## 1AC

**Plan**

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

**1AC – 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**

**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_source/2021/feb-2021/atsource-feb2021-carson.pdf>

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

**Baseless suits are set to increase without the plan**

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 prevents extinction**

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

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

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

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

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

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

**Trolls devastate cloud computing and cause IT nightmare**

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Digital transformation is propelling business cloud-wards at prodigious rates: research company Gartner[1] forecasts (pre-COVID-19) that public cloud market will grow 17% in 2020, up from $228bn in 2019 to $266bn. At the same time scale economies are extending the cloud’s reach out from the data centre, connecting billions of intelligent IoT (Internet of Things) devices at the edge: by 2021, one million new IoT devices will be coming online every hour.[2] The concentration of computing resources into the expanding cloud is becoming increasingly attractive as a target for patent litigation to NPEs, non-practising entities that buy patents to sue others for infringement as their only revenue source. At a time when data security and privacy risks are front of mind for cloud service providers (‘CSPs’) and their customer, the **i**ntellectual **p**roperty risks to cloud service availability posed by NPE patent claims are attracting increasing attention. NPEs are well placed to monetise their patents at each stage of the litigation cycle. They have access to capital and all necessary forensic and legal resources; and an NPE doesn’t practise its patents so is immune to a defendant’s competitive counterclaim or cross-licence offer. Patent stats show consistently increasing NPE activity. Overall, NPE patent litigation increased 4% in 2019 over 2018, accounting for 58% of new cases in the US District Court.[3] **In the cloud sector, NPEs appear to have doubled down over the last five years**, acquiring more cloud patents for their armoury as well as filing more patent cases. As the cloud extends out to embrace IoT devices at the edge, early trends in the IoT patent space show a similar picture, with NPEs acquiring more patents and launching more claims year on year. NPE activities may attract opprobrium as arbitraging the patent system, but that is to miss the point: the defendant in a patent claim brought by a NPE generally has an unattractive real-world choice between the cost and distraction of litigation and the cost of settlement which, whilst low in relation to likely litigation costs, is high relative to the perceived merits of the claim. From the NPE’s standpoint this makes sense. Claiming that software in the CSP’s PaaS (Platform as a Service) or IaaS (Infrastructure as a Service) infringes the NPE’s patents can be an efficient way to threaten alternative objectives: the CSP risks an injunction stopping it from using the software that embodies the patented technology; and the CSP’s customers using that software also face disruption as they may be liable both for their own workloads and for their CSP’s infringing code that they use. From the standpoint of the CSP and its customers all this is bad enough, but **software patent risks are further exacerbated by ubiquitous use of OSS**, which now generally powers the cloud. OSS developments are created by communities of individual developers. With no single holder of software rights, patent infringement issues are unlikely to be top of mind; and if they are, developers will generally lack the resources to help them navigate the risks. Compare this with a corporate developer of proprietary software who holds all the rights to its technology and has both the incentive to address patent infringement risks and the legal and technical resources to do so. The rub is that, simply because they are open, OSS developments and communities are easier targets for NPEs than proprietary software as they don’t need to go to the same lengths to discover potential infringement. The softness of the target increases risk for CSPs using OSS and their users. **Cloud software patent risk is evident and growing**, so it is perhaps surprising that the regulatory response has been muted, especially when data protection, privacy and information security figure so large. Yet an unsettled cloud software patent claim runs risks to cloud service availability that are arguably of the same order as information security risks. In cloud guidance, regulators like the UK’s Financial Conduct Authority (‘FCA’) and the European Banking Authority (‘EBA’) do not expressly address IP risks but implicitly consider them in terms of business continuity, customer duties and reputational risk. So, the FCA says that firms should: “identify and manage any risks introduced by their [cloud] arrangements. Accordingly firms should carry out a risk assessment to identify relevant risks and identify steps to mitigate them, document this assessment, identify current industry good practice … assess the overall operational risks, monitor concentration risk and consider what action it would take if the provider failed ….”[4]

**More cloud innovation begets more risk** (PAE = Patent troll)

**Bhattacharya 20** (Prapti Bhattacharya Asian Law College, Noida, Under the Guidance of Prof. (Dr) T. Ramakrishna, MCI Chair Professor on IPR, “Analysis of IPR Challenges of Cloud Computing and Ways to Overcome the Issues”https://iprlawindia.org/wp-content/uploads/2021/03/Prapti-Bhattacharya.pdf)

Now here we need to discuss the rising importance of PAEs (Patent Assertion Entities, businesses who litigate their patents but generally don‟t otherwise use their patented technology) because it has been observed that compensations awarded for PAEs are almost four times higher than granted for other patent claimants. Since the economic value of cloud is rising day by day, the cloud **customers are preparing exclusively interesting targets for PAEs** because customers usually don’t have the same level of knowledge to understand the difficulties of cloud as cloud service providers (CSPs), and also because they are less prepared to fight an IP suit, and have very less incitement to solve an IP disputes for others. This is the reason why cloud patent claim risk is being accommodated by the largest global CSPs in their cloud service agreements., and their regulators in regulated sectors in India, should take note as well.

**Existing cloud fails to solve asteroids**

**Sichitiu et al 19** (Roxana E. Sichitiu (Avram), Marc E. Frincu Computer Science Department West University of Timisoara Ovidiu Vaduvescu Astronomy department Isaac Newton Group La Palma, Spain, School of Doctoral Sciences, “Digital Tracking Cloud Distributed Architecture for Detection of Faint NEAs”, http://www.euronear.org/publications/Sichitiu\_SYNASC\_2019.pdf)

[Abstract]

Abstract—There is an **exponential volume** of captured images, millions of captures taken every night being processed and scrutinized. Big Data analysis has become essential for the study of the solar system, discovery and orbital knowledge of the asteroids. This analysis often requires more advanced algorithms capable of processing the available data and solve the essential problems in almost real time. One such problem that needs very **rapid investigation** involves the detection of Near Earth Asteroids (NEAs) and their orbit refinement which should answer the question “will the Earth collide in the future with any hazardous asteroid?”. This paper proposes a cloud distributed architecture meant to render near real-time results, focusing on the image stacking techniques aimed to detect very faint moving objects, and pairing of unknown objects with known orbits for asteroid discovery and identification.

[Introduction]

Mankind has been attracted by the sky since its beginings, and astronomy has been studied since the earliest centuries. In the past couple of decades the information collected by ground, air and space instruments increased exponentially in comparison with the 20th century. The last five decades have witnessed a boom regarding the capacity to store the information, as well as the ease of accessing it in a distributed fashion. The information started by being kept on physical disks, but later it slowly migrated to a new concept of being processed and stored, namely cloud computing [1]. The offer of cloud solutions has an ascending trend due to the optimization of data losses, economic advantage, accessibility, and also processing power. [1].

Cloud computing is a very handy solution applicable in multiple domains and astronomy is one of them. Proved by some unfortunate asteroids collisions with the Earth (the most recent asteroid that impacted Earth in 2015 was 20m in size (!), leading to over 2,000 wounded victims in Chelyabinsk, Russia), the USA government mandated NASA to discover by 2030 all NEAs larger than 100m and to classify their path. Some of these bodies are defined as “virtual impactors” (VIs) (referring to a set of about 1000 known NEAs which have a slim but possible chance to impact the Earth in the future according to the current poor knowledge about their orbits). The classification of an orbit defining such VIs involves a varying observing coverage time, starting from a few days to a few weeks upon discovery of each object.

Storing and processing this data on clouds is a natural approach, however, most **existing tools were not designed with parallel and distributed capabilities** (cf. Section III. The collected information requires intelligent software pipelines to process very rapidly the big amount of images, and to scale large data volumes. There are more than one million tracks (unknown objects observed during only one night) in need of pairing with more than 800,000 known asteroids – **which requires a great calculation power and storage** as detailed below (see also Eq. (1)).

**Impact outweighs**

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Astronomers are fond of observing that the real question is not "whether" Earth will again be struck by a large asteroid, but "when." We can detect around the planet the remnants of scores of impact craters of diverse size and age left by previous NEOs, and the pockmarks are even more obvious on the Moon and other celestial bodies, where erosion has not degraded their silhouettes. As asteroids pinball around the Solar System, it is only a matter of time before the next jarring impact-time that might be measured in months or in millions of years. The potential consequences of such a collision beggar belief Prehistoric experience demonstrates that **all of human civilization**, as well as most or **all other forms of life on Earth, may hang in the balance**. Even a more moderately sized asteroid could devastate a community or a country in an instant. As Igor Ashurbeyli assesses the stakes, developing countermeasures to this apocalyptic threat "must become the **most important task** that humanity must solve **in the 21st century**. "211 But the **time frame matters**, too. If we knew, hypothetically, that an extinction-level event was not going to occur for thousands or millions of years, why would we devote time, attention, and money to it now? A known risk of extermination, eons into the future, would pose profound philosophical and psychological conundrums, but preemptively responding to it would not be on anyone's active "to-do list" for generations. Still, timing matters in another way, too. With our present state of astronomical intelligence, **we cannot be certain** about our planet's prolonged safety, and we must exhibit appropriate modesty about our confidence in the completeness of the inventory of known NEOs. Accordingly, the planet may **not have much advance notice** about the next Chicxulub, and we may be **no more able than the dinosaurs** to immediately invent our way out of an unanticipated fatal space specter. Frances Lyall and Paul B. Larsen summarize the issue this way: "Time might be too short adequately to deal with the crisis-missile or other **tech**nology **has to be prepared**." 2 12 It is **difficult for humans to think rationally about this** sort of problem-it is hard to get our collective minds around such enormous consequences and such tiny probabilities simultaneously-especially when people have so little first-hand experience with the causal phenomenon. A **2010 study** by the National Academy of Sciences referred to this as a **classic "zero times infinity" problem** that **thwarts human cognitive processing**.213 Cass Sunstein and Richard Zeckhauser label the resulting bias in decision-making as **"probability neglect"-**a propensity to **misunderstand the fearsome risks** that are so difficult to conceptualize.2 14 **Behavioral economics** literature abounds with examinations of the collective non-rationality in our species' approach to high-severity/low-probability events, leading to **extreme discounting of remote future catastrophes**, to the detriment of individuals and society.2 15 The underdeveloped state of international law on trans-border disasters reflects this cognitive deficit. Perhaps this should not be surprising-the tasks of preventing, responding to, and rebuilding after global catastrophes are daunting. These are topics that sovereign states, as well as individual human beings, **shy away from addressing-they are uncomfortable to think about**; they can involve sharing resources, as well as sympathy, with foreigners; and they seem to call for spending immense sums of money on vanishingly remote contingencies. It will never be easy to marshal political support for developing, improving, and sustaining planetary defense capabilities that in all likelihood will never be exercised during any government official's term in office or even lifetime.216 Nevertheless, planetary defense represents one of the occasions in which these **psychological barriers must be overcome**. The extended time frame in dealing with asteroids places special burdens on the effort to think rationally about very-low-probability dangers, because the people at risk are (likely) not ourselves but our far-distant progeny, generations so remote that the emotional connection to them is strained. We can appreciate that the good work of IAWN and SMPAG today may help increase the odds of our species' survival, but we must also be aware that the counter-asteroid technology available to earthlings a century or two from now will surely surpass today's puny capabilities in ways we cannot imagine.2 17 Collision with a body of 3-5 km diameter) could **kill**, say, **half the world's population** (soon to reach eight billion people) sometime in the next million years. On an actuarial basis, that works out to 4,000 statistical deaths annually. That is surely a significant fatality rate-enough to warrant substantial financial investment-even though the incidents would be extraordinarily "lumpy," in the sense that for almost all of those one million years, there would be no deaths at all due to asteroids, but in one year there would be an unprecedented catastrophe. At this rate, asteroids would rank above many other natural and bizarre phenomena that people fear (and that societies attempt to do something about), such as floods, tornados, airplane crashes, terrorism, or choking. Asteroids, however, would still fall far below other leading causes of death, such as automobile accidents, communicable diseases, and tobacco use. 2 18 This weird combination of probabilities and consequences promotes what many call **the "giggle factor"**: humans' seemingly **congenital reluctance to discuss planetary defense** seriously without retreating to the silliest tropes about alien attacks or sci-fi thrillers. The topic seems to be ripped from kitschy movie trailers, not news headlines. 2 19 An additional fear factor here is the **danger of surprise**. If a significant asteroid were to arrive without warning-as in the Chelyabinsk incident-the afflicted **country might perceive** that it had been **attacked by a hostile neighbor**, rather than by a fickle Mother Nature. If, by further malign luck, the event happened to occur during a period of **heightened international tensions**, the **propensity to misinterpret**, and to **respond precipitously**, would rise. The unforeseen space object could thus **catalyze a larger human-caused tragedy**.2 20 The easiest part of the policy prescription is to recommend that more should be done to gather and disseminate the relevant data about NEOs. NASA, IAWN, and other actors should press forward zealously to enhance the inventory of known asteroids and should expand their efforts to track and characterize those that might plausibly pose a threat. This survey may get expensive: space-based telescopes may be necessary in order to detect space objects that canbe obscured by the Sun, and long-distance space missions may be required in order to collect more information about the structure, composition, and flight characteristics of asteroids of interest.

**1AC – Lobbying**

**Noerr has been extended to give corporations a blank-check for lobbying**

Tim **Wu 20**. 9-20-20. Tim Wu is an Isidor and Seville Sulzbacher Professor of Law at Columbia Law School. “Antitrust and Corruption: Overruling Noerr” https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3670&context=faculty\_scholarship

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 – it restricts the exception**

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.

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

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

**Strength of US institutions solves conflict**

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

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

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

**No alt causes - Plan broadly shapes corporate influence---spills-over**

Raymond J. **Tittmann 10**, a partner in the San Francisco offi ce of Carroll, Burdick, & McDonough LLP, State “Anti-SLAPP” Statutes Codify First Amendment Doctrine Protecting a Corporation’s Right to Petition, Engage: Volume 11, Issue 2, September, 2010, <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/cJS79R1IgRTNE19r4CKyXXXHxwiHj4CDe0TT3vac.pdf>

On January 21, 2010, the Supreme Court found in ***Citizens United*** v. Federal Election Commission1 that corporations have First Amendment rights in the context of campaign fi nance. But in some respects that ruling was not as **newsworthy** as critics suggest. Ironically, individuals and groups that are often at odds with corporate America2 are largely responsible for a series of powerful statutes that have spread across the country over the last twenty years3 applying the First Amendment’s right of petition to corporate entities. As illustrated in the chart at the conclusion of this article, about twenty-eight states now have statutes enabling defendants to attack at the outset of litigation “**S**trategic **L**awsuits **A**gainst **P**ublic **P**articipation” in government, or “**SLAPPs**” as they are popularly called. In December 2009, Representative Steve Cohen (D-TN) introduced a federal anti-SLAPP statute (H.R. 4364), which is awaiting consideration. The **anti-SLAPP** movement is built on a fi fty-year-old line of U.S. Supreme Court authority applying **the First Amendment** to protect a citizen’s—including a **corporate citizen’s**—petitioning activity (known as the “**Noerr-Pennington doctrine**”).4 One can reasonably speculate that Justice Alito had the ***Noerr* line of cases in mind** when President Barack Obama famously criticized the Court for reversing a hundred years of precedent. ***Citizens United* relied on the Noerr line of cases** in noting that **corporations** have consistently received **First Amendment protection**.5

**1AC – Citizen Petitioning**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

\*footnotes omitted\*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Widely available generics prevent millions of deaths**

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

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

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

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

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

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

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

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

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

**Disease causes extinction**

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

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

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

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

1. Introduction

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

**Drug resistant TB is an existential risk – new therepies key**

It’s good to securitize MDR-TB while giving universal access to health care!

**Enemark 13** – Christian Enemark, Professor of International Relations at the University of Southampton, PhD in International Relations (“Drug-Resistant Tuberculosis: Security, Ethics and Global Health,” *Global Society*, Vol. 27, No. 2, pages 159-177, Available through Taylor & Francis)

Introduction

The worldwide spread of **drug-resistant** strains of tuberculosis (**TB**) bacteria (Mycobacterium tuberculosis) is **out of control** and incidents of harder-to-cure TB illness are rising. This article explores the present and potential impact of extensively drug-resistant tuberculosis (**XDR-TB**)—a **deadly, contagious and virtually incurable disease**—on human health and state capacity. Detected cases of XDRTB can occasion the implementation of extraordinary control measures, because some governments are sufficiently fearful of the disease as to frame it as an issue of national security. Such framing has the potential to precipitate more financial resources and stronger legal powers to bolster public health, but it might also increase the risk that emergency response measures will be counterproductive and/or unjust. XDR-TB arguably poses an **existential threat** to local health systems (and the populations they serve) **around the world**, so difficult and costly is it to contain and cure this disease. It is the premise of this article that dealing with the problem is a security challenge as much as (or more than) a humanitarian one; controlling XDR-TB is not only about compassion, it is also about survival. Accordingly, this warrants the implementation of emergency measures that go beyond human rights rules and economic norms that would otherwise restrain government decision making. Framing XDR-TB as a security issue is empirically plausible, and doing so is a good thing provided that increased response efforts promote rather than hinder the **provision of universal access to adequate TB treatment** over the long term.

The article begins by outlining the ways in which policy makers and scholars have sought to draw a link between security and infectious diseases generally. In order to assess the plausibility of framing XDR-TB specifically in security terms, it is necessary first to understand the disease’s current and likely impact in public health terms. Beyond assessment of the morbidity, mortality and associated economic burden imposed by XDR-TB, the article then explores two disease control measures that are motivated particularly by security concerns (as distinct from mere health- and/or economy-oriented motivations). These measures are border control and patient isolation. Both involve curtailing individuals’ freedom of movement for the purpose of preventing or delaying contagion, so it is important to assess each measure by reference to public health ethics. Informing this ethical assessment is the notion that a person infected with a contagious disease like XDR-TB is both threatened and threatening. On the one hand, that person is a disease vector from whom the broader population should be protected (an immediate greater good). On the other hand, he or she is also a disease victim (and the bearer of human rights to life and liberty) whose health and wellbeing should be protected (an immediate individual good). A policy dilemma arises as regards the relative importance of achieving each immediate good. The diffi- culty is compounded by the notion that two long-term, greater goods are also at stake: public confidence in health systems and in the protection of individual rights.

Infectious Diseases, Security and Ethics

The idea of linking health and security concerns, as a matter of academic inquiry and public policy, has received support from two directions. For some members of the public health and human development sectors, the language of security is a means of rallying political support and financial resources to address neglected health issues. In the security sector, some analysts and practitioners argue that the impact of particular health challenges is sufficiently serious as to warrant prioritisation comparable to that traditionally accorded to the threat and use of armed force. Infectious disease (disease caused by bacteria, viruses and other microorganisms) is the health issue that has received the most attention in security-oriented policy documents and scholarly debates. AIDS (caused by the virus HIV) was arguably the first disease to receive the imprimatur of serious attention at the highest levels of security decision making. The passage in 2000 of UN Security Council Resolution 1308 was the first time a health issue was officially framed as a threat to international peace and security. The Resolution expressed concern about the potential adverse effects of HIV/AIDS on UN peacekeeping personnel, but it also stressed more generally that this pandemic, “if unchecked, may pose a risk to stability and security”.1 The belief that HIV/AIDS threatens security has led governments in rich and poor countries alike to take the disease more seriously, and to devote more resources towards controlling it through prevention campaigns and increased provision of life-prolonging medication. George W. Bush’s President’s Emergency Plan for AIDS Relief (PEPFAR), which in 2003 allocated $US15 billion over five years to international HIV/AIDS programmes—“the largest commitment ever by any nation for an international health initiative dedicated to a single disease”2 —is an example of this. The legislation that authorised this extraordinary allocation of resources included a security rationale, with HIV/ AIDS described as “destabilising communities” and being a disease that “weakens the defenses of countries severely affected”.3

Soon after PEPFAR was authorised, a highly pathogenic avian (and potentially pandemic) influenza virus (H5N1) emerged and began its rapid spread to dozens of countries worldwide. This prompted policy makers and scholars alike to begin contemplating the security implications of an influenza pandemic resembling the great “Spanish Flu” of 1918–1919 which killed an estimated 40 million people. Pandemic influenza is a prime candidate for securitisation because of its capacity to inspire dread on a large scale and in a short space of time. In 2007, for example, the World Health Organization (WHO) described this disease as “the most feared security threat”.4 Naturally occurring disease outbreaks have also come to be considered alongside the enduring problem of biological weapons. US President Barack Obama’s 2010 National Security Strategy emphasised the importance of continued efforts “to reduce the risk associated with unintentional or deliberate outbreaks of infectious disease”.5

The political process whereby non-military phenomena (such as naturally occurring disease outbreaks) come to be treated as security issues has been theorised by scholars of the Copenhagen School. The theory of ‘securitisation’ has attracted numerous attempts at contestation, development and refinement, but the theory’s straightforward central proposition continues to have great explanatory power: for threats to count as security issues, they must be distinguished from issues that are merely political. Specifically, they have to be “staged as existential threats to a referent object by a securitizing actor who thereby generates endorsement of emergency measures beyond rules that would otherwise bind”.6 Securitisation is not the same as mere prioritisation. Rather, securitisation theory emphasises and insists upon the emergency nature of threats and the extraordinary nature of responses. Both the threat of and the response to XDR-TB are assessed in later sections of this article. For present purposes, the central concern is societal functioning, with the referent object of security being the state’s ability to protect its population through public health and healthcare systems.

In assessing whether a particular infectious disease should be framed as a threat to security, the theoretical assumption is that a “security” element is what propels an issue to the top of a government’s political agenda. With this special status comes access to extraordinary legal, financial, military and/or other measures, the implementation of which may have adverse implications both for public health and for individual human rights. Although securitisation theory appears to be mainly descriptive of a political process of constructing “security”, it is important to note its built-in (albeit underdeveloped) normative dimension. In originally expounding their theory, Barry Buzan and his co-authors argued that “[a]voiding excessive and irrational securitization is ... a legitimate social, political and economic objective of considerable importance”.7 Moreover, they warned against idealising national security because “[i]t works to silence opposition and has given power holders many opportunities to exploit ‘threats’ for domestic purposes, to claim a right to handle something with less democratic control and constraint”.8 Regarding state responses to infectious diseases, Stefan Elbe points out that people living with HIV, for example, have been “ostracized and even persecuted by some states for their illness”.9 He argues that framing the disease as a national security threat “risks fuelling such exclusionary and dehumanizing responses and could serve as an implicit legitimisation of any harsh or unjust ‘emergency’ policies that states may adopt in relation to persons living with the virus”.10 These observations are a warning that emergency measures to address infectious disease threats must not in themselves curtail human rights to the point that securitisation becomes illegitimate and counterproductive. Although political claims about the security status of particular diseases often refer to the paramount importance of swift and aggressive responses, experience suggests that haste and zeal can sometimes undermine rather than assist disease-control efforts. There is thus a case for tempering security-oriented analysis with a concern for ethical principles.

Because disease control measures sometimes involve infringement of widely accepted individual rights and liberties, infectious diseases raise difficult ethical questions about how to strike a balance between the goal of protecting the greater good of public health and the goal of protecting individual human rights. Quarantine, isolation and travel restrictions, for example, violate the right to freedom of movement. Other public health measures—such as contact tracing and the reporting of the health status of individuals to authorities—can interfere with the right to privacy. Although measures such as these might sometimes be necessary to avert public health disasters, the question arises: how great must a public health threat be for such measures to be justified? Most scholars and policy makers would presumably accept that the goal of promoting the greater good of society through public health does not always take priority over the protection of individual rights and liberties, nor vice versa. The task of appropriately balancing and simultaneously pursuing these two sets of interests is then made more difficult—and more important—by the insertion of a security dimension. For example, the fear factor that is necessarily present in anything to do with “security” can have a distorting effect. It has been argued, for example, that infectious diseases’ powerful ability to engender fear often leads to “rapid, emotionally driven decision making about the care of individual patients and about public health policies”, even when these decisions “challenge generally accepted medical ethics principles such as patient autonomy, non-maleficence, beneficence and justice”.11 Securitisation of an infectious disease should thus be of such a form as can guard against these dangers.

Tuberculosis and Drug Resistance

The resurgence of TB in an **extremely drug-resistant form** since 2006, prompting extraordinary responses by some governments, presents an opportunity to consider anew the relationship between infectious diseases, security and ethics. Tuberculosis is an infectious bacterial disease transmitted via airborne droplets. Although **approximately one-third of the world’s population is infected with TB** bacteria, not all who are infected develop TB disease. Mycobacterium tuberculosis bacteria can lie dormant in the body for many years. If a person’s immune system is weakened (by HIV co-infection, some other medical condition or simply by old age), he or she can develop what is referred to as “active” TB. Only one in 10 infected individuals is likely to progress to an active TB episode during their lifetime in the absence of immune system suppression. The disease most often affects the lungs, but it can also affect the brain, kidneys or spine. Infectious bacteria can spread through the air when a person with active TB sneezes, coughs, spits or talks, and someone with untreated TB can potentially infect 10 to 15 others annually.12 The disease is today **a major cause of illness and premature mortality**, especially among people living with HIV, and the human toll it exacts is likely to increase as drug resistance makes TB treatment more difficult and expensive. According to the latest WHO report on global tuberculosis control, in 2011 there were an estimated 8.7 million new cases of TB globally, almost one million deaths among HIV-negative cases of TB, and an additional 430,000 deaths among people who were HIV-positive.13 People living with HIV who are also infected with TB are 21–34 times more likely to develop TB disease compared with those who are HIV-negative, and the highest rates of HIV–TB co-infection occur in Africa where 44% of TB patients with an HIV test result in 2010 were HIV-positive.14 Although the focus of this article is on the security significance of drug-resistant TB rather than the broader HIV–TB co-epidemic, suffice to say that any increase in HIV prevalence would exacerbate the spread of drug-resistant TB.

TB bacteria build up resistance to anti-TB drugs because of incomplete or inadequate treatment. In poorer countries especially, it can be difficult to ensure adherence to a course of antibiotics which, to be effective, needs to continue without interruption for six to eight weeks. Unsurprisingly, an individual who begins to feel better before such time has elapsed might decide to stop taking the drugs, especially if they are expensive. To reduce the likelihood of drug-resistant TB bacteria emerging, the longstanding approach to TB treatment is directly observed treatment—short course (DOTS), which focuses on supervised adherence to a fixed combination of drugs. Nevertheless, systemic incountry problems like inconsistent drug prescribing, erratic drug supply and unregulated over-the-counter drug sales increase the risk of inadequate TB treatment. Likewise, in many parts of the world, chronic shortages of trained medical staff and inadequate laboratory capacity make it difficult to track and properly treat incidents of TB illness. If drug treatment is stopped prematurely, the TB bacteria will not be completely eliminated from the body and those that remain may mutate into a form against which the drug is powerless; what did not kill the bacteria serves to makes them stronger. A person infected with TB bacteria that are resistant to first-line drugs—multidrug-resistant (MDR) TB—must then resort to stronger (and more toxic) second-line drugs administered over a longer period of time. Some anti-MDR-TB drugs are administered by injection, so individualised treatment requires a high level of medical expertise. If treatment with these second-line drugs is inadequate or incomplete, the targeted bacteria may mutate further into a form against which almost no drug is effective—extensively drug-resistant (XDR) TB.15

The WHO has reported that the total number of incident TB cases per year worldwide has been falling since 2006.16 However, the proportion of TB cases globally that are caused by **drug-resistant TB** bacteria is rising. In 2010, there were an estimated 650,000 cases of MDR-TB among the world’s 12 million prevalent cases of TB.17 Among the 27 countries that the WHO designates as high MDRTB burden countries, former Soviet Union countries are conspicuous in terms of the estimated percentages of new TB cases that are multidrug-resistant: Azerbaijan (22%), Belarus (26%), Estonia (18%), Moldova (19%) and Russia (18%).18 The four countries that had the largest number of estimated cases of MDR-TB in absolute terms in 2008 were China (100,000), India (99,000), Russia (38,000) and South Africa (13,000).19 The most worrying statistic is that “patients enrolled on treatment for MDR-TB in 2010 [104,000] only represented 16% of the MDR-TB cases estimated to exist among reported TB cases”.20 The remaining 84% are either not receiving treatment or are receiving inadequate treatment, and the latter poses an XDR-TB risk. As of the end of 2011, 77 countries had reported at least one case of XDR-TB.21 If the number of MDR-TB cases in the world is 650,000, the WHO estimate of global XDR-TB prevalence comes out at 58,500 cases worldwide. Given the low rate (16%) of MDR-TB treatment going to people who need it, it is reasonable to suppose that many if not most XDR-TB cases are also left untreated.

The disease called “extensively drug-resistant tuberculosis” was first described in 2006.22 Between January 2005 and March 2006, 221 cases of MDR-TB were identified at the Tugela Ferry district hospital in KwaZulu-Natal Province, South Africa. Of these, 53 patients were further diagnosed with XDR-TB. Half had never previously received TB treatment. The mortality rate was extremely high—52 of the patients (98%) died within a median of 16 days after initial sputum collection.23 Unsurprisingly, XDR-TB mortality rates resemble mortality rates from ordinary TB during the pre-antibiotic era. **Without drug treatment, TB victims are highly likely to die**. Studies of the natural history of the disease among sputum smear-positive and HIV-negative cases of pulmonary TB have shown that around 70% of victims died within 10 years. Treatment using combinations of anti-TB drugs developed in the 1940s and 1950s can dramatically reduce mortality rates, and in 2009 the treatment success rate globally among reported smear-positive cases of drug-susceptible, pulmonary TB reached 87%.24 But with increased and more widespread drug resistance has come **reduced rates of treatment success** for this strengthened form of TB illness. In low HIV-prevalence settings, patients with MDR-TB have been treated with a success rate of 60–80%, and the rate is 44–60% for XDR-TB patients.25 This means the mortality rate among treated MDR-TB and XDR-TB patients is as high as 40% and 56% respectively. Mortality rates are even higher in circumstances where a patient undergoing TB treatment is HIV-positive.26 Naturally, whether or not an MDR-TB or XDR-TB patient is HIV-positive, he or she is more likely still to die in circumstances of no treatment at all.

Beyond epidemiological data that evaluate the health burden of TB, it is worth considering also the disease’s economic burden—a burden that will surely increase as TB becomes harder to treat. In addition to the cost of lost productivity, the WHO estimates that TB treatment costs alone will reach US$16.2 billion by 2015.27 Although the six-month course of treatment for drug-susceptible TB is not prohibitively expensive, treating MDR-TB can cost US$144–265 per day, with the requisite two-year treatment costs totalling US$40,000 per patient.28 If every one of the 650,000 people estimated to have MDR-TB were to undergo adequate treatment, the cost would therefore be US$26 billion. According to the WHO, the cost of drugs alone for treating the average MDR-TB patient is 50 to 200 times higher than for treating a drug-susceptible TB patient, and the overall cost of care can be more than 10 times higher.29 In the case of XDR-TB, treatment could be of indefinite duration and indeterminate cost, possibly limited only by the patient’s life expectancy.

After establishing that drug-resistant TB is a serious and worsening problem from a health and economic perspective, the question remains: is the threat of XDR-TB severe enough to count as a security threat? For “security” to be invoked, it is not enough simply to point to a “threat”. Lots of things are threatening to a greater or lesser extent, so the Copenhagen School insists that **a threat must be an existential one**. To count as a security threat (as distinct from a mere economic and/or health threat), the very **survival** of something or someone **must be at stake**. The evidence presented so far suggests strongly that **this is the case**: **XDR-TB** arguably **endangers local and international health systems** because treating this disease is increasingly expensive and the burden of treating large numbers of patients could become **unbearable**. Securitisation as an intersubjective process is achieved, and emergency responses to the identified problem thus endorsed, once the notion of a threat is believed and accepted by others.30 In the case of XDR-TB, the available epidemiological data make a claim to security status plausible, as does a comparison to other infectious diseases that are already sometimes addressed in security terms. For example, compared to HIV which is not readily transmissible, it is much harder to protect oneself against infection by the airborne microorganisms that cause TB. And whereas pandemic influenza also spreads through the air, **TB bacteria can be far more deadly than influenza virus** if the former are drug resistant. Recent attempts at developing a broadly effective TB vaccine have met with little success,31 so antibiotics remain the primary pharmaceutical response to the disease. But as MDR-TB mutates into XDR-TB, and as drug resistance becomes more widespread, a pharmaceutical solution moves further out of reach. The relative importance of containing what is virtually incurable is increasing, and it is in this context that drastic disease control measures are being proposed and implemented. Adopting emergency measures to counter grave threats is the stuff of “security”, but the protection of public health must always be guided by ethical considerations. Accordingly, the remainder of this article addresses the question: how should XDR-TB be securitised?

**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.

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

**Lower courts are currently split over how to administer the *Noerr-Pennington’s* sham exception---that undermines predictability in the existing antitrust**

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Filing lawsuits to **injure rivals**—especially **nascent competitors**—is as old as the hills and as American as apple pie.1 As **competition law** developed in the 20th century, so did the **risk** of antitrust liability for **dominant firms** that attempted to protect their **market position** by burdening **rivals** with litigation.2 For example, in 1938, a group of radio speaker manufacturers were subjected to Section 1 scrutiny for filing at least 54 patent infringement lawsuits, along with additional letters threatening infringement suits. As the Ninth Circuit stated, “We may assume that each of those acts would be lawful, and still a conspiracy might be shown. If the agreement has an unlawful purpose, it is a conspiracy, notwithstanding that the means used to carry it out were lawful.”3 **Litigation**, it has been said, “can be **an integral part** of a scheme **prohibited by the Sherman Act**.”4 In the 1960s, **however**, the **Supreme Court** conferred antitrust **immunity** on lawsuits filed against **rivals** with the creation of the **Noerr-Pennington doctrine**. That doctrine immunizes formal requests–– such as **litigation** and **regulatory protests**––to secure government action intended to harm competitors, **except** when that petitioning is a “**sham**.”5 A sham, as the term implies, is not a legitimate effort to exercise the constitutionally protected right to petition the government to redress a grievance; rather, it is a cover for the “true” purpose of employing the courts or regulatory machinery of government in bad faith to inflict economic pain upon a competitor. That pain can take many forms, including raising rival’s costs, erecting costly entry barriers, delaying or deterring entry, or using a combination of obstacles to drive a rival out of business.6 **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 Noerr Pennington 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**, **telecom**munications, 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

## 2AC

**2AC – Innovation**

**Prefer measures of output – innovation low**

Derek **Thompson 2021** “ America Is Running on Fumes” <https://www.theatlantic.com/ideas/archive/2021/12/america-innovation-film-science-business/620858/>

Undeniably, the communications revolution has been the most significant fount of new ideas in the past half century. **But** the **vitality of the tech industry** in comparison with other industries points up that the U.S. innovation system **has devolved from variety to specialization in the past 40 years or so**. The U.S. used to produce a broad diversity of patents across many industries—chemistry, biology, and so forth—**whereas patents today are more concentrated in a single industry, the software industry**, than at any other time on record. We’ve funneled treasure and talent into the world of bits, **as the world of flesh and steel has decayed around it.** In the past 50 years, **climate change has worsened, nuclear power has practically disappeared, construction productivity has slowed down, and the cost of developing new drugs has soared.**

**2AC – LPE K**

**Reading ‘neoclassical economics wrong’ to our stuff is an absurd take. Economists no longer rely on it. You wouldn’t criticize a physics 101 textbook for excluding high-level friction equations.**

**Coyle ’18** [Diane Coyle; April 13; Economics Professor at the University of Manchester; Prospect Magazine, “In defence of the economists,” https://www.prospectmagazine.co.uk/economics-and-finance/dianecoyle]

SThese are typical. Most of modern economics is like this: **empirical testing**, often using **new sources of data**, addressing questions of immediate importance and relevance to policymakers, citizens and businesses.

Economists are **not in thrall** to neoclassical economics and they certainly do not neglect the role of technology. Economics does not **require** that people be **rational, calculating automatons**. It **very often** has people interacting with each other rather than acting as **atomistic individuals**, despite Reed’s charge. As a matter of course, it **assumes** there is a **fog of uncertainty**, and that different people know **different things**: that there are **asymmetries of information**.

Economists know that **few markets** are **perfectly competitive** and many—including me—**specialise** in studying markets where some firms have a **lot of market power**, customers may make choices that cost them **more than necessary**, and **disequilibrium is the norm**. There is **nothing in economics** that means we cannot take into account the ambiguous effects of changes such as an increase in pay or a higher tax rate. On the contrary, a lot of the empirical work we do involves trying to estimate the relative importance of things like this.

Among **all the academic economists** I know and read, many think the use and allocation of resources is best done by markets but understand that markets are **shaped by government policy** and that there is **no such thing** as the **abstract “free” market**. I **literally can’t think** of a **single one** for whom the “tenets of neoclassicism shape their day-to-day work,” as Reed puts it in his article. As for the charge that economics is guilty of a “neglect of technology,” this mystifies me as an economist—among many—currently researching technological change.

Yes, the subject is mathematical. It is not possible to do applied statistical estimation without writing things down as equations. Our models are written with mathematical notation as a shorthand and to enforce logical consistency, just as historians use models—”the causes of the First World War”—but write them out with lots of words.

It is **both bizarre and frustrating** to **read over and over again** the **same absurd claims** about economics. The caricature **presumes** that practitioners **pass their careers** in the discipline **without ever being troubled** by **another thought** after their **first-year undergraduate course**. Critiques of this kind are like looking at an **introductory physics textbook** and condemning physics for **ignoring friction**.

**Growth is sustainable**—newest data.

**Pearce, 22**—environment and development correspondent for the Breakthrough Institute, writing regularly for Yale Environment 360 among others, citing Narasimha Rao, Associate Professor of Energy Systems, Yale School of the Environment (Fred, “Green Growth Won’t Kill the Planet,” Breakthrough Journal, No. 15, Winter 2022, dml)

Rao’s findings ought to have a **profound impact** on the divisive discourse on climate change, which continues to pit the attempts of developing countries to eliminate poverty by mimicking Western modes of development against many in the West who see this path as **ruinous** for the planet and ultimately **self-defeating** for the poor. They are both **wrong**. In truth, there **need be no incompatibility**. Ecomodernists are right: humanity can **have its cake** and **eat it**, too.

Rao, who grew up in a middle-class family in Mumbai but with poverty around him, is now at Yale University and the International Institute for Applied Systems Analysis (IIASA), an Austria-based intergovernmental think tank. He has spent years as what he calls an “interdisciplinary scholar,” addressing both technological advances and social equity and how they might interact.

He says that, until recently, little climate-change analysis, social research, or futurology has seriously addressed whether climate and living standards can be fixed together. Ecomodernists stepped in with strong belief in the power of transformative technology to both deliver abundant energy and break the umbilical cord linking prosperity to pollution. But theirs is a predominantly **supply-side** and **top-down** perspective, which can lead to a presumption that the benefits of prosperity and abundant energy will **trickle down** to deliver decent living standards for all.

Critics like Anna Walnycki and Tucker Landesman at the International Institute for Environment and Development say a top-down perspective risks increasing social and economic inequality unless “policies are shaped around the needs of ordinary citizens,” especially those in low-income urban communities. Moreover, as Rao points out, energy inequality around the world is even greater than income inequality. And by some measures, more income seems to only increase energy inequalities, according to analysis by researchers at the University of Leeds.

To grapple with such issues, Rao’s work, centered in the Decent Living Energy project, takes a **bottom-up** approach. It starts with an assessment of the **hard material needs** for eliminating poverty—particularly for the billion-plus people living in informal urban settlements without decent housing, sanitation, water, and other basic services—and does the work of separating out the energy needs for eradicating poverty from those to meet the demands of affluence.

In this way, Rao has added **real numbers** to the idea of a decent living, **upending** past global measures of poverty, which were removed from the real lives and material needs of the poor. The most widely used is based on the single metric of daily income per head. Once a dollar a day, the cutoff has now become $1.90 per day for extreme poverty, with a higher threshold of $5.50 per day used by the World Bank for upper-middle-income countries. Almost half the world’s population does not achieve this standard. But what you can buy with those dollars varies vastly round the world, as does what you need to purchase to achieve a decent standard of living. Other measures have looked to well-being outcomes, most influential among them being the UN’s Human Development Index, which is based on life expectancy, years of schooling, and income. But it does not set a threshold level, or measure what material requirements are needed to get to an “acceptable” (different from “good”) outcome.

Rao, with his colleague Jihoon Min, attempts to do better by identifying a shopping bag of material requirements, or “satisfiers,” that are as near as possible universal prerequisites for a decent modern life. They call these requirements “material conditions that people everywhere ought to have, no matter what their intentions or conception of a good life, or what other rights they may claim.”

Those material needs fit into 10 broad indicators of basic human well-being: nutrition, shelter, living conditions, clothing, health care, air quality, education, access to information and communication services, mobility, and freedom to gather and dissent. A person who achieves them does not necessarily have a life that a wealthy person in the West would recognize as comfortable. But they would have a life that could be called decent and dignified.

Many of these requirements derive from widely accepted benchmarks, but others go further. For instance, nutrition requires not just sufficient calories, but also vitamins and minerals and a refrigerator to store food safely. There’s also the need for a cooker that does not fill the home with smoke, part of the air-quality category.

Shelter and adequate living conditions require not just a roof over your head, but also sufficient floor space (depending on household size, typically 30 square meters per person), durable home construction, and sufficient heating and cooling equipment for “thermal comfort.” Also required is “sufficient clothing to achieve basic comfort” and access to a washing machine.

Health care and living conditions requirements include on-premises sanitation and water supplies (50 liters per head per day), plus access to adequate health care facilities and a minimum of one physician per 1,000 people.

The social well-being criteria include not just nine years of education, but also access to communication networks including one phone and one television or computer per household. These new needs, Rao and Min say, may not appear essential to life, but are “globally desired by an overwhelming majority of people,” so not to have them risks social disengagement and ostracism. The electronics need not be personally owned, they note, but access is vital.

The same holds for mobility, which they regard as necessary for social engagement and employment or selling wares. The decent living requirement is set at access to motorized transport, such as a bus or motorbike, sufficient for an average of around 25 kilometres per person per day.

Rao and his colleagues’ analysis of needs is often surprisingly granular. Current thinking holds that households of a similar income level around the world generally want the same appliances. His household surveys nuance that. While most people in most places do want a TV, cellphone, and refrigerator, his study with Kevin Ummel found washing machines are less universally desired, and ovens and tumble driers even less so. Race, culture, and religion are all factors. Patterns also differ depending on whether people live in urban areas and on the status of women; urbanity and greater equality both drive up demand for appliances connected with cooking and washing. People who consume a lot of milk products—such as Sikhs in India—want a refrigerator more than those who do not.

White people, Rao and Ummel note, are more fixated on white goods—that is, large electrical appliances. But they care less about motorbikes and some cooking equipment such as rice cookers, which are much more widespread in Asia.

It is impossible to say what proportion of the world’s population meets all Rao’s standards—or none. Some places far outstrip the basics. The average American has almost six times the “decent” level of floor space and consumes almost seven times as much water. Germans average four and 2.5 times those “decent” levels, respectively. But Rao’s estimates suggest that only two-thirds of people have attained half of them, with nutrition the most achieved and mobility the least. In fact, “the majority of the global population does not currently have decent levels of motorized transport,” coauthor Jarmo Kikstra of Imperial College London, has pointed out.

All this **confirms** findings from Rao and his colleagues’ analysis published in the September Environmental Research Letters that “more people are deprived of DLS [decent living standards] than are income-poor.” Worldwide, **more than three billion** people lack access to clean cooking options, space cooling, sanitation, and transport, and **more than two billion** lack cold storage, decent housing, and proper access to clean water.

In **sub-Saharan Africa**, **over 60 percent** of people do not have access to eight of the requirements for a decent standard of living, with deficits for cooling, sanitation, transport, water access, cold storage, housing, television, and clean cooking. In **South Asia**, **over half** the population lacks adequate sanitation, transport, cooling, clean cooking, water access, and cold storage.

Most standards are almost universally met in rich nations. Yet the data also show that a third of North Americans and 44 percent of Western Europeans miss out on transport needed for mobility, while in both regions about a tenth miss out on decent sanitation. This means that, around the world, in every corner of it, hundreds of millions of people need more, and no green transition that denies it to them could be considered sustainable or just.

The Cost of Decency

But can the gaps in access around the world be **filled**—and **without crashing the climate**?

To be sure, creating a world where everyone can have a decent living standard will require **new public infrastructure** and **more private energy use**. As Rao points out, much of the progress will only be achievable collectively—through public water supply and sanitation services, clinics, schools, public transit, cellphone networks, and so on. Much else will be best secured—and with lowest energy needs—collectively as well, with better public transport rather than an automobile in front of every house, for instance.

But the great takeaway is that **truly essential** needs are, as Rao says, mostly “**cheap** in terms of energy.” Doing some calculations based on the information in Rao and his coauthors’ Environmental Research Letters article, the infrastructure needed to meet decent living standards worldwide by 2040 will add **less than 4 percent** to current consumer energy demand. Half of that will be for improved housing, a quarter for public transit systems. Annual requirements to sustain those living standards would add a further **17 percent**, making a total increase in energy needs to meet decent living standards of the world of just around **20 percent**. That compares with an expected increase in energy demand, **without** ensuring decent living standards for all, of around **50 percent**.

Put another way, these authors say, “essential energy needs to meet everyone’s basic needs . . . could constitute a small share of projected energy growth, namely, around an order of magnitude lower than current US energy demand.” And their analysis, the authors point out, assumes “**only modest** efficiency improvements, rather than relying on an ideal, high-tech future.”

The energy needed, in other words, may be **even less** than the headline figures suggest. For the poorest billion or so on the planet, reductions in deprivation will often come with **reductions in energy use** and **environmental impact**. Marta Baltruszewicz and her coauthors at the University of Leeds have recently shown from studies in Nepal, Vietnam, and Zambia that the households with higher well-being indicators used more energy than households with lower well-being. Without access to electricity or gas, the researchers found, low well-being households burned more firewood and charcoal than their higher well-being neighbors, resulting in more pollution and deforestation. And lacking clean drinking water, they were forced to constantly boil dirty water to make it safe. Overall, the study found that “households achieving well-being have **60%-80% lower** energy footprint of residential fuel use” than the average in those countries.

The bottom line, according to Rao’s coauthor Alessio Mastrucci of IIASA, is that “we **do not have to limit** energy access to basic services. . . . even under **very ambitious** poverty eradication and climate mitigation scenarios, there is **quite a lot** of energy still available for affluence.”

Just how much, of course, matters a great deal for those of us in the rich world with energy-intensive lifestyles and a social conscience. But even before considering any energy technology transformation that can provide more power with fewer emissions, there is hopeful news.

The affluent still consume most of the planet’s resources, with the wealthiest tenth of the planet’s population consuming 20 times more energy than the poorest tenth. But there has been increasing discussion about whether some rich nations are reaching “**peak stuff**,” a **tipping point** beyond which material needs **no longer rise** with wealth—and may even **fall**. For example, Jesse Ausubel of Rockefeller University has long argued that Western societies in general are starting to **dematerialize**.

And the evidence is **growing**, as **studies** increasingly call into question the presumed ratchet linking wealth and energy demands. For example, Europeans consumed 18 percent fewer raw materials in 2020 than they did in 2008, according to the European Commission. The British government’s Office for National Statistics calculated that the personal materials footprint of the average Brit—in food, textiles, construction materials, metals, fossil fuels, and so on—fell from 24.2 metric tons in 2001 to 13.4 metric tons in 2020.

Some of this decoupling is due to **long-standing trends** in improved technological efficiency, combined with **more recent digital innovation**. A single smartphone replaces a computer, a compass, a newspaper, and an alarm clock—not to mention a radio, a camera, a magnifying glass, a flashlight, and a music player. One optical fiber can do the work of a thousand copper phone wires. Global digital camera sales have declined by 87 percent in the past decade, as cameras in phones take their place.

Both **public** and **private consumption patterns** are changing in other ways, too. In the public domain, the assembly of infrastructure tends to **peak** as economies rapidly industrialize, and then **falls**. (That is why China has, in recent years, consumed 20 times more cement than America, and around eight times more steel too.) Even US president Joe Biden’s trillion-dollar infrastructure plans may not reverse this, since those appear to have less to do with cement and steel structures than broadband connectivity and power grids.

And American consumers are increasingly spending their money on **experiences** rather than on **disposable material goods**, according to McKinsey & Company analysts. Their findings suggest that, whereas prior generations defined themselves through their possessions, we now define ourselves more through our experiences, both real and virtual. The new car in the driveway matters less than the vacation you take with it. We don’t eat more, but instead go to more and better restaurants. We don’t buy ever more cheap furniture; we buy quality. Other modern lifestyle choices may also **drive down material** and **energy requirements**: eating less meat, going to the gym, and meeting up remotely rather than in person, for instance. People were driving less even before the COVID-19 lockdown.

If such trends **continue**, and if energy becomes **less carbon-intensive**, it would not be a stretch to imagine a world that can achieve **decent living standards for all** with **few environmental tradeoffs**.

**Unchecked Noerr immunity sanctions dirty climate advocacy**

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

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

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

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

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

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

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

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

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

**Sham litigation—Alt ensures cooption by digital capitalists and worker exploitation. Aff and perm are necessary non-reformist reforms**

**Frase 13** (Peter, editorial board of Jacobin and the author of Four Futures: Life After Capitalism. “Property and Theft”, https://jacobinmag.com/2013/09/property-and-theft)

Both of these essays demonstrate the absurdities and injustices of a strengthening IP regime. Yet each, in a different way, shows that simply denouncing all **i**ntellectual **p**roperty is inadequate, as are the political battle lines that are often drawn today. On one side, we find pirates and free-culture advocates, insisting that “information wants to be free” and that any attempt to enclose the copying of patterns within legal restrictions is an affront and an inanity. This view unites a sort of Left-Right coalition that can encompass the libertarian economist David K. Levine and the amorphous rebellion of Europe’s Pirate parties. Arrayed against them are those who may acknowledge the corporate corruption of the patent and copyright systems, but who nevertheless hold up a reformed IP system as a bulwark against the depredations of a “sharing economy” that all too often amounts to a handful of Internet monopolists profiting from the uncompensated labor of creative workers. Jaron Lanier, author of the recent Who Owns the Future?, is one of the more strident proponents of this view.

We have here something a bit like the old “reform or revolution” dichotomy, which arrays the advocates of smashing the existing system against the timid meliorism of those who only want to make it more humane. But **the contrast fails here** just as it did in the larger drama of twentieth-century socialism, where revolution and reform both ultimately led back to capitalist restoration and neoliberal retrenchment. We need another path — one that **recognizes the necessity of reformist struggles within capitalist institutions**, while still attempting to move toward a break with the system and the creation of a fundamentally new kind of economy and society. André Gorz called this the “non-reformist reform”: a project of “reforms which advance toward a radical transformation of society” by making a “modification of the relations of power” which could “serve to **weaken capitalism and to shake its joints**.”

What would constitute a non-reformist reform of intellectual property? The revolutionary overthrow of all **i**ntellectual **p**roperty, even if it were possible, leaves unanswered the question of how to ensure that **those who create knowledge and culture are provided for**, and how to control the exploitation of the cultural commons by digital capitalists. The anarchist championing of online piracy **only allows for some resistance around the edges**, without posing a fundamental challenge to the system. And yet the idea of reforming IP into something better and more egalitarian, something that truly rewards all who participate in the work of creation, seems like another iteration of the naïve dream of a just and democratic capitalism.

### 2AC – 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.

**Noerr protects sham petitioning in Anti-dumping procedures**

Daniel **Fullerton 2013** -- Staff member, American University Business Law Review, Volume 2; J.D. Candidate, American University, Washington College of Law “Petitioning For Cash: How Domestic Industries Exploit Antidumping Procedures And Antitrust Exceptions To Force Their Foreign Competitors Into Lucrative Settlement Agreements”

\*AD=Anti-Dumping

2. **The Noerr-Pennington Doctrine Probably Stands in the Way of Antitrust Liability** Though post-order settlements of AD cases raise many antitrust concerns,163 **these settlements are likely protected from antitrust liability by** the **Noerr**-Pennington doctrine.164 Under this doctrine, a private party petitioning the government for some lawful action is generally exempted from antitrust scrutiny, even if the petition acts to restrain commerce.165 In AD cases, a petition for an administrative review is a lawful action, and domestic interested parties may lawfully pick which foreign firms to include in the review.166 Moreover, domestic interested parties’ withdrawal of a review petition within ninety days is also a lawful action.167 **Thus, petitioning for administrative reviews is lawful under AD law and likely enjoys Noerr**-Pennington **immunity**. Many courts strictly uphold Noerr-Pennington immunity, **even if the petitioning party was motivated by anticompetitive purposes** designed to restrain trade.168 [Footnote begins] 168. See Cho, supra note 5, at 361 (reasoning that courts' narrow interpretation of the Noerr-Pennington doctrine's sole exception would make that exception ineffective in AD cases); Associated Container Transp. Ltd. v. United States, 705 F.2d 53, 58-59 (2d Cir. 1983) (considering petitioning parties' subjective motivations to be irrelevant for Noerr-Pennington purposes).[Footnote ends] **Such a narrow application of the doctrine essentially allows domestic producers to use the administrative review process to extort foreign competitors without any threat of antitrust liability because the doctrine exempts the domestic producers’ lawful attempts to obtain government action from any antitrust liability.**169 However, domestic interested parties do not necessarily enjoy absolute protection from antitrust liability because of the Noerr-Pennington doctrine’s “sham” exception.170 Generally, courts invoke the sham exception in situations where parties use a governmental process itself, and not the outcome of that process, as an anticompetitive weapon.171 Because courts vary in their application of the Noerr-Pennington sham exception, it is not clear whether AD administrative review petitions filed in an attempt to compel private settlement agreements qualify as a sham for Noerr- Pennington purposes.172 Generally, to qualify as a sham, an administrative review petition must fulfill both elements of the two-prong test courts traditionally use to evaluate whether an action falls under the Noerr-Pennington sham exception.173 First, a court must determine whether the petition was objectively baseless.174 A petition for administrative review is considered objectively baseless if a court finds that an objective petitioner could not 168. See Cho, supra note 5, at 361 (reasoning that courts’ narrow interpretation of the Noerr-Pennington doctrine’s sole exception would make that exception ineffective in AD cases); Associated Container Transp. Ltd. v. United States, 705 F.2d 53, 58–59 (2d Cir. 1983) (considering petitioning parties’ subjective motivations to be irrelevant for Noerr-Pennington purposes). 169. See Prusa, supra note 83 (suggesting that Noerr-Pennington protection effectively provides domestic parties with a “right” to pursue or attain private settlement agreements). 170. See, e.g., Cho, supra note 5, at 361 (describing the sham exception as a limitation on the Noerr-Pennington immunity). 171. See, e.g., VIBO Corp., Inc. v. Conway, 669 F.3d 675, 684–85 (6th Cir. 2012); Knology, Inc. v. Insight Commc’n Co., 393 F.3d 656, 658–59 (6th Cir. 2004). Cf. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972) (“If the end result is unlawful, it matters not that the means used in violation may be lawful.”). 172. See Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 55 n.3 (1993) (observing that several courts of appeals demand that an alleged sham be legally unreasonable, other courts hold that successful litigation by definition cannot be a sham, and still other courts of appeals sometimes consider certain meritorious litigation to be a sham). 173. See id. at 60–61 (establishing the two-prong test). 174. Id. at 60. 2013 PETITIONING FOR CASH 381 reasonably expect the petition to be successful on its merits.175 Then, if a court somehow finds an administrative review petition to be objectively baseless, it could apply the second prong and assess the petitioners’ subjective motivations to use the administrative review to harm foreign competitors.176 **It would be difficult to show that an AD** administrative review **petition is objectively baseless** **because it is difficult to predict the outcome of an administrative review**; thus, it would be difficult to prove that a petitioner could not expect at least a reasonable chance of success.177 Though **the first prong makes it difficult for post-order settlement agreements to escape Noerr**-Pennington immunity, some courts show movement away from a strict application of the sham exception test by incorporating an abuse of process analysis in Noerr-Pennington decisions, potentially making it easier to overcome Noerr-Pennington immunity.178 Applying Justice Stevens’s reasoning in Professional Real Estate Investors, the sham exception’s first prong test of objective reasonableness might not be appropriate for determining whether the domestic parties should be subjected to antitrust liability because it is too difficult to effectively apply the first prong in complicated abuse of process situations.179 In Grip-Pak, Judge Posner similarly distinguished the applicability of Noerr-Pennington immunity in abuse of process situations, arguing that Noerr-Pennington immunity is applied too broadly in abuse of process cases.180 Though some question the two-prong sham exception test, courts are **yet to collectively** **move away** from this two-prong analysis **and its objective baselessness requirement**.181 **Thus, the sham exception would likely be ineffective in AD cases.**182

**Ag dumping causes extinction through collapse of US food production, developing economies and environment collapse**

**Murphy & Hansen-Kuhn 20** (Sophie, University of British Columbia and the Institute for Agriculture and Trade Policy, Vancouver, Canada and; Karen, 2Institute for Agriculture and Trade Policy, Washington, DC “The true costs of US agricultural dumping”, (2020). The true costs of US agricultural dumping. Renewable Agriculture and Food Systems 35, 376–390.)

Why does it matter?

Dumping matters for at least three reasons. First, dumping hurts US producers who sell their product into markets that are **controlled by just a handful of agricultural commodity trading corporations.** When farmers cannot get back their production costs from the market, they are forced to rely on other strategies to survive, whether it is off-farm employment, government subsidies or under-valuing their labor (Ray et al., Reference Ray, Daniel and Tiller2003; Rosset, Reference Rosset2006). As this paper documents, the prices US farmers get for their crops, on average, are in many years below their average cost of production. The price gap lessened, and even disappeared briefly, during the period of high and volatile commodity prices from 2007 to 2013. But prices in international markets are down again and in 2018 are the lowest they have been since 2002. Net farm income in the USA **is down by 50%** since 2013 (Schnepf, Reference Schnepf2017). The US Department of Agriculture Economic Research Service (ERS) projects that median farm income, estimated at −$940 in 2016, will decline to −$1316 in 2018, noting that, ‘In recent years, slightly more than half of farm households have had negative farm income each year’ (Economic Research Service, 2018).Footnote2 The economic consequences of a system that reinforces dumping are felt by US commodity growers and their families, their hired workers, and by the rural communities they live in; communities that are deprived of spending that would otherwise support vibrant economic life. It is this acute **socio-economic crisis in rural areas** that provides one of the links among the members of La Via Campesina, an international federation of farmer and peasant organizations that has included the US National Family Farm Coalition since the mid-1990s. These farmer and peasant organizations have found common cause in a political platform that links every continent; while economists may describe them as competitors, the farmers are inclined to find common ground in selling into oligopsonistic markets wherever they may be located.

Secondly, it undermines the economic viability of farmers in other countries, whether the farmers are growing crops for their domestic markets in importing countries or selling their crops to traders for export in competition with US production (Ray et al., Reference Ray, Daniel and Tiller2003; Wise, Reference Wise2004; Morrison and Mermigkas, Reference Morrison and Mermigkas2014). This is especially a problem for developing countries that rely on agriculture for **economic stability** because the sector makes up half or more of their employment and the largest share of their GDP—such countries are typically among the world's poorest. Even countries that do not import US commodities suffer because US exports are large enough to affect world prices, which affect all countries who trade some share of their agricultural production.

Thirdly, dumping undermines the realization of environmental objectives. Agriculture **is putting unsustainable stress on a number of planetary boundaries**, including **genetic diversity and nitrogen** (Rockström et al., Reference Rockström, Steffen, Noone, Persson, Chapin and Lambin2009; Campbell et al., Reference Campbell, Beare, Bennett, Hall-Spencer, Ingram, Jaramillo, Ortiz, Ramankutty, Sayer and Shindell2017). Care of the natural resource base, including the imperative to protect soil health, water quality and the ecological diversity of farmland, are all squeezed when **production is under-valued** (Rayner and Lang, Reference Rayner and Lang2013). Several factors reinforce a vicious circle, including commodity markets that externalize environmental costs, farmers’ attempts to make up on volume what they have lost on value, and the tendency of low prices to drive increasing concentration, hurting new entrants and diminishing competition. The result harms planetary systems and the local ecosystems across the planet that are linked by international trade and investment (High Level Panel of Experts on Food Security and Nutrition, 2017a).

**2AC – Multi-plank CP**

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

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

IV. Analysis

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

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

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

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

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

**2AC – FTC DA**

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

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

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

**Other entities enforce the aff**

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

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

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

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

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

**Plan is key to FTC effectiveness**

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

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

**Existing standards waste time and resources**

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

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

**2ac – EPA Court Ptx DA**

**They’ll overturn now**

Pamela **King 11/3**—Reporter at Greenwire. ("Where Supreme Court justices stand on EPA, climate," 11/3/2021, from E&E News, https://www-eenews-net.ezp-prod1.hul.harvard.edu/articles/where-supreme-court-justices-stand-on-epa-climate/)

While the justices’ rulings are notoriously difficult to predict, the court is now dominated by six conservative members — many of whom have **already voiced support** for reining in EPA’s regulatory authority under the Clean Air Act.

At least one justice has even **cast doubt on climate science**.

**CAA Fails**

**Richardson 20** (Nathan Richardson University of South Carolina, “The Rise and Fall of Clean Air Act Climate Policy”, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1114&context=mjeal)

B. Structural Limitations

It is possible that the differences between Trump and Obama matter less than what they have in common: the constraints of climate politics in America, and of the **C**lean **A**ir **A**ct itself.

1. Political Constraints Perhaps it is not Trump that is different, but the climate issue itself. The traditional one-way-ratchet pattern of Clean Air Act regulation may have persisted **because air quality issues are just not that politically salient**. Environmental and industry groups care a great deal, and exert some influence, but they don’t get everything they want. Green groups don’t get all the regulatory stringency they want under Democratic administrations, and industry groups are rarely if ever able to push Republican administrations to roll back air quality regulations.524 Air quality is not a high-profile political issue, at least so long as policy operates within certain boundaries—the air doesn’t get dirty enough nor do regulations get costly enough.525 The result is the traditional one-way ratchet. Climate’s political salience means it does not fit this technocratic/interest group model.

The reverse could be true. Rolling back regulations on traditional pollutants could be difficult or impossible because it invites opponents to claim that those rolling back the regulations are in favor of dirty air, smog, and the palpable health effects that come with them—problems the American public takes seriously and views as responsibilities of government.526 Climate, in contrast, is a relatively new danger in the public consciousness, is politically contested, and has effects that are less direct, less observable, and which may not be felt for decades. Climate regulatory rollbacks are therefore less politically costly. In either case, climate’s high profile and politicized nature distinguish it from most other areas of environmental regulation. It is not just industry but also large segments of the Republican base that oppose strong climate regulation.527 This raises the political cost to a Democratic administration of proposing and implementing climate rules. The Obama administration was able to finalize significant rulemakings, but only after delay over political fears, and at political cost: those regulations became a campaign issue in the form of “war on coal” rhetoric.528 This added political cost to climate regulations may help explain why the Clean Power Plan was not more ambitious.

Clean Air Act regulation **is not as separate from partisan politics** as it may have previously appeared. When an air pollution issue is politically salient, regulatory actions (new rules or repeal of old ones) will follow. At some level this should not be surprising. The Clean Air Act and its 1990 Amendments would never have passed Congress had air quality issues not become sufficiently politically significant.529 No major climate legislation has passed in Congress, but that does not mean the issue is not politically relevant; in fact the opposite—the polarization of the issue appears to be a key factor blocking legislation. That same polarization also appears to have weakened climate regulation and made its subsequent repeal more likely.

2. A Poor Fit for Climate?

Critics of climate regulation under the Clean Air Act have long alleged that the statute is ill-suited for regulating greenhouse gases, most notably the Bush EPA in Massachusetts itself.530 The statute does not mention climate change. It primarily targets domestic emissions, while climate is a global problem. Critics suggest that using the statute to regulate climate is anti-democratic in that it circumvents a public debate on climate policy that would occur as a predicate to new climate legislation.531

There are structural problems too. The most robust sections of the statute

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for controlling stationary-source emissions, the Section 110 NAAQS program and Section 112 for hazardous air pollutants, are, most observers believe, a poor fit for climate.532 Some of the parts of the statute most suited to greenhouse gases **are skeletal and rarely-used gap-fillers**. 533 The tools in the statute most useful for limiting greenhouse gas emissions (vehicle standards in Section 202 and stationary source standards in Section 111) must be applied to classes of emissions sources separately; EPA must issue rulemakings for motor vehicles, power plants, refineries, etc.534 **This increases administrative expense and complexity** relative to a single economy-wide policy and makes emissions trading between sectors difficult or impossible. Some emitting sectors, like agriculture, are **probably outside of the reach of the statute entirely**.535 Regulation of greenhouse gases under these provisions also has other limitations, ranging from the **frustrating to the possibly fatal**.536

**OR, EPA could still target co-pollutants**

Lexi **Smith 11/7**—BA from Harvard in nvironmental science and public policy. ("Supreme Court to weigh EPA authority to regulate greenhouse pollutants » Yale Climate Connections," 11/7/2021, from Yale Climate Connections, https://yaleclimateconnections.org/2021/11/supreme-court-to-weigh-epa-authority-to-regulate-greenhouse-pollutants/)

Finally, **even if EPA** – **and** therefore the **executive branch agencies as a whole** – **were to lose authority to regulate** **g**reen**h**ouse **g**ase**s** **directly under the** **C**lean **A**ir **A**ct**, it could still indirectly reduce greenhouse gas** **emissions by targeting co-pollutants** **that fall more squarely under** **C**lean **A**ir **A**ct **authority.** For instance, **greenhouse gas emissions are** often **accompanied** **by particulate matter, nitrogen oxides, sulfur oxides, volatile** organic **compounds, and air toxics. By regulating those co-pollutants, EPA can** **bring down** **greenhouse gas emissions without exercising any direct regulatory authority** over them. Of course, if the Court fully embraces the nondelegation doctrine, EPA’s authority to regulate those other pollutants could also be jeopardized. But, as mentioned above, some Justices may stop short of such a decision in light of concerns about the Court’s legacy and risks of a backlash.

**2AC – Pharma DA**

**Objectively basis is bad**

**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

The third objective test archetype, the “objectively unreasonable” archetype, defines the “sham” exception in the broadest terms. Here, **a claim is deemed a sham if 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. This test is broader than the “objectively baseless” test and that is by design. The principal evil of the “objectively baseless” test is that it allows the claimant to pursue claims **that have some non-zero chance of securing a technical win** on the subject of liability, **even though no reasonable prudent claimant would file such a claim** if he / she were genuinely seeking redress and evaluating the decision to sue on an objective cost-benefit basis. For example, under the “objectively baseless” formulation, even if the claimant is a patent holder, bearing monopoly power, who has been advised by counsel that his patent is ninety percent (90%) likely to be found invalid, and also ninety percent (90%) likely to be found not infringed by the Defendant’s product, so that the overall likelihood of success on the subject of liability is a mere one percent (1%),42 **the claimant may file suit, fully expecting to lose**, **knowing that the costs of the litigation will serve as a significant “street tax”** on the profits of its less-financially-capable startup competitor.

**The bar for retaliation post-aff is still high**

Saami **Zain** **14**. J.D., LLM (Antitrust); Assistant Attorney General, New York State Attorney General’s Office, Antitrust Bureau. 8-21-14. “Antitrust Liability for Maintaining Baseless Litigation” <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2783&context=lawreview>

Antitrust claims for maintaining baseless litigation are not likely to become common—even in pharmaceutical cases. **The difficulty of meeting various, formidable substantive and procedural requirements for antitrust liability will likely limit the viability of pleading and proving such claims.** **Nevertheless, even if not-often used, it could be a “big stick” to assist in combating anticompetitive conduct and deterring frivolous litigation.**

**Not more ambiguous than current tests and the squo thumps**

**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

This test is also, arguably, the most ambiguous of the objective test archetypes. **However, there are numerous similarly framed tests** **currently in operation throughout our jurisprudence**. Consider, for example, many feeshifting statutes. These laws typically provide for the imposition of attorney fees upon the non – prevailing party.43 Note that, in such provisions, the feeshifting is usually not occurring because the non – prevailing party asserted a baseless or frivolous claim. Rather, many of these statutes (and / or the case law interpreting them) impose fee-shifting because the non – prevailing party asserted a position that was viewed as merely unreasonable or exceptional (sometimes construed as merely “standing out”) in some respect.44 **Bottom line: While the third objective test archetype is arguably more ambiguous, it is no more ambiguous than the fee-shifting statutes in widespread use today**. In those contexts, claimants were required to pay attorney fees even though their claims had “some chance” of winning (i.e., their claims were not “objectively baseless”). **The reason: their position was unreasonable.** **Had a fee-shifting paradigm similar to the “objectively baseless” archetype been in place, no fee-shifting would have occurred**. Because a test more similar to the “objectively unreasonable” archetype was in place, claimants adopting unreasonable positions were sanctioned, discouraging such activity in the future. Thus, it is now possible to construct a tabular summary of some of the comparative advantages and disadvantages of the various objective test archetypes. See Exhibit 2. [Table Omitted] Why discuss and compare these three objective test archetypes? Because a superficial reading of PRE would suggest that the Court in that case did indeed adopt an “objectively baseless” – type formulation as the objective test for the “sham” exception. And this presents two problems (as discussed in the balance of this paper). **The first problem is that the PRE “Objectively Baseless” test is ambiguously framed. And the ambiguity is substantial.** For example, it appears highly likely that the Court intended to adopt the “objectively baseless” archetype. (Note that the Court even denominated its test as the “objectively baseless” test.) However, the test is so ambiguously framed that it must be acknowledged that it is possible (however unlikely) that the actual intended substantive meaning of that test is closer to the “objectively unreasonable” test. **And ambiguity in legal tests is always problematic.** The second problem is that, if indeed the PRE objective test is a variant of the “objectively baseless” arc9etype (as seems likely), **the unfortunate fact is that from a policy standpoint that test is too narrow.** The Court should embrace the next opportunity to either clarify or correct the PRE objective test for the identification of “sham” claims, so that it clearly comports with the more satisfactory “objectively unreasonable” formulation for policy reasons

**Turn – sham litigation harms legitimate suits**

**Klein 07.** Christopher C. Klein. Associate Professor, Economics and Finance Department, Middle Tennessee State University. “"Anticompetitive Litigation and Antitrust Liability"” <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.568.758&rep=rep1&type=pdf>

IV. Conclusion When suits may be legitimate or sham and defendants can countersue for damages from sham suits, the resulting equilibria are of three basic types. If countersuits have no deterrent value, defendants either always or never countersue. If suits can be deterred, defendants countersue at least part of the time and either some or all sham suits are deterred, or all sham suits and at least some legitimate suits are deterred. Pre-trial settlements do not occur. Furthermore, broader definitions of illegal litigation tend to reduce the total frequency of litigation by increasing the deterrent effects of countersuits. **These broader definitions may also produce a chilling effect on legitimate litigation.** The English rule for the allocation of court costs, however, neutralizes this effect on legitimate litigation. Thus, **broader standards for defining illegal suits in conjunction with the English rule** **for allocating court costs** **may minimize** both **the frequency of illegal suits** **and the probability of countersuit, without affecting the frequency of legitimate suits**. Unfortunately, the Supreme Court has chosen to avoid a chilling effect on legitimate suits by enforcing “baselessness” as a requirement for suits to face countersuit liability. **This also minimizes the desirable chilling effect on suits motivated by collateral anticompetitive,** abusive, or malicious **gains**. **The likely result is an unnecessary maximization of litigation of these types**. The analysis conducted here and the frequency of citations to sham litigation decisions are both consistent with this outcome. Nevertheless, the “baselessness” requirement only applies to cases involving a single allegedly sham proceeding, due to the limited circumstances of the case before the Court. The subsequent attention to multiple suits or “pattern litigation” in the legal literature stems from the limited scope of the Court’s decision. Moreover, the shift in the legal literature toward the effect of fraud and misrepresentation on sham litigation is illuminated. If one seeks to successfully achieve an anticompetitive goal by bringing a suit that has no chance of winning on its true merits, then fraudulent or misrepresented evidence may be the only means to sustain such a suit. On the other hand, defendants seeking to countersue may raise the fraud issue to justify the necessary claim that the plaintiff’s suit is baseless. If countersuits focused on the economics of the initial suit, such claims would be less likely.

## 1AR

**1AR – Innovation**

**Expert consensus agrees they’re existential**

**Sandberg ’18** - Ph.D. in computational neuroscience from Stockholm University, and is currently a James Martin Research Fellow at the Future of Humanity Institute at Oxford University

Anders Sandberg, “Human Extinction from Natural Hazard Events,” *Oxford Research Encyclopedia of Natural Hazard Science*, February 26, 2018, <https://doi.org/10.1093/acrefore/9780199389407.013.293>.

Impacts

Earth is subject to impacts of Near Earth Objects (NEOs) and long-periodic comets. While the possibility of impacts causing disasters was suggested early by Halley, Laplace, and others, the serious possibility of global risk was first convincingly brought up in 1980 when Luis Alvarez suggested a link between an asteroid impact and the Cretaceous–Tertiary mass extinction event (Alvarez et al., 1980). Since then much research has tried to establish a causal role of impacts in past mass extinctions. While conclusive proofs have not yet been found, **there is consensus that a large impact could cause a mass extinction and hence human extinction.**

The effects of impacts depend to a large degree on impactor mass (although velocity and impact site can have relevant effects [Walkden & Parker, 2008]). For smaller (<1.4 km diameter) impactors the effects are local or transmitted through tsunamis. Beyond this size the **main hazard is global cooling** due to stratospheric ejecta and soot from wildfires, as well as harm the ozone layer through nitrous oxides. Ejecta from larger impactors may cause **globally distributed fires** and darken the sky enough to **prevent photosynthesis for months**, and injections of sulphate aerosols and water vapor into the stratosphere would change the climate over years (Toon et al., 1997; Pierazzo & Artemieva, 2012; Brugger, Feulner & Petri, 2017). At this scale infrastructure and agricultural collapse is to be expected (Chapman, 2003). Human mortality has been modeled as scaling linearly from 0% at 1.6 km to 100% for 10 km impactors (Stokes et al., 2003), although this is at best an educated guess. **The most extreme impacts** (440 km and upward) **would sterilize the biosphere** (Sleep et al., 1989); such events may have occurred in the early solar system but today only a handful of such bodies remain and are all in stable orbits.

The population of potential impactors has a roughly power-law size distribution (Malamud, 2004), with globally risky asteroids impacting once every few million years and multi-megaton locally devastating impacts such as the 1908 Tunguska explosion every 1,000 years (Brown et al., 2002; Harris & D’Abramo, 2015). At present the NASA Space Guard has mapped an estimated 90% of 1 km or larger NEOs, significantly reducing the remaining risk for the next century. The handful of known 10+ km NEOs are in safe orbits. All remaining risk is from undiscovered large NEOs. The residual human risk is dominated by tsunamis rather than global disaster or extinction (Harris, 2008; NRC, 2010). However, “new” long-periodic comets add a badly characterized risk that may be on the order of one 2+ km impactor per 5 to 10 million years. This is based on estimates from observed comet fluxes, correcting for observational incompleteness, rough models of comet size distributions, and the possibility of brief (2–3 Myr) comet showers due to gravitational interactions with passing stars (Chapman, 2003; Weissman, 2006).

**1ar – States CP**

**Lacking genetic diversity in industrial crops causes extinction**

Carmen G**. Gonzalez 11**, Professor of Law at Seattle University School of Law and Former Visiting Professor at the Hopkins-Nanjing Center and U.S. Supreme Court Fellow, CLIMATE CHANGE, FOOD SECURITY, AND AGROBIODIVERSITY: TOWARD A JUST, RESILIENT, AND SUSTAINABLE FOOD SYSTEM, Fordham Environmental Law Review, Vol. 22, p. 493-500

Over the last fifty years, much of the world's agriculture has transitioned into industrial agriculture, which requires greater inputs of water, synthetic pesticides and fertilizers, and fossil fuel-based energy than traditional peasant agriculture. 8 This model of agricultural production has triggered a wide range of environmental problems, including **deforestation**, increased reliance on dwindling stocks of **fossil fuels**, **soil degradation**, **agrochemical contamination** of water supplies, **depletion of aquifers**, and the release of **greenhouse gases**.9 The impact on **genetic diversity**, however, has been particularly **devastating**.10

[TO FOOTNOTE]

10. See FOWLER & MOONEY, supra note 2, at ix (describing the loss of **genetic diversity in agriculture** as a "devastating **time bomb** .... **leading us to** a rendezvous with **extinction**").

[END FOOTNOTE]

According to the United Nations Food and Agriculture Organization, 75% of the world's food crop diversity was lost in the twentieth century as farmers abandoned local varieties in favor of genetically uniform high-yielding crops." Although thousands of crops have been cultivated since the dawn of agriculture,12 twelve crops currently supply 80% of the world's plant-based dietary energy.' 3 Just four crops - rice, wheat, potato, and maize - supply nearly 60% of plant-derived calories and protein.14 In addition to relying on a small number of crops, the world's food supply also relies on an alarmingly narrow genetic base.' 5 Genetically **uniform**, high-yielding varieties have supplanted traditional varieties for 70% of the world's maize;16 50% of the wheat in Asia, Africa, and Latin America;' 7 and 75% of Asian rice.' 8 While Indian farmers cultivated 30,000 wild varieties of rice in 1950, only fifty varieties are projected to remain by 2015.19

The **dangers** posed by the **genetic uniformity** of the world's food crops can best be illustrated by the **Irish potato famine** of the 1840s. 20 Native to the Andes, the potato was introduced into Spain in 1570 and into England and Ireland in approximately 1590.21 For over two centuries, all of the potatoes cultivated in Europe descended from these two introductions. 22 The Irish potato famine was caused by a fungus known as phytophthora infestans.23 Due to the genetic uniformity of the Irish potato crop, **a single infestation** was sufficient to produce **widespread devastation**.24 The Irish potato famine lasted for five years, and resulted in the death of as many as 2,000,000 people and the migration to the United States of a comparable number.25 Eventually, potato varieties resistant to phytophthora infestans were discovered among the thousands of distinct potato varieties in the Andes and in Mexico, thus enabling potato cultivation to recover in Ireland.26 If some of these resistant potato varieties had originally been planted in Ireland along with the more vulnerable varieties, then the Irish potato famine might have been averted.27

The Irish potato famine is a tragic example of the vulnerability of genetically uniform crops to pests and disease. Unable to rely on their own natural defenses, **genetically uniform crops** typically **require** **significant agrochemical inputs** to survive.28 However, pesticides **kill beneficial organisms** as well as target pests, and typically lead to the **resurgence** of pests, **outbreaks** of new pests, and **pesticide resistance.**29 In contrast, genetically diverse crops are more resilient than genetically uniform monocultures because some varieties are able to resist **pests**, **disease**, and adverse **weather conditions** to which other varieties might succumb.30 Indeed, cultivating different crops and different crop varieties has historically served as an insurance policy for farmers - a means of protecting their livelihoods in the face of climate variations, pathogen infestations, price fluctuations, and socio-political disruptions.3 1

**Antitrust is key—dumping is driven by market power**

**Murphy & Hansen-Kuhn 20** (Sophie, University of British Columbia and the Institute for Agriculture and Trade Policy, Vancouver, Canada and; Karen, 2Institute for Agriculture and Trade Policy, Washington, DC “The true costs of US agricultural dumping”, (2020). The true costs of US agricultural dumping. Renewable Agriculture and Food Systems 35, 376–390.) \*This card says 3 main factors: market power, subsidies, and government insurance. BUT this card also says that subsidies and insurance are “patch” that keeps system going, but price distortion bc market power is the root of the issue.

There are three main factors behind dumping. One is the level of market power enjoyed by the companies that provide inputs to farmers, buy commodities and process those commodities into food, animal feed and industrial products. Those actors as a broad group are often referred to as agribusiness. In this paper, we focus primarily on the international commodity trading firms that buy grain from farmers and sell it on to other agents around the world, whether processed or still in raw commodity form. Four firms dominate this trade, all of them vertically integrated along the grain value chains: Archer Daniels Midland, Bunge, Cargill and Louis Dreyfus. These four firms dominate US domestic agricultural commodity supply chains, and the international grain trade (Hendrickson and Heffernan, Reference Hendrickson and Heffernan2007; Hendrickson et al., Reference Hendrickson, Wilkinson, Heffernan and Gronski2008; Murphy et al., Reference Murphy, Burch and Clapp2012). They are estimated to control 75–90% of grain trade globally; in many local markets, just one or two firms are present (Clapp, Reference Clapp2014).

Despite this situation, the US Government has failed to limit or reduce the oligopolistic market power of commodity traders (Howard, Reference Howard2016). Concentrated market power in agriculture is a problem that has prompted Congressional hearings and nation-wide listening tours (see the ‘Report of the USDA National Commission on Small Farms: A Time to Act’ from 1997, or the reports from Senate HearingsFootnote3). It is an old problem—one that in the past has prompted legislative and regulatory action. But successive Farm Bills have come and gone leaving the problem unaddressed, while legislation in other areas, such as the 2000 deregulation of financial services through the elimination of the Glass–Steagall Act, have further strengthened grain traders’ economic position (Murphy et al., Reference Murphy, Burch and Clapp2012; Clapp, Reference Clapp2014). Grain traders are heavily involved in commodity processing. They are vertically integrated in the market. This means that the costs at different stages of the commodity value chain remain internal to the firm's operation, including the price of corn purchased on the commodity exchange, the price of the processed products made from that corn at the crushing plant, and the cost of the grain provided to a feed lot operator (Hendrickson and Heffernan, Reference Hendrickson and Heffernan2007; Murphy, Reference Murphy2008a). The external price discovery mechanisms that markets rely upon for efficiency are missing. Vertically integrated companies are able to capture a disproportionate share of the benefits of cheap grain (Wise, Reference Wise2005; Wise and Rakocy, Reference Wise and Rakocy2010).

In effect, agribusinesses that buy and process agricultural commodities have the market power to push prices below the level that would provide a reasonable profit to producers and to appropriate value at the stages of the supply chain under their control. The persistent gap between production costs and the price farmers receive is evidence the market is not correcting. The government payments make it possible for farmers to continue—they muffle the price signal—but they **fail to stop dumping**. As the authors see it, and as IATP has argued historically, price distortions are built into the earliest point of commodity production, with insurance and other government subsidies serving as a patch that (sort of) keeps the system going.

**1AR – Multi-plank CP**

**Unfair patent use standard iss too vague and links to the net benefit**

**McFeely 8** (J.D. candidate, Sandra Day O'Connor College of Law, Arizona State University, 2008, An Argument for Restricting the Patent Rights of Those Who Misuse the U.S. Patent System to Earn Money Through Litigation, 40 Ariz. St. L.J. 289, y2k)

C. Challenges to the Implementation

While pursuing an expanded doctrine of patent misuse may help solve the problem of the patent troll in its quest for profits through litigation, such a scheme is not without its own set of potential problems. Small inventors with limited resources may be disadvantaged by such a scheme when up against larger competitors with greater access to capital. At the same time, businesses in **general** may face more **uncertainty** with an expanded doctrine of **patent misuse** that may in turn lead to **more**, rather than less, **litigation**. In addition, there is an argument that the suggested expansion of the doctrine of **patent misuse** could reduce an inventor's **incentive** to **disclose** new **inventions**, thereby leading to **a net decrease in innovation** and **concomitant harm** to society. Finally, it would be naive to ignore the fact that implementing the proposed scheme may itself incentivize other **unintended undesirable behaviors** that may be just as troublesome as those currently engaged in by the **patent troll**. These potential drawbacks are discussed in the paragraphs that follow.

**Civil Law has repeatedly been struck down because it’s FIRST AMENDMENT – that limits fed gov power**

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

6.3 Constitutional Limits on Regulating Patent Assertions **Under current law, opponents of the TROL Act may be correct that the bill violates the First Amendment**. The Federal Circuit has held that **patent holders are immune from liability** based on their enforcement actions **unless** the patent holder’s allegations of **infringement were objectively baseless** and the patent holder knew those allegations were objectively baseless. This broad immunity rule, however, misinterprets the relevant constitutional provisions and wrongly vitiates courts’ long-standing power to condemn acts of patent enforcement that are undertaken, simply, in bad faith. 6.3.1 Judicially Created Immunity for Patent Holders **For decades**, **persons** accused of patent infringement **have tried to assert civil claims** against overzealous patent holders. Those claims are sometimes grounded in state law (for example, claims for unfair competition or for tortious interference with business relations) and other times grounded in federal law (for example, claims for unfair competition under the Lanham Act or for violations of the civil RICO statute). **The Federal Circuit, however, has held that patent holders are mostly immune from civil liability for their enforcement behavior**. According to the Federal Circuit, to strip a patent holder of immunity, the plaintiff must prove not only the elements of its claim, it must also prove, by clear and convincing evidence, (1) that the patent holder’s infringement allegations were “objectively baseless,” meaning that no reasonable litigant could have expected to succeed, and (2) that the patent holder made its infringement allegations with knowledge of their inaccuracy or with reckless disregard for their accuracy (Globetrotter 2004, 1377). Courts and commentators sometimes call the immunity enjoyed by patent holders a matter of “preemption” because it is most frequently invoked when an alleged infringer relies on state law, such as the law of torts or unfair competition, to challenge a patent holder’s behavior in enforcing a federal patent (see, e.g., Hunter Douglas 1998, 1338; Johnson 2014, 2027). The term “preemption” suggests that the source of the immunity doctrine is the Constitution’s Supremacy Clause, which limits only the power of state governments, not the federal government. In more recent cases, however, **the Federal Circuit has made clear that its immunity doctrine stems not from the Supremacy Clause alone,** **but also from the First Amendment,** **which does limit the power of the federal government**. In Globetrotter, for instance, the court wrote: “Our decision to permit state-law tort liability for only objectively baseless allegations of infringement rests on both federal preemption and the First Amendment” (Globetrotter 2004, 1377). The Federal Circuit’s two-element test for stripping patent holders of immunity is drawn from U.S. Supreme Court decisions on the Noerr-Pennington doctrine of antitrust law. That doctrine protects the First Amendment right to petition the government by immunizing defendants from antitrust liability based their pursuit of litigation unless the litigation was a “sham” (Noerr 1961; Pennington 1965). To establish that litigation was a sham, the plaintiff must show that the defendant’s lawsuit was both objectively baseless and filed with the subjective intent to impair competition (Professional Real Estate Investors 1993, 60–61). **The Federal Circuit has explicitly cited the Supreme Court’s test for establishing sham litigation as the basis of its test for stripping a patent holder of immunity from civil liability for patent enforcement activities** (Globetrotter 2004, 1376).

**Courts are afraid to strike the down the patents---couching in terms of antitrust is key**

**Rose 14** (COLLIN A. ROSE, Managing Editor, COLUM. J. L. & SOC. PROBS., 2014-15. J.D. Candidate 2015, Columbia Law School. A Match Made for Court: Patent Assertion Entities and the Federal Trade Commission, 48 Colum. J.L. & Soc. Probs. 95, y2k)

1. Limits on Judicial Actors

For **judicial actions**, recent cases demonstrate **the limits** courts face in **affecting change** to the **patent system** and, by extension, the **business model of PAEs**. The case that most directly targets PAEs, eBay, 179 is almost eight years old, and PAE activity has only increased in its wake. 180 The rule that eBay instituted has been partially circumvented by those PAEs turning to the ITC to recreate the problem of patent holdup. 181 Furthermore, both KSR Technology and Bilski demonstrate that the Court has identified [\*125] aspects of the patent system it finds intolerable--for example, a rigid TSM test or patenting a commodity-hedging process 182--but that it has also struggled to delineate the future of those limits. In both cases, the Court left significant guesswork for **lower courts** to **interpret** its holdings. 183 Moreover, i4i Limited Partnership emphasizes the Court's continued belief in **the strictest presumption of validity for patents**, 184 even when it comes at the **expense** of those targeted by **patent infringement** suits. 185 All four of these cases highlight the **Court's difficult position** in adjudicating **patent cases** as it walks the line of **staying true** to the principles of the **patent system** while simultaneously adapting to modern needs. **Most disturbingly**, these episodes cast doubt that courts will soon provide **an effective remedy** to the **systematic patent issues** that have allowed PAEs to **thrive**.

**The courts are only comfortable with antitrust in patents**

**Kroll 16** (Kyle R. Kroll, J.D. Candidate 2016, University of Minnesota Law School, Anticompetitive Until Proven Innocent: An Antitrust Proposal To Embargo Covert Patent Privateering Against Small Businesses, 100 Minn. L. Rev. 2167, y2k)

**A rebuttable presumption** is not an **uncommon mechanism** in **antitrust** law. 294 Therefore, it is **more likely** that **courts** or legislative bodies would be **comfortable** in employing such a tool. Federal courts have **adopted a rebuttable presumption** in at least one instance involving **patent litigation already**. 295 Given the **precedents** already set by the federal courts and the fact that this solution would likely **be most effective at deterring patent privateering**, it should be adopted.

### 1AR – FTC DA

**Existing standards waste time and resources**

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

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

**1AR – Pharma DA**

**The “objectively basis” standard is too high**

Karen **Roche 2013**. \* J.D. Candidate, May 2013, Loyola Law School Los Angeles. 2-8-2013. “Deference or Destruction? Reining in the Noerr-Pennington and State Action Doctrines” <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2809&context=llr>

Is the Sham Exception Itself a Sham? The Court could have used the sham exception as a tool to narrow the reach of Noerr immunity.178 However, the exception has grown increasingly confusing and has been narrowed to the point where **it is almost impossible to claim that something is a sham**.179 As such, **it is ineffective as a limit to Noerr**. 180 **The result** of such a narrow exception **is the immunization of too many petitions** **that**, whether or not successful, **give petitioners room to overcharge consumers and eliminate competitors**. 181 Petitioners are able to use the petitioning process to raise costs for their competitors or to delay the entry of competitors into the market. **Even if the petition is eventually unsuccessful,** **the effect of the petition itself may eliminate competition** **and allow the petitioner to raise prices** **without competing products or services to bring those prices down**.182 a. The PRE test raises the bar too high and fails to protect the consumer While the language of the PRE test may seem straightforward,183 it is unclear how the test should be applied in practice. Much of this confusion was caused by the language Justice **Thomas** used in PRE. 184 He **did not** clearly **explain what “objectively baseless” meant**, but instead defined an objectively baseless lawsuit as one in which “no reasonable litigant could realistically expect success on the merits”; one that lacked probable cause, as in the tort of malicious prosecution; and one that was not warranted by existing law or based on a good faith argument for the modification of the law, as in Federal Rule of Civil Procedure 11 (“Rule 11”).185 Justice Thomas borrowed the language of Rule 11 and the requirements for malicious prosecution to define objectively baseless, but, as Justice Souter pointed out in his concurrence, the Rule 11 test and the requirements for malicious prosecution are not the same.186 **Thus, what it means for a petition to be objectively baseless is unclear at best**. As one commentator pointed out, “Many cases may be sufficiently weak that a reasonable litigant could not realistically expect success and yet not be so devoid of merit as to lack probable cause.” 187 Moreover, while most people read PRE as a narrowing of the Court’s earlier application of the sham exception, the Ninth Circuit views the PRE and California Motor Transport tests as inconsistent and attempts to “reconcile these cases by reading them as applying to different situations.” 188 The Ninth Circuit applies the two-part PRE analysis to cases in which a single action may be sham petitioning but applies California Motor Transport to cases where a whole series of legal proceedings may constitute sham petitioning.189 In the latter situation, the court does not look at whether any of the proceedings had merit but instead looks at whether collectively they are brought for the purpose of harming or harassing a market rival.190 The lack of clarity surrounding the PRE test makes it much more difficult for those harmed by petitions to claim an antitrust violation since it is unclear what will be enough to prove a sham. **Additionally**, the test that Justice **Thomas** articulated, **which equates objectively baseless petitions with a lack of probable cause, is far too broad**.191 The PRE Court said that a winning lawsuit precludes a finding that the suit is objectively baseless.192 Further, the court must not assume that a losing lawsuit was unreasonable or without foundation.193 Thus, from the outset, it will be difficult to find that a petition is objectively baseless.194 The current test “allows [an antitrust defendant] to present a sufficiently weak citizen petition with no reasonable expectation of success” and protects that petition because it is “not so devoid of merit as to lack probable cause.” 195 This sets the bar too high for proving a sham petition and often results in increased cost to the consumer, who without the sham exception has no tools to prove an antitrust violation.196 For example, in Louisiana Wholesale Drug Co. v. Sanofi-Aventis, 197 the court held that a petition to the FDA was not a sham, even though the defendant petitioner may have had no reasonable belief that the petition was viable.198 Instead, the court believed that the petitioner’s arguments were “arguably warranted by existing law or at the very least [ ]based on an objectively good faith argument for the extension, modification or reversal of existing law.” 199 Using this language to determine whether the petition was objectively baseless allowed the court to conclude that the petition was not a sham, **regardless of the fact that the petition seemed to have little merit and was clearly harmful to the plaintiff and other consumers**.200 **The PRE test’s high bar allowed the defendant to submit its petition without antitrust liability and protected the petitioner’s activity at the expense of the consume**r.201

**Objectively basis bad- has a 1% conviction rate of cases**

**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

C. The PRE “Objectively Baseless” Objective Test – An Overly Narrow Test As stated,107 the second problem with the objective test established by the Court in PRE is that, despite any ambiguity that may exist in the PRE decision, if the Court did indeed intend for the objective test to be a variant of the “objectively baseless” archetype, then a powerful argument can be made that it has chosen unwisely. The fact is that, in litigation generally, and in patent infringement lawsuits particularly, the PRE objective test, so construed, is too narrow. 1. PRE and Anticompetitive “Possible Technical Wins” Recall that the scope of the “objectively unreasonable” archetype for “sham” claims is broader than the “objectively baseless” archetype and that that is by design. The principal evil of the “objectively baseless” archetype is that it allows the claimant to pursue claims that have some non-zero chance of securing victory on the technical subject of liability (a “possible technical win”), even though no reasonable prudent claimant would file such a claim if he / she were genuinely seeking redress and evaluating the decision to sue on an objective cost-benefit basis. 2. Anticompetitive “Possible Technical Wins” in Patent Infringement Under the “objectively baseless” formulation, even if the claimant is a patent holder, bearing monopoly power, who has been advised by counsel that his patent is ninety percent (90%) likely to be found invalid, and also ninety percent (90%) likely to be found not infringed by the Defendant’s product, so that **the likelihood of success** on the subject of liability **is a mere one percent (1%),**108 **the claimant may** file suit, fully **expect**ing **to lose,** **knowing** that the **costs of the litigation will serve as a significant “street tax**” on the profits of its less-financially-capable startup competitor. **Scenarios of this sort aren’t mere fantasy**. One of the consistent policy questions that has confronted the public and the patent bar, almost since the latter’s inception but certainly as well since the veritable explosion in patent litigation that has occurred since the mid-1980’s after the U.S. Court of Appeals for the Federal Circuit was created, is the striking rise in the size of patent damages awards, the similarly striking rise in the costs of said litigation,109 and, finally and equally importantly, the increasing use of patent litigation proceedings as a tactical mechanism for imposing a patent “street tax” on competitors and derailing mergers, acquisitions, and other competitor business plans.110 **Would the employment of an “objectively unreasonable”** archetype – type test **ameliorate these problems?** There is reason to believe that **it would, at least in part**. Note that the test requires that the claimant believe that it has a reasonable chance at securing a favorable outcome “based on the nature of the claim.” That is, the expectation against which the claimant will be judged must be the legal relief sought and expected, and not (for example) any “street tax” or other collateral burdens the litigation might impose upon the defendant. **Does empirical evidence support the suggestion that the current PRE test is insufficiently deterring “sham” litigations?** Empirical estimation of the effects of legal tests is extremely difficult and complex, but at least one probative observation can be made. **Rule 11** of the Federal Rules of Civil Procedure **is a** “some chance” / “**objectively baseless” – type standard**. What percentage of complaints, across all kinds of litigations, typically trigger Rule 11 proceedings? According to at least one study, **the answer** (albeit based on an estimate) **is approximately one percent (1%).**111 This invites the question as to whether one believes that, of all of the patent infringement complaints that are filed, a similarly small percentage of them are “objectively baseless” despite the articles in the business and legal press about gamesmanship in patent infringement litigation. **If one doubts that gamesmanship exists, remember: (a) eliminating competitors can be very profitable;112 and (b) under the PRE “objectively baseless**” **test, it is highly unlikely that one’s patent infringement claim will ever be found to constitute a “sham**.” Remember also that, although the burden of proving infringement rests with the patent holder,113 a patent is presumed to be valid,114 and the burden of proving invalidity rests on the party asserting invalidity.115