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**Innovation**

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

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

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

**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 solves a litany of existential risks**

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

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

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

**New cloud tech is key to asteroid detection**

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

[Abstract]

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

[Introduction]

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

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

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

**Impact outweighs**

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

**Lobbying**

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

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

**The plan solves**

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

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

**Anticompetitive lobbying entrenhces**

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

**Populism driven nationalist blocks make conflicts inevitable**

**Haass & Kupchan 21** (Richard N. Haass and Charles A. Kupchan 21. Richard N. Haass is President of the Council on Foreign Relations, was Director of Policy Planning for the United States Department of State and a close advisor to Secretary of State Colin Powell. Charles A. Kupchan is Professor of International Affairs at Georgetown University, a Senior Fellow at the Council on Foreign Relations, and was Director for European Affairs on the National Security Council. “The New Concert of Powers”. Foreign Affairs. 3-23-21. https://www.foreignaffairs.com/articles/world/2021-03-23/new-concert-powers)

The international system is at a **historical inflection point.** As Asia continues its economic ascent, two centuries of Western domination of the world, first under Pax Britannica and then under Pax Americana, are coming to an end. The West is losing not only its material dominance but also its ideological sway. Around the world, democracies are **falling prey** to illiberalism and **populist dissension** while a rising China, assisted by a pugnacious Russia, seeks to challenge the West’s authority and republican approaches to both domestic and international governance. U.S. President Joe Biden is committed to refurbishing American democracy, restoring U.S. leadership in the world, and taming a pandemic that has had devastating human and economic consequences. But Biden’s victory was a close call;on neither side of the Atlantic will **angry populism or illiberal temptations readily abate**. Moreover, even if Western democracies overcome polarization, beat back illiberalism, and pull off an economic rebound, they will not forestall the arrival of a world that is both multipolar and ideologically diverse. History makes clear that such **periods of tumultuous** **change** come with **great peril**. Indeed, **great-power** **contests** over hierarchy and ideology regularly lead to **major wars**. Averting this outcome requires soberly acknowledging that the Western-led liberal order that emerged after World War II cannot anchor global stability in the twenty-first century. The search is on for a viable and effective way forward. The best vehicle for promoting stability in the twenty-first century is a global concert of major powers. As the history of the nineteenth-century Concert of Europe demonstrated—its members were the United Kingdom, France, Russia, Prussia, and Austria—a steering group of leading countries can curb the geopolitical and ideological competition that usually accompanies multipolarity. Concerts have two characteristics that make them well suited to the emerging global landscape: political inclusivity and procedural informality. A concert’s inclusivity means that it puts at the table the geopolitically influential and powerful states that need to be there, regardless of their regime type. In so doing, it largely separates ideological differences over domestic governance from matters of international cooperation. A concert’s informality means that it eschews binding and enforceable procedures and agreements, clearly distinguishing it from the UN Security Council. The UNSC serves too often as a public forum for grandstanding and is regularly paralyzed by disputes among its veto-wielding permanent members. In contrast, a concert offers a private venue that combines consensus building with cajoling and jockeying—a must since major powers will have both common and competing interests. By providing a vehicle for genuine and sustained strategic dialogue, a global concert can realistically mute and manage inescapable geopolitical and ideological differences. A global concert would be a consultative, not a decision-making, body. It would address emerging crises yet ensure that urgent issues would not crowd out important ones, and it would deliberate on reforms to existing norms and institutions. This steering group would help fashion new rules of the road and build support for collective initiatives but leave operational matters, such as deploying peacekeeping missions, delivering pandemic relief, and concluding new climate deals, to the UN and other existing bodies. The concert would thus tee up decisions that could then be taken and implemented elsewhere. It would sit atop and backstop, not supplant, the current international architecture by maintaining a dialogue that does not now exist. The UN is too big, too bureaucratic, and too formalistic. Fly-in, fly-out G-7 or G-20 summits can be useful but even at their best are woefully inadequate, in part because so much effort goes toward haggling over detailed, but often anodyne, communiqués. Phone calls between heads of state, foreign ministers, and national security advisers are too episodic and often narrow in scope. Fashioning major-power consensus on the international norms that guide statecraft, accepting both liberal and illiberal governments as legitimate and authoritative, advancing shared approaches to crises—the Concert of Europe relied on these important innovations to preserve peace in a multipolar world. By drawing on lessons from its nineteenth-century forebearer, a twenty-first-century global concert can do the same. Concerts do lack the certitude, predictability, and enforceability of alliances and other formalized pacts. But in designing mechanisms to preserve peace amid geopolitical flux, policymakers should strive for the workable and the attainable, not the desirable but impossible. A GLOBAL CONCERT FOR THE TWENTY-FIRST CENTURY A global concert would have six members: China, the European Union, India, Japan, Russia, and the United States. Democracies and nondemocracies would have equal standing, and inclusion would be a function of power and influence, not values or regime type. The concert’s members would collectively represent roughly 70 percent of both global GDP and global military spending. Including these six heavyweights in the concert’s ranks would give it geopolitical clout while preventing it from becoming an unwieldy talk shop. Members would send permanent representatives of the highest diplomatic rank to the global concert’s standing headquarters. Although they would not be formal members of the concert, four regional organizations—the African Union, Arab League, Association of Southeast Asian Nations (ASEAN), and Organization of American States (OAS)—would maintain permanent delegations at the concert’s headquarters. These organizations would provide their regions with representation and the ability to help shape the concert’s agenda. When discussing issues affecting these regions, concert members would invite delegates from these bodies as well as select member states to join meetings. For example, were concert members to address a dispute in the Middle East, they could request the participation of the Arab League, its relevant members, and other involved parties, such as Iran, Israel, and Turkey. A global concert would shun codified rules, instead relying on dialogue to build consensus. Like the Concert of Europe, it would privilege the territorial status quo and a view of sovereignty that precludes, except in the case of international consensus, using military force or other coercive tools to alter existing borders or topple regimes. This relatively conservative baseline would encourage buy-in from all members. At the same time, the concert would provide an ideal venue for discussing globalization’s impact on sovereignty and the potential need to deny sovereign immunity to nations that engage in certain egregious activities. Those activities might include committing genocide, harboring or sponsoring terrorists, or severely exacerbating climate change by destroying rainforests. Policymakers should strive for the workable and the attainable, not the desirable but impossible. A global concert would thus put a premium on dialogue and consensus. The steering group would also acknowledge, however, that great powers in a multipolar world will be driven by realist concerns about hierarchy, security, and regime continuity, making discord inescapable. Members would reserve the right to take unilateral action, alone or through coalitions, when they deem their vital interests to be at stake. Direct strategic dialogue would, though, make surprise moves less common and, ideally, unilateral action less frequent. Regular and open consultation between Moscow and Washington, for example, might have produced less friction over NATO enlargement. China and the United States are better off directly communicating with each other over Taiwan than sidestepping the issue and risking a military mishap in the Taiwan Strait or provocations that could escalate tensions. A global concert could also make unilateral moves less disruptive. Conflicts of interest would hardly disappear, but a new vehicle devoted exclusively to great-power diplomacy would help make those conflicts more manageable. Although members would, in principle, endorse a norm-governed international order, they would also embrace realistic expectations about the limits of cooperation and compartmentalize their differences. During the nineteenth-century concert, its members frequently confronted stubborn disagreements over, for instance, how to respond to liberal revolts in Greece, Naples, and Spain. But they kept their differences at bay through dialogue and compromise, returning to the battlefield in the Crimean War in 1853 only after the revolutions of 1848 spawned destabilizing currents of nationalism. A global concert would give its members wide leeway when it comes to domestic governance. They would effectively agree to disagree on questions of democracy and political rights, ensuring that such differences do not hinder international cooperation. The United States and its democratic allies would not cease criticizing illiberalism in China, Russia, or anywhere else, and neither would they abandon their effort to spread democratic values and practices. On the contrary, they would continue to raise their voices and wield their influence to defend universal political and human rights. At the same time, China and Russia would be free to criticize the domestic policies of the concert’s democratic members and publicly promote their own vision of governance. But the concert would also work toward a shared understanding of what constitutes unacceptable interference in other countries’ domestic affairs and, as a result, are to be avoided. OUR BEST HOPE Establishing a global concert would admittedly constitute a setback to the liberalizing project launched by the world’s democracies after World War II. The proposed steering group’s aspirations set a modest bar compared with the West’s long-standing aim of spreading republican governance and globalizing a liberal international order. Nonetheless, this scaling back of expectations is unavoidable given the twenty-first century’s geopolitical realities. The international system, for one, will exhibit characteristics of both bipolarity and multipolarity. There will be two peer competitors—the United States and China. Unlike during the Cold War, however, ideological and geopolitical competition between them will not encompass the world. On the contrary, the EU, Russia, and India, as well as other large states such as Brazil, Indonesia, Nigeria, Turkey, and South Africa, will likely play the two superpowers off each other and seek to preserve a significant measure of autonomy. Both China and the United States will also likely limit their involvement in unstable zones of less strategic interest, leaving it to others—or no one—to manage potential conflicts. China has long been smart enough to keep its political distance from far-off conflict zones, while the United States, which is currently pulling back from the Middle East and Africa, has learned that the hard way. The international system of the twenty-first century will therefore resemble that of nineteenth-century Europe, which had two major powers—the United Kingdom and Russia—and three powers of lesser rank—France, Prussia, and Austria. The Concert of Europe’s primary objective was to preserve peace among its members through a mutual commitment to upholding the territorial settlement reached at the Congress of Vienna in 1815. The pact rested on good faith and a shared sense of obligation, not contractual agreement. Any actions required to enforce their mutual commitments, according to a British memorandum, “have been deliberately left to arise out of the circumstances of the time and of the case.” Concert members recognized their competing interests, especially when it came to Europe’s periphery, but sought to manage their differences and prevent them from jeopardizing group solidarity. The United Kingdom, for example, opposed Austria’s proposed intervention to reverse a liberal revolt that took place in Naples in 1820. Nonetheless, British Foreign Secretary Lord Castlereagh eventually assented to Austria’s plans provided that “they were ready to give every reasonable assurance that their views were not directed to purposes of aggrandizement subversive of the Territorial System of Europe.” A global concert would give its members wide leeway when it comes to domestic governance. A global concert, like the Concert of Europe, is well suited to promoting stability amid multipolarity. Concerts limit their membership to a manageable size. Their informality allows them to adapt to changing circumstances and prevents them from scaring off powers averse to binding commitments. Under conditions of rising populism and nationalism, widespread during the nineteenth century and again today, powerful countries prefer looser groupings and diplomatic flexibility to fixed formats and obligations. It is no accident that major states have already been turning to concert-like groupings or so-called contact groups to tackle tough challenges; examples include the six-party talks that addressed North Korea’s nuclear program, the P5+1 coalition that negotiated the 2015 Iran nuclear deal, and the Normandy grouping that has been seeking a diplomatic resolution to the conflict in eastern Ukraine. The concert can be understood as a standing contact group with a global purview. Separately, the twenty-first century will be politically and ideologically diverse. Depending on the trajectory of the populist revolts afflicting the West, liberal democracies may well be able to hold their own. But so too will illiberal regimes. Moscow and Beijing are tightening their grip at home, not opening up. Stable democracy is **hard to find** in the Middle East and Africa. Indeed, **democracy is receding,** not advancing, worldwide—a trend that could well continue. The international order that comes next must make room for ideological diversity. A concert has the necessary informality and flexibility to do so; it separates issues of domestic rule from those of international teamwork. During the nineteenth century, it was precisely this hands-off approach to regime type that enabled two liberalizing powers—the United Kingdom and France—to work with Russia, Prussia, and Austria, three countries determined to defend absolute monarchy. Finally, the inadequacies of the current international architecture underscore the need for a global concert. The rivalry between the United States and China is heating up fast, the **world is suffering** through a devastating pandemic, climate change is advancing, and the evolution of cyberspace poses new threats. These and other challenges mean that clinging to the status quo and banking on existing international norms and institutions would be dangerously naive. The Concert of Europe was formed in 1815 owing to the years of devastation wrought by the Napoleonic Wars. But the lack of great-power war today should not be cause for complacency. And even though the world has passed through previous eras of multipolarity, the advance of globalization increases the demand for and importance of new approaches to global governance. Globalization unfolded during Pax Britannica, with London overseeing it until World War I. After a dark interwar hiatus, the United States took up the mantle of global leadership from World War II into the twenty-first century. But Pax Americana is now running on fumes. The United States and its traditional democratic partners have neither the capability nor the will to anchor an interdependent international system and universalize the liberal order that they erected after World War II. The absence of U.S. leadership during the COVID-19 crisis was striking; each country was on its own. President Biden is guiding the United States back to being a team player, but the nation’s pressing domestic priorities and the onset of multipolarity will deny Washington the outsize influence it once enjoyed. Allowing the world to slide toward regional blocs or a two-bloc structure similar to that of the Cold War is a nonstarter. The United States, China, and the rest of the globe cannot fully uncouple when national economies, financial markets, and supply chains are irreversibly tethered together. A great-power steering group is the best option for managing an integrated world no longer overseen by a hegemon. A global concert fits the bill.

### 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\

**Citizen petition costs billions even if they are ultimately denied---prefer data**

**Robin 20** (Feldman Robin, Arthur J. Goldberg Distinguished Professor of Law, Director of the Center for Innovation (C4i), University of California Hastings Law, Robin Feldman, The Burden on Society from Eleventh-Hour “Citizen Petitions” Filed to Slow Generic Drugs, 79 Md. L. Rev. Online 1, y2k)

Often companies file their **citizen petition** in the **months right before** their generic competitors’ approval is **anticipated**. In the **vast majority** of cases, the FDA **denies** these petitions.6 **Yet**, the drug companies’ motives are **easy** to identify: delaying a **lower-priced generic** from entering the market for **even ninety days** can earn the companies **hundreds of millions of** dollars of revenue, making their **bogus** citizen **petitions** worth their while.

Protecting the availability of low-cost generic drugs **matters** to the American public. **Affordable** generic drugs, in addition to being **critical** to **public health**, translate into **huge savings** for the American public and government-funded **insurance programs**.8 The availability of a **generic equivalent** can **reduce** the price of a prescription drug **significantly9** ; more than three-quarters of prescriptions are now filled with their generic equivalents.10 Thus, bringing generics to market is **an essential part** of **controlling drug costs**.

Despite the **documented** abuse of the citizen petition system,11 the **cost to society** of these delays has not been calculated, which may hinder the push for policy solutions. Following the analytic techniques that Congress uses for estimating the likely impact of reform, this Article will identify a set of citizen petitions that could be described as the **sole**, “but for” **cause** of keeping a particular generic **out of the market**.12 It will use the criteria that the petition was denied; the FDA approved the generic within one business day of denying the petition; and the generic came to market within one week of the FDA’s approval, signaling that the petition was the final obstacle standing in the way of the generic’s entry to market.

Drawing from a **previously published data** set of 249 citizen petitions,13 this Article will analyze **four** petitions from a two-year period that are highly likely to have been the **final obstacle to a generic drug entering the market**, and for which **sufficient volume** and **usage data exist**. Using these four dubious citizen petitions, this Article will show that the total financial cost to society of citizen petition delays was $1.9 billion— which equals roughly **$3.6 million *per day***.14 Additionally, this Article will find that the total financial cost to government-provided insurance programs in the same period was roughly $782 million.15 Due to the **conservative methodology** employed16 (choosing only petitions that met the criteria of “but for” this citizen petition the generic would have gone to market), the estimates are likely **low**. Citizen petitions that contributed to a generic’s delay to market as one of multiple tactics or for which there was not sufficient volume and usage information were eliminated from consideration in this estimate.

This is an **extraordinarily narrow method** of identifying citizen petitions that contribute to generic drug delays. This approach **significantly underestimates** the financial impact when pharmaceutical companies misuse the regulatory system by filing baseless citizen petitions. By counting financial costs only associated with citizen petitions that stand alone during the twelve-year period rather than when they may be contributing to the delay as part of an arsenal of tactics, the total cost is undoubtedly underestimated. Moreover, this Article does not include in the calculation any costs to public health that may come from patients **foregoing medication** due to the lack of a lower cost generic alternative. Nonetheless, these delays bring **substantial** and **sobering costs**.

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

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

B. **JUDICIAL GUIDANCE**

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

i. Reduce Judicial Participation

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

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

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

2. Define the Court's Role

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

**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.

**Controlling drug costs is key to prevent aging crisis and chronic diseases**

**Holtz-Eakin 21** (Douglas Holtz-Eakin, PhD, is the President of the American Action Forum, LOWER DRUG COSTS NOW: EXPANDING ACCESS TO AFFORDABLE HEALTH CARE, 5-5, <https://www.americanactionforum.org/testimony/lower-drug-costs-now-expanding-access-to-affordable-health-care/#ixzz6yXhV9s4V>, y2k)

**Drivers of Drug Spending**

To the extent that drug expenditures are increasing or will begin to increase in the near future, a key factor is utilization. Annual growth in pharmaceutical spending in February 2020 was 7.9 percent,[6] but annual pharmaceutical price growth was only 2.4 percent.[7] On a per capita basis, real net spending has grown by only 1 percent between 2007 and 2017 and actually declined by 2.2 percent in 2017.[8]

Still, Americans are getting **older**, **living longer**, and are increasingly **burdened** with **chronic** disease. As of this year, **60 percent** of the United States’ adult population had been diagnosed with at least one chronic health condition, and 40 percent had two or more chronic conditions.[9] Managing these chronic conditions is **an expensive proposition** that relies primarily on **medication**. **Eighty-six percent** of all **health care spending** is for patients with one or more **chronic disease**; 98 percent of Medicare and 83 percent of Medicaid spending goes toward providing care for the chronically ill.[10], [11] Specifically, **over 75 percent** of U.S. health care spending goes toward treatment of **chronic disease**.[12] As these trends continue, **the financial burden** of maintaining a high quality of life with chronic conditions will **inevitably** disproportionately increase the **growth of pharmaceutical health care spending.**

**Aging crisis causes international wars**

Mark **Haas 7**, Ph.D., Assistant Professor of Political Science at Duquesne University, “A Geriatric Peace? The Future of U.S. Power in a World of Aging Populations,” International Security, Vol. 32, No. 1 (Summer 2007), pp. 112–147. Available online @ Harvard Belfer Center, <http://belfercenter.ksg.harvard.edu/files/is3201_pp112-147.pdf>

Second, while the **U**nited **S**tates should expect less international aid from its allies, it, too, is likely to experience the slowing of economic growth and the crowding out of military expenditures for **elderly care**. Although the scope of the aging crisis confronting the United States is smaller than in all the other great powers (with the possible exception of the United Kingdom), this does not mean that this challenge is trivial. To pay for the **massive fiscal costs** associated with its aging population, the **U**nited **S**tates will in all likelihood have to **scale back the scope of its international policies**. The current U.S. position of unprecedented power allows its leaders to pursue highly extensive international military, economic, and humanitarian commitments.114 The economic effects of an aging population will likely **deny** even **the U**nited **S**tates **the fiscal room** necessary to maintain the extent of its current global position, **let alone** adopt major new international initiatives. In the face of the exploding costs for elderly care, the crowding out of other spending will occur even for the richest country in the history of the world. An important consequence of the United States’ aging problem and the fiscal constraints it will create is that neo-isolationist foreign policy strategies are likely to become more compelling for U.S. leaders in coming decades than they would be in the absence of these conditions. The salience of these strategies will increase because they mesh with the need to reduce spending. If isolationist strategies come to dominate U.S. decisionmaking circles, the United States may end up **retreating from the world** even more than the burdens created by its aging population dictate. The preceding analysis points to a paradox for U.S. security in an aging world. Because the other great powers are aging faster and to a greater extent than is the United States, thereby creating a more austere fiscal environment in these other states than the United States, the latter’s currently dominant power position in relation to the other great powers will be preserved. Yet, because the United States, too, will experience many of the negative economic effects of an aging population, its absolute military power will likely decline from its current position. As a result, the **U**nited **S**tates (and its allies) will be less able to dedicate significant resources to **preventing WMD proliferation**, funding nation building, engaging in humanitarian interventions, and pursuing various other costly strategies of **international confiict resolution and prevention**. Global aging may help to make the twenty-first century a particularly dangerous time for U.S. international interests. Although this article has concentrated on population aging in the great powers, the same phenomenon is likely to affect much of the world at some point in this century. In fact, the aging problem in many developing states is likely to be as acute as for the industrialized countries, but the former also suffer from the huge disadvantage of growing old before growing rich, thus greatly handicapping these states’ ability to pay for elderly care costs. If the **strain on** governments’ **resources** caused by the costs of **aging populations** becomes sufficiently great, it is not difficult to imagine either an **increased probability of wars** to acquire resources or the creation in these countries of “failed states.” (Failed states are countries whose governments do not possess the capacity to provide for citizens’ basic needs.) These countries are prime targets to become both breeding grounds and safe havens for international terrorists.115While global aging may be helping to create more failed states than ever before, the United States and its allies will have significantly fewer resources at their disposal than they do today to address adequately this problem, potentially to the great detriment of these states’ security.

**Chronic diseases cause extinction**

**Lima 19** (Renata Lima, LABiToN—Laboratory of Bioactivity Assessment and Toxicology of Nanomaterials, University of Sorocaba, Sorocaba, Brazil, Prospects for the Use of New Technologies to Combat Multidrug-Resistant Bacteria, Pharmacol., 21 June 2019, <https://www.frontiersin.org/articles/10.3389/fphar.2019.00692/full>, y2k)

Prospects for the use of new technologies to combat multidrug-resistant bacteria

The increasing use of **antibiotics** is being driven by factors such as **the aging of the population**, increased occurrence of infections, and **greater prevalence of chronic diseases** that require **antimicrobial treatment**. The **excessive** and **unnecessary use** of antibiotics in humans has led to the emergence of **bacteria resistant** to the **antibiotics** currently available, as well as to the selective development of other microorganisms, hence contributing to the **widespread dissemination of resistance** genes at the **environmental** level. Due to this, attempts are being made to develop new techniques to combat resistant bacteria, among them the use of strictly lytic bacteriophage particles, CRISPR–Cas, and nanotechnology. The use of these technologies, alone or in combination, is promising for solving a problem that humanity faces today and that could lead to human **extinction**: the domination of **pathogenic bacteria resistant** to artificial drugs. This prospective paper discusses the potential of bacteriophage particles, CRISPR–Cas, and nanotechnology for use in combating human (bacterial) infections.

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

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

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

**Cultivated meat solves extinction**

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

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

CULTIVATED MEAT IS MUCH BETTER FOR THE ENVIRONMENT

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

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

CULTIVATED MEAT CONSERVES LAND & WATER RESOURCES

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

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

### Solvency

**The United States federal government should substantially expand its prohibitions on anticompetitive petitioning by the private sector.**

**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

**T Prohibitions (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

**The court stopped using per se prohibitions as absolute**

**Abramson 8** (Brian Dean Abramson, Private intellectual property attorney. J.D., Florida International University College of Law, 2005, LET THEM EAT SMOKE: THE CASE FOR EXEMPTING THE TOBACCO INDUSTRY FROM ANTITRUST, 6 Cardozo Pub. L. Pol'y & Ethics J. 345, y2k)

Initially, the Supreme Court ruled that the Sherman Act constituted **an absolute prohibition** against **contracts restraining trade**, no matter what the intent of these contracts was. 29 The Court soon realized that such a standard would be **unworkable**, 30 because **every** contract **necessarily** involves **some** restraint of commerce. For example, if party A agrees to work full-time for party B for a year, then party A may be restrained from working even part-time for any other company. Because of this, the Court sought to establish **some standard** by which it could determine which contracts were **intended to fall** under the Sherman Act.

**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.

### T Expand

**Their evidence is normative not descriptive it’s criticizing a past decision on legal reasoning**

**1NC Wenger 20** [Katheryn M. Wenger, University of California, Hastings College of the Law, Juris Doctor Candidate, 2020; "You Don't Have to Pay the Troll Toll: Antitrust Violations of Patent Assertion Entities and the Noerr-Pennington Doctrine Sham Litigation Exception," Hastings Constitutional Law Quarterly 47, no. 4 (Summer 2020): 557-594, poapst]

Denying alleged PAE infringers to assert antitrust counterclaims stifles innovation and affords PAEs patent rights greater than the intended purpose patent protection—disclosure of an invention for a secured exclusive right to the invention (also known as the “patent bargain”).71 PAEs (like IV) abuse this system when they force competitors to license an entire patent portfolio instead of just the necessary patent(s). **Therefore, in their affirmation of the Maryland district court’s decision, the Federal Circuit set a bad precedent that drastically depletes innovation and grants PAEs considerable patent rights, which goes against the purpose of Article I, Section 8, Clause 8.**

**C/I - Expand means to cover new activities**

**Breyer 7 –** Stephen Gerald Breyer is an American lawyer and jurist who has served as an associate justice of the Supreme Court of the United States since 1994, ‘7 127 S.Ct. 2301 (2007) 551 U.S. 142, Lisa WATSON, et al., Petitioners, v. PHILIP MORRIS COMPANIES, INC., et al.

The upshot is that a highly regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone. A private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase "acting under" a federal "official." And that is so even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored. A contrary determination would expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries. See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a (2000 ed. and Supp. IV) (mandating disclosure of testing results in the context of pesticide registration). Neither language, nor history, nor purpose lead us to believe that Congress intended any such expansion.

**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.

**RICO CP**

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

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

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

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

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

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

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

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

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

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

**Loopholes—trolls will capitalize AND cases lose**

**Yegulalp 13** “Patent trolls face a new deterrent: The RICO Act” Serdar Yegulalp, Senior Writer, InfoWorld | SEP 17, 2013, https://www.infoworld.com/article/2612158/patent-trolls-face-a-new-deterrent--the-rico-act.html

Using **RICO** to battle patent trolls was suggested as a tactic in 2009, in the Yale Journal of Law and Technology. Blair **Silver** suggested RICO was likely to work as a deterrent in part "because of the scope of its remedies: treble damages, attorney's fees, and investigation costs," and because RICO explicitly covers intellectual property crimes as well as the ones normally associated with racketeering.

Silver did caution that RICO needed to be applied correctly to be effective, citing a history of **how** the courts have been **reluctant** to apply RICO to patent law because "**most civil RICO allegations are thrown out for formalistic problems**."

So far, the **real-world track record** for using RICO against patent trolls is sadly **weak**. Back in 2011, when patent trolls **Innovatio** tried to sue the owners of coffee shops and motels for using commonplace Wi-Fi technology, Cisco, Netgear, and Motorola all jointly countersued. Alas, **no dice**: The judge **didn't** buy into the RICO portion of the lawsuit and **threw it out.**

For the tens of millions of customers who visit the company’s service stations each month, the Fortinet solution has substantially improved their customer experience.

To complicate things further, the judge in that case later ruled that Innovatio's patent claims were **in fact an essential part** of the 802.11 standard. But it's hard to argue that gave them license to shake down end-users, rather than demand licensing fees from device makers.

The hardest part, then, is making sure the countersuit is **actually applicable**. Filing a properly drafted RICO claim takes a legal team with a good understanding of the statute -- and it may well be **difficult** to file **RICO** against a troll who's managed to **stay on just this side of the law** with its behavior.

Buying **such legal expertise doesn't come cheap, either**. An individual who doesn't have millions of dollars in his pockets to spare either has to seek pro bono aid, rely on the likes of the EFF's Patent Busting Project to save him, or pay up.

**Dev markets dead**

**USGLC 8/21** “COVID-19 Brief: Impact on the Economies of Low-Income Countries” US Global Leadership Coalition, August 12, 2021, https://www.usglc.org/coronavirus/economies-of-developing-countries/

The failure to control the COVID-19 pandemic has had far reaching impacts on the global economy, with global GDP falling by 3.3 percent in 2020. Even with the global economy projected to grow by 6 percent in 2021, recovery will depend on equitable distribution of the vaccine globally. Failure to do so could cost the world economy up to $9 trillion, according to the International Chamber of Commerce, with the costs born equally by wealthy and poor countries, causing more economic devastation than the 2008 financial crisis.

The COVID-19 pandemic erased the equivalent of **255 million jobs** in 2020, losses were particularly high in Latin America and the Caribbean, Southern Europe and Southern Asia.

The global economic downturn is having a disproportionate impact on low-income and emerging economies. They will **take the hardest hit**, according to Kristalina Georgieva, Managing Director of the International Monetary Fund, as they have “less resources to protect themselves against this dual…health and economic crisis.” World Bank President David Malpass also warned that the global recession could set back **decades of progress** in low-income countries, stating that the COVID-19 pandemic would lead to higher infant mortality rates and stunted growth for children.

The United Nations Development Programme (UNDP) projects that developing economies will lose at least $220 billion in income.

An additional 95 million people are expected to have entered the ranks of the extreme poor in 2020 (80 million more undernourished than before) due to the average annual loss in per capita GDP, says the IMF.

An additional 207 million people could be pushed into extreme poverty by 2030, due to the severe long-term impact of the coronavirus pandemic, bringing the total number to more than a billion, according to a new study from the UNDP.

Failure to Distribute Vaccines Around the World

Vaccine access has emerged as the leading determinate of global economic recovery, particularly for low-income and emerging economies.

Low-income countries would add $38 billion to their GDP forecast for 2021 if they had the same vaccination rate as high income countries.

Rand Corporation estimates changes in real annual GDP for four scenarios:

Graph from Rand Corporation

Differences in ongoing financial support are degrading economic growth and recovery prospects for low-income countries.

Regional Assessments

The World Bank reports that sub-Saharan Africa experienced its first economic recession in 25 years, with the economy declining by 2.0 percent in 2020. Growth in the region is forecast to rise to between 2.3 – 3.4 percent in 2021.

For the first time in 60 years, East Asia’s economic growth stalled – growing by a mere 1.2 percent in 2020 – and the pandemic could drive 19 million people into poverty.

Latin America and the Caribbean experienced the worst economic contraction in the region’s history with the economy declining by 6.7 percent in 2020, with expected growth by 4.4 percent in 2021. Unemployment is expected to reach 13.5 percent, the economic downturn could push 28 million people into extreme poverty.

**We solve constitutionalizing better---Noerr is too expansive now**

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

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

The First Amendment guarantees freedom of speech, assembly, and “to petition the government for a redress of grievances.” 4. U.S. Const. Amend. I.It therefore protects efforts to influence political debate as well as legitimate petitioning in legislative, judicial, or administrative processes. 5. Not all authorities agree that lawsuits are “petitions.” See Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 403 (2011) (Scalia, J., concurring in part and dissenting in part) (“I find the proposition that a lawsuit is a constitutionally protected ‘Petition’ quite doubtful.”); U.S. Const. amend. I (“Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).The First Amendment does not, however, create a right to **bribe government officials**, **deceive agencies**, **file false statements**, **or abuse government process through repeated 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. 6. See infra text and accompanying notes 37– 55.For these reasons, it **is an extraconstitutional outlier ripe for reexamination.**

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

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

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

**BBB Ptx DA**

**No spillover link---each anti-trust case is unique and isolated**

**Chambers Associate 21** (The Student's Guide to the Legal Profession, Antitrust in 2021 - the view from White & Case, <https://www.chambers-associate.com/practice-areas/antitrust/antitrust-in-2021-the-view-from-white-case>, y2k)

JP: Because antitrust law has developed through **case law**, rather than being governed by **detailed statutory language**, it has **changed** over time, and is still **changing**. Not only is it important that the laws are interpreted in a way that protects consumers, **businesses** also have to be able to understand the **parameters of the law** and have some certainty in order to be able to engage in competition-enhancing conduct. The antitrust laws can result in criminal penalties and/or treble damages resulting in billions of dollars in exposure. Being able to help your clients navigate these laws before (or after) a business practice is challenged is essential to avoid these potentially huge penalties.

CA: What kind of work is involved day-to-day?

JP: Truthfully, the day-to-day work is always changing. As an antitrust lawyer, you can work in litigation, mergers, investigations, counseling, etc. It is truly a dynamic practice. During a litigation, work will vary depending on the phase of the case ranging from legal or factual research, drafting, expert work, witness prep, discovery, trial prep, and more. Litigation for an antitrust litigator has all the excitement and challenges of any other type of litigation, with the added benefit of a specialized knowledge of the antitrust laws and a deep dive into the industry you’re working in. Outside of litigation, clients are always reaching out with really interesting questions about whether they can (or should) engage in certain business practices, potential liability, etc. Digging into different industries and understanding different business models is just as fun and challenging as understanding the intricacies of the legal question at issue.

JC: Antitrust requires you to understand and oftentimes predict what effect certain conduct could have on the market (prices, availability of goods, and so on). Economics plays an important role in making these predictions.

“Digging into different industries and understanding different business models is just as fun and challenging as understanding the intricacies of the legal question at issue.”

HMB: As a litigator, I am generally working on a particular case during any given day, so my work depends on the stage of the case. In my current case, we are in discovery so my day-to-day involves meeting and conferring with plaintiffs, drafting discovery letters, overseeing document review and production, interviewing potential witnesses and working with experts as they develop their expert reports.

CA: What are the highs and lows of the practice?

JP: The legal and business questions in **antitrust cases** are always interesting, **unique**, and complex. In my practice, I have been on the side of both plaintiffs and defendants, which really has given me a broad understanding of the laws and the impact of them on both sides of the equation. Regardless of which side you are on, whether you are involved in a litigation, representing a merging party, or have another role, the outcome of an antitrust proceeding can have a huge impact on not just your client, but the way businesses function or practices in an industry take shape. Like many areas of law, antitrust is fast paced and always changing. Clients have **unique** and important **concerns** that will be time sensitive and **challenging**. Antitrust litigation in particular can take years—that can be both a good and bad thing. While you may be anxious to reach a resolution, you should also relish the chance to be involved in many aspects of a sprawling case, sometimes that can mean being involved from the filing of the complaint, through trial, and various appeals.

JC: **Each antitrust case is different**. Each case usually involves a **different industry** with its own **unique features** and **practices**. Learning about a new industry for the first time is challenging and rewarding. The practice does not get old. One difficult aspect of antitrust practice is that sometimes, it is difficult to provide clients with absolute certainty about a business practice. As lawyers, we crave certainty, but some gray areas of antitrust could go either way in terms of liability.

**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

**Uncertainty exists now**

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

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

**Biden’s depleted his PC**

Ed **Driscoll 11/11**—Columnist, Dallas Editor. ("Bidenflation is real and it’s spectacular — and directly tied to Biden’s stimulus," November 11, 2021, from PJ Media, https://pjmedia.com/instapundit/484681/)

[Larry] Summers predicted that would happen too, although perhaps too subtly for the White House to recognize. Summers had noted that the Biden administration wanted to prioritize social justice in its programs but had left itself **no budgetary room** for that purpose, thanks to the **massive scope** of stimulus spending. Not only does Biden lack budgetary capital for that purpose, his massive incompetence has **entirely depleted his political capital** for that agenda. His job approval hasn’t fallen into the **thirties** because of a perception that Biden is overly concerned about voter priorities and household issues, after all.

The shift in the media on inflation over the last day or so underscores that risk. For the last few months, the media has been happy to pass along all of the happy talk about “transitory” inflation, scoff at families who stress out over rising food prices, and even paint inflation as a great sign for America’s economy. After yesterday’s CPI numbers hit a 31-year record for inflation and show no sign of slowing down, the fuel for gaslighting has apparently run out, and Biden’s suddenly looking **incompetent** and **lost** on the issue that generally matters most to voters — the economy.

**Won’t pass—Manchin and inflation**

Darragh **Roche 11/11**—at Newsweek. ("Crippling inflation could kill Joe Biden's Build Back Better bill," 11/11/2021, from Newsweek, https://www.newsweek.com/crippling-inflation-kill-joe-biden-build-back-better-joe-manchin-1648356)

President Joe Biden's proposed **B**uild **B**ack **B**etter Act could be at risk amid concern Senator Joe Manchin (D-WV) **won't back the bill** with inflation already at its highest level in 30 years.

The Consumer Price Index for October recorded a 6.2 percent increase year on year in figures published by the Bureau of Labor Statistics on Wednesday, with notable rises in the price of food and energy.

Manchin, whose vote is crucial in passing the bill through the budget reconciliation process, has previously suggested he **wouldn't support a major spending bill that might exacerbate inflation**.

The senator, who is considered a moderate or conservative Democrat, tweeted about inflation on Wednesday.

"By all accounts, the threat posed by record inflation to the American people is not 'transitory' and is instead getting worse," Manchin wrote.

"From the grocery store to the gas pump, Americans know the inflation tax is real and DC can no longer ignore the economic pain Americans feel every day."

Manchin's recent comments **may be a cause of concern** for the White House in light of a statement he issued on November 1 that linked an expansion of social spending with rising inflation.

"Throughout the last three months, I have been straightforward about my concerns that I will not support a reconciliation package that **expands social programs and irresponsibly adds** to our nearly $29 trillion in national debt that no one else seems to care about. Nor will I support a package that risks hurting American families suffering from historic **inflation**," the statement said.

Manchin added that he wouldn't "support a multitrillion-dollar bill without greater clarity about why Congress chooses to ignore the **serious effects inflation** and debt have on our economy and existing government programs."

## 1AR

### Case

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

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

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

**The squo test is ambiguous, but courts can handle ambiguity AND can use other areas**

**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 second objective test archetype, the “objectively baseless” archetype, defines the “sham” exception in broader terms. Here, a claim is deemed objectively adequate (and will be treated as a Category I genuine or Category III excused claim) so long as it has “some chance” of succeeding on the technical issue of liability, regardless of the size or scope of any damages or redress that might be awarded. Similarly, a claim is deemed “objectively inadequate” (and will be treated as a Category II improvident or Category IV sham claim) if it is “objectively baseless” (that is, so long as it has “no chance” of succeeding on the technical issue of liability). Thus, on the one side of the coin, the claim is “genuine” if it has “some chance” of succeeding; on the flip side of the same coin (test), it is a “sham” if it is “objectively baseless.” Throughout this paper, this variety of objective test archetype will be referred to as the “objectively baseless” or “some chance” archetype. This archetype regarding “shams” is viewed as broader than (and inclusive of the kinds of claims covered by) the fraudulent archetype, because the objectively baseless test is construed as also prohibiting the employment of fraudulent claims. (As stated, a fraudulent claim is not what it is purported to be and thus lacks objective probity.) If the need arose, the test could be expressly denominated as the “objectively baseless or fraudulent” (or “some non-fraudulent chance”) archetype to eliminate doubt on this point, but the more-concise designations are employed here. Taken in this light, the test does proscribe a broader array of offensive claims. Not only are Walker Process claims proscribed, but, in addition, the baseless claims of California Motor are proscribed as well. In this respect, the test is a clear improvement. But **it is also a more ambiguous test.** **Defining whether a claim has “some chance”** (however small) **of succeeding is arguably more difficult, in most cases, than evaluating whether it is fraudulently framed or reliant upon a fraudulent** **foundation**. There are important checks on that ambiguity, however, and one example is Federal Rule of Civil Procedure Rule 11 (“Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions”). It can be argued that Rule 11(b) itself is an “objectively baseless” – type standard, as it proscribes attorneys from presenting to the court pleadings, motions, or papers that are “frivolous”; only claims that are “warranted” by “some” existing law or an objectively reasonable extension or reversal of existing law may be presented.40 Thus, while the “objectively baseless” formulation of the “sham” exception objective test is more ambiguous, it is not a type of ambiguity with which the judiciary is unfamiliar. Recall, as well, that the Court in PRE drew analogy to Rule 11.41

**Here are objective criteria**

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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>

B. Evaluating Cases for Potential Antitrust Liability While antitrust liability should be imposed against companies which maintain anticompetitive, frivolous lawsuits, determining whether a particular action is baseless and anticompetitive may be quite difficult. Indeed, there may be significant legal and practical difficulties in establishing a prima facie antitrust claim, much less proving it. **Nevertheless**, by focusing on Hatch-Waxman cases, **this section suggests several potential criteria** that may assist in identifying appropriate cases. **The first criterion** evaluated is the litigant’s efforts (or lack thereof) in ascertaining infringement prior to filing suit. If a patentee failed to take reasonable steps to evaluate infringement prior to litigation, this may be indicative that the action was filed (and maintained) for an improper purpose. For example, the court **in** In re Neurontin Antitrust Litigation denied a motion to dismiss the antitrust claim in part due to allegations that the patentee never tested or examined the allegedly infringing product prior to filing suit.149 **Second** is examining whether a patentee continuously insists upon an interpretation of its patent claims that is nonsensical, wholly unsupported, or contradicted by either the patent’s specification or its own assertions made before the P.T.O. For example, Raylon v. Complus Data150 involved Raylon’s patent for a hand-held ticketing device that contained its own internal keypad and printer and included a display that was “pivotally mounted on” the device.151 The patent included a drawing that illustrated the invention’s preferred embodiment, which was comprised of (among other things) a rectangular body with buttons for entering data, a location where tickets could be printed out, and a separate display attached to the device.152 Raylon filed patent infringement actions against various software and hardware manufacturers of hand-held ticketing devices.153 In defending the lawsuits, several defendants countered that their products could not infringe on Raylon’s patent because their devices had rigid, fixed-mounted displays that could not be pivoted.154 Raylon did not contest that defendants’ products contained fixed-mounted, non-pivoting displays, but nonetheless maintained that defendants’ devices infringed its patents because those devices could be manually pivoted, i.e., by the person holding the device.155 The District Court rejected Raylon’s arguments as one which “stretch[es] the bounds of reasonableness,” because it was unsupported by the evidence and would essentially ignore the “pivotally mounted” limitation of the patent.156 Nevertheless, the District Court denied defendant’s motion for sanctions and fees under Rule 11 and Section 285.157 On appeal, the Federal Circuit reversed, holding that Raylon’s interpretation of “pivotally mounted” was “frivolous” and “unreasonable” because the patent’s claims, specifications, and preferred embodiment all clearly “show[] a display that is mounted to pivot relative to the housing on which it is attached.”158 Moreover, the Federal Circuit concluded that Raylon’s construction was unsupported by the patent prosecution history (made before the P.T.O) and “does not conform to the standard canons of claims construction.”159 **Third** is examining whether a patentee inexorably asserts infringement, even after discovery and evaluation of the accused product(s) or method(s) substantiate non-infringement. For example, in AstraZeneca v. Dr. Reddy’s, the court was critical of AstraZeneca’s continued position that Dr. Reddy’s generic product infringed its formulation patent despite substantial evidence that Dr. Reddy’s formulation was not 70% crystalline, as required by the asserted patent.160 Similarly, the court in In re Cyclobenzaprine Hydrochloride Extended Release Capsule Patent Litigation granted fees under Section 285 in part because patentee maintained its lawsuit despite failing to provide any evidence of infringement as to certain claims—even as late as trial.161 **Fourth,** litigation misconduct may evince that the action was initiated and maintained for an improper purpose. For example, in AstraZeneca v. Dr. Reddy’s, one factor in the court’s awarding of fees was patentee’s discovery abuses, i.e., its “wide-ranging” discovery requests which were a mere “fishing-expedition” done for the purpose of deterring competition.162 Similarly, engaging in a pattern of dubious litigation may suggest an improper purpose, particularly when the allegations made in the various actionsappear weak and/or unreasonable. 163 **Finally**, evaluating anticompetitive effects of litigation is also an important consideration in identifying suitable antitrust cases. In the Hatch-Waxman context, filing and maintaining baseless litigation is likely to impede competition in cases where it delays generic entry. In other contexts, it may be far more difficult to demonstrate that sham litigation, either by itself or along with other conduct, is **anticompetitive. Applying these criteria will assist in identifying appropriate cases for potential antitrust liability**. And while the criteria discussed focuses on patent litigation in the Hatch-Waxman context, several may be applied in other contexts. For example, a lack of due diligence in evaluating the strength of one’s claim prior to filing suit may be indicative of improper motive in nearly any action. Similarly, continuing to take an unreasonable and unsupportable position throughout litigation concerning the language of a relevant document (such as a contract)—particularly if inconsistent or even contradicted by other evidence—is likely to suggest an improper motive for the litigation. Finally, misconduct during the course of litigation surely happens in all types of cases, and in certain situations may evidence that the litigation is being maintained for an improper purpose.

**Advantage CP**

**Either CP gets struck down OR links to the DA because it would require over turning the Noerr-Pennington immunity**

**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)

Lastly, **a blanket prohibition against the use of PAEs in patent litigation would probably not curb patent privateering**. 290 First, it would be **difficult** for courts to determine if a company **truly is a PAE or not**, given the **secretiveness** of privateering arrangements. A court could employ **the same criteria** as listed in the proposed presumption in Section A, **but if it did so, it might as well simply employ the presumption anyway**. Second, **benign** uses of PAEs for litigation by **inventors**, **universities**, and **small firms** would be **unjustifiably enjoined**. 291 A blanket prohibition on privateering would thus be overly broad. Third, prohibition would still not solve the evidentiary difficulty of discovering the existence of a privateering arrangement or the identity of a sponsor. 292 Fourth, such a prohibition may **violate Noerr-Pennington immunity**, established by the **First Amendment**. A presumption, on the other hand, succumbs to **none of these difficulties.** 293

[\*2213] **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.

**Goes too far**

**Phelps ‘15** (Marshall Phelps; former chief of global intellectual property operations for two of the largest technology companies in the world – IBM and Microsoft; 9/16/15; "Do Patents Really Promote Innovation? A Response To The Economist"; https://www.forbes.com/sites/marshallphelps/2015/09/16/do-patents-really-promote-innovation-a-response-to-the-economist/#585ae04a1921)

Last month, the venerable Economist newspaper published an editorial decrying the state of the patent system. They rightly condemned the “parasitic ecology of trolls” that has bruised the patent system in recent years. But then the Economist went much further, claiming that while “today’s patent regime operates in the name of progress, instead it sets innovation back.” This is hardly surprising for a publication that throughout the 19th century openly called for the abolition of the patent system. They did so, mind you, even as the patented inventions of Matthias Baldwin, Samuel Morse, Alexander Graham Bell, and Thomas Edison were unleashing the railroad, telegraph, telephone, and electrical power industries and transforming the face of human society. But no matter, let’s take the Economist’s central claim at face value — that patents “set innovation back” rather than promote it — and see if it holds up to scrutiny. Let’s start with the basics: What **causes** innovation in the **first place?** Economists have **repeatedly demonstrated** that inventors are driven **primarily** by the expectation of **profiting** from **owning the rights** to **their inventions**. Zorina Khan of Bowdoin College, whose 2005 classic The Democratization of Invention: Patents and Copyrights in American Economic Development was awarded the prestigious Alice Hanson Jones Prize for outstanding work in economic history, observed that “Ordinary people [are] stimulated by **higher perceived returns** or demand-side incentives to make long-term commitments to **inventive activity**.” She also found that “their patterns of patenting were procyclical [and] responded to expected profit opportunities.” Along with her colleague the late Kenneth Sokoloff of UCLA, Professor Khan then summarized the role of **patents** in helping U.S. **startup businesses** grow the economy from an **agrarian backwater** into the **most powerful industrial economy** on the **face of the earth:** The U.S. **patent system** had a **powerful impact** on the patterns of inventive activity. Its provision of **broad access** to **property rights** on **new inventions**, coupled with the requirement of public disclosure, was **extremely effective** at stimulating the growth of a market for **technology** and **promoting technological change** [emphasis added]. Then, as now, the American formula for success was simple: Startups + patents = jobs and economic growth! Over the last 50 years, economists have found that patents continue to **foster ex ante innovation** — meaning, they induce people to invent because of the **prospect** of **profiting from those inventions**. The work of economists such as Arrow (1962), Griliches (1963), Schmookler (1966), Kitch (1977), Reinganum (1981), Klemperer (1990), Romer (1990), Giulbert and Shapiro (1990), Grossman and Helpman (1991), Scotchmer (1999), and Gallini (2002) on this issue is mostly available for free online at the Social Science Research Network. One especially interesting 2007 study by Arora, Ceccagnoli, and Cowen entitled "R&D and the Patent Premium" found that "the patent premium for innovations that were patented is substantial. Firms earn on average a 50% premium over the no patenting case, ranging from 60% in the health related industries to about 40% in electronics.” Sure, one should be cautious about academic research, especially given the old joke about how an economist opens a can of soup. (Answer: assume a can opener.) But real-world economics clearly confirms the research findings. Consider, for example, that the **biggest job-creating new industries** of the last **60 years** — **semiconductors** (consumer electronics), **PCs**, **software**, **biotech**, mobile **telephony**, and **Internet e-commerce** — were **all launched** and **grew strong** on the basis of **patented inventions** created by **startup businesses**. As the CEO of Juno Therapeutics, Hans Bishop, and ARCH Venture Partners co-founder Bob Nelson recently wrote in Forbes: “Let us be clear: investments in the biotech industry are **based entirely on patents**. Without strong patents, we **cannot raise money** to **find cures for disease**.” Moreover, the evidence that patents foster innovation is not confined to the U.S., nor is it limited only to developed countries. In 2008, a study by the Organization for Economic Co-operation and Development (OECD) found that “stronger levels of patent protection are positively and significantly associated with inflows of high-tech product [and] expenditures on R&D.” And in another study that attracted wide attention, Shih-Tse Lo of Concordia University in Montreal found that the 1986 reforms **strengthening** the Taiwanese patent system “stimulated **additional inventive activity**, especially in industries where patent protection is generally regarded as an **effective strategy** for **extracting returns**, and in industries which are **more R&D intensive**. The reforms also seemed to induce additional foreign direct investment in Taiwan.” Interestingly, the evidence also shows that rather than hindering knowledge sharing, as the Economist claims, patents actually promote it. Acemoglu, Bimpikis, and Ozdaglar (2008) observed that “patents improve the allocation of resources by encouraging rapid experimentation and efficient ex-post transfer of knowledge across firms.” Indeed, it turns out that the patent system is one of the **most effective tools** for **knowledge-sharing** and **technology transfe**r ever devised. A 2006 study by French economists Francois Leveque and Yann Meniere found that **88 percent** of U.S., European, and Japanese businesses said they actually rely upon the information **disclosed in patents** to keep up with **technology a**dvances and direct their **own** R&D efforts. This is hardly a new phenomenon. The 19th century inventor Elias E. Reis reported that when he read about an 1886 patent issued to Elihu Thomson for a new method of electric welding, “there immediately opened up to my mind a field of new applications to which I saw I could apply my system of producing heat in large quantities.” Thomas Edison was known to frequent the patent office in order to study other inventors’ patents and hopefully spark ideas of his own. As for Edison himself, a 2013 study found that rather than blocking further invention, his seminal 1880 incandescent lamp patent (No. 223,898) actually “stimulated downstream development work” that resulted in “new technologies of commercial significance [including] the Tesla coil, hermetically sealed connectors, chemical vapor deposition process, tungsten lamp filaments and phosphorescent lighting that led to today’s fluorescent lamps.” A simple thought experiment suggests why this is so. As UCLA’s Sokoloff and Yale’s Naomi Lamoreaux observed in a 1997 paper, “The very act of establishing exclusive property rights in invention not only protected patentees but also promoted the diffusion of information about technology. To see why, imagine a world in which there was no patent system to guarantee inventors property rights to their discoveries. In such a world, inventors would have every incentive to be secretive and guard jealously their discoveries from competitors [because those discoveries] could, of course, be copied with impunity. This is the world of trade secrets. “By contrast,” the authors noted, “in a world where property rights in invention were **protected**, the situation would be very different. Inventors would now feel free to **promote their discoveries** as **widely as possible** so as to maximize returns either from commercializing their ideas themselves or from [licensing] rights to the idea to others. The protections offered by the patent system would thus be an important stimulus to the exchange of technological information in and of themselves. Moreover, it is likely that the **cross-fertilization** that resulted from these information flows would be a **potent stimulus** to **technological change**.” In the real world, one need only look at the smartphone industry to see the truth in that thought experiment. Does anyone believe that global smartphone use would have experienced such extraordinarily rapid growth under a trade secret regime? Impossible. Only a **strong patent system** enabling the licensing and cross-licensing of proprietary technology across four very disparate industries — telephony, electronics, computing and software — could have produced the **hugely successful smartphone industry** that we **enjoy today.** The response of some critics to all this evidence is, “Yes, but you can’t prove causation.” And it’s true, one cannot prove theoretically that the patent system by itself causes higher rates of innovation and economic growth. That’s because the exogenous factors — the dynamism of markets, the efficacy of legal and governmental institutions, the availability of capital, and the role of countless other factors — are far too complex and interdependent to isolate causation to patents alone. It’s like trying to pinpoint ultimate causation in the weather. It can’t be done. But by the same token, one also cannot prove that free market capitalism — isolated from all the legal, educational, economic, governmental and cultural institutions that surround it in any country — causes more economic growth than a government-run socialist economy. Yet we all know without a doubt from real-world experience — including the fact that 74 years of socialism in the Soviet Union failed to produce even a decent refrigerator — that free markets are strongly correlated with greater economic prosperity. The same is true of the patent system: on balance and over the long term, patents are **strongly correlated** with i**ncreased innovation**, **knowledge sharing**, and **economic growth.** I’m all for stopping the patent trolls who pillage innocent businesses rather than create anything useful. But if we want America to **keep inventing the future**, we’d better **keep patenting**.

**The court will explicitly ignore FDA guidance and regulations on citizen petition by super-imposing the Noerr-Pennington immunity---that creates a perverse incentive for firms to submit petitions**

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

II. PHARMACEUTICAL DRUG ANTITRUST LITIGATION IN THE SECOND CIRCUIT

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

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

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

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

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

B. The Second Circuit's Reasoning in Apotex

In Apotex, the **S**econd **C**ircuit **unanimously** affirmed the district court's decision after a de novo review, denying **generic** drug **manufacturer** Apotex's claim that brand-name drug manufacturer Acorda had filed a **sham citizen petition** in violation of U.S. antitrust law. 68 The **key issue** in Apotex was whether the **brand**-name **manufacturer's** citizen petition was **objectively and subjectively baseless** and therefore **a sham litigation** that could serve as the **sole basis of an antitrust claim. 69**

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

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

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

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

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

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

CONCLUSION

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

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

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

**BBB Ptx DA**

**Courts don’t link to politics.**

**Ward 9** (Artemus, Professor – Political Science – Northern Illinois University “Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court”, Congress & the Presidency, Jan-Apr, (36)1; p. 119)

After the old order has collapse the once- united, new-regime coalition begins to fracture as original commitments are extended to new issues. In chapter 3 Whittington combines Skowronek's articulation and disjunctive categories into the overarching "affiliated" presidencies as both seek to elaborate the regime begun under reconstructive leaders. By this point in the ascendant regime, Bourts are staffed by justices from the dominant ruling coalition via the appointment process - and Whittington spends time on appointment politics here and more fully in chapter 4. Perhaps counter-intuitively, **affiliated political actors - including presidents - encourage Courts to exercise vetoes and operate in issue areas** of relatively low political salience. Of course, this "activism" is never used against the affiliated president per se. Instead, affiliated Courts correct for the overreaching of those who operate outside the preferred constitutional vision, which are often state and local governments who need to be brought into line with nationally dominant constitutional commitments. Whittington explains **why it is easier for affilitated judges, rather than affiliated presidents, to rein in outliers and conduct constitutional maintenance. The latter are saddled with controlling opposition political figures, satisfying short-term political demands, and navigating intraregime gridlock and political thickets.** Furthermore, because of their electoral accountability**, politicians engage in position-taking**, credit-claiming, and blame-avoidance behavior. By contrast, their **judicial counterparts are relatively sheltered from political pressures and have more straightforward decisional processes. Activist Courts can take the blame for advancing and legitimizing constitutional commitments that might have electoral costs.** In short, a division of labor exists between politicians and judges affiliated with the dominant regime.

**Institutional and persuasive power**

**Pacelle 2** [Richard L. Pacelle, Associate Professor, Political Science, University of Missouri-St. Louis, THE ROLE OF THE SUPREME COURT IN AMERICAN POLITICS, 2002, p. 102]

The limitations on the Court are not as significant as they once seemed. They constrain the Court, but the boundaries of those constraints are very broad. Justiciability is self-imposed and seems to be a function of the composition of the Court rarther than a philosophical position. Checks and balances are seldom successfully invoked against the judiciary, in part because the Court has positive institutional resource to justify its decision. The Supreme Court has a relatively high level of diffuse support that comes, in part, from a general lack of knowledge by the public and that contributes to its legitimacy. The cloak of the Constitution and the symbolism attendant to the marble palace and the law contribute as well. As a result, presidents and the Congress should pause before striking at the Court or refusing to follow its directives. Indeed, presidents and members of Congress can often use unpopular Court decisions as political cover. They cite the need to enforce or support such decision even though they disagree with them. In the end, the institutional limitations do not mandate judicial restraint, but turn the focus to judicial capacity, the subject of the next chapter.

**Manchin will delay until next year, which makes passage even less likely**

Darragh **Roche 11/11**—at Newsweek. ("Crippling inflation could kill Joe Biden's Build Back Better bill," 11/11/2021, from Newsweek, https://www.newsweek.com/crippling-inflation-kill-joe-biden-build-back-better-joe-manchin-1648356)

The original price tag for the Build Back Better Act was $3.5 trillion, but this was reduced to $1.75 trillion in large part because of opposition from Manchin and Senator Kyrsten Sinema (D-AZ).

Democrats are aiming to pass the bill without Republican support, but this will require all Senate Democrats to support the final measure, making Manchin's position crucial.

However, Democrats who support the bill say experts believe it won't worsen long-term inflation and any rise will be temporary. They hope to offset inflation by taxes on the richest Americans.

President Biden made the same point in a statement issued on Wednesday that addressed the inflation rate.

"17 Nobel Prize winners in economics have said that my plan will 'ease inflationary pressures,'" Biden's statement said. "And my plan does this without raising taxes on those making less than $400,000 or adding to the federal debt, by requiring the wealthiest and big corporations to start to pay their fair share in taxes."

Biden also acknowledged that current inflation levels are a problem.

"Inflation hurts Americans pocketbooks, and reversing this trend is a top priority for me," he said.

Speaking at the Port of Baltimore on Wednesday, Biden said people "remain unsettled about the economy" amid high prices and the administration was "tracking these issues and trying to figure out how to tackle them head on."

Axios reported on Wednesday that Manchin may delay the **B**uild **B**ack **B**etter Act until **next year** given the limited number of legislative days left in 2021 and **his concerns about inflation**.

If the bill gets **put back further**, it could make **reaching a deal more difficult**.

Moderates and progressives in the Democratic Party have been in conflict over the bill and the separate $1.2 trillion bipartisan infrastructure bill, which has now passed both the House and Senate. Manchin voted in favor of that bill.

Progressives had tried to link the passage of the bipartisan bill with progress on Build Back Better and House Democrats finally passed the bipartisan legislation on November 5 while also voting on a procedural motion to advance the reconciliation bill.

Biden will sign the bill at a White House ceremony on Monday and has also said the bipartisan infrastructure bill would have a positive effect on inflation. In a tweet on Sunday, he said: "The bipartisan infrastructure deal will help ease inflationary pressures, lowering costs for working families."

While Biden has sought to frame the Build Back Better Act as a cure to inflationary ills, if Manchin isn't convinced then the bill **could be dead on its arrival in the Senate**.