018, “If you’re a lobbyist who never gave us money, I didn’t talk to you. If you’re a lobbyist who gave us money, I might talk to you.” One can indeed get the best congressperson money can buy. **Corporate lobbying is two to three times bigger in the US than the EU**. Campaign contributions are 50 times larger in America than in the EU. The Great Reversal also examines the situation in three crucial industries: finance, healthcare and “Big Tech”. On finance, the startling finding is that the cost of intermediation — how much bankers and brokers charge for taking in savings and transferring them to end users — has remained around two percentage points for a century. All those computers have made no difference. This then is a rent-extraction machine. That really has to change. There are two things about America that most outsiders will never understand: its gun laws and its healthcare system. The US spends far more on healthcare (not much below a fifth of GDP) and yet has far worse health outcomes than any other high-income country. How has this happened? The answer is that the system creates rent-extracting monopolies from top to bottom: doctors, hospitals, insurance companies and pharmaceutical businesses all feed at this overflowing trough. Finally, Philippon sheds light on what he calls the “GAFAMs” (Google, Amazon, Facebook, Apple and Microsoft). He demonstrates that the economic weight of these titans of tech is no bigger than that of the giants of the past. But their links to the economy as a whole are far smaller. It is no surprise, therefore, that their impact on productivity growth has also been relatively modest. The author convincingly challenges the view that these businesses’ mono­poly positions are the natural product of economies of scale and network effects. So something can and should be done. In rising order of radicalism, these would be: preventing dominant comp­anies from acquisitions or forcing them to divest; limiting their ability to exploit dominant positions by imposing interoperability with other networks and data portability; and breaking them up. The Great Reversal also notes the rise of monopsony — the monopoly power of buyers — in labour markets, via restrict­ive contracts, occupational licensing and restrictions on entry. Deregulation needs to focus on such barriers. As economists have known since Adam Smith, business on its own will pursue restraints on competition, and with great enthusiasm. The outcome is rentier capitalism, which is both inefficient and politically illegitimate. The difficulty, however, is that it can be far too easy for incumbents to buy the political and regulatory protection it desires. What should the US want? The answers, suggests Philippon, are: free entry; regulators prepared to make mistakes when acting against monopoly; and protection of transparency, privacy and data ownership by customers. **The great obstacle to action in the US is the pervasive role of money in politics. The results are the twin evils of oligopoly and oligarchy**. Donald Trump is in so many ways a product of the defective capitalism described in The Great Reversal. What the US needs, instead, is another Teddy Roosevelt and his energetic trust-busting. Is that still imaginable? All believers in the virtues of competitive capitalism must hope so.

**Slow growth collapses the liberal order AND causes global hotspot escalation---it culminates in numerous existential risks.**

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Four structural forces will **shape** the future of International Relations: globalization (but without liberal rules, institutions, and leadership)1; multipolarity (the end of American hegemony and wider distribution of power among states and non-states2); the strengthening of distinctive, national and subnational identities, as persistent cultural differences are accentuated by the disruptive effects of Western style globalization (what Samuel Huntington called the “non-westernization of IR”3); and **secular economic stagnation**, a product of **long**er **term** global decline in birth rates combined with aging populations.4 These structural forces do not determine everything. **Environment**al events, **global health** challenges, **internal political developments**, policy mistakes, **technology breakthroughs** or failures, will intersect with structure to **define** our future. But these four structural forces will **impact** the way states behave, in the **capacity** of great powers to **manage** their **differences**, and to act collectively to settle, rather than exploit, the **inevitable** shocks of the next decade.

Some of these structural forces could be **managed** to promote prosperity and **avoid war**. Multipolarity (inherently more prone to conflict than other configurations of power, given coordination problems)5 plus globalization can work in a world of **prosperity**, convergent values, and **effective** conflict management. The Congress of Vienna system achieved relative peace in Europe over a hundred-year period through informal cooperation among multiple states sharing a fear of populist revolution. It ended decisively in 1914. Contemporary neoliberal institutionalists, such as John Ikenberry, accept multipolarity as our likely future, but are confident that globalization with liberal characteristics can be sustained without American hegemony, arguing that liberal values and practices have been **fully accepted** by states, global institutions, and private actors as **imperative for growth** and political legitimacy.6 Divergent values plus multipolarity can work, though at significantly lower levels of economic growth-in an autarchic world of isolated units, a world envisioned by the advocates of decoupling, including the current American president.7 Divergent values plus globalization can be managed by hegemonic power, exemplified by the decade of the 1990s, when the Washington Consensus, imposed by American leverage exerted through the IMF and other U.S. dominated institutions, overrode national differences, but with real costs to those states undergoing “structural adjustment programs,”8 and ultimately at the cost of global growth, as states—especially in Asia—increased their savings to self insure against future financial crises.9

But all four forces operating simultaneously will produce a future of **increasing** internal polarization and **cross border conflict**, diminished economic growth and poverty alleviation, weakened **global institutions** and norms of behavior, and **reduced** collective capacity to confront emerging challenges of **global warming**, accelerating **tech**nology **change**, **nuc**lear weapon**s innovation** and **prolif**eration. As in any effective scenario, this future is clearly visible to any keen observer. We have only to abolish wishful thinking and believe our own eyes.10

Secular Stagnation

This unbrave new world has been emerging for some time, as US power has **declined** relative to other states, especially China, global liberalism has failed to deliver on its promises, and totalitarian capitalism has proven effective in leveraging globalization for economic growth and political legitimacy while exploiting technology and the state’s coercive powers to maintain internal political control. But this new era was jumpstarted by the world **financial crisis** of 2007, which revealed the bankruptcy of unregulated market capitalism, **weakened** faith in US leadership, exacerbated economic deprivation and inequality around the world, ignited growing populism, and undermined international liberal institutions. The **skewed** distribution of wealth experienced in most developed countries, politically tolerated in periods of growth, became **intolerable** as growth rates declined. A combination of **aging** populations, **accelerating** technology, and global **populism/nationalism** promises to make this growth decline **very difficult** to reverse. What Larry Summers and other international political economists have come to call “**secular stagnation**” increases the likelihood that **illiberal** globalization, **multipolarity**, and **rising nationalism** will define our future. Summers11 has argued that the world is entering a **long** period of diminishing economic growth. He suggests that secular stagnation “may be the defining macroeconomic challenge of our times.” Julius Probst, in his recent assessment of Summers’ ideas, explains:

…rich countries are ageing as birth rates decline and people live longer. This has pushed down real interest rates because investors think these trends will mean they will make lower returns from investing in future, making them more willing to accept a lower return on government debt as a result.

Other factors that make investors similarly pessimistic include rising global inequality and the slowdown in productivity growth…

This decline in real interest rates matters because economists believe that to overcome an economic downturn, a central bank must drive down the real interest rate to a certain level to encourage more spending and investment… Because real interest rates are so low, Summers and his supporters believe that the rate required to reach full employment is so far into negative territory that it is effectively impossible.

…in the long run, more immigration might be a vital part of curing secular stagnation. Summers also heavily prescribes increased government spending, arguing that it might actually be more prudent than cutting back – especially if the money is spent on infrastructure, education and research and development.

Of course, governments in Europe and the US are instead trying to shut their doors to migrants. And austerity policies have taken their toll on infrastructure and public research. This looks set to ensure that the next recession will be particularly nasty when it comes… Unless governments change course radically, we could be in for a sobering period ahead.12

The rise of nationalism/populism is both cause and effect of this economic outlook. Lower growth will make every aspect of the liberal order **more difficult to resuscitate** post-Trump. Domestic politics will become **more** polarized and dysfunctional, as competition for **diminishing** resources intensifies. International collaboration, ad hoc or through institutions, will become **politically toxic**. Protectionism, in its multiple forms, will make economic recovery from “secular stagnation” a heavy lift, and the liberal hegemonic leadership and strong institutions that **limited** the damage of previous downturns, will be **unavailable**. A clear demonstration of this negative feedback loop is the economic damage being inflicted on the world by Trump’s trade war with China, which— despite the so-called phase one agreement—has predictably escalated from negotiating tactic to imbedded reality, with no end in sight. In a world already suffering from inadequate investment, the uncertainties generated by this confrontation will **further curb** the **investments** essential for future growth. Another demonstration of the **intersection** of structural forces is how populist-motivated controls on immigration (always a weakness in the hyper-globalization narrative) deprives developed countries of Summers’ recommended policy **response** to secular stagnation, which in a more open world would be a win-win for rich and poor countries alike, increasing **wage rates** and remittance **revenues** for the developing countries, replenishing the labor supply for rich countries experiencing low birth rates.

Illiberal Globalization

Economic weakness and rising nationalism (along with multipolarity) will not end globalization, but will **profoundly** alter its character and greatly reduce its economic and political benefits. Liberal global institutions, under American hegemony, have served multiple purposes, enabling states to improve the quality of international relations and more fully satisfy the needs of their citizens, and provide companies with the legal and institutional stability necessary to manage the inherent risks of global investment. But under present and **future** conditions these institutions will become the **battlegrounds**—and the victims—of geopolitical competition. The Trump Administration’s frontal attack on multilateralism is but the final nail in the coffin of the Bretton Woods system in trade and finance, which has been in slow but accelerating decline since the end of the Cold War. Future American leadership may **embrace renewed collaboration** in global **trade** and **finance**, macroeconomic management, environmental sustainability and the like, but **repairing the damage** requires the heroic assumption that America’s own identity has not been **fundamentally** altered by the Trump era (four years or eight matters here), and by the internal and global forces that enabled his rise. The fact will remain that a sizeable portion of the American electorate, and a monolithically proTrump Republican Party, is committed to an illiberal future. And even if the effects are transitory, the causes of weakening global collaboration are **structural**, not subject to the efforts of some hypothetical future US liberal leadership. It is clear that the US has lost respect among its rivals, and trust among its allies. While its economic and military capacity is still greatly superior to all others, its political dysfunction has diminished its ability to convert this wealth into effective power.13 It will furthermore operate in a future system of **diffusing material power**, diverging economic and political governance approaches, and rising nationalism. Trump has promoted these forces, but did not invent them, and future US Administrations will struggle to cope with them.

What will illiberal globalization look like? Consider recent events. The instruments of globalization have been weaponized by strong states in pursuit of their geopolitical objectives. This has turned the liberal argument on behalf of globalization on its head. Instead of interdependence as an unstoppable force pushing states toward collaboration and convergence around market-friendly domestic policies, states are exploiting interdependence to inflict harm on their adversaries, and even on their allies. The increasing interaction across national boundaries that globalization entails, now produces not harmonization and cooperation, but friction and escalating trade and investment disputes.14 The Trump Administration is in the lead here, but it is not alone. Trade and investment friction with China is the most obvious and damaging example, precipitated by China’s long failure to conform to the World Trade Organization (WTO) principles, now escalated by President Trump into a trade and currency war disturbingly reminiscent of the 1930s that Bretton Woods was designed to prevent. Financial sanctions against Iran, in violation of US obligations in the Joint Comprehensive Plan Of Action (JCPOA), is another example of the rule of law succumbing to geopolitical competition. Though more mercantilist in intent than geopolitical, US tariffs on steel and aluminum, and their threatened use in automotives, aimed at the EU, Canada, and Japan,15 are equally destructive of the liberal system and of future economic growth, imposed as they are by the author of that system, and will spread to others. And indeed, Japan has used export controls in its escalating conflict with South Korea16 (as did China in imposing controls on rare earth,17 and as the US has done as part of its trade war with China). Inward foreign direct investment restrictions are spreading. The vitality of the WTO is being sapped by its inability to complete the Doha Round, by the proliferation of bilateral and regional agreements, and now by the Trump Administration’s hold on appointments to WTO judicial panels. It should not surprise anyone if, during a second term, Trump formally withdrew the US from the WTO. At a minimum it will become a “dead letter regime.”18

As such measures gain traction, it will become clear to states—and to companies—that a global trading system more responsive to raw power than to law entails escalating risk and diminishing benefits. This will be the end of economic globalization, and its many benefits, as we know it. It represents nothing less than the subordination of economic globalization, a system which many thought obeyed its own logic, to an international politics of zero-sum power competition among multiple actors with divergent interests and values. The costs will be significant: Bloomberg Economics estimates that the cost in lost US GDP in 2019- dollar terms from the trade war with China has reached $134 billion to date and will rise to a total of $316 billion by the end of 2020.19

Economically, the just-in-time, maximally efficient world of global supply chains, driving down costs, incentivizing innovation, spreading investment, integrating new countries and populations into the global system, is being Balkanized. Bilateral and regional deals are proliferating, while global, nondiscriminatory trade agreements are at an end. Economies of scale will **shrink**, incentivizing **less investment**, increasing **costs** and **prices**, compromising growth, marginalizing countries whose **growth** and **poverty reduction** depended on participation in global supply chains. A world already suffering from **excess** savings (in the corporate sector, among mostly Asian countries) will respond to heightened risk and uncertainty with **further retrenchment**. The problem is perfectly captured by Tim Boyle, CEO of Columbia Sportswear, whose supply chain runs through China, reacting to yet another ratcheting up of US tariffs on Chinese imports, most recently on consumer goods:

We move stuff around to take advantage of inexpensive labor. That’s why we’re in Bangladesh. That’s why we’re looking at Africa. We’re putting investment capital to work, to get a return for our shareholders. So, when we make a wager on investment, this is not Vegas. We have to have a reasonable expectation we can get a return. That’s predicated on the rule of law: where can we expect the laws to be enforced, and for the foreseeable future, the rules will be in place? That’s what America used to be.20

The international political effects will be equally damaging. The four **structural forces** act on each other to produce the **more dangerous**, **less prosperous** world projected here. **Illiberal globalization** represents **geopolitical conflict** by (at first) physically non-kinetic means. It arises from **intensifying** competition among powerful states with divergent interests and identities, but in its effects drives down growth and fuels **increased** nationalism/populism, which further **contributes to conflict**. Twenty-first-century protectionism represents bottom-up forces arising from economic disruption. But it is also a top-down phenomenon, representing a strategic effort by political leadership to reduce the **constraints of interdependence** on freedom of geopolitical action, in effect a **precursor** and **enabler** of war. This is the disturbing hypothesis of Daniel Drezner, argued in an important May 2019 piece in Reason, titled “Will Today’s Global Trade Wars Lead to **World War Three**,”21 which examines the preWorld War I period of heightened trade conflict, its contribution to the disaster that followed, and its parallels to the present:

Before the First World War started, powers great and small took a **variety of steps** to thwart the globalization of the 19th century. Each of these steps made it **easier** for the key combatants to **conceive of a general war**.

We are beginning to see a similar approach to the globalization of the 21st century. One by one, the **economic constraints** on military aggression are **eroding**. And too many have forgotten—or never knew—how this played out a century ago.

…In many ways, 19th century globalization was a victim of its own success. Reduced tariffs and transport costs flooded Europe with inexpensive grains from Russia and the United States. The incomes of landowners in these countries suffered a serious hit, and the Long Depression that ran from 1873 until 1896 generated pressure on European governments to protect against cheap imports.

…The primary lesson to draw from the years before 1914 is not that economic interdependence was a weak constraint on military conflict. It is that, even in a globalized economy, governments can take protectionist actions to reduce their interdependence in anticipation of future wars.

In retrospect, the 30 years of tariff hikes, trade wars, and currency conflicts that preceded 1914 were harbingers of the devastation to come. European governments did not necessarily want to ignite a war among the great powers. By **reducing** their **interdependence**, however, they made that option **conceivable**.

…the backlash to globalization that preceded the Great War seems to be reprised in the current moment. Indeed, there are ways in which the current moment is **scarier than the pre-1914 era**. Back then, the world’s hegemon, the United Kingdom, acted as a brake on economic closure. In 2019, the United States is the protectionist with its foot on the accelerator. The constraints of Sino-American interdependence—what economist Larry Summers once called “the financial balance of terror”—**no longer look so binding**. And there are **far too many** hot spots—the **Korean peninsula**, the **S**outh **C**hina **S**ea, **Taiwan**—where the kindling seems awfully dry.

Multipolarity

We can define multipolarity as a wide distribution of power among multiple independent states. Exact equivalence of material power is not implied. What is required is the possession by several states of the capacity to coerce others to act in ways they would otherwise not, through kinetic or other means (economic sanctions, political manipulation, denial of access to essential resources, etc.). Such a distribution of power presents inherently graver challenges to peace and stability than do unipolar or bipolar power configurations,22 though of course none are safe or permanent. In brief, the greater the number of consequential actors, the greater the challenge of coordinating actions to avoid, manage, or de-escalate conflicts. Multipolarity also entails a **greater potential for sudden changes** in the balance of power, as one state may **defect** to another coalition or opt out, and as a result, the greater the degree of **uncertainty** experienced by all states, and the greater the **plausibility** of downside assumptions about the **intentions** and **capabilities** of one’s adversaries. This psychology, always present in international politics but particularly powerful in multipolarity, **heightens the potential for escalation of minor conflicts**, and of states launching **preventive** or **preemptive** wars. In multipolarity, states are always on edge, entertaining **worst-case** scenarios about actual and potential enemies, and **acting** on these fears—expanding their armies, introducing new weapon systems, altering doctrine to **relax** constraints on the **use of force**—in ways that reinforce the worst fears of others.

The risks inherent in multipolarity are **heightened** by the attendant **weakening of global institutions**. Even in a state-centric system, such institutions can facilitate communication and transparency, helping states to manage conflicts by reducing the potential for misperception and escalation toward war. But, as Waheguru Pal Singh Sidhu argues in his chapter on the United Nations, the **influence** of multilateral institutions as agent and actor is **clearly in decline**, a result of bottom-up populist/nationalist pressures **experienced** in many countries, as well as the **coordination problems** that increase in a system of multiple great powers. As conflict resolution institutions atrophy, great powers will find themselves in “**security dilemmas**”23 in which verification of a rival’s intentions is unavailable, and **worst-case assumptions** fill the gap created by uncertainty. And the supply of conflicts will **expand** as a result of growing **nationalism** and **populism**, which are premised on hostility, paranoia, and isolation, with governments seeking **political legitimacy through external conflict**, producing a **siege mentality** that deliberately cuts off communication with other states.

Finally, the transition from unipolarity (roughly 1989–2007) to multipolarity is unregulated and hazardous, as the existing superpower fears and resists challenges to its primacy from a rising power or powers, while the rising power entertains new ambitions as entitlements now within its reach. Such a “power transition” and its dangers were identified by Thucydides in explaining the Peloponnesian Wars,24 by Organski (the “rear-end collision”)25 during the Cold War, and recently repopularized and brought up to date by Graham Allison in predicting conflict between the US and China.26

A useful, and consequential illustration of the inherent challenge of conflict management during a power transition toward multipolarity, is the weakening of the arms control regime negotiated by the US and the Soviet Union during the Cold War. Despite the existential, global conflict between two nuclear armed superpowers embracing diametrically opposed world views and operating in economic isolation from each other, the two managed to avoid worst-case outcomes. They accomplished this in part by institutionalizing verifiable limits on testing and deployment of both strategic and intermediate-range nuclear missiles. Yet as diplomatically and technically challenging as these achievements were, the introduction of a third great power, China, into this twocountry calculus has proven to be a deal breaker. Unconstrained by these bilateral agreements, China has been free to build up its capability, and has taken full advantage in ramping up production and deployment of intermediate-range ground-launched cruise missiles, thus challenging the US ability to credibly guarantee the security of its allies in Asia, and greatly increasing the costs of maintaining its Asian regional hegemony. As a result, the Intermediate Nuclear Force treaty is effectively dead, and the New Start Treaty, covering strategic missiles, is due to expire next year, with no indication of any US–Russian consensus to extend it. The US has with logic indicated its interest in making these agreements trilateral; but China, with its growing power and ambition, has also logically rejected these overtures. Thus, all three great powers are entering a period of nuclear weapons competition unconstrained by the major Cold War arms control regimes. In a period of rapid advances in technology and worsening great power relations, the nuclear competition will be a defining characteristic of the next decade and beyond. This dynamic will also complicate nuclear nonproliferation efforts, as both the demand for nuclear weapons (a consequence of rising regional and global insecurity), and supply of nuclear materials and technology (a result of the weakening of the nonproliferation regime and deteriorating great power relations) will increase.

Will deterrence prevent war in a world of several nuclear weapons states, (the current nuclear powers plus South Korea, Iran, Saudi Arabia, Japan, Turkey), as it helped to do during the bipolar Cold War? Some neorealist observers view nuclear weapons proliferation as stabilizing, extending the balance of terror, and the imperative of restraint, to new nuclear weapons states with much to fight over (Saudi Arabia and Iran, for example).27 Others,28 examining issues of command and control of nuclear weapons deployment and use by newly acquiring states, asymmetries in doctrines, force structures, and capabilities between rivals, the perils of variable rates in transition to weapons deployment, problems of communication between states with deep mutual grievances, the heightened risk of transfer of such weapons to non-state actors, have grave doubts about the safety of a multipolar, nuclear-armed world.29 We can at least conclude that prudence dictates heightened efforts to slow the pace of proliferation, while realism requires that we face a proliferated future with eyes wide open.

The current distribution of power is not perfectly multipolar. The US still commands the world’s largest economy, and its military power is unrivaled by any state or combination of states. Its population is still growing, despite a recent decline in birth rates. It enjoys extraordinary geographic advantages over its rivals, who are distant and live in far worse neighborhoods. Its economy is less dependent on foreign markets or resources. Its political system has proven—up to now—to be resilient and adaptable. Its global alliance system greatly extends its capacity to defend itself and shape the world to its liking and is still intact, despite growing doubts about America’s reliability as a security guarantor. Based on these mostly material and historical criteria, continued American primacy would seem to be a good bet, if it chooses to use its power in this way.30

So why multipolarity? The clearest and most frequently cited evidence for a widening distribution of global power away from American unipolarity is the narrowing gap in GDP between the US and China. The IMF’s World Economic Outlook forecasts a $0.9 trillion increase in US GDP for 2019–2020, and a $1.3 trillion increase for China in the same period.31 Many who support the American primacy case argue that GDP is an imperfect measure of power, that Chinese GDP data is inflated, that its growth rates are in decline while Chinese debt is rapidly increasing, and that China does poorly on other factors that contribute to power—its low per capita GDP, its political succession challenges, its environmental crisis, its absence of any external alliance system. Yet GDP is a good place to start, as the single most useful measure and long-term predictor of power. It is from the overall economy that states extract and apply material power to leverage desired behavior from other states. It is true that robust future Chinese growth is not guaranteed, nor is its capacity to convert its wealth to power, which is a function of how well its political system works over time. But this is equally the case for the US, and considering recent political developments is not a given for either country.

As an alternative to measuring inputs—economic size, political legitimacy, technological innovation, population growth—in assessing relative power and the nature of global power distribution, we should consider outputs: what are states doing with their power? The input measures are useful, possibly predictive, but are usually deployed in the course of making a foreign policy argument, sometimes on behalf of a reassertion of American primacy, sometimes on behalf of retrenchment. As such, their objectivity (despite their generous deployment of “data”) is open to question. What is undeniable, to any clear-eyed observer, is a real decline in American influence in the world, and a rise in the influence of other powers, which predates the Trump administration but has accelerated into America’s free fall over the last four years. This has produced a de facto multipolarity, whether explainable in the various measures of power—actual and latent—or not. This decline results in part from policy mistakes: a reckless squandering of material power and legitimacy in Iraq, an overabundance of caution in Syria, and now pure impulsivity. But more fundamentally, it is a product of relative decline in American capacity—political and economic—to which American leadership is adjusting haphazardly, but in the direction of retrenchment/restraint. It is highly revealing that the last two American presidents, polar opposites in intellect, temperament and values, agreed on one fundamental point: the US is overextended, and needs to retrench. The fact that neither Obama nor Trump (up to this point in his presidency) believed they had the power at their disposal to do anything else, tells us far more about the future of American power and policy—and about the emerging shape of international relations—than the power measures and comparisons made by foreign policy advocates.

Observation of recent trends in US versus Russian relative influence prompts another question: do we understand the emerging characteristics of power? Rigorously measuring and comparing the wrong parameters will get us nowhere at best and mislead us into misguided policies at worst. How often have we heard, with puzzlement, that Putin punches far above his weight? Could it be that we misunderstand what constitutes “weight” in the contemporary and emerging world? Putin may be on a high wire, and bound to come crashing down; but the fact is that Russian influence, leveraging sophisticated communications/social media/influence operations, a strong military, an agile (Putin-dominated) decision process, and taking advantage of the egregious mistakes by the West, has been advancing for over a decade, shows no sign of slowing down, and has created additional opportunities for itself in the Middle East, Europe, Asia, Latin America, the Arctic. It has done this with an economy roughly the size of Italy’s. There are few signs of a domestic political challenge to Putin. His external opponents are in disarray, and Russia’s main adversary is politically disabled from confronting the problem. He has established Russia as the Middle East power broker. He has reached into the internal politics of his Western adversaries and influenced their leadership choices. He has invaded and absorbed the territory of neighboring states. His actions have produced deep divisions within NATO. Again, simple observation suggests multipolarity in fact, and a full explanation for this power shift awaiting future historians able to look with more objectivity at twenty-first-century elements of power.

When that history is written, surely it will emphasize the extraordinary polarization in American politics. Was multipolarity a case of others finding leverage in new sources of power, or the US underutilizing its own? The material measures suggest sufficient capacity for sustained American primacy, but with this latent capacity unavailable (as perceived, I believe correctly, by political leadership) by virtue of weakening institutions: two major parties in separate universes; a winnertake-all political mentality; deep polarization between the parties’ popular bases of support; divided government, with the Presidency and the Congress often in separate and antagonistic hands; diminishing trust in the permanent government, and in the knowledge it brings to important decisions, and deepening distrust between the intelligence community and policymakers; and, in Trump’s case, a chaotic policy process that lacks any strategic reference points, mis-communicates the Administration’s intentions, and has proven incapable of sustained, coherent diplomacy on behalf of any explicit and consistent set of policy goals.

Rising Nationalism/Populism/Authoritarianism

The evidence for these trends is clear. Freedom House, the go-to authority on the state of global democracy, just published its annual assessment for 2020, and recorded the fourteenth consecutive year of global democratic decline and advancing authoritarianism. This dramatic deterioration includes both a weakening in democratic practice within states still deemed on balance democratic, and a shift from weak democracies to authoritarianism in others. Commitment to democratic norms and practices—freedom of speech and of the press, independent judiciaries, protection of minority rights—is in decline. The decline is evident across the global system and encompasses all major powers, from India and China, to Europe, to the US. Right-wing populist parties have assumed power, or constitute a politically significant minority, in a lengthening list of democratic states, including both new (Hungary, Poland) and established (India, the US, the UK) democracies. Nationalism, frequently dismissed by liberal globalization advocates as a weak force when confronted by market democracies’ presumed inherent superiority, has experienced a resurgence in Russia, China, the Middle East, and at home. Given the breadth and depth of right-wing populism, the raw power that promotes it—mainly Russian and American—and the disarray of its liberal opponents, this factor will weigh heavily on the future.

The major factors contributing to right-wing populism and its global spread is the subject of much discussion.32 The most straightforward explanation is rising inequality and diminished intergenerational mobility, particularly in developed countries whose labor-intensive manufacturing has been hit hardest by the globalization of capital combined with the immobility of labor. Jobs, wages, economic security, a reasonable hope that one’s offspring has a shot at a better life than one’s own, the erosion of social capital within economically marginalized communities, government failure to provide a decent safety net and job retraining for those battered by globalization: all have contributed to a sense of desperation and raw anger in the hollowed-out communities of formerly prosperous industrial areas. The declining life expectancy numbers33 tell a story of immiseration: drug addition, suicide, poor health care, and gun violence. The political expression of such conditions of life should not be surprising. Simple, extremist “solutions” become irresistible. Sectarian, racial, regional divides are strengthened, and exclusive identities are sharpened. Political entrepreneurs offering to blow up the system blamed for such conditions become credible. Those who are perceived as having benefited from the corrupt system—long-standing institutions of government, foreign countries and populations, immigrants, minorities getting a “free ride,” elites—become targets of recrimination and violence. The simple solutions of course, don’t work, deepening the underlying crisis, but in the process politics is poisoned. If this sounds like the US, it should, but it also describes major European countries (the UK, France, Italy, Germany, Poland, Hungary, the Czech Republic), and could be an indication of things to come for non-Western democracies like India.

We have emphasized throughout this chapter the interaction of four structural forces in shaping the future, and this interaction is evident here as well. Is it merely coincidence that the period of democratic decline documented by Freedom House, coincides precisely with the global financial and economic crisis? Lower growth, increasing joblessness, wage stagnation, superimposed on longer-term widening of inequality and declining mobility, constitute a forbidding stress test for democratic systems, and many continue to fail. And if we are correct about secular stagnation, the stress will continue, and authoritarianism’s fourteen-year run will not be over for some time. The antidemocratic trend will gain additional impetus from the illiberal direction of globalization, with its growth suppressing protectionism, weaponization of global economic exchange, and weakening global economic institutions. Multipolarity also contributes, in several ways. The former hegemon and author of globalization’s liberal structure has lost its appetite, and arguably its capacity, for leadership, and indeed has become part of the problem, succumbing to and promoting the global right-wing populist surge. It is suffering an unprecedented decline in life expectancy, and recently a decline in the birth rate, signaling a degree of rot commonly associated with a collapsing Soviet Union. While American politics may once again cohere around its liberal values and interests, the time when American leadership had the self-confidence to shape the global system in its liberal image is gone. It may build coalitions of the like-minded to launch liberal projects, but there will be too much power outside these coalitions to permit liberal globalization of the sort imagined at the end of the Cold War. In multipolarity, the values around which global politics revolve will reflect the diversity of major powers, their interests, and the norms they embrace. Convergence of norms, practices, policies is out of the question. Global collective action, even in the face of global crises, will be a long shot. To expect anything else is fantasy

Unbrave New World and Future Challenges

At the outset of this chapter we described these structural forces as interacting to produce more conflict and diminished prosperity. We also predicted a world with shrinking collective capacity to address new challenges as they arise. What specifically will such a world look like? We address below three principal challenges to global problem solving over the next decade.

Interstate Conflict

In the world experienced by most readers of this volume, conflict is observed within weak states, sometimes promoted by regional competitors, by terrorist groups, or by great powers, acting through surrogates or by indirect means. Sometimes, as in Syria, this conflict spills over to contiguous states and contributes to regional instability, and challenges other regions to respond effectively, a challenge that Europe has not met. Much of this will continue, but the global significance of such local conflicts will be greatly magnified by increasing great power conflict, which will feed—rather than manage or resolve—local instabilities and will in turn be exacerbated by them. Great powers will jockey for advantage, support their local partners, escalate preemptively. Conflicts initially confined to failing states or unstable regions will be redefined by great powers as global in scope and significance.

This tendency of states to view local conflicts in the context of a zero-sum, global struggle for power is familiar to students of the Cold War, but now with the additional challenges to collective action, expanded uncertainty and worst-case thinking associated with the power transition to multipolarity. We can easily observe **increased** conflict in **US–China relations**, as we will in **US–Russia relations** as future US administrations try to make up for ground lost during the Trump presidency, especially in the Middle East. We can observe it among powerful states with **mutual historical grievances**, now with a **weakening** presence of the **hegemonic security guarantor** and having to consider the **renationalization** of their defense: **Japan-So**uth **Ko**rea, **Germany-France**. We can observe it among **historical** rivals operating in rapidly changing security landscapes: **India-China**. We can observe it within the Middle East, as internal rivalries are appropriated by regional powers in a contest for regional dominance. We can observe it clearly in Syria, where the regime’s violent suppression of Arab Spring resistance led to all-out civil war, attracted outside support to proxy forces by aspiring regional hegemons Saudi Arabia and Iran, enabled the rise of ISIS, and eventually to great power intervention, principally by Russia. In a world of effective great power collaboration or American primacy, the Syrian civil war might have been settled through power sharing or partition, or if not, contained within Syria. The collapse of Yugoslavia, occurring during a period of US “unipolarity” and managed effectively, demonstrates the possibilities. Instead, with the US retrenching, Middle East rivals unconstrained by great powers, and great power competition rising, the Syria civil war was fed by outside powers, then metastasized into the region, and—in the form of refugee flows—into Europe, fundamentally altering European politics. Libya may be at the early stages of this scenario.

**Second is democracy**

**Anticompetitive lobbying destroys trust in government**

**Mounk 2018**. Yascha Mounk. Yascha Mounk is a contributing writer at The Atlantic, an associate professor at Johns Hopkins University, a senior fellow at the Council on Foreign Relations, and the founder of Persuasion. “America Is Not A Democracy” <https://www.theatlantic.com/magazine/archive/2018/03/america-is-not-a-democracy/550931/>

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.

**Democracy checks global conflicts**

**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

**Plan**

#### Plan: The United States federal government should substantially increase its prohibitions on anticompetitive petitioning.

**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.

B. The Holding and the Dicta in PRE Clarification of PRE would be simplest if there was a cogent argument that the “**true” objective test** of PRE is, in fact, one of the variants articulated in PRE that most closely resembles the “objectively unreasonable” archetype. Fortunately, **there is just such an argument**. The argument is this: the precise holding in PRE is narrow, and the other formulations and guidelines appearing in the decision are dicta. Consider the time-honored approach to identifying the single holding in a decision when confronted with several alternatives. Which formulation is the holding? The formulation essential to the decision is the holding, and its siblings are the dicta.118 In the instant case, the core holding in PRE is simple: an objectively reasonable effort to litigate cannot be a sham regardless of subjective intent. 119 That simple (but profound) statement is all that was needed to actually dispose of the case. All of the other formulations regarding the PRE objective test are interesting, and informative, but, **under the Court’s own tests** **for distinguishing holdings** from dicta, **they would not be viewed as the** definitive, **binding legal test**. It should be noted that Justice Stevens’ concurring opinion in PRE supports this view: While I agree with the Court’s disposition of this case and with its holding that “an objectively reasonable effort to litigate cannot be sham regardless of subjective intent,” I write separately to disassociate myself from some of the unnecessarily broad dicta in the Court’s opinion. Specifically, I disagree with the Court’s equation of “objectively baseless” with the answer to the question whether any “reasonable litigant could realistically expect success on the merits.” There might well be lawsuits that fit the latter definition but can be shown to be objectively unreasonable, and thus shams. It might not be objectively reasonable to bring a lawsuit just because some form of success on the merits – no matter how insignificant – could be expected.120

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

\*\*\*\*\*\* FOOTNOTE 121\*\*\*\*

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.

\*\*\*\*\*\*\*FOOTNOTE ENDS

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

## 2AC

**2AC – AT: T---per se---2AC**

**We don’t have to win that sham litigation itself an anticompetitive practice---the resolution says to prohibit BY expanding the scope of antitrust laws---plan expands it by limiting the Noerr doctrine which then PROHIBITS the activity**

**Court of Appeals of Texas 15** (Note Inv. Grp., Inc. v. Assocs. First Capital Corp., 476 S.W.3d 463, 2015 Tex. App. LEXIS 9980 (Court of Appeals of Texas, Ninth District, Beaumont September 24, 2015, Opinion Delivered), y2k)

The words "by" and "against" are also not defined by Tex. R. Civ. P. 167, nor are they defined by Tex. Civ. Prac. & Rem. Code Ann. ch. 42. Tex. Civ. Prac. & Rem. Code Ann. §§ 42.001-42.005; Tex. R. Civ. P. 167.1-.7. Therefore, the court construes those words in accordance with their ordinary and commonly understood meanings. The ordinary meaning of the word "**by**" is **through** or through the **medium** of. The word "against" means in opposition or hostility to. Thus, when the court construes those words according to their commonly accepted definitions, it finds that claims are "by" a defendant if they are simply "through" that defendant and claims are "against" a defendant if they are "in opposition to" that defendant. More like this Headnote

**We meet---the use of predatory litigation is an anti-competitive business practice under the Sherman Act---*Noerr-Pennington* immunizes it**

**Helsel 95** (Scott D. Helsel, Scott D. Helsel, Preventing Predatory Abuses in Litigation Between Business Competitors: Focusing on a Litigant's Reasons for Initiating the Litigation to Ensure a Balance Between the Constitutional Right to Petition and the Sherman Act's Guarantee of Fair Competition in Business, 36 Wm. & Mary L. Rev. 1135 (1995), <https://scholarship.law.wm.edu/wmlr/vol36/iss3/>, y2k)

Congress passed the **Sherman** Antitrust **Act** "in response to strong public fear of and hostility

against monopolistic combinations and their **a**nticompetitive **b**usiness **p**ractices."6 The Sherman Act prohibits "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations... ."7 The Act also prohibits all "attempt[s] to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations ... ."' At least under the **terms of the Act**, the **predatory use** of litigation would seem to **violate** the Sherman Act insofar as **such litigation restrains trade protected by the Act**. Unlike other activity prohibited by the Sherman Act,9 **however**, the **right of access** to the courts is **protected** by the First Amendment's right to petition."l Accordingly, courts must balance the interests of litigants in bringing their grievances before a court with Congress' interest in providing for free competition in interstate commerce. In establishing this balance, the Supreme Court has created **the Noerr-Pennington doctrine**, which clearly favors the constitutional right to petition.1

**Counter interpretation---Prohibition is the forbidding of an activity courts can do it**

**Free Dictionary ND –** The Free Dictionary is an English language Legal dictionary, “Prohibition” https://legal-dictionary.thefreedictionary.com/Prohibition

**prohibition**

n. forbidding an act or activity. A court order forbidding an act is a writ of prohibition, an injunction, or a writ of mandate (mandamus) if against a public official. (See: injunction, mandate)

**2AC – AT: T - CWS**

**W/M – plan text in a vacuum**

**Expanding scope” means to bring non-covered actions under the coverage of antitrust laws**

**Middle District of Florida 81**

“Barr v. National Right to Life Comm., Inc,” United States District Court for the Middle District of Florida Orlando Division, 23 July 1981, Lexis.

The Sherman Act was enacted with the goal of "prevention of restraints to free competition and commercial transactions which [\*14] tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services." *Apex Hosiery Co v. Leader, 310 U.S. 469, 492-3 (1940).* In recent years, **numerous attempts have been made to expand the scope of the antitrust laws to include activity which is inherently non-commercial in nature**. In Apex Hosiery Co., the Supreme Court found that a strike staged by a union attempting to impose a closed shop agreement upon the petitioner which resulted n a three-month shutdown of petitioner's factory was not an activity embraced within the phrase "restraint of trade or commerce." Because there was no purpose on the part of the union to restrain competition in the market for petitioner's product and the strike was not intended to and did not affect market price, **the restraint was held not to be one prohibited by the Sherman Act**. *Id., 501-502.*

Other activities found not to be encompassed within the prohibitions of the antitrust laws include attempts to influence the enforcement or passage of laws, even where the sole purpose in seeking to influence such passage or enforcement was to destroy competitors. *Eastern Railroad Presidents* [\*15] *Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)*. In Noerr, the railroad had conducted a widespread publicity campaign, through a public relations firm, against the trucking industry, which was designed to promote the adoption of laws and law enforcement practices which would be detrimental to the trucking business. The Court exempted this agreement to lobby for legislation from Sherman Act coverage, characterizing the activity as political rather than commercial, thereby including it within the First Amendment protection of the right to petition government. The Noerr doctrine was extended in *United Mine Workers v. Pennington, 381 U.S. 657 (1965)*, to include attempts to influence government officials who performed purely commercial functions. There the Court sanctioned the actions of several large mine operators, in cooperation with union officials, in attempting to eliminate the competition of smaller coal producers by persuading the Secretary of Labor to set a higher minimum wage for employees of producers selling to the TVA under the Walsh-Healey Act and by convincing the TVA to purchase coal only from producers covered by the higher minimum wage provision.

The [\*16] lower courts have also exempted activity which was non-economic in purpose from coverage by the Sherman Act. In *Council for Employment and Economic Energy Use v. WHDH Corporation, 580 F.2d 9 (1st Cir. 1978)*, cert. denied, *440 U.S. 945 (1979)*, plaintiff, a political committee, alleged that the broadcasters had conspired in restraint of trade by agreeing together on the amount of free advertising time to provide opponents of the Council's position on a public initiative referendum question. The First Circuit relied on the reasoning underlying the Noerr-Pennington doctrine to find that the antitrust laws were not intended to regulate such conduct, which it termed political rather than commercial. Similarly, in *State of Missouri v. National Organization for Women, Inc., 467 F.Supp. 289 (W.D. Mo. 1979)*, aff'd, *620 F.2d 1301 (8th Cir. 1980)*, the Court found that the anti-trust laws did not apply to the defendant's efforts to encourage pro-ERA organizations to refrain from holding conventions in unratified states, because of the activity's non-economic and non-commercial purpose and its political nature. Finally, in *Miller & Son Paving, Inc. v. Wrightstown Township Civic Assn., 443 F.Supp*. [\*17] *1268 (E.D. Pa. 1978)*, aff'd, *595 F.2d 1213 (3d Cir. 1979)*, **the Court found that activities of the defendant** in following judicial procedures, the purpose of which was to deny zoning for quarrying to plaintiff's land was political and non-commercial and accordingly, **exempt from antitrust coverage**, having been heavily persuaded by the defendant's total lack of interest in eliminating competition in the quarrying business.

**Contextual evidence prove**

**9th Circuit Court of Appeals 04**

“MetroNet Servs. Corp. v Qwest Corp.” United States Court of Appeals for the Ninth Circuit, 24 September 2004, Lexis.

We recognize that a unilateral attempt by a seller to eliminate arbitrage can result in anticompetitive harm. If "there [were] nothing built into the regulatory scheme which performs the antitrust function, the benefits of antitrust [\*\*37] [would be] worth its sometimes considerable disadvantages." Id. at 881 (internal citation and quotation marks omitted). Even in the presence of such a regulatory scheme, a plaintiff may be able to pursue an antitrust claim based on existing antitrust standards. See *Covad, 374 F.3d at 1052* (reversing the dismissal of a price squeeze claim after Verizon). However, given the novel nature of MetroNet's claims, the regulatory structure that exists and the record of agency action in this case -- and guided by Verizon -- **we decline to expand the scope of Section 2 liability to Qwest's attempts to eliminate arbitrage by MetroNet**.

**The scope is what antitrust law deals with.**

**Macmillan dictionary**. "**SCOPE (noun)** American English definition and synonyms". https://www.macmillandictionary.com/us/dictionary/american/scope\_1

DEFINITIONS2

1the things that a particular activity, organization, subject, etc. deals with

in scope: The new law is **limited in scope**.

beyond/outside the scope of someone/something: These issues are beyond the scope of this book.

within the scope of someone/something: Responsibility for office services is not within the scope of the department.

**2AC – AT: Cap K**

**Capitalism is inevitable – near universal acceptance of profit incentives reinforce its expansion and crowd out alternatives**

Branko **Milanovic, 2019**, [The author is a Serbian-American economist. He is most known for his work on income distribution and inequality. Since January 2014, he has been a visiting presidential professor at the Graduate Center of the City University of New York and an affiliated senior scholar at the Luxembourg Income Study (LIS). He also teaches at the London School of Economics and the Barcelona Institute for International Studies.[6] In 2019 he has been appointed the honorary Maddison Chair at the University of Groningen. Milanović formerly was the lead economist in the World Bank's research department, visiting professor at University of Maryland and Johns Hopkins University.], "Capitalism, Alone: The Future of the System that Rules the World." P. 2-5., mm

There are two epochal changes the world is living through. One is the establishment of capitalism as not only the dominant, but the sole socioeconomic system in the world. The second is the rebalancing of economic power between Europe and North America on the one hand and Asia on the other, owing to the rise of Asia. For the first time since the Industrial Revolution, incomes on the three continents are edging closer to each other, returning to roughly the same relative levels they had before the Industrial Revolution (now, of course, at a much higher absolute level of income). In world-historical terms, the sole rule of capitalism and the economic renaissance of Asia are remarkable developments—which may be related. The fact that the entire globe now operates according to the same economic principles— production organized for profit using legally free wage labor and mostly privately-owned capital, with decentralized coordination— is without historical precedent. In the past, capitalism, whether in the Roman Empire, sixth-century Mesopotamia, medieval Italian city states, or the Low Countries in the modern era, always had to coexist—at times within the same political unit—with other ways of organizing production. These included hunting and gathering, slavery of various kinds, serfdom (with workers legally tied to the land and banned from offering their labor to others), and petty-commodity production carried out by independent craftspeople or small-scale farmers. Even as recently as one hundred years ago, when the first incarnation of globalized capitalism appeared, the world still included all of these modes of production. Following the Russian Revolution, capitalism shared the world with communism, which reigned in countries that contained about one-third of the human population. None but capitalism remain today, except in very marginal areas with no influence on global developments. Capitalism facilitates—and when foreign profits are higher than domestic, even craves—the cross-border exchange of goods, the movement of capital, and in some cases the movement of labor. It is thus not an accident that globalization developed the most in the period between the Napoleonic Wars and World War I, when capitalism largely held sway. And it is no accident that today’s globalization coincides with the even more absolute triumph of capitalism. Had communism triumphed over capitalism, there is little doubt that despite the internationalist creed professed by its founders, it would not have led to globalization. Communist societies were overwhelmingly autarkic and nationalistic, and there was minimal movement of goods, capital, and labor across borders. Even within the Soviet bloc, trade was carried out only to sell surplus goods or according to mercantilist principles of bilateral bargaining. This is entirely different from capitalism, which has an inherent tendency to expand. The uncontested dominion of the capitalist mode of production has its counterpart in the similarly uncontested ideological view that money-making not only is respectable but is the most important objective in people’s lives, an incentive understood by people from all parts of the world and all classes. It may be difficult to convince a person who differs from us in life experience, gender, race, or background of some of our beliefs, concerns, and motivations. But that same person will easily understand the language of money and profit; if we explain that our objective is to get the best possible deal, they will be able to readily figure out whether cooperation or competition is the best economic strategy to pursue. The fact that (to use Marxist terms) the infrastructure (the economic base) and superstructure (political and judicial institutions) are so well aligned in today’s world not only helps global capitalism maintain its dominion but also makes people’s objectives more compatible and their communication clearer and easier, since they all know what the other side is after. We live in a world where everybody follows the same rules and understands the same language of profit-making. Such a sweeping statement does need some qualification. There are indeed some small communities scattered around the world that shun money-making, and there are some individuals who disdain it. But they do not influence the shape of things and the movement of history. The claim that individual beliefs and value systems are aligned with capitalism’s objectives should not be taken to imply that all of our actions are entirely and always driven by profit. People sometimes perform actions that are genuinely altruistic or are driven by other objectives. But for most of us, if we assess these actions by time spent or money forgone, they play only a small role in our lives. Just as it is wrong to call billionaires “philanthropists” if they acquire an enormous fortune through unsavory practices and then give away a small fraction of their wealth, so it is wrong to zero in on a small subset of our altruistic actions and ignore the fact that perhaps 90 percent of our waking lives is spent in purposeful activities whose objective is improving our standard of living, chiefly through money-making. This alignment of individual and systemic objectives is a major success achieved by capitalism. Unconditional supporters of capitalism explain this success as resulting from capitalism’s “naturalness,” that is, the alleged fact that it perfectly reflects our innate selves—our desire to trade, to gain, to strive for better economic conditions and a more pleasant life. But I do not think that, beyond some primary functions, it is accurate to speak of innate desires as if they existed independently of the societies we live in. Many of these desires are the product of socialization within the societies where we live—and in this case within capitalist societies, which are the only ones that exist. It is an old idea, argued by writers as distinguished as Plato, Aristotle, and Montesquieu, that a political or economic system stands in harmonious relation with a society’s prevailing values and behaviors. This is certainly true of present-day capitalism. Capitalism has been remarkably successful in imparting its objectives to people, prompting **or** persuading them to adopt its goals and thus achieving an extraordinary concordance between what capitalism requires for its expansion and people’s ideas, desires, and values. Capitalism has been much more successful than its competitors in creating the conditions that, according to the political philosopher John Rawls, are necessary for the stability of any system: namely, that individuals in their daily actions manifest and thus reinforce the broader values upon which the social system is based.

**Capitalism is sustainable---recent data proves we’re entering the golden age**

**Hausfather 21** – a climate scientist and energy systems analyst whose research focuses on observational temperature records, climate models, and mitigation technologies. He spent 10 years working as a data scientist and entrepreneur in the cleantech sector, where he was the lead data scientist at Essess, the chief scientist at C3.ai, and the cofounder and chief scientist of Efficiency 2.0. He also worked as a research scientist with Berkeley Earth, was the senior climate analyst at Project Drawdown, and the US analyst for Carbon Brief. He has masters degrees in environmental science from Yale University and Vrije Universiteit Amsterdam and a PhD in climate science from the University of California, Berkeley. (Zeke, "Absolute Decoupling of Economic Growth and Emissions in 32 Countries," Breakthrough Institute, 4-6-2021, https://thebreakthrough.org/issues/energy/absolute-decoupling-of-economic-growth-and-emissions-in-32-countries, Accessed 4-11-2021, LASA-SC)

The past 30 years have seen immense progress **in improving the quality of life for much of humanity**. Extreme poverty — the number of people living on less than $1.90 per day — has fallen by nearly two-thirds, from 1.9 **billion to** around 650 **million**. Life expectancy has risen in most of the world, along with literacy and access to education, while infant mortality has fallen. Despite perceptions to the contrary, **the average person born today is likely to have access to more opportunities and have a better quality of life than at any other point in human history**. Much of this increase in human wellbeing has been propelled by rapid economic growth driven largely by state-led industrial policy, particularly in poor-to-middle income countries. However, this growth has come at a cost: between 1990 and 2019, global emissions of CO2 **increased by 56%.** Historically, economic growth has been closely linked to increased energy consumption — and increased CO2 emissions in particular — leading some to argue that a more prosperous world is one that necessarily has more impacts on our natural environment and climate. There is a lively academic debate about our ability to “absolutely decouple” emissions and growth — that is, the extent to which the adoption of clean energy technology can allow emissions to decline while economic growth continues. Over the past 15 years, however, **something has begun to change.** Rather than a 21st century dominated by coal that energy modelers foresaw, **global coal use peaked in 2013 and is now in structural decline**. We have succeeded in making clean energy cheap, with solar power and battery storage costs falling 10-fold since 2009. The world produced more electricity from clean energy — solar, wind, hydro, and nuclear — than from coal over the past two years. And, according to some major oil companies, **peak oil is upon us** — not because we have run out of cheap oil to produce, but because demand is falling and companies expect further decline as consumers increasingly shift to electric vehicles. The world has long been experiencing a relative **decoupling** between economic growth and CO2 emissions, with the emissions per unit of GDP **falling for the past 60 years**. This is the case even in countries like **India and China** that have been undergoing rapid economic growth. But relative decoupling alone is inadequate in a world where global CO2 emissions need to peak and decline in the next decade to give us any chance at limiting warming to well below 2℃, in line with Paris Agreement targets. Thankfully, there is increasing evidence that the world is on track **to absolutely decouple CO2 emissions and economic growth** — with global CO2 emissions potentially having peaked in 2019 **and unlikely to increase substantially in the coming decade**. While an emissions peak is just the first and easiest step towards eventually reaching the net-zero emissions required to stop the world from continuing to warm, it demonstrates that linkages between emissions and economic activity are not an immutable law, but rather simply a result of our current means of energy production. In recent years we have seen more and more examples of absolute decoupling — economic growth accompanied by falling CO2 emissions. Since 2005, 32 countries with a population of at least one million people **have absolutely decoupled** emissions from economic growth, both for terrestrial emissions (those within national borders) and consumption emissions (emissions embodied in the goods consumed in a country). This includes the United States, Japan, Mexico, Germany, United Kingdom, France, Spain, Poland, Romania, Netherlands, Belgium, Portugal, Sweden, Hungary, Belarus, Austria, Bulgaria, El Salvador, Singapore, Denmark, Finland, Slovakia, Norway, Ireland, New Zealand, Croatia, Jamaica, Lithuania, Slovenia, Latvia, Estonia, and Cyprus. Figure 1, below, shows the declines in territorial emissions (blue) and increases in GDP (red). To qualify as having experienced absolute decoupling, we require countries included in this analysis to pass four separate filters: a population of at least one million (to focus the analysis on more representative cases), declining territorial emissions over the 2005-2019 period (based on a linear regression), declining consumption emissions, and increasing real GDP (on a purchasing power parity basis, using constant 2017 international $USD). We chose not to include 2020 in this analysis because it is not particularly representative of longer-term trends, and consumption and territorial emissions estimates are not yet available for many countries. There is a wide range of rates of economic growth between 2005-2019 among countries experiencing absolute decoupling. Somewhat counterintuitively, there is no significant relationship between the rate of economic growth and the magnitude of emissions reductions within the group. **While it is unlikely that there is not at least some linkage between the two factors, there are plenty of examples of countries (e.g., Singapore, Romania, and Ireland) experiencing both extremely rapid economic growth and large reductions in CO2 emissions.** One of the primary criticisms of some prior analyses of absolute decoupling is that they ignore **leakage**. Specifically, the offshoring of manufacturing from high-income countries over the past three decades to countries like China has led to “illusory” drops in emissions, where the emissions associated with high-income country consumption are simply shipped overseas and no longer show up in territorial emissions accounting. There is some truth in this critique, as there was a large increase in emissions embodied in imports from developing countries between 1990 and 2005. After 2005, however, structural changes in China and a growing domestic market led to a reversal of these trends; the amount of emissions “exported” from developed countries to developing countries **has actually declined over the past 15 years.** This means that, for many countries, both territorial emissions and consumption emissions (which include any emissions “exported” to other countries) **have jointly declined**. In fact, on average, consumption emissions have been declining slightly faster than territorial emissions since 2005 in the 32 countries we identify as experiencing absolute decoupling. Figure 2, below, shows the change in consumption emissions (teal) and GDP (red) between 2005 and 2019. There is a pretty wide variation in the extent to which these countries have reduced their territorial and consumption emissions since 2005. Some countries — such as the UK, Denmark, Finland, and Singapore – have seen territorial emissions fall faster than consumption emissions, while the US, Japan, Germany, and Spain (among others) have seen consumption emissions fall faster. Figure 3 shows reductions in consumption and territorial emissions for each country, with the size of the dot representing the size of the population in 2019. **Absolute decoupling is possible.** There is no physical law requiring economic growth — and broader increases in human wellbeing — to necessarily be linked to CO2 emissions. All of the **services that we rely on today that emit fossil fuels** — electricity, transportation, heating, food — can in principle **be replaced by near-zero carbon alternatives**, though these are more mature in some sectors (electricity, transportation, buildings) than in others (industrial processes, agriculture).

**The transition would be so politically disastrous that it’d irreversibly set back political progress against climate change. Speed is key, so only existing dematerialization and renewables can solve in time.**

**Klein** 8/31/**21**, Opinion Writer at the New York Times, former Founder of Vox, and author of “Why We’re Polarized” (Ezra, “Transcript: Ezra Klein Answers Listener Questions” from ‘The Ezra Klein Show’ podcast, *The New York Times*, <https://www.nytimes.com/2021/08/31/podcasts/transcript-ezra-klein-ask-me-anything.html>, Accessed 09-1-2021)

But now let me talk about degrowth more in the terms of it is a direct political project, which is as an answer to climate change. I would cut this into a few pieces. Is degrowth necessary for addressing climate change? Is it the fastest way to address climate change? And is it desirable? It has to be at least one of those things to be the strategy you’d want to take.

And I don’t think it is. Let’s start with necessary. Many countries in Europe, even the United States, are **growing while reducing their carbon footprint**. Now, you could say they’re not doing so fast enough depending on the country. But they could all do so much faster if there was enough political will to deploy more renewable technology, to tax carbon, to do a bunch of things that we have not been able to pass. So it is clearly true that we **can decouple growth and energy usage**.

Hickel, to be fair, will say that that may be true. But given the speed at which we need to act, we can’t just be deploying renewable energy technology. It would also help the situation if we stopped using as much through material consumption. That is, I think, conceptually true and politically false.

I mean, let’s just state that **speed** is, first and foremost, a **political problem**. There is a delta between where we are right now in terms of what we are doing on climate change and where we could be. That delta is big, and that delta gets bigger every year because it gets harder every year. And the time we have to act before we start getting some of the really truly catastrophic feedback loops in play is **shortening**. So you’re now talking here about the speed at which you can move politics.

So for something to be faster, it doesn’t just need to be faster if you implemented it. It needs to be something you can implement such it **accelerates the politics** of radical climate action. And that’s where I think **degrowth** completely **falls apart**. And I have tried to look for the answer people give on this, and I’ve never found one that is convincing.

**Technological innovation successfully dematerializes growth.**

**McAfee 19**, \*Andrew Paul McAfee, a principal research scientist at MIT, is cofounder and codirector of the MIT Initiative on the Digital Economy at the MIT Sloan School of Management; (2019, “More from Less: The Surprising Story of How We Learned to Prosper Using Fewer Resources and What Happens Next”, https://b-ok.cc/book/5327561/8acdbe)

There is **no shortage** of examples of dematerialization. I chose the ones in this chapter because they illustrate a set of fundamental principles at the intersection of business, economics, innovation, and our impact on our planet. They are:

We do want more all the time, but **not more resources**. Alfred Marshall was right, but William Jevons was wrong. Our wants and desires keep growing, evidently without end, and therefore so do our economies. But our use of the earth’s resources **does not**. We do want more beverage options, but we don’t want to keep using more aluminum in drink cans. We want to communicate and compute and listen to music, but we don’t want an arsenal of gadgets; we’re happy with a single smartphone. As our population increases, we want more food, but we don’t have any desire to consume more fertilizer or use more land for crops.

Jevons was correct at the time he wrote that total British demand for coal was increasing even though steam engines were becoming much more efficient. He was right, in other words, that the price elasticity of demand for coal-supplied power was greater than one in the 1860s. But he was wrong to conclude that this would be permanent. Elasticities of demand can change over time for several reasons, the most fundamental of which is **technological change**. Coal provides a clear example of this. When fracking made natural gas much cheaper, total **demand** for coal in the United States **went down** even though its price decreased.

With the help of **innovation** and **new technologies**, economic growth in America and other rich countries—growth in all of the wants and needs that we spend money on—has become **decoupled** from resource **consumption**. This is a recent development and a **profound** one.

Materials cost money that companies locked in competition would rather **not spend**. The root of Jevons’s mistake is simple and **boring**: resources cost **money**. He realized this, of course. What he didn’t sufficiently realize was how strong the **incentive** is for a company in a contested market to **reduce** its spending on **resources**

(or anything else) and so eke out a bit more profit. After all, a penny saved is a penny earned.

Monopolists can just pass costs on to their customers, but companies with a lot of competitors can’t. So American farmers who battle with each other (and increasingly with tough rivals in other countries) are eager to cut their spending on land, water, and fertilizer. Beer and soda companies want to minimize their aluminum purchases. Producers of magnets and high-tech gear run away from REE as soon as prices start to spike. In the United States, the 1980 Staggers Act removed government subsidies for freight-hauling railroads, forcing them into **competition** and **cost cutting** and making them all the more eager to not have expensive railcars sit idle. Again and again, we see that **competition** spurs **dematerialization**.

There are multiple paths to dematerialization. As profit-hungry companies seek to use fewer resources, they can go down four main paths. First, they can simply find ways to use **less** of a **given material**. This is what happened as beverage companies and the companies that supply them with cans teamed up to use less aluminum. It’s also the story with American farmers, who keep getting bigger harvests while using less land, water, and fertilizer. Magnet makers found ways to use fewer rare earth metals when it looked as if China might cut off their supply.

Second, it often becomes possible to **substitute** one resource for **another**. Total US coal consumption started to decrease after 2007 because fracking made natural gas more attractive to electricity generators. If nuclear power becomes more popular in the United States (a topic we’ll take up in chapter 15), we could use both less coal and less gas and generate our electricity from a small amount of material indeed. A kilogram of uranium-235 fuel contains approximately 2–3 million times as much energy as the same mass of coal or oil. According to one estimate, the total amount of energy that humans consume each year could be supplied by just seven thousand tons of uranium fuel.

Third, companies can use **fewer molecules** overall by making better use of the materials they **already own**. Improving CNW’s railcar utilization from 5 percent to 10 percent would mean that the company could cut its stock of these thirty-ton behemoths in half. Companies that own expensive physical assets tend to be fanatics about getting as much use as possible out of them, for clear and compelling financial reasons. For example, the world’s commercial airlines have improved their load factors—essentially the percentage of seats occupied on flights—from 56 percent in 1971 to more than 81 percent in 2018.

Finally, some materials get replaced by **nothing** at all. When a telephone, camcorder, and tape recorder are separate devices, three total microphones are needed. When they all collapse into a smartphone, only one microphone is necessary. That smartphone also uses no audiotapes, videotapes, compact discs, or camera film. The iPhone and its descendants are among the world champions of dematerialization. They use vastly less metal, plastic, glass, and silicon than did the devices they have replaced and don’t need media such as paper, discs, tape, or film.

If we use more renewable energy, we’ll be replacing coal, gas, oil, and uranium with **photons** from the **sun** (solar power) and the **movement** of **air** (wind power) and water (hydroelectric power) on the earth. All three of these types of power are also among dematerialization’s **champions**, since they use up essentially **no resources** once they’re up and running.

I call these four paths to dematerialization slim, swap, optimize, and evaporate. They’re not mutually exclusive. Companies can and do pursue all four at the same time, and all four are going on all the time in ways both obvious and subtle.

Innovation is **hard** to **foresee**. Neither the fracking revolution nor the world-changing impact of the iPhone’s introduction were well understood in advance. Both continued to be underestimated even after they occurred. The iPhone was introduced in June of 2007, with no shortage of fanfare from Apple and Steve Jobs. Yet several months later the cover of Forbes was still asking if anyone could catch Nokia.

Innovation is not **steady** and **predictable** like the orbit of the Moon or the accumulation of interest on a certificate of deposit. It’s instead inherently jumpy, uneven, and **random**. It’s also **combinatorial**, as Erik Brynjolfsson and I discussed in our book The Second Machine Age. Most new technologies and other innovations, we argued, are combinations or recombinations of preexisting elements.

The iPhone was “just” a cellular telephone plus a bunch of sensors plus a touch screen plus an operating system and population of programs, or apps. All these elements had been around for a while before 2007. It took the vision of Steve Jobs to see what they could become when combined. Fracking was the combination of multiple abilities: to “see” where hydrocarbons were to be found in rock formations deep underground; to pump down pressurized liquid to fracture the rock; to pump up the oil and gas once they were released by the fracturing; and so on. Again, none of these was new. Their effective combination was what changed the world’s energy situation.

Erik and I described the set of innovations and technologies available at any time as **building blocks** that ingenious people could combine and recombine into useful new configurations. These new configurations then serve as more blocks that later innovators can use. Combinatorial innovation is exciting because it’s unpredictable. It’s not easy to foresee when or where powerful new combinations are going to appear, or who’s going to come up with them. But as the number of both building blocks and innovators increases, we should have **confidence** that more breakthroughs such as fracking and smartphones are ahead. Innovation is highly decentralized and largely uncoordinated, occurring as the result of **interactions** among **complex** and **interlocking** social, technological, and economic systems. So it’s going to keep surprising us.

As the Second Machine Age progresses, dematerialization **accelerates**. Erik and I coined the phrase Second Machine Age to draw a contrast with the Industrial Era, which as we’ve seen transformed the planet by allowing us to overcome the limitations of muscle power. Our current time of great progress with all things related to **computing** is allowing us to **overcome** the **limitations** of our mental power and is **transformative** in a different way: it’s allowing us to **reverse** the Industrial Era’s bad habit of taking **more** and **more** from the earth every year.

Computer-aided design tools help engineers at packaging companies design generations of aluminum cans that keep getting lighter. Fracking took off in part because oil and gas exploration companies learned how to build **accurate** computer **models** of the rock formations that lay deep underground—models that predicted where hydrocarbons were to be found.

Smartphones took the place of many separate pieces of gear. Because they serve as GPS devices, they’ve also led us to print out many fewer maps and so contributed to our current trend of using less paper. It’s easy to look at generations of computer paper, from 1960s punch cards to the eleven-by-seventeen-inch fanfold paper of the 1980s, and conclude that the Second Machine Age has caused us to chop down ever more trees. The year of peak paper consumption in the United States, however, was 1990. As our devices have become more capable and interconnected, always on and always with us, we’ve sharply turned away from paper. Humanity as a whole probably hit peak paper in 2013.

As these examples indicate, computers and their kin help us with all four paths to **dematerialization**. Hardware, software, and networks let us slim, swap, optimize, and evaporate. I contend that they’re the **best tools** we’ve **ever invented** for letting us tread more **lightly** on our planet.

All of these principles are about the **combination** of technological **progress** and **capitalism**, which are the first of the two pairs of forces causing **dematerialization**.

**2AC – AT: Advantage CP**

**Patent Trolls are a prereq – R&D doesn’t solve**

**Duan 21** Ran Duan - University of Rochester, Simon Business School Thesis. “Patent Trolls and Capital Structure Decisions in High-Tech Firms” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3730425>

In this paper, I provide novel evidence that **the threat of patent litigation** **leads to overly conservative capital structures and an inefficient level of innovation in high-tech firms**. I show that decreased cash flow volatility, especially in treated firms closer to financial distress, provides a key channel for my results. In addition, I show that TC Heartland directly impacts NPE litigation and the value of newly granted patents. I also show a dark side of the anti-patent troll protection: The value of newly granted patents decreases after TC Heartland, potentially because anti-troll laws could increase the cost for firms to enforce patent rights in court. This dark side points to the endogeneity in the passage of state anti-troll laws: Large high-tech firms who are patent enforcers lobbied against these laws. To the states which declined to pass anti-troll laws, the harm of the laws to big high-tech firms overweighs the benefit of protecting small innovating firms. Thus, the endogeneity problem suggests that caution should be exercised when inferring from my results the effects of curbing patent trolls on the control firms. **The legal system that defends patent rights is critical to economic growth.** However, the patent litigation system provides an opportunity for patent trolls to exploit high-tech firms. **The threat of patent trolls is an under-explored economic friction that hinders growth in high-tech firms.** My paper contributes to the growing literature on the economic consequences of NPEs by showing that TC Heartland directly impacts the way that patent rights are enforced. Together with the anti-patent troll state laws, the TC Heartland decision changes the dynamics of patent litigation in the U.S. These findings should be taken into consideration in debates over anti-patent troll laws and the optimal strength of intellectual property rights.

**Options are restricted**

Paul R. **Gugliuzza 2015**. Professor of Law at Temple University. Professor Gugliuzza has testified before both the U.S. Senate and the U.S. House of Representatives on the topic of patent law, and his scholarship has been cited in over a dozen judicial opinions across all levels of the state and federal courts "Patent Trolls and Preemption" <https://www.virginialawreview.org/articles/patent-trolls-and-preemption/>

The Federal Circuit’s erroneous expansion of Noerr immunity is not only wrong as a matter of doctrine, it also has several destructive policy implications. For instance, it grants patent holders a license to lie in their demand letters, so long as those letters also contain objectively plausible allegations of infringement. Thus, patent holders can lawfully send letters stating that many recipients have already purchased licenses to the asserted patents even if, in fact, few if any recipients have done so.44 And patent holders can lawfully claim that the validity of the asserted patents have been upheld in court or in reexamination at the Patent and Trademark Office, even if that is not true.45 In addition, **because the Federal Circuit purports to derive its Noerr-based immunity standard from the First Amendment,**46 **that standard makes it unconstitutional for not just states but also the federal government to condemn any but the most fantastical allegations of patent infringement**. Thus, although the President, members of Congress, and the Federal Trade Commission have all recently voiced concerns about “patent trolls,”47 **Federal Circuit law significantly limits the regulatory** **options**.

**2AC – AT: States CP**

**The federal circuit has explicitly said it will strike down or substantially narrow the counterplan**

**Hrdy 2019**. Camilla A. Hrdy. Assistant Professor, University of Akron School of Law. “"Getting Patent Preemption Right" https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3332528

Perhaps precisely because it makes little doctrinal or policy sense, the Federal Circuit has abandoned its conflict preemption approach and supplemented it with the First Amendment. As Professor Paul Gugliuzza has discussed, **the Federal Circuit has** **supplemented its patent preemption** **decisions** **with** **an analysis** **of whether state laws that restrict patent enforcement violate the First Amendment’s Petition Clause.**84 **Drawing on** the so-called **Noerr-Pennington doctrine**, used to limit antitrust liability for certain anticompetitive actions taken in the course of “petitioning” the government,85 **the Federal Circuit has derived a rigid two-part test** that requires assessing both the objective merits of the patentee’s assertion of infringement and the patentee’s subjective motives in making the assertion.86 In Globetrotter Software, Inc. v. Elan Computer Group, Inc.,87 the Federal Circuit cited antitrust law cases, including the Supreme Court’s holding in Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., which immunized a copyright plaintiff from antitrust liability under NoerrPennington. 88 **The Federal Circuit explained** its rule that **state laws** that seek to penalize blameworthy conduct taken in the course of enforcing a patent **would not be upheld as applied unless the patent is “obviously invalid” o**r “plainly not infringed.”89 **This outcome, the court stated**, **was** **required by** “**both federal patent preemption and the First Amendment**.”90 In sum, the Federal Circuit’s reading of Petitioning Immunity essentially preempts any state law that creates liability for enforcing a patent that is not “obviously invalid” or “plainly not infringed.”91 The upshot for patentees is robust protection from state law liability. “[S]ince Globetrotter,” Gugliuzza recounts, “the Federal Circuit has barred the state law claims in all but one case raising the issue.”92 So what is the problem? The Federal Circuit is not entirely unreasonable in its usage of this Petitioning Immunity doctrine as applied to state anti-patent law. The First Amendment Petition Clause obviously applies to states. That said, there are some legal problems here. The first is that **Noerr-Pennington immunity**, like antitrust law’s state action doctrine, **comes from the Supreme Court’s interpretation of the Sherman Act,** which in the Court’s view must be construed narrowly to avoid a conflict with the Petition Clause.93 There is no inherent reason this doctrine could not be applied to state laws as well—assuming bringing a patent suit is a “petition,” which the Supreme Court case law suggests it is.94 But the Federal Circuit has not explicitly performed this narrowing construction of state law or at least has not been particularly clear about what it is doing. Second, the Federal Circuit seems to have an exceptionally strong idea about how much protection the Petition Clause provides to a petitioner— something the Supreme Court recently pointed out in Octane Fitness, LLC v. Icon Health & Fitness, Inc, where it addressed the Federal Circuit’s protective rule for awarding damages against a losing patent plaintiff. 95 Third, the focus of Petitioning Immunity analysis is ill-suited to this situation—where a state (or federal) law seeks to impose liability for pre-litigation conduct, partly in order to save potential defendants the costs of going to court. The test asks courts to assess the objective merits of a patent assertion claim. Courts simply cannot reasonably do this prior to infringement. Lastly, relying on the First Amendment rather than patent preemption raises a significant policy issue, clearly identified by Gugliuzza— that the First Amendment would limit federal regulation of patents as well.96 The irony here is that the impact of Noerr-Pennington immunity—stricter preemption of state law—is not dissimilar to the impact of applying the historic preemption rule under the Intellectual Property Clause. In effect, the Federal Circuit has unwittingly displaced the Intellectual Property Clause’s preemptive effect with Petitioning Immunity under the First Amendment.97 Again, there is no inherent reason the Federal Circuit cannot use the First Amendment to address this issue instead of the Intellectual Property Clause. But along with the legal and policy issues stated above, my larger problem with Noerr-Pennington is that it is simply unnecessary. The court should just be using preemption under the Intellectual Property Clause instead.

### 2AC – AT: Injunctive Pending Appeal CP

**Perm do the CP – includes all of the plan – Should isn’t immediate or certain**

**Dictionary.com** **10** ---- <http://dictionary.reference.com/browse/should>

/ʃʊd/ Show Spelled[shood] Show IPA –auxiliary verb 1. pt. of shall. 2. (**used to express condition**): Were he to arrive, I should be pleased. 3. must; ought (used to indicate duty, propriety, or expediency): You should not do that. 4. would (used to make a statement less direct or blunt): I should think you would apologize. Use should in a Sentence See images of should Search should on the Web Origin: ME sholde, OE sc ( e ) olde; see shall —Can be confused:  could, should, would (see usage note at this entry ). —Synonyms 3. See must1 . —**Usage note** Rules similar to those for choosing between shall and will have long been advanced for should and would, but again the rules have had little effect on usage. In most constructions, would is the auxiliary chosen regardless of the person of the subject: If our allies would support the move, we would abandon any claim to sovereignty. You would be surprised at the complexity of the directions. Because the main function of should in modern American English is to express duty, necessity, etc. ( You should get your flu shot before winter comes ), its use for other purposes, as to form a subjunctive, can produce ambiguity, at least initially: I should get my flu shot if I were you. Furthermore, should seems an affectation to many Americans when used in certain constructions quite common in British English: Had I been informed, I should (American would ) have called immediately. I should (American would ) really prefer a different arrangement. As with shall and will, most educated native speakers of American English do not follow the textbook rule in making a choice between should and would. **See also shall.** Shall –auxiliary verb, present singular 1st person shall, 2nd shall or ( Archaic ) shalt, 3rd shall, present plural shall; past singular 1st person should, 2nd should or ( Archaic ) shouldst or should·est, 3rd should, past plural should; imperative, infinitive, and participles lacking. 1. plan to, ***intend* to,** or expect to: **I shall go later.**

**Uncertainty exists now – must be solved**

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

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

**2AC – AT: FTC DA**

**Biden guidance causes court action on antitrust now**

Tara **Lachapelle 21**. Lachapelle is a Bloomberg Opinion columnist covering the business of entertainment and telecommunications, as well as broader deals. She previously wrote an M&A column for Bloomberg News. “

As President Joe **Biden pushes for more aggressive antitrust enforcement** — an effort spearheaded by legal scholar Lina Khan, his controversial pick to lead the FTC — **the agency is running up against practical limitations**. It’s working with very limited resources for a very large number of deals. How large? So far this year, nearly 10,000 U.S. companies agreed to be acquired for a combined deal value of $1.25 trillion, data compiled by Bloomberg show. That’s already surpassed last year’s sum and may even be on track for a record. Not all of those tie-ups will require regulatory approval but in July alone, 343 transactions filed premerger notifications and are awaiting review, compared with 112 in July 2020, according to the FTC.

These filings start a 30-day clock for regulators to decide whether to further investigate a deal. If that waiting period expires without any action, a company would typically take that to mean that it’s free to complete the transaction. But now the FTC says it can’t get to its backlog fast enough and that inaction on its part doesn’t signal permission to proceed. In warning letters sent to filers this month, the agency said companies that go ahead anyway do so at their own risk because the FTC might later decide a deal violates antitrust laws and sue to undo it — and what a mess that would create for buyers and sellers. And yet, if the agency thought such an aggressive move might discourage mergers, it was wrong.

“To my mind, it is a completely hollow threat and makes the agency look weak,” Joel Mitnick, a partner in the antitrust and global litigation groups at law firm Cadwalader, Wickersham & Taft LLP, said in a phone interview. “They’re saying they’re going to ignore the statutory time limits on them whenever they feel like it and continue to investigate transactions until they’re satisfied. But it’s very difficult for the agency to sue to unwind the transaction once the eggs are scrambled.”

Merger reviews traditionally involve some give and take. Companies will often give regulators more time if they think it will increase the odds of winning approval. If that cooperative attitude is being tossed out the window, though, dealmakers are ready to reassess and embrace a more adversarial process.

For M&A lawyers, it’s a disturbance to an equilibrium that existed under other administrations, and they fear a reversion to the merger-hostile environment of the 1960s. Of course, folks in Khan’s camp would say it wasn’t an equilibrium at all, but rather an often overly cozy relationship between regulators and companies that were given too much leeway in recent years.

In any case, businesses are understandably frustrated by what would seem to be an unreasonable ask. Waiting indefinitely to close a deal is costly and full of risks. At least one acquirer isn’t having it. Last week, Illumina Inc. finalized an $8 billion purchase of cancer-testing startup Grail even though U.S. and European authorities haven’t completed their probes. Even as the FTC began this week its attempt to unwind the deal, other dealmakers may decide they like their chances, too.

The FTC “better be ready to litigate,” said David Wales, a partner in the antitrust and competition group at law firm Skadden, Arps, Slate, Meagher & Flom LLP and former acting director of the agency’s Bureau of Competition. “I’ve seen first-hand the resource constraints at the FTC,” he said. “They can’t sue everybody. They can’t block every deal. They will have to be strategic about it.”

Already, **regulators have two major cases sucking up resources**. The FTC last week refiled its monopoly lawsuit against Facebook Inc., alleging its takeovers of Instagram and WhatsApp violated antitrust laws. (Its deal last year for Giphy also employed a sneaky maneuver to avoid showing up on regulators’ radars, and now they’re looking to close that loophole.) **The Justice Department is pursuing its own case against Google**. And **what was initially seen as a narrow effort to reel in dominant tech**nology companies **has since expanded to other industries in light of a sweeping executive order from** President **Biden**. Even more obscure areas such as ocean shipping are facing new scrutiny.

**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.

**We solve—Abbvie inc proves that – the FTC has been locked up in litigation since 2011 and will keep going after patent trolls which the affirmative makes substantially easier**

**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.

**FTC loves the plan, it’s key to effective enforcement. Squo is unsustainable.**

**Ohlhausen 2007**. Maureen K. Ohlhausen. Director of the Office of Policy Planning at the Federal Trade Comission. “Enforcement Perspectives on the Noerr-Pennington Doctrine” <https://heinonline.org/HOL/LandingPage?handle=hein.journals/antitruma20&div=34&id=&page=>

Why Issue a Report on the Noerr Doctrine at All? The FTC has an active competition advocacy program that targets proposed government actions-typically at the state but occasionally at the federal level-that are likely to restrict competition without providing countervailing benefits to consumers. This work often takes the form of industry-spe- cific advocacy, such as studies, workshops, reports, and, most frequently, letters to government officials ranging from top- ics as varied as limited service real estate brokerage 12 to the interstate direct shipment of wine. 3 The specific anticom- petitive proposals addressed in our advocacy efforts, howev- er, are the fruits of two doctrines that shield from antitrust liability government action to hamper or displace competition and competitors' attempts to get government to enact such restrictions. As part of a strategy to address not just the fruit but also the seeds of this competitive harm, the FTC staff first analyzed the state action doctrine, which shields certain anti- competitive acts taken under the color of government authority. In the State Action Report, the FTC staff examined the doctrine and suggested ways to bring it more closely in line with its original objectives, including reaffirming a clearly articulated standard tailored to its original purposes and goals, clarifying and strengthening the standards for active supervision, and clarifying and rationalizing the criteria for identifying the quasi-governmental entities that should be subject to active supervision. The NoerrReport follows in this vein, providing an analy- sis of the doctrine that protects competitors' attempts to get governments to do for them what antitrust law forbids them from doing for themselves. There are two paths for com- petitors to achieve this result. The first path-directly asking a government entity to set prices, limit entry, or grant a monopoly-is undoubtedly a necessary part of the democ- ratic process and protection from liability is necessary for a representative democracy to work. The Report makes clear that such petitioning activity is rightly shielded by the appli- cation of Noerr. A second path exists, however, that does not advance the functioning of representative democracy but rather abuses governmental processes for anticompetitive ends. Competitors who follow this path do not convince on the merits a gov- ernment decision maker to take an action that harms com- petition, but rather they subvert the government decision, such as by filing false information, or they use the burdens of the process itself, rather than its outcome, to hamstring com- petitors. Some commentators have labeled this behavior "cheap exclusion," because a competitor engages in exclu- sionary conduct that either is low-cost (filing a false patent list- ing is much cheaper than engaging in predatory pricing, for example) or risks little (the rejection of a filing by a govern- ment entity rather than a loss of profits or market share).5 A focal point of the FTC's recent enforcement and policy activity has been competitor attempts to abuse government processes to achieve an anticompetitive result, either directly or indirectly. Combating such anticompetitive behavior raises particular challenges for enforcers. As noted by former FTC Bureau of Competition Director Susan Creighton **[L]imiting Noerr** and state action to the core articulated by the Supreme Court **is central to an effective strategy for antitrust enforcement directed against cheap exclusion**. If cheap exclusion should be a central part of a proper enforcement agenda, the undue expansion of these defenses and immunities is not simply an issue at the periphery of antitrust, but rather **goes to the heart of the effectiveness**

The Commission has achieved notable success in combating cheap exclusion, and the knowledge gained through this initiative guides the Report's analysis of the proper scope of the Noerr doctrine. Why Issue the Report in This Particular Form? It is difficult to find two people who agree on all varieties of conduct that the Noerr doctrine should or would shield or even how to analyze the doctrine. Those favoring a theoret- ical approach may try to discern the ideal and complete form of the doctrine by scrutinizing clues embedded in the rela- tively sparse Supreme Court case law. I take a more pragmatic view, however, and believe that the Court has for the most part taken each case's factual situation on its own terms, pointing out rough guideposts for avoiding clashes with con- stitutionally protected actions. The theoretical view and the pragmatic view each dictate a different approach to a report about the doctrine. The theoretical approach would explore every aspect of the doc- trine to its outermost contours, no matter how infrequent- ly an enforcer would try to bring a case that pushed the boundaries between antitrust law and protected political and government activity. The pragmatist would focus more tightly on the kinds of behavior that not only commonly occur but that enforcers (who, after all, work for agencies that are politically accountable at some level) may realisti- cally challenge, for example, anticompetitive actions that do not strongly implicate private political activity or sover- eign government decisions. The Report takes the latter, pragmatic approach, and its title-Enforcement Perspectives on the Noerr-Pennington Doctrine-was not accidental. Its choice of issues and approach are informed by the Commission's experience and positions in several recent matters challenging attempts to abuse government processes, including the Federal Trade Commission's amicus brief opposing defendant's motion to dismiss in In re Buspirone;17 the analysis to aid public comment in Bristol-MyersSquibb Co.;"i and the Commis- sion opinion in Union Oil Co. ofCalifornia19 A brief review ofthese matters follows. In January 2002, lawsuits relating to Bristol-Myers Squibb's (BMS) alleged monopolization through improper listing of a patent on its branded buspirone drug, BuSpar, presented the FTC with an opportunity to clarify the Noerr doctrine.2' The plaintiffs alleged that BMS restrained com- petition by fraudulently listing patents in the FDA's Orange Book 21 and using these fraudulent listings to delay FDA approval of competing generic buspirone products. BMS claimed Noerrprotection for its conduct. The Commission's amicus brief opposed the application of Noerr,and the court ultimately denied immunity on three independent and alter- native grounds. The first, and perhaps most important, of these grounds was the principal argument that the Commis- sion had advanced in its brief, namely that Orange Book fil- ings simply do not constitute petitioning. The court found that an Orange Book filing is analogous to a tariff filing and reasoned that, in both cases, "the government does not per- form an independent review of the validity of the statements, does not make or issue an intervening judgment, and instead acts in direct reliance on the private party's representations. "22 In Unocal,FTC complaint counsel alleged that defendant Unocal made misrepresentations regarding its patent rights that induced the California Air Resources Board to adopt an industry-wide standard that effectively required other refin- ers to use Unocal's patented technology. In its decision revers- ing the administrative law judge on the issue of Noerr pro- tection, the Commission stated that "the weight of lower court authority, spanning more than thirty years, has recog- nized that misrepresentations may preclude application of Noerr-Penningtonin less political arenas than the legislative lobbying at issue in Noerr itself. ' 23 The Commission con- firmed that misrepresentation can warrant denial of Noerr protection outside the political arena, provided that (1) the misrepresentation or omission is "deliberate, factually verifi- able, and central to the outcome of the proceeding or case," and (2) "it is possible to demonstrate and remedy this effect without undermining the integrity of the deceived govern- 24 mental entity." In another action that implicated the reach of Noerr, the Commission issued a complaint against BMS for its course of conduct in connection with BuSpar (mentioned above) and two other drugs. The analysis to aid public comment accompanying the FTC complaint and the consent order explained that BMS' "overall course of conduct" across all of the products in question-including repeated filing of law- suits "without regard to the merits," repeated filings of patents with the FDA "without regard to their validity, enforceability, or listability," and repeated filing of false state- ments with government agencies-constituted "a clear and systematic pattern of anticompetitive misuse of the govern- ment process," and thus was outside the scope of Noerr's protection.25 The Report, which advocates limiting Noerr to its two core purposes articulated by the Supreme Court, was another opportunity to **enhance the ability of antitrust enforcers to reach abuses of government processes**. Accordingly, it embraces the positions adopted by the Commission in Buspirone, Unocal, and BMS and recommends areas in which to clarify the reach of Noerr without impinging the values Noerr protects.

### 2AC – AT: Infrastructure

**Antitrust and patent law are not perceived**

**Baum 10** (LAWRENCE BAUM and NEAL DEVINS Professor of Political Science, Ohio State University; Goodrich Professor of Law and Professor of Government, Why the Supreme Court Cares About Elites, Not the American People, 98 Geo. L.J. 1515, 98 Geo. L.J. 1515, y2k)

In considering public knowledge and interest in the Court, we can start by recognizing that, for the most part, Americans have **little knowledge** of politics in general. **Decades** of survey research have established that most citizens have only minimal knowledge of politics and public policy. 164 Indeed, more than one third are "political 'know nothings'" who "do not know the respective functions of the three branches of government, who has the power to declare war, or what institution controls monetary policy." 165

Evidence on public knowledge of the Supreme Court is mixed. On the one hand, surveys are regularly cited for the proposition that knowledge about the Court is exceedingly thin--that far more people can name two of the Seven Dwarfs than two of the Justices, to take one example. 166 On the other hand, there is countervailing evidence that indicates widespread understanding of some basic attributes of the Court. 167

In relation to the Court's legitimacy, awareness of decisions is more important than the names of the Justices or the Court's institutional attributes. [\*1549] Certainly, the great majority of Supreme Court decisions are essentially unknown to the general public. 168 These decisions receive little attention in the mass media, 169 and few people receive information about them through other channels. The Justices hardly need to worry that such decisions will precipitate a public uprising.

It is worth underlining the point that a **great deal** of the Court's work is essentially **invisible** to the public. **Decisions** in fields such as **antitrust** and **patent law** may be highly consequential, **but** it seems unlikely that there are **strong public feelings** about those decisions. **Even if** Justices seek to maintain the **Court's legitimacy**, they have **no reason** to worry that **public outrage** in decisions in those fields will **damage** this **legitimacy**. 170 More telling, the Rehnquist Court's federalism revival was unnoticed by most of the mass public. During the period from 1992 to 2006, the Court invalidated **eleven** federal statutes on federalism grounds, 171 thereby **shifting the balance** between the federal government and the states **substantially**. Nevertheless, these decisions (**although prompting significant law review commentary**) appeared to have **low** political salience. 172 Of 229 Gallup Poll questions that explicitly referenced the Supreme Court during this period, there was not a single question concerning these decisions or [\*1550] any other Supreme Court invalidations of federal statutes. 173

**The Third Circuit just ruled in favor of a plaintiff bringing a sham litigation lawsuit last week by conflating the two prongs of the PRE test – that overwhelmingly thumps all DA’s by going further than the affirmative but still doesn’t resolve circuit splits**

**Gidley Et Al 4-19.** “BRIEF OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI”<https://www.kilpatricktownsend.com/-/media/2021/Brief-of-Amici-Curiae-Law-Professors-in-Support-of-Petition-for-a-Write-of-Certiorari.ashx?la=en&hash=221AE831D5329F45CA6FA9F7C265424DB96D5063>

This Court should grant the petition for a writ of certiorari and reverse the Third Circuit’s decision because it conflicts with this Court’s sham-litigation test articulated in PRE by effectively eliminating the second step of the sham litigation test: the inquiry into whether a patent owner had a subjective belief that his patent infringement suit lacked merit or was indifferent to the outcome of the suit. The Third Circuit’s novel approach—inferring subjective bad faith from a finding of objective baselessness—is at odds with PRE itself and sham-litigation jurisprudence in the other circuit courts. The petitioners address the relevant facts of this case, as well as this Court’s applicable jurisprudence. Therefore, Amici offer additional insights concerning how the **Third Circuit’s decision threatens innovators’ property rights, as well as the Congressionally created incentives** in the HatchWaxman Act, **and poses a real and serious threat to pharmaceutical innovation, a key pillar of the U.S. innovation economy**. The FTC’s urging of the Third Circuit to adopt a truncated approach to the sham-litigation test is simply another attempt by the FTC to dictate that socalled “reverse-payment” settlement agreements in the pharmaceutical industry are necessarily anticompetitive. After failing to convince this Court in Actavis to adopt a “quick-look” approach to evaluating reverse-payment settlement agreements, the FTC is now seeking to avoid having to develop actual proof of subjective bad faith on the part of a patent owner. Instead of marshalling any such evidence, the FTC seeks to rely on an inference that a finding that a patent suit was objectively baseless given a complicated patent validity issue necessarily means that the patent owner harbored a subjective belief that the suit was without merit or was indifferent to whether the suit succeeded. This truncated inquiry into subjective intent undoes the safeguard that the bad-faith inquiry serves— namely, ensuring that litigants whose suits are ultimately found to be meritless but who sincerely sought a favorable outcome are immune from antitrust liability under the Noerr-Pennington doctrine. Moreover, the Third Circuit’s novel approach to the subjective prong of the PRE test is particularly ill suited in the context of the Hatch-Waxman Act. The Third Circuit’s subjective-motivation analysis conflicts with the incentives inherent in the Hatch-Waxman regime by subjecting an innovator to antitrust liability—and accompanying treble damages—when an innovator files a patent infringement suit against an alleged infringer and automatically activates the thirty-monthstay provision designed by Congress to encourage quick resolution of patent challenges. If this Court allows the Third Circuit’s new interpretation of the subjective-motivation prong of the sham-litigation test to stand, **it will have detrimental chilling effects** on Hatch-Waxman lawsuits and settlements, both of which are encouraged by Hatch-Waxman. **In turn, the Third Circuit’s truncated version of the sham-litigation test will discourage pharmaceutical innovation and harm our innovation economy**—an acutely undesirable result in an era where the need for rapid pharmaceutical innovation is paramount. This Court should reverse the Third Circuit’s erroneous decision.

**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** 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.

**Compromises mean their impact may be eliminated, underfunded to ineffectiveness, or delayed for years**

David **Dayen, 9-14**-2021, executive editor, "Infrastructure Summer: The Sophie’s Choice of the Reconciliation Bill," American Prospect, https://prospect.org/infrastructure/building-back-america/infrastructure-summer-sophies-choice-of-the-reconciliation-bill/

THIS HOBSON’S CHOICE, figuring out whether to live with less on every policy in the Build Back Better Act, or to jettison some and make sure the policies remaining actually work and are politically potent, is agonizing for advocates and members of Congress. In a better world, this choice wouldn’t exist; the policies reflect critical human needs, and deciding to punt on them yet again should be unacceptable. But the axis of Sens. Joe Manchin (D-WV) and Kyrsten Sinema (D-AZ) has decided that they must have a cap on both spending and revenues, which is forcing these difficult conversations.

Adding to the frustration is the sheer number of policies in the legislation. When you put all your priorities as a party into one bill, you draw in every member who’s been fighting for one part or another for years. But when the overall toplines get cut, nobody wants to take out their pet project. The only other option is to cut everything across the board, which can lead to a slew of ineffective half measures.

We’re seeing this play out in several ways. Some programs, like HCBS, are just being cut. Others, like the dental benefit in Medicare, are being delayed for several years. This makes it look cheaper within the ten-year budget window.

**Biden’s green infrastructure is *too weak* to solve warming and *increases emissions***

**Aronoff, 21** (Kate Aronoff is a staff writer at The New Republic, She is the co-author of A Planet To Win: Why We Need A Green New Deal, a fellow at the Type Media Center and a contributing writer to the Intercept, January 26 2021 “The Fossil Fuel Industry Thinks It Will Have a Good Year Under Biden” The New Republic, <https://newrepublic.com/article/161048/fossil-fuel-oil-biden-stimulus>) MULCH

But the business press and industry analysts have presented a rather different story. Oilfield services companies are cautiously optimistic, after a rash of bankruptcies last year. The combined prospects of an economic stimulus and infrastructure package—**both of which will boost fossil fuel demand—spell a more prosperous 2021 and 2022 for the world’s biggest polluters**. Even Biden’s aspirations to “Build Back Better” with green jobs, Oslo-based energy consultancy Rystad Energy predicted last week, may well be welcome news to oil and gas producers. **“Any ‘green’ focus of the infrastructure bill,”** a company press release read, “will be mostly additive to overall short-term oil products demand due to construction activity, with risks mostly limited to medium-term oil demand, depending on the scope and success of the projects.” **Stimulus measures, in other words, will increase energy demand in general.** At least for now, **that means more demand for fossil fuels**.

They call it the “Biden boost,” predicting an extra 350,000 barrels per day (bpd) for 2021 and 900,000 bpd for 2022, should he follow through on his promises. They do also note that new environmental rules, if carried out, could cause oil demand to start to fall toward the **end of the 2020s.** This may seem counterintuitive given Biden’s campaign promises. The mechanism isn’t complicated, though: There’s a stubborn link between growth in gross domestic product and greenhouse gas emissions. Even the greenest of recoveries is likely to boost both growth and emissions in the near term by putting people back to work and boosting consumer spending. Unless economic recovery policy includes sweeping, rapid changes to electrify and decarbonize the country and actively curtail fossil fuel production, even a stimulus that’s green on many other fronts could help emissions climb for years to come. **Savvy U.S. polluters, of course, could still flourish even with new regulations.** Federal lands—on which Biden has issued his two-month pause on new drilling leases and permits, allowing a select few Department of Interior officials to approve exceptions—are now home to just 14 percent of active land rigs. A recently released analysis by Morgan Stanley expects that large, diversified companies can simply reallocate all of their new drilling and planned investment to nonfederal land. While the bank predicts political pressure will put any permanent ban on leasing off the table, it projects tighter rules on everything from methane emissions to environmental reviews going forward. **For many companies, that wouldn’t be a bad thing.** “In effect,” Oil & Gas Journal writes of the bank’s findings, a Biden administration placing more climate-focused policy constraints on the industry “is constructive for the oil and gas macro—constraining supply and putting upward pressure on the marginal cost of shale production without impacting short-term demand.” Smaller firms that do a lot of business on federal land face big risks, of course. Yet larger and more integrated U.S. oil majors like Chevron are well insulated against even sweeping restrictions and “could benefit to the extent President Biden’s policies tighten the supply/demand balance for global oil & gas markets.”

## 1AR

**1AR – T**

**Counter interp - Anticompetitive practices reduce competition, lead to higher prices, reduce quality or levels of service, and undermine innovation**

**FTC No Date** – Federal Trade Commission, “Anticompetitive Practices,” https://www.ftc.gov/enforcement/anticompetitive-practices

**Anticompetitive Practices**

The FTC takes action to stop and prevent unfair business practices that are likely to **reduce competition** and lead to **higher prices**, **reduced quality or levels of service**, or **less innovation**. Anticompetitive practices include activities like **price fixing**, **group boycotts**, and exclusionary exclusive dealing contracts or trade association rules, and are generally grouped into two types:

**agreements between competitors**, also referred to as horizontal conduct

**monopolization**, also referred to as single firm conduct

The FTC generally pursues anticompetitive conduct as violations of Section 5 of the Federal Trade Commission Act, which bans “unfair methods of competition” and “unfair or deceptive acts or practices.”

**1AR – States CP**

**States can regulate patents generally but not patent *enforcement* under Noerr that go beyond objective baselessness, so the bar is still too high for damages**

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

II. PREEMPTION AND PETITIONING IMMUNITY The constitutional barrier that immediately comes to mind, given the federal nature of substantive patent law, is preemption under the Supremacy Clause. Some states that have passed statutes regulating patent enforcement appear to be aware of preemption concerns. The preamble to the Vermont statute, for instance, states that the legislature “recognizes that Vermont is preempted from passing any law that conflicts with federal patent law.”130 And the Alabama statute instructs that the act “shall be interpreted consistently with any federal law or regulations governing patents or patent infringement.”131 Under Supreme Court precedent interpreting the Supremacy Clause, however, **these new statutes likely avoid preemption. Yet the Federal Circuit has treated those Supreme Court decisions**—including decisions that deal specifically with the preemptive scope of the federal Patent Act—**as mostly irrelevant when assessing the power of the states to regulate patent enforcemen**t. **Instead, the Federal Circuit has relied on the Noerr-Pennington doctrine to hold that**, **because of the Petition Clause of the First Amendment**, **states may outlaw assertions of infringement only if the patent holder made the allegations with knowledge that they were objectively baseless.**

### 1AR – Infrastructure DA

**Lawmakers compartmentalize**

**Pergram 18** (Chad Pergram, Congressional reporter. “Amid Kavanaugh cacophony, Congress forges bipartisan agreements on key issues”. October 13, 2018. <https://www.foxnews.com/politics/amid-kavanaugh-cacophony-congress-forges-bipartisan-agreements-on-key-issues>)

Step back from the Kavanaugh cacophony. Examine what lawmakers from both parties in both chambers accomplished in September and early October, with virtually zero fanfare. **Amid** the **turmoil**, Congress approved the first revamp of national aviation policy in years. The Senate approved the final version of the legislation 93-6. This came after a staggering six extensions due to bickering and disagreement. Then, Congress approved a sweeping, bipartisan measure to combat opioid abuse. The House okayed the package 393-8. The Senate adopted the measure 98-1. And, there was no government shutdown. The House and Senate came to terms on two bipartisan bills which funded five of the 12 annual spending bills which operate the government. The sides agreed to latch an additional measure to one of the spending plans to fund the remaining seven areas of federal spending through December 7. President Trump briefly threatened to force a government shutdown if lawmakers didn’t include money for his border wall in the plan. But the President ultimately punted that battle until December. Democrats praised Republicans for keeping conservative “poison pill” riders out of the appropriations bills. That decision drew Democratic support for the measures. The Senate approved a bipartisan water and infrastructure package. McConnell hailed the bipartisanship which descended upon the Senate – **even as the senators fought over Kavanaugh**. Nearly **in the same breath**, McConnell derided boisterous, anti-Kavanaugh protesters outside the Capitol as a “mob.” McConnell insisted this week he needed the Senate to clear a slate of 15 conservative judges to lower courts before he could cut senators loose for the midterm elections. McConnell and Schumer appeared at loggerheads. McConnell’s goal was clear: extract the confirmation of these nominees – or tether to Washington vulnerable Democratic senators from battleground states to keep them off the campaign trail. Schumer knew McConnell would ultimately prevail on the nominees after the midterms. So the New York Democrat accepted McConnell’s ransom, permitting the Senate vote on a slate of nominees on Thursday night. Schumer also extracted a concession from McConnell: send senators home until November 13th. One may wonder how lawmakers can find themselves in an **imbroglio** over a major issue like Kavanaugh – **yet forge major bipartisan accords on other**. Frankly, that’s just politics. Politics always elicits strange bedfellows. Successful lawmakers know they should **compartmentalize their disputes**. The enemy today may be your best ally tomorrow.