## 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**

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

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

**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**

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

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

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

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

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

Perhaps the greatest risk to global strategic stability from new technology, however, comes from the risk that **revisionist autocracies may win the new tech arms race**. Throughout history, states that have dominated the commanding heights of technological progress have also dominated international relations. The United States has been the world’s innovation leader from Edison’s light bulb to nuclear weapons and the Internet. Accordingly, stability has been maintained in Europe and Asia for decades because the **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**

**Kemp 20** (Richard, accomplished technology lawyer, consistently top ranked in the leading directories. He appears in Legal 500’s Hall of Fame 2020, is ranked by Who’s Who Legal 2021 as a Global Elite Thought Leader for Data, and is top ranked by Chambers. “Intellectual Property in the Cloud: The Patent Troll Threat”, https://www.kempitlaw.com/intellectual-property-in-the-cloud-the-patent-troll-threat/)

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**

David A. **Koplow** 20**19**. Professor of Law at Georgetown University. He specializes in the areas of public international law, national security law, and the intersection between international law and U.S. constitutional law. Koplow served as Special Counsel for Arms Control to the General Counsel of the Department of Defense (2009-2011); Deputy General Counsel for International Affairs at the Department of Defense (1997-1999); and as Attorney-Advisor and Special Assistant to the Director of the U.S. Arms Control and Disarmament Agency (1978-1981). A Rhodes scholar, Koplow graduated from Harvard College and Yale Law School. "Exoatmospheric Plowshares: Using a Nuclear Explosive Device for Planetary Defense against an Incoming Asteroid," UCLA Journal of International Law and Foreign Affairs 23, no. 1 (Spring 2019): 76-158

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**

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**

**Mounk 18**. Yascha Mounk. Yascha Mounk is a contributing writer at The Atlantic, an associate professor at Johns Hopkins University, a senior fellow at the Council on Foreign Relations, and the founder of Persuasion. “America Is Not A Democracy” <https://www.theatlantic.com/magazine/archive/2018/03/america-is-not-a-democracy/550931/>

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

**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**

**Diamandis 21** (EP, Lunenfeld-Tanenbaum Research Institute, Mount Sinai Hospital, Toronto, Canada 2. Department of Laboratory Medicine and Pathobiology, University of Toronto, Toronto, Canada 3. Department of Pathology and Laboratory Medicine, Mount Sinai Hospital, Toronto, Canada 4. Department of Clinical Biochemistry, University Health Network, Toronto, Canada, “The mother of all battles: Viruses vs. humans. Can humans avoid extinction in 50-100 Years”, PrePrint)

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 2AC

**2AC – Innovation High**

**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 – T Per Se**

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

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

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

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

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

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

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

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

### 2AC – T Core Antitrust Laws

**Noerr Pennington is CORE**

**Lanyon 19** (Brian P. Lanyon, J.D. Candidate, 2019, Seton Hall University School of Law, SHAM LITIGATION IN ZONING CHALLENGES: FINDING THE BALANCE BETWEEN PROTECTION OF CONSTITUTIONAL RIGHTS AND ANTICOMPETITIVE BUSINESS PRACTICES, 43 Seton Hall Legis. J. 135, y2k)

The **N**oerr-**P**ennington **d**octrine **limits** the Sherman Act's reach by **relying** on First Amendment guarantees. 46 The doctrine derives its name from two United States Supreme Court cases: Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. 47 and United Mine Workers of America v. Pennington. 48 Generally, the doctrine establishes that petitioners for government redress are immune from antitrust liability unless their action falls under the doctrine's "sham exception" and deemed objectively baseless. 49 Under the Noerr-Pennington doctrine, a lawsuit is considered objectively baseless "if no reasonable litigant could realistically expect success on the merits." 50 The doctrine provides immunity to petitioners for redress of their grievances to a variety of government bodies, including administrative agencies, legislatures, executives, or the judiciary. 51 The doctrine has its foundations in **antitrust law**, but it has been extended to support challengers who object to zoning applications, since these challenges are petitions to government bodies recognized by the Noerr-Pennington doctrine. 52 "The Noerr-Pennington doctrine is not limited to federal antitrust actions … and may be invoked in other actions under state and federal law to protect the First Amendment right to petition the government." 53 It has also been applied to protect against "common-law torts such as malicious prosecution and abuse of process," which are frequently the legal basis of claims brought in state courts by developers in response to the challenger's objectively baseless opposition of their land development application. 54

However, **in Noerr**, the Supreme Court recognized that **the application** of the Sherman Act is **justified** in instances where the petition "is a **mere** [\*142] **sham** to **cover** what is actually nothing more than an attempt to **interfere** directly **with the business relationships of a competitor**." 55 The sham exception exists to remove protections from meritless claims and ensures that the Noerr-Pennington doctrine does not give petitioners an unchecked right to challenge competitors. 56

**Exemptions and Immunities define the scope of Antitrust**

**Kruse et al. 19**, Layne E. Kruse, Co-Chair; Melissa H. Maxman, Co-Chair; Vittorio Cottafavi, Vice Chair; Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/19, from Northwestern, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

D. Top 3 Accomplishments Since Last Long Range Plan in 2015

(1) Publications. In addition to our Annual ALD Updates, we are set to publish an update to the Noerr-Pennington Handbook, which should be out in 2019. We also published a new version of the State Action Handbook in 2016. The **Handbook on the Scope of the Antitrust Laws** was **published in 2015.** (2) Commentary on Legislative and Regulatory Proposals. The Committee has been very active in supporting Section commentary on proposed legislation, regulations, and other policy issues. For instance, in March 2018, the E&I Committee assisted former E&I Chair John Roberti in composing his article, “The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law”, presented to the DOJ Antitrust Division Roundtable on behalf of the ABA Antitrust Section. In January 2018, in response to a request from the Section Chair, we submitted Section comments along with the Legislative and State AG Committees, addressing the proposed Restoring Board Immunity Act legislation that would impact the post-NC Dental exemptions and immunity climate. Previously, we commented on the Professional Responsibility Act. (3) Spring Meeting Programs. We have sponsored or co-sponsored a program at every Spring Meeting since our last long range plan. In 2019 we will chair Sham Litigation after FTC v. AbbVie The FTC v. AbbVie decision – calling for the disgorgement of $448 million on the basis of sham patent litigation. In addition, we will co-sponsor in 2019 with the Trade, Sports & Professional Associations Committee, a program on “Antitrust Law's Anomalous Treatment of Sports,” addressing how US courts have shown broad deference to the "rules of the game," including near-immunity status for concepts such as "amateurism." II. Major Competition/Consumer Protection Policy or Substantive Issues Within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years A. Issue #1: Will Certain Exemptions Be Eliminated or Expanded? A goal of the current DOJ Antitrust Division is to streamline antitrust laws, and in particular, take a hard look at exemptions and immunities. This is in the wheelhouse of our Committee’s fundamental policy issue: How much of the economy has opted out of our antitrust system? Is that a problem or are ad hoc exemptions acceptable ways to fine tune the application of the antitrust laws? We anticipate, therefore, that efforts to enact or to repeal existing statutory exemptions and immunities will continue. In recent years, there have been efforts to repeal the exemptions for railroads and (at least in part) the McCarran-Ferguson insurance exemption. The Section and the Committee has generally supported efforts to repeal statutory exemptions. Given that repeal issues are very political it is unlikely that we will see many exemptions actually repealed. On the other hand, proposals for new exemptions and immunities will continue to be introduced in Congress. The Committee will improve on a template for use in assisting the Section in drafting comments to Congress on newly proposed exemptions and immunities. One development that may continue in the health care area are issues over a "COPA" or "Certificate of Public Advantage" at the state level. A COPA is a state statutory mechanism that provides certain collaborations in the health care community with immunity from private or government actions under the antitrust laws by invoking the state action doctrine. The FTC has generally opposed such efforts at the state level, but several states have used them to immunize health care mergers. This is a major development that should be monitored. Through programs, newsletters, and Connect entries, the Committee intends to educate its members about Congressional and other efforts to repeal, or introduce new, exemptions and immunities, as well as the application of existing statutory exemptions and immunities in the courts. The Committee’s Handbook on the Scope of Antitrust Law, published in 2015, addresses developments in the statutory immunities area. It built on the prior publication, Federal Statutory Exemptions from Antitrust Law Handbook in 2007. Our Scope book will need to be updated within the next three years. B. Issue #2: Will There Be Legislative Solutions to State Action Issues at State and Federal Levels? The FTC’s case against the North Carolina Board of Dental Examiners put the "active supervision" prong of the state action test front and center. North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S.Ct. 1101 (2015). The Court agreed with the FTC’s position that state occupational licensing boards comprised of market participants must satisfy the active supervision requirement. This spurred additional suits against other types of state boards involving regulated professionals. Moreover, every State had to reassess its boards to determine if there is "active supervision." Courts and state legislatures are addressing those issues. We also expect the proper framing of the clear articulation prong of the state action doctrine will be addressed. The Supreme Court spoke to the clear articulation test in FTC v. Phoebe Putney Health System, Inc., 133 S.Ct. 1003 (2013), narrowing the foreseeability test to cover only situations in which the anticompetitive conduct is the “inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.” How this test has played out in the lower courts will be of particular interest to the Committee and its membership. The COPA issues, at the state level, as previously mentioned, will impact this area. The Committee expects to address these issues through updates to Connect, newsletters, Spring Meeting programs, committee programs, its contributions to the Annual Review of Antitrust Law Developments. The State Action Practice Manual addresses these issues, as well as the Committee’s Handbook on the Scope of Antitrust Law. C. Issue #3: Will Noerr Be Restricted or Expanded? The Noerr-Pennington doctrine is an exemption issue that is frequently litigated. In particular, the most likely area of further development is in the pharma industry. Alleged misrepresentations to government agencies has caught the attention of some courts. In addition, there may be more development on the pattern exception, which raises the issue of whether each act of petitioning in a pattern must satisfy the objectively and subjectively baseless requirements for sham petitioning. The Committee’s new Handbook on Noerr (forthcoming) and its earlier Handbook on the Scope of Antitrust Law addresses developments in the Noerr law. III. Specific Long Term Plans to Strengthen Committee The Committee provides important services to the membership of the Section through publications, drafting ABA Antitrust Section comments to proposed regulation and international competition proposed immunities, and programming. The goals of the Committee include: (1) to provide policy comments on key questions about the scope of the antitrust laws for legislation and policy-making; (2) produce a mix of publications and programming that provides relevant and useful information to our members; (3) to ensure that the Committee remains valuable to our members’ practices; and (4) to make the most productive use of electronic communications to deliver the Committee’s work product. A. Potential Modifications to Charter: What is the Role of this Committee? The **Committee’s** current charter accurately characterizes its **purview**—that is, **addressing the scope of the antitrust laws**. **That scope**, of course, is **defined** primarily in terms of **exemptions** and **immunities** (both **statutory** and **non-statutory**). The Committee, however, has dealt with other doctrines, such as preemption and primary jurisdiction. These areas may not necessarily be viewed as traditional exemptions or immunities, but they nonetheless **directly affect** the application **and** extent of the antitrust laws. In addition, the Committee expends significant efforts to address international issues, including statutory exclusions from the U.S. antitrust laws, including the FTAIA; the related doctrines of act of state, sovereign immunity, and foreign sovereign compulsion; and industry-specific exemptions and exclusions from non-U.S. antitrust laws, including blocking exemptions.

**2AC – Multi-plank CP**

**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.

**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.

**Courts will narrow the counterplan**

**Ostas 07.** Daniel T. Ostas. Assistant Professor at the College of Business and Management, University of Maryland. He holds both aJ.D. and a Ph.D. A member of the Indiana Bar since 1980. “The Law and Ethics of K Street: Lobbying, the First Amendment, and the Duty to Create Just Laws” <https://www.jstor.org/stable/pdf/27673157.pdf?refreqid=excelsior%3A51dcc3d5e0be8682cb67189baea962d3>

E. Summary The above **survey of the law demonstrates that lobbyists have been entrusted with wide latitude** in determining who, what, when, where, and how to lobby. This is largely true because of the societal respect afforded to First Amendment liber ties. Whether one characterizes the right to lobby as a free speech right, a right to petition the government, or as an amalgam of the two, **it is clear that lobbying and lobbyists enjoy First Amendment protections**. Hence, **the government is constitutionally constrained in regulating lobbying**. The legal analysis also demonstrates that the various substantive areas of the law that address lobbying are more often than not conflicted, gap riddled, and/or poorly enforced. For example, revolving-door legislation provides for cooling-off periods, but currently applies only to direct lobbying contacts and not to other public-relations activities. Hence, the revolving door remains ajar, leaving both an incentive for and the appearance of inside dealing. Similarly, bribery law makes it illegal to give, offer, or promise anything of value in exchange for a public favor; yet, regulators routinely leave government to work for companies that they previously regulated. Although not technically a bribe, the economic incentives to act with favor for one's future employer would seem hard to resist. In addition, there appears to be no federal law that directly prohibits a lobbyist from lying to a legislator. For better or worse, **the primary means of regulating lobbying activities currently resides in public registration** **and disclosure** statutes. Perhaps sunlight is indeed the best way to assure public confidence in the lobbying process. Although disclosure regulations do not directly address the issues of who, what, when, where, or how, the public information that reporting provides could have much the same effect. In the end, **whether a lobbyist cooperates with the policies that underlie lobbying regulations** **or feels free to exploit regulatory loopholes and constitutional freedoms will largely depend on his or her personal values and ethics.** It is to these questions of ethics that the discussion now turns.

### 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 – Taxes CP

**Has to expand the scope of antitrust – what happens**

**Bradley 84** (Lawrence D. Bradley, Cornell Law, NOERR-PENNINGTON IMMUNITY FROM ANTITRUST LIABILITY UNDER CLIPPER EXXPRESS V. ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.: REPLACING THE SHAM EXCEPTION WITH A CONSTITUTIONAL ANALYSIS., 69 Cornell L. Rev. 1305)

Federal antitrust laws **prohibit** activity that restrains trade or reduces competition. 1 The antitrust statutes' **prohibitions** collide **with first amendment rights** 2 when the trade restaint results from petitioning the government. In Eastern Railroad Presidents Conference v. Noerr Motor freight, Inc. 3 and United Mine Workers of America v. Pennington, 4 the Supreme Court held that activity is immune from antitrust liability if the imposition of such liability would infringe upon the actor's right to petition the government. This Noerr-Pennington doctrine does not, however, protect ostensible petitioning that is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with . . . a competitor." 5

Considerable confusion has developed regarding what one party must show to establish that another party has engaged in "sham" petitioning. 6 Some courts have **automatically** awarded alleged petitioning activity **a Noerr-Pennington exemption** from **antitrust liability** and then have had to **determine** whether that activity fit into a "**sham exception**," which would make **the activity susceptible to renewed antitrust challenges**. 7 In Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 8 the Ninth Circuit replaced this "exception-to-the-exemption" analysis with a clear first amendment analysis; under the Ninth Circuit's approach, Noerr-Pennington immunity attaches only if the activity at issue is protected by the first amendment. 9

**Using taxes as a means to create a penalty is illegal!**

**Burrus 16** (Trevor Burrus, research fellow in the Cato Institute’s Center for Constitutional Studies and managing editor of the Cato Supreme Court Review, 10/28/16, “Could It Be Unconstitutional to Raise the Obamacare “Tax” for Not Purchasing Health Insurance?,” https://www.cato.org/blog/could-it-be-unconstitutional-raise-obamacare-tax-not-purchasing-health-insurance)

As many predicted, especially us at Cato, the Affordable Care Act is beginning to make health insurance less affordable for many Americans. Part of the problem, in a nutshell, is precisely what my colleague Michael Cannon described in 2009, the young and the healthy avoiding signing up for health insurance and choosing to pay the fine, or, as Chief Justice John Roberts would call it, a tax.

MIT economist Jonathan Gruber, often described as an architect Obamacare, recently said that some of these problems can be alleviated by increasing the “tax” on those without insurance. “I think probably the most important thing experts would agree is we need a larger mandate penalty,” said Gruber.

Depending on how high the penalty goes, **there could be a constitutional problem with that**. In the opinion that converted the “penalty” into a constitutional “tax,” Chief Justice Roberts described the characteristics of the “shared responsibility payment” that made it, constitutionally speaking, **a tax rather than a penalty**. One of those characteristics **is that the penalty was not too high:** “for most Americans the amount due will be far less than the price of insurance, and, by statute, it can **never be more**. It may often be a reasonable financial decision to make the payment rather than purchase insurance, **unlike the ‘prohibitory’ financial punishment in Drexel** Furniture.” In Drexel Furniture, also known as the Child Labor Tax Case, the Court struck down a 10 percent tax on the profits of employers who used child labor in certain businesses. One reason the Court struck it down was **because its “prohibitory and regulatory effect and purpose are palpable.”**

Roberts actually went out of his way to describe paying the “tax” as a voluntary and permissible act. Even though they won, this should have irked the government a bit because the Chief was essentially giving millions of people permission to not buy insurance, which the government knew would severely undermine the law. In Roberts’s words:

Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. The Government agrees with that reading, confirming that if someone chooses to pay rather than obtain health insurance, they have fully complied with the law.

Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance. We would expect Congress to be troubled by that prospect if such conduct were unlawful. That Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws. It suggests instead that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance.

So could **raising the “tax” turn it into a “penalty” and thus make it unconstitutional**? Possibly. At some point, the tax **would take on a punitive character**, and, if people like Gruber get their way, **the tax might have to be pretty stiff**. With health insurance prices going up, it can still be cheaper to pay the “tax” rather than purchase insurance. And that tax might have to go up a lot to make some people change their minds. If the government ever tries to attach criminal penalties to noncompliance, then the argument is **even stronger that it would become an unconstitutional regulation of commerce**, given that the Court held that the individual mandate isn’t a valid use of the commerce power.

**2AC – Court Clog**

**COVID uniquely stacks the backlog now**

**Land 21** “Can We Talk? Eyeing COVID-Clogged Dockets, Judges Push Civil Cases to Settle” <https://www.law.com/2021/07/30/can-we-talk-eyeing-covid-clogged-dockets-judges-push-civil-cases-to-settle/>

As judges around the country gingerly reopen their courtrooms and invite lawyers, litigants and jurors back for business—sometimes as usual, but often still far from the normal routines of years past—they’re being confronted by an array of pitfalls, real and potential.

Will a surge of **COVID-19** cases among the unvaccinated and forceful advance of the delta variant force renewed shutdowns? Will jurors and staffers be willing to risk a return? Are mask mandates and vaccine passports in the offing? But one very real dilemma is already on their minds: **Backlogs of criminal, civil and domestic cases that have piled up, exacerbating already crowded dockets** where litigants and lawyers jostle to get motions filed, rulings issued and, toughest of all, cases tried. Richard Clifton, a senior judge on the U.S. Court of Appeals for the Ninth Circuit, who serves as president of the Federal Judges Association, said that court backlogs are a big topic for judges, although not all are as impacted as others. “At least one judge in a very busy district didn’t think the backlog had turned out as high as it turned out to be,” he said. “Other judges have commented, unspecifically, they’re just piling up.” He said the most frequent comment is that the civil calendar “is just sitting there” because judges are spending all their time dealing with criminal caseloads. He hasn’t heard about judges suggesting settlement as an option to those with civil cases but, he said, “I would be shocked if it weren’t happening.” “The reality is that most cases get settled, we all know that—it’s not a good or a bad thing, it’s just a fact,” he said. And, while judges don’t actively get involved in settlements, their goal is to resolve cases. “And if it’s realistic to say to parties, ‘look, you won’t get a trial date anytime soon,’ I’m sure that’s something judges are saying to parties in those cases.” That’s exactly what happened to Ryan Baker, of Waymaker in Los Angeles. “It absolutely is the case that, especially in the federal courts, civil trials are at the end of the line,” he said. Baker represents the defendant in a trademark case filed in 2017. “I know there’s been a lot of debate among the judges on how to handle this situation,” he said. “There are very different views, as there are with any group of people, on what is appropriate and what measures need to be taken.” In Baker’s case, U.S. District Judge Cormac Carney of the Central District of California minced no words in telling the parties in April that he could not guarantee a trial date in 2021, or even the first half of 2022. “The court strongly believes that this case should settle,” he wrote in a minute order. “To hold a trial in this civil case would mean asking citizens to report for jury duty or to testify as witnesses when many of them have been out of work for months and fear they will not be able to pay their rent, mortgage, or other bills, or put food on the table for their families. “And it would also ask the court **to find time in its congested calendar for such an endeavor after more than a year of closure due to the coronavirus**,” Carney wrote. Baker said the case went through two mediations and three court-ordered settlement conferences before settling July 23. “And these conferences, the last couple have been ordered because the court is concerned that this case is not going to be set for trial, not this year, not even next year, because of the backlog of criminal matters that will necessarily precede all the civil trials,” he said. California’s Central District, which includes Los Angeles, has six judicial vacancies. But Baker said a lot depends on how much is at stake in the case and the specific judge’s calendar. He has another case in the district in which Judge Consuelo Marshall has set a trial date for February 2022. But there has been a strong push for settlement. “**The backlog factor weighs heavily in favor of courts really advocating for private resolution because the reality is litigants are having to bear the cost of extended and protracted litigation,”** Baker said. In a 2015 patent infringement lawsuit in the Southern District of New York, Judge Gregory Woods canceled a Nov. 29 trial, citing a criminal trial now scheduled for that date. After his June 15 order, U.S. Magistrate Judge Sarah Netburn asked the parties for settlement dates. Another judge in New Mexico cited the court’s backlog as a reason to grant final approval of a nearly $4.2 million settlement involving a class of truck drivers seeking unpaid overtime wages. Settling the 2019 class action would avoid “significant delay,” U.S. Magistrate Judge Gregory Fouratt said in an April 9 order. “The court further observes that litigation of this case would have moved exceptionally slowly in the current pandemic environment in which jury **trials are logistically difficult and almost entirely devoted for the next 12-18 months to resolving an unprecedented backlog** in criminal cases,” he wrote. Shannon Liss-Riordan, the plaintiff’s lawyer in that case, agreed that the pandemic has exacerbated delays, but not “to an inordinate degree.” Liss-Riordan, of Boston’s Lichten & Liss-Riordan, noted that she tried a federal bench trial this year via Zoom along with several arbitrations during the past year. Her firm also has settled two cases that were at least a decade old. Sometimes, clients opt to settle on their own, many hoping to avoid the increasing costs of litigating and the potential unavailability of witnesses one or two years down the road. “Everybody is really tired of hearing, ‘well, the pandemic,’” Baker said. “Everything in life is different because of the pandemic, including the operation of the judicial system. The second part is, ‘what can we do about it?’ One of the first, most obvious, answers is, ‘We can try to settle it. We can take matters in our own hands.’” In some cases, Baker said, the parties have stipulated to arbitration despite having no arbitration agreement because it’s faster than going through the courts.

**Link turn – plan reduces clogging. We have an advantage about** SHAM **litigation**

**Zekster 2007**. Alex Zektser. Attorney-Advisor at Department of Transportation - Office of the Secretary of Transportation. “Baltimore Scrap Corp. v. David J. Joseph Co.: Extending Noerr-Pennington - How Much Is Too Much” https://heinonline.org/HOL/LandingPage?handle=hein.journals/gmcvr18&div=26&id=&page=

C. **Overcrowded Dockets** In addition to the above concerns with expanding Noerr-Pen- nington, **there is the practical problem that the dockets of the modern court system are extremely overcrowded**. For example, 1,117 new cases were "filed and added" in the Court of Appeals for the Second Circuit during 2005.177 This court only has about thirteen active judges.'78 Therefore, it is no wonder that the average time that elapsed between the date of filing and the date of the disposition of the case was 8.8 months. 7 9 In the year 2004, this same court heard about 100 less cases and the average time that it took the court to dispose of a case was 0.2 months less than in 2005.'80 Moreover, between these two years the amount of time that it took for a judge to decide a case once it was submitted increased from 2.3 months in 2004181 to 2.7 months in 2005.82 As this example from the Court of Appeals for the Second Cir- cuit shows, federal courts are faced with extremely overcrowded dock- ets. Right now, it takes more than two-thirds of a year for an average case to be resolved (from filing to disposition).183 **Courts need to do all that they can to keep their dockets running smoothly and allowing companies to solicit and fund "straw men" litigators to undermine their competitors only hinders this ability.**

**Patent trolls cause court clog**

**Chuang 6** (Ashley Chuang, J.D. Candidate, University of Southern California Law School, FIXING THE FAILURES OF SOFTWARE PATENT PROTECTION: DETERRING PATENT TROLLING BY APPLYING INDUSTRY-SPECIFIC PATENTABILITY STANDARDS, 16 S. Cal. Interdis. L.J. 215, y2k)

G. Detriments of Patent Trolling

1. **Clogs the Legal System**

Because of a **patent troll's** approach to generating revenue, a troll's charges of infringement and litigation can often be **baseless** and thus **clog** the legal system. 144 A patent troll's most common approach is to simply initiate a letter campaign and send out as many cease-and-desist letters as time and paper will allow, or to file lawsuits against end users and resellers of a patented product or service. 145 Recipients of **cease-and-desist letters** are faced with few choices, and **settling** or **licensing** often is the only affordable solution. 146 Those that do not immediately settle or license will most likely be faced with more **aggressive actions** from the patent troll, and eventually the patent troll will file a **lawsuit**. 147 Given the unpredictability of patent litigation, settlement is often the only viable solution for a target company when sued. 148 Further, these lawsuits, resulting from **bulk filings** or **mass-mailings**, often consist of **broadly asserted** and possibly baseless charges that **raise** transaction costs and **inundate** an already overwhelmed **legal system**. 149

**2AC – Midterms DA**

**Maritime antitrust**

Eric **Kulisch 1-10**, Air Cargo Editor, **Mission creep**: Why the FTC is investigating retail supply chain distortions, https://www.freightwaves.com/news/mission-creep-why-the-ftc-is-investigating-retail-supply-chain-distortions

The **F**ederal **T**rade **C**ommission’s mission is to protect consumers and businesses against anticompetitive, deceptive and unfair business practices, but **historically** it hasn’t **touched** ocean **shipping**. Overseeing competition in sea freight is the primary jurisdiction of the Federal Maritime Commission. The Department of Justice gets involved if international container lines engage in anticompetitive behavior outside antitrust immunity that allows discussion about rate guidelines for individual service contracts and vessel sharing. **Yet** **the FTC**, in late November, launched a study into the **supply chain operations** of nine major retailers, wholesalers and packaged goods suppliers. The companies were asked to turn over detailed information to help the agency determine whether steps they took to ensure adequate inventories exacerbated widespread transportation bottlenecks, supply shortages and inflationary pressures in ways that harmed smaller companies and consumers. The responses are due Wednesday. The **probe** is part of **a Biden administration** effort to show that it is, at least symbolically, focused on issues driving up prices for food, gas and merchandise, which are hitting people in their pocketbooks and contributing to lower confidence in the economy and the president. And torrid inflation — consumer prices jumped 6.8% in November, the biggest increase in 39 years — is giving the Biden team an opportunity to initiate a competition agenda aimed at reducing market consolidation based on a narrative, advanced by progressives, that inflation is caused by greedy big business. Today’s inflation is the result of a bullwhip recovery from the pandemic, government stimulus programs that allowed people to order more goods, supply chain bottlenecks and labor shortages, according to economists. Supply chain impediments are the result of port congestion and tight ocean capacity in the face of record U.S. import demand, which has resulted in a tenfold increase in shipping rates from Asia compared to pre-pandemic levels. The White House recently claimed its Port Action Plan was responsible for reducing shipping rates and backlogs at the ports of Los Angeles and Long Beach, although short-term container rates are rising again and logistics experts say there hasn’t been any material improvement in cargo processing. Critics say **the FTC’s scope expansion** is **misguided**. Retailers are “the wrong target,” said Steve Lamar, president of the American Apparel & Footwear Association. “That’s not where the bad behavior is being exhibited. It’s at the carrier level. And if you are really looking at trying to reduce inflationary pressures, the administration has a handy tool they can use” — removing and refunding tariffs on imports from China to offset harmful freight costs. Lawrence Summers, the head of the National Economic Council under President Barack Obama and Treasury secretary for President Bill Clinton, said on Twitter, “The emerging claim that antitrust can combat inflation reflects ‘science denial.’ … Increases in prices and profit margins are what happens when competitive industries experience increases in demand. That is what calls forth increased supply. This is how a market system operates.” Other financial experts argue concentrations of power allow companies to arbitrarily price goods much higher than they would in a free market. In their view, inflation is the rate of change in prices and oligopolies more easily pass through higher costs, so antitrust action can lower prices. **In the crosshairs** The FTC supply chain review came after the White House, and port envoy John Porcari in particular, pushed federal agencies to find tools they could leverage to alleviate chokepoints, said a Washington trade attorney who asked not to be named to protect access to the executive branch. Without a jurisdictional hook to investigate the ocean freight industry, Chair Lina Khan — an advocate for curbing the dominance of big companies — told the White House the FTC could look at the trickle-down impact on the economy from how big companies are dealing with port congestion and downstream distribution bottlenecks, according to the source. The commission eventually invoked a provision of **the FTC Act**, which authorizes it to conduct wide-ranging studies that don’t have a specific law enforcement purpose. The order, which gives the companies 45 days to respond, was fine-tuned after the two Republican members of the commission expressed concern about jurisdictional overreach. The National Retail Federation expressed concern that the FTC inquiry is a distraction from investigating the behavior of ocean carriers and is an administrative headache for the companies involved. “The current supply chain crisis is affecting companies large and small who are being impacted by disruptions at every stage of the supply chain. Focusing on the practices of a few U.S. retailers who have been trying to address the shipping crisis will not help to solve the issues that persist today,” Jonathan Gold, the NRF’s vice president for supply chain and customs policy, said at an open FTC meeting on Dec. 16. Importers face a multitude of challenges, including shortages of materials; COVID outbreaks that threaten foreign factories and ports; shortages of empty containers and chassis to carry them over the road; and marine terminals restricting returns of empty containers, according to trade experts. Cargo owners complain ocean carriers regularly renege on container contracts so they can charge other shippers higher rates on the spot market; don’t guarantee space on their vessels even when premiums are paid; refuse to negotiate service contracts; limit the amount of capacity they provide shippers; and unfairly charge rent for port storage and late return fees when full terminals are not accepting truck appointments. Many retailers placed orders earlier, used alternate vendors and ports, and moved more cargo by air to get goods to stores in time for the holidays, but are still experiencing delays. Gold said the NRF supports White House efforts to collaborate with supply chain stakeholders on congestion solutions, FMC investigations into ocean carrier and terminal practices and new legislation to regulate the maritime industry. “These are the kind of solutions we need to see — not a study focused on a few retailers who are working to address these challenges,” he told the FTC. Agency watchers say it usually takes a year or two for it to issue a report resulting from a Section 6B order, but Kahn made clear in announcing the study that it needed to move quickly and gather as much information as possible. “Focusing on the practices of a few U.S. retailers who have been trying to address the shipping crisis will not help to solve the issues that persist today.” “The FTC has a long history of pursuing market studies to deepen our understanding of economic conditions and business conduct, and we should continue to make nimble and timely use of these information-gathering tools and authorities,” she said. After the FTC receives the requested documents, it will probably take another 45 to 60 days for staff to review them and make requests for any additional information. The agency will be under pressure to issue a preliminary report by March, the government affairs source predicted. Busting up corporate trusts The FTC’s probe also **fits** within the Biden administration’s worldview that **antitrust rules** need redefining to **contain corporate power**, especially tech giants like Amazon, Apple, Facebook and Google. In recent weeks, officials have blamed food producers, retailers and energy companies for anticompetitive behaviors and pushed for antitrust investigations. Officials say dominant corporations in uncompetitive markets are taking advantage of their market power to raise prices and increase profit margins.

**Antitrust laws are not perceived**

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

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

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

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

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

**No one cares about antitrust**

**Crane 7** (Daniel A. Crane, Associate Professor of Law, Benjamin N. Cardozo School of Law. I thank Eleanor Fox and Hanno Kaiser for many helpful comments, Vol. 105, No. 6, 2007 Survey of Books Related to the Law (Apr., 2007), pp. 1193-1212 (20 pages), 105 Mich. L. Rev. 1193, y2k)

IV. Beyond Modesty

The hallmark of Hovenkamp's antitrust is modesty, and Hovenkamp is the embodiment of the current antitrust epoch. With the wide consensus that consumer welfare is antitrust's sole normative goal, the enterprise has been almost entirely de-ideologized and depoliticized. At a recent symposium on antitrust at (where else?) the University of Chicago, two recent chairmen of the Federal Trade Commission - one a Bush-appointed Republican and the other a Clinton-appointed Democrat - lauded one another for the ideological and political neutrality that antitrust enforcement has assumed. **Antitrust** has become a largely **technocratic field** for economic experts. **The public pays it little attention**, and the antitrust community has accepted the resulting trade-offs. Antitrust no longer lends itself to large **political gestures** or **radical interventions** - "trust-busting" is out of fashion, as we learned from the failure of the divestiture proposal in Microsoft. In return for this loss of **political grandeur** and **public saliency**, the antitrust community contents itself with **insulation from** external **political pressure** and internal control over its institutions, resources, and direction.

### 2AC – Econ DA

**Not even clear if it exists**

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>

5. Other Limitations of Noerr: Exceptions for Fraud Another potential limitation on Noerr immunity is a fraud or misrepresentation exception.80 Although the Court in both California Motor Transport and Allied Tube indicated in dicta that “fraud and misrepresentations made in an adjudicatory context exceeded Noerr’s reach [but] were immune in a legislative setting,” the Court reopened the issue in PRE without giving an answer as to whether an exception exists.81 Additionally, although the Court substantially narrowed the sham exception in Allied Tube, it also limited the scope of the Noerr doctrine generally by declining to extend immunity to all genuine efforts to influence government action.82 The Court held that whether Noerr immunity applies in a particular case depends on the nature, context, and impact of the activity.83 Although certain limitations on Noerr immunity exist, the Court has continued to broaden the reach of the doctrine, as seen with the narrowing of the sham exception.84 **While it is unclear whether a fraud** or misrepresentation **exception exists**, the Court has conclusively stated that there is no conspiracy exception to Noerr immunity.85 The Court has also held that the incidental effects of petitioning will be protected by Noerr immunity.86 Thus, in Allied Tube, although petitioning a private standard-setting organization was not itself covered by Noerr, the Court held that immunity might still apply if petitioning the organization was incidental to a valid effort to influence the government.87

**Trolls thump R&D---plan is prerequisite**

**Heinecke 15** (Grace Heinecke, J.D. Candidate, 2016, Fordham University School of Law, PAY THE TROLL TOLL: THE PATENT TROLL MODEL IS FUNDAMENTALLY AT ODDS WITH THE PATENT SYSTEM'S GOALS OF INNOVATION AND COMPETITION, 84 Fordham L. Rev. 1153, y2k)

a. Recent **Studies** Provide **Concrete Evidence** of a **Negative Impact on Innovation**

Several recent studies indicate the damage that patent trolls have on innovation. One study, conducted by Harvard University and the University of Texas, aimed to discover how trolls affect innovation at publicly traded companies. 261 As an initial matter, the researchers concluded that "NPEs on average behave as patent trolls," 262 so the study generally uses the terms synonymously. The study found that "as NPEs become **effective** at bringing **opportunistic lawsuits**, they can inefficiently **crowd out** some firms that would otherwise produce welfare-enhancing innovations without engaging in infringement." 263 The study also determined that certain types of firms, including "firms with **large cash balances** and firms with **positive shocks to** their **cash holdings**," are more likely to be **targeted** by NPEs. 264 The study found that "losing to an NPE has a **large** and **negative** impact on future **R&D activities**," with the study's results showing that "firms that lose to a large aggregator NPE … invest **significantly less in R&D** in the years following the loss … relative to firms that were also targeted by NPEs but won." 265 Additionally, patent **trolls** are more likely to sue companies that have a **small legal department** or are tied up in **other litigation**, which may encourage companies to spend [\*1181] money on hiring **lawyers** that could instead be spent on developing **new technology**. 266 Companies may thus invest less in new technologies. 267 They may also make settlement payments to patent trolls to avoid the time and expense of litigation. 268

**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**

**Innovation low now**

**Tong 21** [Scott Tong, correspondent at Marketplace, 2-3-2021 https://www.marketplace.org/2021/02/03/u-s-falls-out-of-top-10-in-measure-of-innovation/]

Say it with me now: **We’re No. 11!**

The **U**nited **S**tates, in Bloomberg’s annual ranking of innovative countries, has fallen outside the top 10.

What’s perhaps more concerning is the longer view: When Bloomberg launched the index, America was first.

Right now, South Korea stands atop this particular ranking.

The Bloomberg index finds the U.S. lagging in [STEM] science, technology, engineering and math grads, advanced degrees and workers in research and development.

All those are linked to **the** **high cost of education** here.

“The U.S. could subsidize STEM degrees to a greater degree,” said Alex Tanzi, who compiles the innovation rankings for Bloomberg.

He said when the world’s best and brightest do come here to study, increasingly, they leave afterward.

“There’s been talk when people get a Ph.D. in the U.S., it should come with a green card. So there’s policies like that that would induce people to stay in the U.S.,” he said.

It also matters what trained workers do in this country.

Youngjin Yoo teaches digital innovation at Case Western Reserve University. He said big American companies hardly conduct long-term research anymore.

“We are living off the innovations of the ’60s and ’70s, you know, like Cold War. A lot of innovation activities going on now is consumer experience,” he said.

Consumer experiences with short-term payoffs, Yoo said. Like social media.

“I would almost argue that these are **frivolous innovations**.”

**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 – Tax CP**

**No economic impact to aging crisis and increases in productivity are inevitable and solve**

Lincoln **Caplan 14**, Visiting Lecturer in Law and a Senior Research Scholar in Law at Yale Law School, 7/18/2014, “Baby, it’s you: Why boomers are an economic boon”, WTTW, https://www.pbs.org/newshour/nation/baby-boomers-economic-boon

The dependency ratio is only occasionally mentioned in debates about public policy, but its premise — that the growth in the ratio indicates how greatly baby boomers will burden the rest of society — is shaping some of the most consequential debates in the United States today: about the size of the federal government, about how government expenditures should be allocated, and about the nation’s financial viability in the next generation.¶ A demographic tool has become an economic one, treating a demographic challenge as both an economic crisis and a basis for pessimism justifying drastic reductions in bedrock government programs, including those supporting children and the poor. Even at state and local levels, the aging boomer demographic is repeatedly blamed for our economic difficulties. **That is a lamentable mistake**. The United States has serious economic problems, and the aging population poses significant challenges, but those challenges are not the main cause of the problems. They should not be treated that way.¶ The dependency ratio does not justify the solutions that the alarmists propose. Just as important, perhaps, it fails to account for the **striking benefits** accruing from the dramatic increase in life expectancy in the United States during the 20th century –what the MacArthur Foundation’s Research Network on an Aging Society called “one of the greatest cultural and scientific advances in our history.”¶ Although the concept of the dependency ratio dates back to Adam Smith’s 1776 “The Wealth of Nations,” remarkably, there seems to be no published history of the concept as it is used today. The inclusion of young people over the age of 14 in the productive segment reflected in the traditional ratio suggests that it was developed in the 19th century, when America’s farm economy still required their help. But as late as 1933, in “Recent Social Trends,” a vast and definitive statistical portrait of the United States in that era, the dependency ratio was not referred to or used.¶ By the 1940s, however, the ratio became a regular tool among the different measures the government employed to describe the state of the nation and to project what it would look like in the future. Although no group was spared in the Great Depression, older Americans were especially hurt. Social Security was the first national program to ensure that Americans 65 and older would have at least a minimum of income to pay for food, clothing and shelter. That program, which became law in 1935, started to make monthly payments in 1940. Social Security’s large scale required the government to anticipate how many Americans it would cover, which made the dependency ratio, and the old-age ratio in particular, an important demographic measure.¶ The U.S. government has been calculating what it calls the economic dependency ratio, which includes in the productive segment people who are still working after the presumed retirement age of 65. In 2010, it was 22 percent of men that age and older and 14 percent of women and, by 2020, it is projected to be 27 percent of men and 19 percent of women. Even that ratio is crude, but it is less crude and more accurate than the traditional old-age dependency ratio.¶ “…our society has chosen to regard older people as a burden when age alone does not make them so.”¶ Still, the revised calculation does not address fundamental concerns that scholars have raised in the recent past. They have criticized the dependency ratio for its blatant **oversimplification** of reality and for its ideological bias. In 1986, sociologists Toni M. Calasanti and Alessandro Bonanno described the bias as the “social construction of the elderly’s obsolescence.” They meant that our society has chosen to regard older people as a burden when age alone does not make them so. Age is accompanied by decline, but different people decline in different ways. A person’s race, ethnicity, wealth, and level of education are often better predictors of that decline than age.¶ Sociologist Donald E. Gibson wrote in 1989 that “it has become commonplace to predict or assume that demographic trends will lead to an economic crisis in the third or fourth decade of the next century.” He went on: “All current versions of the dependency ratio, however, share one important deficiency.” **They fail to take account of economic productivity**, and how improvements in productivity lead to progress through increases in income and in “the country’s capacity to support people.”¶ Projections in the 1980s of an aging crisis rested on the assumption that, in the subsequent half century, the American economy would perform poorly and produce little improvement in real income. In fact, between then and now, real income has grown somewhat more than was predicted, with dramatically unequal distribution. (The rise in real income for nine out of 10 Americans has been slight. The rise for the top 10 percent has been much higher — and higher still for the top one percent.) Gibson’s point was more fundamental, however. “Very often this assumption is not explicated,” he wrote. “Not to do so is to present an economic problem as a demographic problem.”¶ In a similar argument last year, economists Ronald Lee at Berkeley and Andrew Mason at the University of Hawaii criticized the dependency ratio for being “incomplete and misleading” and for exaggerating “the adverse impact on the macro-economy of population aging,” because it does not reflect that in the United States the elderly “rely heavily” on income from their own private wealth to support them — in economic terms, to pay for their consumption.¶ In general, Lee and Mason reported, “Net transfers from the working age population, mostly through the public sector in the form of Social Security benefits, Medicare, and Medicaid, make up only about 40 percent or less of funding for consumption.” As a result, the aging of the U.S. population will mean an increase in the number of older people who are only partially dependent on the government, not wholly dependent, as the dependency ratio assumes.¶ By contrast, Lee and Mason assume that the increasing number of elderly boomers in the United States will arrive at old age having accumulated assets similar in amount on average to those who are currently elderly. More older people per capita will mean more assets per capita. These assets will generate national income, boost productivity, and contribute to a future justifying a more optimistic outlook rather than the pessimistic one that the ratio is used to justify.

**‘Prohibitions’ merely hinder and include exceptions.**

**Lynch ‘2** [Sandra; December 17; Judge on the United States Court of Appeals, First Circuit; Lexis, “Second Generation Props., L.P. v. Town of Pelham,” 313 F.3d 620, 634]

§ 332(c)(7)(B). We start with the fact that Congress used "services" and not "service." A straightforward reading is that "services" refers to more than one carrier. Congress contemplated that there be multiple carriers competing to provide services to consumers. That one carrier provides some service in a geographic gap should not lead to abandonment of examination of the effect on wireless services for other carriers and their customers. Next, the phrase "have the effect of prohibiting" may well refer to actions that **mostly** prohibit. For example, B.A. Garner, A Dictionary of Modern Legal Usage 256 (2d ed., 1995), gives as the first definition of effective "having a high degree of effect." (emphasis added). Accord B.A. Garner, A Dictionary of Modern American Usage 237-38 (1998). Moreover, a **common reading** of the word "prohibition" standing alone would apply to a situation of denial of services to the **vast majority** of users. See, e.g., **O**xford **E**nglish **D**ictionary (2d ed. 1989) (defining "prohibit" as "to prevent, preclude, **hinder**") (emphasis added). Thus Congress may well have **mean**t the effective prohibition clause to reach **certain situations** in which there is some **coverage** in a **gap**.

**Liability comes after the declaring an act anticompetitive**

**Geier 1** (Mark Geier, Berkeley Law, "United States v. Microsoft Corp." Berk. Tech. LJ 16 (2001): 297)

C. Legal Background

The government charged **Microsoft** with four **violations** of the Sherman Act.74

1. Maintenance of Monopoly Power by Anticompetitive Means To establish this section 2 violation, the government must prove: "(1) the possession of monopoly power and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consejuence of a superior product, business acumen, or historic accident." Monopoly power is "the power to control prices or exclude competition. ,,76 To determine whether monopoly power exists, a court defines the relevant market and then assesses the defendant's power to control prices or to exclude competition from that market. 77 The relevant market includes all possible substitutes for the defendant's product viewed from the buyer's perspective. 78 The court considers both geographic limitations on the market (e.g., tariffs or transportation costs) and limitations imposed by supply- and demand-side product substitution.79 A finding of a dominant If a court finds monopoly power, the plaintiff must also demonstrate that the defendant acquired or maintained that power by anticompetitive means.8 2 The primary issue in this determination is whether the defendant's conduct has an **exclusionary** effect. 83 Predatory behavior is a type of exclusionary conduct that occurs when a firm with monopoly power consciously makes its products less attractive or incurs costs with no prospect of compensation other than building or maintaining a barrier against competition. 84 Once the **defendant's conduct is deemed anticompetitive**, **liability** attaches, unless the defendant can offer procompetitive justifications for the conduct. 85

**That establishes a prohibition because market participants had violated antitrust laws**

**Melamed 9** (A. Douglas Melamed, law professor @ Stanford, THE PURPOSES OF ANTITRUST REMEDIES, Antitrust Law Journal , 2009, Vol. 76, No. 1 (2009), pp. 359-368)

The remedy inquiry is **different**. The remedy inquiry takes **the liability** standards **as given** and addresses the **consequences** of a violation of those standards. Remedies can deal with the harm caused by a violation (the compensation, termination, and restoration purposes discussed above), and they can use the violation as an occasion to take steps to prevent future violations (the deterrence and prevention purposes). But remedies are hard to get right and, when suboptimal, can undermine antitrust objectives by interfering with markets and prohibiting or deter- ring procompetitive conduct. As the contributions to this symposium demonstrate, optimizing antitrust remedies requires, among other things, clear thinking about the purpose of the remedies.

**1AR – Econ DA**

**Studies prove costs**

**Mahn 14** (Giordana Mahn, Loyola University Chicago School of Law, J.D. expected May 2014, Keeping Trolls Out of Courts and Out of Pocket: Expanding the Inequitable Conduct Doctrine, 45 Loy. U. Chi. L.J. 1245, y2k)

**Empirical studies** of PAE litigation show that the **costs** of PAE suits are **generally wasteful**, **divert** company funds allocated for **R&D** to pay for litigation, and do not **increase** innovative incentives. 160 Whatever the benefit, PAEs do more harm to product companies, innovation, and the public than good. In a survey of **forty-six companies**, Professors James Bessen and Michael J. Meurer from Boston University School of Law calculated that of the $ 29 billion defendants paid in 2011 from [\*1272] PAE suits, 161 only 25% contributed to innovation, while 75% were categorized as "**deadweight loss" to** society. 162 These costs of litigation or licensing fees subtract from opportunity costs likely spent on R&D to improve technology. 163 Bessen and Meurer categorize these costs to defend PAE suits as social losses - representing reduced incentives in innovation - that do not transfer in the form of royalty payments to small inventors as PAEs suggest. 164 The startups and innovative companies are less likely to invest in **R&D,** because they become "**targets for litigation** mainly when they introduce innovative products." 165

Despite these statistics supporting the harmful effect of PAEs, their supporters argue that PAEs promote innovation by providing an **incentive** for independent inventors and small businesses. Heavily funded by **investors**, PAEs provide a **litigation threat** for small inventors who also lack the necessary resources to develop and market a product. 166 Additionally, the growing number of PAE firms offers a competitive market for large and small companies to sell their patent **portfolios**. 167 PAEs have an incentive to purchase these patents to sue [\*1273] practicing entities, and therefore contribute to innovation by compensating small inventors to focus on continued development. 168 With incoming revenue from licensing or royalty payments, a struggling product company may assert patents for survival and to keep up with new technology. 169 For example, Kodak, a product company, exercised trolling techniques to raise funds for R&D. 170

Studies show that PAEs **harm** rather than help **small businesses** and **startups**. Additionally, PAEs have a much more detrimental impact on small to medium size companies than large companies. 171 One study found that the median decline in common stock value of a defendant in a PAE lawsuit is **$ 20.4 million**. 172 Because the threat of PAE litigation is so **commonplace**, startups may face **more difficulty** raising funds from **investors** who anticipate such litigation costs. 173 In fact, **investors have shifted funding to PAE firms** as they offer greater returns than **startups**. 174

**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.**