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**Innovation**

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

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

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

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

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

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

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

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

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

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

**Innovation solves a litany of existential risks**

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

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

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

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

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

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

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

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

5G Risks and Security Concerns

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

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

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

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

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

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

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

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

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

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

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

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

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

**Petitioning**

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

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

**The plan solves**

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

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

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

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

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

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

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

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

**Two scenarios**

**First is slow growth**

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

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

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

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

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

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

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

Secular Stagnation

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

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

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

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

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

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

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

Illiberal Globalization

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

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

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

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

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

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

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

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

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

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

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

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

Multipolarity

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

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

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

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

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

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

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

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

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

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

Rising Nationalism/Populism/Authoritarianism

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

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

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

Unbrave New World and Future Challenges

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

Interstate Conflict

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

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

**Second is democracy**

**Anticompetitive lobbying destroys trust in government**

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

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

**Democracy checks global conflicts**

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

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

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

**Solvency**

**The United States federal government should substantially increase 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.

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

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

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

## 2AC

**Innovation**

**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**.

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

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

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

**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.

**Prohibitions include conditions**

**HUMES ‘16,** P. J. — 248 Cal.App.4th 410 (2016) 203 Cal.Rptr.3d 677 STEWART ENTERPRISES, INC., et al., Plaintiffs and Respondents, v. CITY OF OAKLAND et al., Defendants and Appellants. No. A143417. Court of Appeals of California, First District, Division One. June 23, 2016.

The City argues that the application of the emergency ordinance to Stewart's project impaired no vested right conferred by the permit-vesting ordinance because the latter ordinance only "proscribed the application of legislation to `prohibit' a project, whereas the [emergency ordinance] imposed [a] CUP requirement." Reasoning that the emergency ordinance merely "require[d] further discretionary review" instead of outright "prohibiting" the construction of a crematorium, the City concludes that the permit-vesting ordinance was "inapplicable." The trial court rejected this position, stating, "**To impose a condition on a building permit is to prohibit the project until the property owner satisfies the condition**. If the condition were one that the property owner could unquestionably satisfy by unilateral action, without requiring the public entity's discretionary approval, the analysis might differ. Here, however, an application for a CUP can be denied. Such a denial would plainly `prohibit' Stewart from completing `the construction ... or use authorized by [the] permit.'" (6) We agree with the trial court's reasoning. To "prohibit" is defined as "[t]o forbid by law" or "[t]o prevent or hinder." (Black's Law Dict. (8th ed. 420\*420 2004) p. 1248, col. 1.) Under either definition, the emergency ordinance "prohibited" the construction of a crematorium as authorized by Stewart's building permit. Once the emergency ordinance was applied to the project, Stewart was no longer allowed to build the crematorium because it did not have a CUP. The possibility that Stewart could regain the right to build the crematorium if it applied for and was granted a CUP does not change this fact: **a project can be "prohibited" even if the fulfillment of certain contingencies might at some later date reauthorize it.** Therefore, we conclude that the application of the emergency ordinance impaired Stewart's vested right under the permit-vesting ordinance to build the crematorium.

**T Expand the Scope**

**Counter-interp-- Expand the scope means new activities are covered that were not before**

**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.

**That means Courts or Congress can enlarge the scope of antitrust prohibitions.**

Donald F. **Turner 90**. Professor of Law, Georgetown University Law Center. "The Virtues and Problems of Antitrust Law," Antitrust Bulletin 35, no. 2 (Summer 1990): 297-310.

However, unsound interpretations of antitrust laws have adverse economic effects. Court-formulated rules have **varied** from time to time over the years since antitrust statutes were passed, and the **scope of antitrust prohibitions** were either **enlarged or reduced**. While there are extensive disputes as to what the precedents' defects have been and are, it is generally recognized that antitrust law has had and still has some undesirable features that the **courts or Congress should correct**.

**FTC Section 5 CP**

**CP unravels the First amendment and due process**

**Bender 13** (Paul Bender, Attrney @ Meyer, Klipper & Mohr, PLLC, S. 214’s Inappropriate Interference With the Fundamental Right to Settle Litigation, <https://patentdocs.typepad.com/files/s.-214s-inappropriate-interference-with-the-fundamental-right-to-settle-litigation.pdf>, y2k)

As explained earlier in this paper, the ability of parties to settle claims is a basic feature of the American judicial system. Settlement of claims **without undue government interference** is an essential aspect of **the due process** that the Constitution guarantees. That is not to say that resolution of claims through settlement, like **any** **litigation strategy**, is **completely immune from governmental regulation and limitation**. Governmental interference with the presumptive and **due process-related right** to settle claims rather than bear the costs and uncertainties of litigation must, however, be supported by a demonstrable need for that interference. If the **right** to settle claims to a **dispute** is to have meaning and **substance**, government must be required to bear the burden of proving that a settlement that it wants to prevent is so likely to be contrary to the public interest that the freedom of parties to choose to settle, rather than litigate their opposing claims must give way. S. 214 flies in the face of the presumptive right of parties to settle, rather than litigate their opposing claims. It presumes, without proof, that patent settlements containing certain terms are contrary to the public interest, even when those settlements unquestionably result in accelerated public access to inexpensive generic drugs, and places upon the parties that wish to settle the heavy burden of proving, by clear and convincing evidence, that their settlement is not harmful to the public. That requirement that parties prove their **entitlement** to exercise a **basic procedural right**, as a substitute for why the right should not be exercised, is **a dangerous assault** on a cornerstone of **procedural due process**.

**That undermines rule of law and democratic governance---fiating through NO review is especially bonkers**

**Andersen 21** (Elizabeth Andersen is the executive director of the World Justice Project, To defend rule of law, we must agree on its meaning, <https://thehill.com/opinion/criminal-justice/535366-to-defend-rule-of-law-we-must-agree-on-its-meaning>, y2k)

Against this backdrop, it is critically **important** to articulate and **promote** a clear conception of the **r**ule **o**f **l**aw. **Failure** to do so threatens **good governance** everywhere.

So let’s be clear. Just because a policy or practice is pursued through law does not mean it upholds the rule of law. A nation governed by the **r**ule **o**f **l**aw should check **corruption** but **not** selectively, **arbitrarily** or **without regard for due process**. The **r**ule **o**f **l**aw promises ‘law and **order’** but **not** at the expense of **fundamental rights.**

The **r**ule **o**f **l**aw does **not take sides** in **policy debates** or elections, so long as the **process** and the outcomes are governed by duly enacted laws that are **clear** and **accessible**, are applied equally to all, protect **fundamental rights** and are **reviewable by an independent judiciary**. Most importantly, the rule of law is never fully achieved nor destroyed, no one act makes or breaks it and it requires continuous nurturing.

**Causes uncertainty and delay.**

Alexander Paul **Okuliar et al. 21**. Morrison & Foerster LLP. "FTC Lays Groundwork For Rulemakings: Are New Substantive Competition Rules Coming?". No Publication. 3-25-2021. https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1067906/ftc-lays-groundwork-for-rulemakings-are-new-substantive-competition-rules-coming

The FTC's foray into rulemaking could lead to a period of **uncertainty and legal challenges** in those areas touched by a new agency rule. There is likely to be significant debate **over the scope of** the FTC's **authority, the particulars of the rulemaking process, the substance** of any proposed rules, and, when tested in court, the extent of Chevron **deference** to which the agency is entitled. Substantive FTC competition rules could also create potential divergence in enforcement policy or activity between the DOJ and FTC brought about by the new rules.

**courts strike down the counterplan.**

Alison **Jones and** William E. **Kovacic 20**. Alison Jones, King’s College London, London, United Kingdom. William E. Kovacic, King’s College London, George Washington University, and United Kingdom Competition and Markets Authority, "Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy". SAGE Journals. 3-20-2020. https://journals.sagepub.com/doi/10.1177/0003603X20912884 https://journals.sagepub.com/doi/10.1177/0003603X20912884

One possible solution to rigidities that have developed in Sherman Act jurisprudence is for the FTC to rely more heavily on the prosecution, through its own administrative process, of cases **based on Section 5 of the FTC Act** and its prohibition of “unfair methods of competition.”93 This section allows the FTC94 to tackle not only anticompetitive practices prohibited by the other antitrust statutes but also conduct constituting incipient violations of those statutes or behavior that exceeds their reach. The latter is possible where the conduct does not infringe the letter of the antitrust laws but contradicts their basic spirit or public policy.95

There is no doubt therefore that Section 5 was designed as an expansion joint in the U.S. antitrust system. It seems unlikely to us, nonetheless, that a majority of FTC’s current members will be minded to use it in this way. Further, even if they were to be, the reality is that such an application may encounter **difficulties**. Since its creation in 1914, **the FTC has never prevailed before the Supreme Court in any case challenging dominant firm misconduct**, whether premised on Section 2 of the Sherman Act or **purely on Section 5 of the FTC Act**.96 The last FTC success in federal court in a case predicated solely on Section 5 occurred in the late **1960s**.97

The FTC’s record of limited success with Section 5 has **not been for want of trying**. In the 1970s, the FTC undertook an ambitious program to make the enforcement of claims predicated on the distinctive reach of Section 5, a foundation to develop “competition policy in its broadest sense.”98 The agency’s Section 5 agenda yielded some successes,99 but also **a large number of litigation failures** involving cases to address subtle forms of coordination in oligopolies, to impose new obligations on dominant firms, and to dissolve shared monopolies.100 The agency’s program elicited powerful **legislative backlash** from a Congress that once supported FTC’s trailblazing initiatives but turned against it as the Commission’s efforts to obtain dramatic structural remedies unfolded.101

### Court Packing Adv CP

Court packing destroys democracy and congress is a bigger i/l to democracy

**Ilya Shapiro 2021** director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute, and author of Supreme Disorder: Judicial Nominations and the Politics of America’s Highest Court.

“Don’t pack the court” <https://www.scotusblog.com/2021/03/dont-pack-the-court/>

When Ruth Bader Ginsburg died in September, Democratic Senate Leader Chuck Schumer warned that “[**nothing is off the table**](https://www.politico.com/news/2020/09/19/rbg-supreme-court-replacement-fight-senate-418438)” if Republicans filled her seat before Inauguration Day. Thus, when Amy Coney Barrett was sworn in little more than a month later, the drumbeats resumed for court packing: adding seats to “rebalance” the court. Although presidents had always made nominations to Supreme Court vacancies arising in election years, and their success hinged almost entirely on whether their party controlled the Senate, there had never been a confirmation so close to an election. And this one came four years after Republicans had declined to take up Merrick Garland’s nomination to the opening left by Antonin Scalia’s death, allowing President Donald Trump to appoint Neil Gorsuch. These calls for court packing didn’t start last fall, but grew from 2016 through the polarizing confirmation of Brett Kavanaugh, and played a major role in the Democratic presidential primaries. Indeed, most of those running expressed a willingness to add justices, with Pete Buttigieg, now the secretary of transportation, adopting a [more nuanced proposal](https://www.yalelawjournal.org/feature/how-to-save-the-supreme-court) to have five justices picked by each party, who then would have to unanimously agree on another five. Of course, trying to depoliticize the court by affixing scarlet partisan letters to two-thirds of its members is too clever by half. Joe Biden declined to join most of his fellow candidates in endorsing court ​packing and stayed coy on the issue during the general election, ultimately proposing a bipartisan commission to study judicial reform because “[the court system … is getting out of whack](https://www.politico.com/news/2020/10/22/joe-biden-court-packing-judicial-reforms-commission-431157).” This commission is [apparently staffing up](https://www.politico.com/news/2021/01/27/biden-supreme-court-reform-463126), with four names floated in public. One of those names is Caroline Fredrickson, who was until recently president of the American Constitution Society (lefty counterpart to the Federalist Society). She [noted in the early primaries](https://thehill.com/homenews/senate/434630-court-packing-becomes-new-litmus-test-on-left) that “the Kavanaugh nomination has put a fire under progressives” and that it’s “not written in stone that the court has nine seats.” Indeed, not even constitutional parchment specifies the number of justices, but historically, each expansion of the court was accompanied by political mischief. As the country grew, Congress created new circuits, with new justices appointed to each one — additions that [didn’t always inure to the nation’s benefit](https://twitter.com/baseballcrank/status/1107659649652801536). In 1869, after a Congress hostile to Andrew Johnson had actually cut seats to prevent his filling them, the Circuit Judges Act fixed the high bench at nine seats, a number that has survived 150 years and allowed the court to gain stability and prestige. The most famous example of attempted court packing is, of course, the Judicial Procedures Reform Bill of 1937. Fresh off a massive reelection and unhappy about a series of rulings against his New Deal programs, President Franklin Delano Roosevelt proposed adding a new justice for every sitting justice older than 70½, up to a maximum bench of 15. The plan met heavy, bipartisan resistance and faced public opposition even from Vice President John Nance Garner and Roosevelt ally Justice Louis Brandeis. The plan led to enormous Democratic losses in the 1938 midterms. No real calls for court packing have come between FDR’s time and now, though there were calls to “Impeach Earl Warren” in the Jim Crow South. As with most such proposals in our history, the partisan appeal is both evident and heavy-handed. Yet there’s nothing inherently ideological about a larger Supreme Court. Presidents of both parties nominate however many justices there are. In addition to issues of judicial administration — maybe the court could hear more cases with more personnel — there would be less significance to each of, say, 19 seats than 9 (and presumably fewer decisions with one-vote margins), so there would be less of a battle royal over each vacancy. The problem comes in getting to the new number, whatever it is. If we were passing the first judiciary act, we could implement whatever structure we thought best. **But we’re not, so how do you get to an expansion of any kind that won’t result in a similar expansion the next time the opposing party is in power?** Presumably you’d need a transition period, such that the reform only takes effect far enough into the future that we don’t know who’ll be in the White House. Politicos tend to be risk-averse, so I’m not sure this is viable, but even if a “delayed packing” plan went through, it wouldn’t address the complaints of those who want the court changed now, rather than some hypothetical time in the future. Moreover, it’s unlikely that the judicial reform commission, if it truly represents the range of expert opinion, would agree on much. If a major proposal somehow came out of it, a 50-50 Senate where key Democrats Joe Manchin and Kyrsten Sinema have ruled out eliminating the filibuster would make it a nonstarter. Even adding (or moving around) lower court judges, given the growth in cases in some parts of the country since district judgeships were last created in 2002 and circuit judgeships in 1990, would be a hard lift because Republicans want not to repeat the late 1970s, when Jimmy Carter got scores of new robes to fill — which turned out to be a consolation for not having any Supreme Court vacancies on his watch. If Democrats think they’d be “uniting” the country by compensating for Republican‐​appointed justices they consider to be illegitimate, then they deserve the political **losses** that such ends‐​justify‐​the‐​means radicalism has historically caused. **And if they think that packing the court would restore “norms,” then they really don’t understand the nature of** **governance.** [**To quote Bernie Sanders**](https://www.reuters.com/article/us-usa-election-sanders/us-senator-bernie-sanders-against-increasing-number-of-supreme-court-justices-idUSKCN1RD3AL)**, of all people, “My worry is that the next time the Republicans are in power they will do the same thing.”** Underlying both the standard and creative court-packing proposals is a problem with the proponents’ premise: that the court needs reforming in the first place. The court isn’t in crisis, but progressives — and especially legal elites — are very unhappy with its nascent conservative majority. And yet the Supreme Court is [more respected than any federal institution](https://news.gallup.com/poll/317135/amid-pandemic-confidence-key-institutions-surges.aspx) save the military, and [more popular than it’s been in over a decade](https://news.gallup.com/poll/316817/approval-supreme-court-highest-2009.aspx). Toning down judicial confirmations and having justices seen less through partisan lenses are laudable goals, but they’ll only be reached when the court itself is less important. **Don’t rebalance the court, rebalance our constitutional order so Washington — and, within Washington, the executive branch — isn’t making so many big decisions for such a large, diverse, pluralistic country.** In the end, Democrats ought to draw a less-obvious lesson from FDR’s experience. By mid‐​1941, just four years after court ​packing failed, only two justices remained whom Roosevelt hadn’t appointed — and one of those, Harlan Stone, he had elevated to chief justice. In a very real sense, then, FDR packed the court the old‐​fashioned way, by maintaining control of the White House and Senate and waiting for natural attrition. Joe Biden, take note.

**EPA Court Ptx DA**

**Abbvie thumps**

**Isaacson and Rothschild 21** “Balancing Hatch Waxman and the Sham Litigation Exception” April Abele Isaacson and Cynthia Rothschild Ph.D. - Kilpatrick Townsend & Stockton LLP, April 29, 2021, https://www.jdsupra.com/legalnews/balancing-hatch-waxman-and-the-sham-4098835/

As previously reported on March 31, 2021, AbbVie Inc. has petitioned the U.S. Supreme Court for a writ of certiorari to review the Third Circuit’s ruling1 determining the biopharma company’s patent infringement suit was a sham litigation**. Petitioners argue the Third Circuit’s decision effectively nullifies the subjective prong of the Noerr-Pennington doctrine’s sham litigation exception**. The Noerr-Pennington doctrine allows litigants to petition the government for redress of grievances, including by litigating against a competitor without fear of antitrust liability and attendant treble damages. This immunity does not, however, extend to suits filed simply to harass a competitor, i.e., as a sham litigation. The test for identifying sham suits requires a plaintiff prove: (1) the challenged lawsuit was objectively baseless; and (2) the antitrust defendant was subjectively motivated by an improper purpose in bringing the challenged suit.2

**The supreme court denies cert to the challenge**

**HAUG 10/20** “The Sham Litigation Exception after AbbVie - Is the Subjective Element a Sham?” October 20, 2021

https://www.haugpartners.com/article/the-sham-litigation-exception-after-abbvie-is-the-subjective-element-a-sham/

Writ of Certiorari at the Supreme Court: AbbVie/ Besins filed a petition for a writ of certiorari to review the Third Circuit’s ruling, asking the Supreme Court to address “[w]hether the subjective element of the ‘sham litigation’ exception to Noerr-Pennington immunity may be met by an inference from a finding that a challenged lawsuit was objectively baseless, even without evidence that the antitrust defendant actually believed the suit lacked merit or was indifferent to the outcome.”32 In its petition, AbbVie/ Besins argued that the Third Circuit’s decision effectively nullifies the subjective prong of the Noerr-Pennington doctrine’s sham litigation exception and shifts the burden to show subjective intent from the plaintiff to the defendant.33 AbbVie/ Besins took issue with the fact that “the Third Circuit treated circumstances that are present in virtually all Hatch-Waxman Act litigation—that AbbVie’s patent-infringement suit was directed by experienced lawyers who understood the law and the financial stakes of the cases and who knew that a lawsuit under the Hatch-Waxman Act would automatically stay FDA approval of Perrigo’s product—as supporting the inference of bad faith.”34

**The petition was denied** subsequently.35 After the Supreme Court declined to review the ruling, the Federal Trade Commission withdrew the remaining reverse-payment claim, ending its litigation against AbbVie.36

**Strike down now**

**Millihiser 11/3** “A new Supreme Court case could gut the government’s power to fight climate change” Ian Millhiser Nov 3, 2021, https://www.vox.com/2021/11/3/22758188/climate-change-epa-clean-power-plan-supreme-court

So West Virginia is a monster of a case — potentially the culmination of a conservative vision incubated at the Federalist Society for years, and long championed by conservative activists such as Justices Neil Gorsuch and Brett Kavanaugh. Indeed**, a majority of the Court has already expressed sympathy toward Gorsuch’s plans to shrink the power of federal agencies, which is a strong sign that the West Virginia petitioners are likely to prevail** on at least some of their claims.

**Precedent doesn’t shape decisions---ideology does**

**Gass 21** “What Supreme Court’s jettisoning of precedent may mean for future” Henry Gass – Staff writer for CS Monitor, May 20, 2021, <https://www.csmonitor.com/USA/Justice/2021/0520/What-Supreme-Court-s-jettisoning-of-precedent-may-mean-for-future> [edited for acronym]

Earlier this week the conservative supermajority on the U.S. Supreme Court voted to scrap a legal rule that, while decades old, had never really been used.

On the surface it may not seem like a radical move – the judicial equivalent of canceling a gym membership you never use. The so-called watershed exception – that criminal rules don’t apply retroactively unless they represent a major procedural change – had never been applied in its 32-year history, Justice Brett Kavanaugh wrote in the court’s majority opinion.

But on closer examination, and in the context of other actions the court took this week, scrapping the watershed exception suggests that the court – in particular its conservative wing – has a more gung-ho attitude toward overturning precedent than in the past.

Respect for precedent is a founding principle of the U.S. legal system, and overturning it is one of the Supreme Court’s defining powers. In a 1932 dissent, Justice Louis Brandeis explained why the high court should, generally, respect past decisions: “In most matters,” he wrote, “it is more important that the applicable rule of law be settled than that it be settled right.”

In other words, following earlier rulings (i.e., precedent) is important even if you disagree with those earlier rulings. Past rulings should only be overturned if there’s “special justification.”

The legal doctrine the justices follow when reviewing precedent is known as stare decisis – taken from a Latin maxim “to stand by things decided and not disturb settled points.” The doctrine has no formal boundaries, so which “matters” fall outside the “most matters” described by Brandeis?

In recent decades, as conservative jurists – and judicial philosophies like originalism – have come to dominate the high court, how those justices interpret stare decisis has become the defining debate.

Justice Antonin Scalia helped entrench the originalist philosophy, which holds that the Constitution should be interpreted as the framers intended. He was also reluctant to overturn precedent, describing stare decisis as a “pragmatic exception” to originalism. Originalists on the court today, such as Justices Clarence Thomas and Amy Coney Barrett, have expressed much less reluctance, however.

“**We are in the midst of a change in how Supreme Court justices treat established precedent,”** says Kimberly West-Faulcon, a professor at Loyola Law School in Los Angeles, in an email.

Those views were on display this week, and with the court set to review a key abortion precedent next term, they will likely guide some of the court’s future rulings.

“A lot of wiggle room”

The stare decisis doctrine “is far from a model of clarity,” says Ilya Somin, a professor at George Mason University’s Antonin Scalia Law School.

“It leaves a lot of wiggle room” for any justice, he continues, “to overturn any precedent he or she thinks is badly wrong, and also so long as getting rid of it will not cause some kind of enormous harm in society.”

The court’s liberal justices have indulged this trend to a degree – casting important votes in recent years to overturn precedents regarding same-sex marriage and state laws criminalizing sodomy – but since they have been an ideological minority on the court for decades, they have not been as active as their conservative colleagues.

And how the court’s conservative justices view precedent does seem to be shifting. The fact that they abandoned the watershed exception this week despite the question never being asked or argued is one indicator. And their individual records provide further indications.

Justice Scalia famously said that Justice Thomas “does not believe in stare decisis, period.” And as of 2019, Justice Thomas had written more than 250 opinions seriously questioning precedent, according to Stephen Wasby, a professor of political science at the University at Albany.

But where Justice Thomas used to write these opinions alone, he is now finding support from several colleagues.

Justice Kavanaugh – who, having voted with the majority more than any other justice this term, is effectively the court’s ideological center – has shown a recent, expansive view toward overruling precedent. In addition to his opinion this week scrapping the watershed exception, earlier this term he wrote an opinion effectively overturning a 2016 ruling that barred [LWOP] life without parole sentences for nearly all juvenile offenders.

And as court watchers, and some of his colleagues, have noted, he has been overturning precedent with less clarity and consistency than Justice Thomas.

Meanwhile, the newest member of the court, Justice Barrett, wrote extensively on stare decisis while teaching law at the University of Notre Dame. The doctrine is a “soft rule,” she wrote in one article; “modern originalism” raised the possibility that “following precedent might sometimes be unlawful,” she wrote in another. In a third, she wrote that “rigid application” of stare decisis “raises due-process concerns and, on occasion, slides into unconstitutionality.”

When does precedent get overturned?

Beyond that, jettisoning the watershed exception illustrates “the court’s willingness to overrule [a precedent] rather than just leave it,” says Douglas Berman, a professor at the Ohio State University Moritz College of Law.

“The willingness of this court to embrace a shift in doctrine, **even when they didn’t have to**, that’s the key,” he adds.

Indeed, a core principle of overturning precedent is that the justices should first be asked to consider overturning a precedent. That is not something they were asked to address in their ruling this week in Edwards v. Vannoy.

The case instead asked the court if a decision it made last year – barring convictions from non-unanimous juries – applied retroactively. That practice, in Oregon and Louisiana, had roots in the Jim Crow era. For decades, when considering such a question the Supreme Court had followed a precedent holding that no new criminal rules would apply retroactively unless they constitute “watershed” new procedures.

In the 32 years since that exception was written, Justice Kavanaugh said in the majority opinion, “the Court has never found that any new procedural rule actually satisfies the purported exception.”

“No one can reasonably rely on an exception that is non-existent in practice,” he added. “The watershed exception must ‘be regarded as retaining no vitality.’”

Practically, the ruling this week means that hundreds of people convicted by non-unanimous juries in Louisiana and Oregon must serve the remainder of their sentences – even though the method of their conviction has been deemed unconstitutional.

The ruling broke along ideological divides, with Justice Kavanaugh joined by the court’s five other conservatives. Meanwhile Justice Elena Kagan, joined by the court’s two other liberals, criticized the abandonment of the exception in a dissent that struck at the heart of the court’s long-running debate about precedent.

The majority “discards precedent without a party requesting that action,” she wrote. “And it does so with barely a reason given, much less the ‘special justification’ our law demands.”

Justice Kagan wrote with some added authority because, as she pointed out in a footnote, she had dissented from the court’s ruling last year on non-unanimous jury verdicts “precisely because of its abandonment of stare decisis.”

But with that Ramos v. Louisiana ruling now law, she added, “I take the decision on its own terms, and give it all the consequence it deserves.”

The Supreme Court has, for the best part of a century, **regularly** overturned precedents – led by justices of all ideological stripes. But the theory underlying those decisions – that the court must be asked first, and that a special justification is needed – while admittedly open to some interpretation, has been applied with relative consistency.

**The Edwards ruling is one indication of how that consistency is disappearing**. And the court is now preparing, in the coming months and years, to review weightier precedents on issues like abortion rights, gun rights, and the nexus of LGBTQ rights and religious liberty.

**6-3 majority breaks the DA**

**Cohen 8/27** “The Conservative Supreme Court Has Just Gotten Started” DAVID S. COHEN – Rolling Stone reporter, AUGUST 27, 2021, https://www.rollingstone.com/politics/political-commentary/supreme-court-eviction-moratorium-1217988/

Second, the court’s conservative majority is showing increasing boldness in pushing forth its own right-wing ideology. There were moments in the last year that court observers praised the justices for reaching conclusions that were not split along party lines. These observers hoped that Chief Justice John Roberts was protecting the institution by forging alliances that did not break down on neat Republican-Democratic lines.

This was always just a fantasy, as last night’s decision reinforced: The court last term may have had a few cross-party decisions, but it had plenty of rulings that broke down in predictable fashion. Many of those cases were also shadow docket cases, where the Supreme Court allowed religious groups to get exemptions from coronavirus mandates and permitted states and the federal government to execute prisoners. But they were also in fully argued cases where the court upended voting rights protections, protected conservative donors from being publicly identified, and ruled against organized labor.

The same dynamic was at play yesterday. The six conservative Republicans on the court ruled that the eviction moratorium should be put on hold, hampering the efforts of the Democratic President to look out for the health and welfare of the country. The court’s three liberal Democrats pushed back in dissent, raising an alarm that the court was “second-guessing” the decisions of disease experts. But three is always less than six, so the Republicans won. That isn’t how we normally like to think the Supreme Court works, but that’s as good an explanation as any for what happened last night.

And finally, last night’s decision is another ominous sign of what’s to come. Last term, the Supreme Court had important issues on its docket related to the election, the pandemic, religious freedom, and more. But this coming term it has even weightier issues — in particular, whether to overrule Roe v. Wade and whether to expand gun rights to allow people to carry guns anytime, anywhere. The bold actions of the Supreme Court’s Republicans — including its ruling in the eviction case on August 26th — signal that this group of rightwing Justices will not shy away from imposing their conservative ideology whenever they can.

In other words, watch out. **The conservative Supreme Court has just gotten started.**

**CAA is dogwater**

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

B. Structural Limitations

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

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

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

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

2. A Poor Fit for Climate?

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

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

**Even maximalist regulation has zero effect on warming**

Jonathan A. **LESSER 16**, PhD, the president of Continental Economics, an economic litigation and consulting firm [“Missing Benefits, Hidden Costs the Cloudy Numbers in the EPA’s Proposed Clean Power Plan,” *Manhattan Institute*, June 2016, http://www.manhattan-institute.org/sites/default/files/R-JL-0616.pdf]

As discussed previously, all the estimated SCC values are premised on scenarios projecting large changes in CO2 emissions from current levels of about 30 billion metric tons, from an increase to almost 120 billion metric tons in 2100 (MERGE) to a decrease to about 13 billion metric tons (550 ppm scenario). The 2015 IWG report’s SCC values are average per-ton figures reflecting these emissions changes, measured in many billions of tons, and the resulting changes in global economic well-being, measured in many trillions of dollars.

But the CPP will not reduce CO2 emissions by many billions of tons. The CPP will reduce U.S. CO2 by 415 million tons per year in 2030—less than 7 percent below the forecast total of U.S. CO2 emissions of 5.5 billion metric tons (6.1 billion short tons) in 2030 61 and only about 1 percent of projected world CO2 emissions in that year. As such, the CPP is unlikely to have **any statistically significant impact** on global temperatures.

In fact, independent analyses using the EPA-sponsored Model for the Assessment of Greenhouse Gas Induced Climate Change (MAGICC) estimate that the CPP will reduce the world’s average temperature between only 0.004◦C and 0.013°C by 2100, with an average reduction of 0.008°C.62 Changes in average global temperature of those magnitudes are **far too small to be measured physically**. Nor can such small changes be separated from natural climate variation. Thus, the projected CO2 emissions under the CPP reductions will have **no measurable impact** on world climate. And if those emissions reductions have no measurable impact on world climate, they will not have any measurable impact on world GDP, either.

This fact may explain why the EPA never discusses the actual physical impacts that the CPP will have on world climate. Indeed, as the July 2015 IWG SCC report stated, “Even if the United States were to reduce its greenhouse gas emissions to zero, that step would be far from enough to avoid substantial climate change.”63

**Unchecked Noerr immunity sanctions dirty climate advocacy**

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

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

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

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

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

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

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

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

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

**Dirty advocacy threatens climate risks---it distorts public debate which precludes effective GHG regulations**

**Tucker 12** (William C. Tucker, A.B. cum laude Harvard College, J.D. Northeastern U. School of Law, is an Assistant Regional Counsel, U.S. Environmental Protection Agency, Region II. Deceitful Tongues: Is Climate Change Denial a Crime?, 39 Ecology L.Q. 831, y2k)

Although there are expected to be mitigation costs associated with weaning the world from fossil fuels and moving towards an economy of sustainable growth, incurrence of those costs is inevitable. The energy industry cannot continue with "business as usual" indefinitely owing to the inevitable depletion of fossil fuels in another century or so. 414 In the interim, the increasing **scarcity** of **oil**, **gas**, and **coal** reserves will drive the industry to adopt more **extreme measures** to **extract** them, running increasingly costly **environmental risks** in doing so. And the longer we wait, the higher the costs will be to humankind, since in addition to costs of mitigation those costs will also include the significant and escalating costs of climate change adaptation. Yet there are some who, for profit, would **recklessly gamble** with the **future of humanity** and the Earth. As a strong global consensus began to emerge in the 1990s among climate scientists that anthropogenic global warming posed a grave threat to humankind, some in the fossil fuel industry began **an extensive** **p**ublic **r**elations campaign to keep that knowledge from the public and **governmental officials**. This campaign has been highly successful. **Conservative politicians** in the United States today are almost united in **opposition** both to domestic **GHG regulation** and **international cooperation** in reducing GHG worldwide. Thus, not only has the U.S. government failed to respond to the crisis, but the ability of the **U**nited **S**tates to provide **international leadership** on climate change has been severely **eroded**. The denial campaign is designed for one purpose alone: to deceive. Its purpose is to prevent government regulation of CO<2> emissions by creating out of whole cloth a monumental illusion: that a controversy exists among climatologists about the basic facts, as well as the climate implications, of global warming. To create the impression in the public mind of such a controversy, the denial campaign deliberately set out to create a vast artificial edifice, a Hollywood set of false facades and roads leading nowhere complete with lab-coated actors mouthing carefully tested and scripted messages. The [\*893] purpose is to hide from the public the dangers of the conspirators' principal product, fossil fuels, by creating a soothing alternate reality to cast doubt upon the looming threat of global environmental catastrophe predicted by mainstream climate science. It is fundamentally deceptive in purpose, conception and execution. Yet, one may say, though this plan of deception may be morally repugnant, why focus on **criminality** when other legal means may be available through **government regulation** or in tort to curb GHG emissions? The answer to this question is that **freedom of speech -** both individual and corporate - and the reverence with which it is regarded in our society notwithstanding, we cannot allow **fraudulent** or deceptive speech to ~~paralyze~~ **destroy** the public **debate on a subject** no less important than the **survival of the human species** and the future of the Earth itself. We punish fraud with a vengeance in the myriad and ingenious ways it manifests itself in such mundane matters as payment of taxes, banking and other financial transactions, consumer advertising, internet malfeasance, applications for licenses, and other contractual undertakings. And fraud is a broadly defined crime, encompassing not just the outright lie, but deception, misrepresentation, concealment, factual omissions and other "badges" or indications of fraud, any of which may be evidence of both the scheme to defraud itself and the defrauder's criminal intent. One may well wonder why this essential weapon of the prosecutor's arsenal, thought to be vitally necessary to protect all our financial, cultural and governmental institutions from deceit in both small and large matters, is ineffective to prevent a massive deception pressed upon the general public of such scope and effect as to endanger the future of humankind itself. Furthermore, establishing **liability** under criminal fraud statutes can serve as a basis for civil claims, such as the RICO action in Philip Morris, through which the government or private parties may seek **court-ordered relief** to enjoin or sanction further fraudulent activity by the corporations and individuals concerned. 415 Anthropogenic climate change may be the greatest trial humankind has faced in all its brief, 200-millenium sojourn on this planet. 416 Yet we must not forget that it is our science, only relatively recently developed, that has brought us both prosperity and crisis: unprecedented wealth and comfort, but at a grievous cost - unprecedented harm to our fragile environment. 417 We cannot expect to profit so from science but discard it when it becomes inconvenient, when it counsels frugality in the avoidance of catastrophic harm. **Science remains our best survival tool**. And yet there are those who would discard that tool by taking us **into a new dark age**, who urge upon us an illusion of greater and greater affluence through unrestrained exploitation of the Earth's resources, while attempting to hide from us the devastating environmental consequences [\*894] of their predations. If we remain blinded by that shimmering mirage, ignoring the environmental dangers facing us, science is warning us that as a species we are in peril. The alternative is also before us: sustainability and enduring prosperity. 418 Let us choose wisely, with open eyes.

**FTC Independence DA**

**Non-compete rule**

**Kerkhoff 11/1** “FTC tempts legal fate with power grab” JOHN KERKHOFF, OPINION CONTRIBUTOR — 11/01/21, https://thehill.com/opinion/judiciary/579130-ftc-tempts-legal-fate-with-power-grab?rl=1

Yet, the agency’s latest gambit may be its **most ambitious** to date: The FTC plans to limit (or ban) non-compete and exclusionary contract clauses.

On what authority? That’s unclear. The agency will rely on Section 5 of the Federal Trade Commission Act, which bans “unfair methods of competition.” The FTC has traditionally enforced Section 5 on a case-by-case basis through in-house adjudication. It’s never been used to issue rules like the current proposals — for good reason.

Legal precedent and principles pose potentially **insurmountable hurdles** for the FTC. After all, agencies can issue substantive rules only when Congress has conferred the power to do so. And on that score, scant evidence supports such authority. Commissioners point to an obscure provision buried in a section of the FTC Act addressing procedural issues, which says the agency can “make rules and regulations for the purpose of carrying out the provisions of this subchapter.” True, the D.C. Circuit ruled 40 years ago that the language gives the FTC substantive rulemaking power. But today many scholars think the statute extends only to internal procedural processes, not legally binding rules. Indeed, one scholar has called the D.C. Circuit decision “laughable.” (See page 296.)

Yet, that’s the sole source of legal support that Khan could muster in a law review article last year arguing for Section 5 rulemaking. She never grappled with longstanding federalism principles that require Congress to be crystal clear in giving an agency power over subjects usually left to states. As the Supreme Court explained in its August opinion striking down the Centers for Disease Control and Prevention’s (CDC) eviction moratorium, Congress must use “exceedingly clear language” to allow an agency to “intrude into an area that is the particular domain of state law.” Contract law is just so, and it’s hard to see how “unfair methods of competition” provide such clarity.

What’s more, the Supreme Court has held that nearly identical phrasing in the National Industrial Recovery Act — allowing the executive branch to issue “codes of fair competition” — unconstitutionally transferred the legislative power from Congress to the president, violating the so-called “nondelegation doctrine.” That sounds a lot like Section 5. And, in fact, **the court distinguished the FTC Act** precisely because FTC enforcement occurred through adjudication, not rules. Rulemaking today could thus revive the long-dormant nondelegation doctrine. That scenario is no fantasy. The high court has recently invited such challenges.

**Perception’s thumped – Trump’s FTC tried to do exactly our affirmative and it’s been the FTC policy since the 1980s**

John D . **Harkrider 18**. partner at Axinn, Veltrop & Harkrider LLP and an Associate Editor of *AntiTrust* .“Antitrust in theTrump Administration: ATough EnforcerThat Believes in Limited Government” <https://www.axinn.com/assets/htmldocuments/Summer18-Harkrider%C2%A9.pdf>

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

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

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

Why Issue a Report on the Noerr Doctrine at All? The FTC has an active competition advocacy program that targets proposed government actions-typically at the state but occasionally at the federal level-that are likely to restrict competition without providing countervailing benefits to consumers. This work often takes the form of industry-spe- cific advocacy, such as studies, workshops, reports, and, most frequently, letters to government officials ranging from top- ics as varied as limited service real estate brokerage 12 to the interstate direct shipment of wine. 3 The specific anticom- petitive proposals addressed in our advocacy efforts, howev- er, are the fruits of two doctrines that shield from antitrust liability government action to hamper or displace competition and competitors' attempts to get government to enact such restrictions. As part of a strategy to address not just the fruit but also the seeds of this competitive harm, the FTC staff first analyzed the state action doctrine, which shields certain anti- competitive acts taken under the color of government authority. In the State Action Report, the FTC staff examined the doctrine and suggested ways to bring it more closely in line with its original objectives, including reaffirming a clearly articulated standard tailored to its original purposes and goals, clarifying and strengthening the standards for active supervision, and clarifying and rationalizing the criteria for identifying the quasi-governmental entities that should be subject to active supervision. The NoerrReport follows in this vein, providing an analy- sis of the doctrine that protects competitors' attempts to get governments to do for them what antitrust law forbids them from doing for themselves. There are two paths for com- petitors to achieve this result. The first path-directly asking a government entity to set prices, limit entry, or grant a monopoly-is undoubtedly a necessary part of the democ- ratic process and protection from liability is necessary for a representative democracy to work. The Report makes clear that such petitioning activity is rightly shielded by the appli- cation of Noerr. A second path exists, however, that does not advance the functioning of representative democracy but rather abuses governmental processes for anticompetitive ends. Competitors who follow this path do not convince on the merits a gov- ernment decision maker to take an action that harms com- petition, but rather they subvert the government decision, such as by filing false information, or they use the burdens of the process itself, rather than its outcome, to hamstring com- petitors. Some commentators have labeled this behavior "cheap exclusion," because a competitor engages in exclu- sionary conduct that either is low-cost (filing a false patent list- ing is much cheaper than engaging in predatory pricing, for example) or risks little (the rejection of a filing by a govern- ment entity rather than a loss of profits or market share).5 A focal point of the FTC's recent enforcement and policy activity has been competitor attempts to abuse government processes to achieve an anticompetitive result, either directly or indirectly. Combating such anticompetitive behavior raises particular challenges for enforcers. As noted by former FTC Bureau of Competition Director Susan Creighton **[L]imiting Noerr** and state action to the core articulated by the Supreme Court **is central to an effective strategy for antitrust enforcement directed against cheap exclusion**. If cheap exclusion should be a central part of a proper enforcement agenda, the undue expansion of these defenses and immunities is not simply an issue at the periphery of antitrust, but rather **goes to the heart of the effectiveness** The Commission has achieved notable success in combating cheap exclusion, and the knowledge gained through this initiative guides the Report's analysis of the proper scope of the Noerr doctrine. Why Issue the Report in This Particular Form? It is difficult to find two people who agree on all varieties of conduct that the Noerr doctrine should or would shield or even how to analyze the doctrine. Those favoring a theoret- ical approach may try to discern the ideal and complete form of the doctrine by scrutinizing clues embedded in the rela- tively sparse Supreme Court case law. I take a more pragmatic view, however, and believe that the Court has for the most part taken each case's factual situation on its own terms, pointing out rough guideposts for avoiding clashes with con- stitutionally protected actions. The theoretical view and the pragmatic view each dictate a different approach to a report about the doctrine. The theoretical approach would explore every aspect of the doc- trine to its outermost contours, no matter how infrequent- ly an enforcer would try to bring a case that pushed the boundaries between antitrust law and protected political and government activity. The pragmatist would focus more tightly on the kinds of behavior that not only commonly occur but that enforcers (who, after all, work for agencies that are politically accountable at some level) may realisti- cally challenge, for example, anticompetitive actions that do not strongly implicate private political activity or sover- eign government decisions. The Report takes the latter, pragmatic approach, and its title-Enforcement Perspectives on the Noerr-Pennington Doctrine-was not accidental. Its choice of issues and approach are informed by the Commission's experience and positions in several recent matters challenging attempts to abuse government processes, including the Federal Trade Commission's amicus brief opposing defendant's motion to dismiss in In re Buspirone;17 the analysis to aid public comment in Bristol-MyersSquibb Co.;"i and the Commis- sion opinion in Union Oil Co. ofCalifornia19 A brief review ofthese matters follows. In January 2002, lawsuits relating to Bristol-Myers Squibb's (BMS) alleged monopolization through improper listing of a patent on its branded buspirone drug, BuSpar, presented the FTC with an opportunity to clarify the Noerr doctrine.2' The plaintiffs alleged that BMS restrained com- petition by fraudulently listing patents in the FDA's Orange Book 21 and using these fraudulent listings to delay FDA approval of competing generic buspirone products. BMS claimed Noerrprotection for its conduct. The Commission's amicus brief opposed the application of Noerr,and the court ultimately denied immunity on three independent and alter- native grounds. The first, and perhaps most important, of these grounds was the principal argument that the Commis- sion had advanced in its brief, namely that Orange Book fil- ings simply do not constitute petitioning. The court found that an Orange Book filing is analogous to a tariff filing and reasoned that, in both cases, "the government does not per- form an independent review of the validity of the statements, does not make or issue an intervening judgment, and instead acts in direct reliance on the private party's representations. "22 In Unocal,FTC complaint counsel alleged that defendant Unocal made misrepresentations regarding its patent rights that induced the California Air Resources Board to adopt an industry-wide standard that effectively required other refin- ers to use Unocal's patented technology. In its decision revers- ing the administrative law judge on the issue of Noerr pro- tection, the Commission stated that "the weight of lower court authority, spanning more than thirty years, has recog- nized that misrepresentations may preclude application of Noerr-Penningtonin less political arenas than the legislative lobbying at issue in Noerr itself. ' 23 The Commission con- firmed that misrepresentation can warrant denial of Noerr protection outside the political arena, provided that (1) the misrepresentation or omission is "deliberate, factually verifi- able, and central to the outcome of the proceeding or case," and (2) "it is possible to demonstrate and remedy this effect without undermining the integrity of the deceived govern- 24 mental entity." In another action that implicated the reach of Noerr, the Commission issued a complaint against BMS for its course of conduct in connection with BuSpar (mentioned above) and two other drugs. The analysis to aid public comment accompanying the FTC complaint and the consent order explained that BMS' "overall course of conduct" across all of the products in question-including repeated filing of law- suits "without regard to the merits," repeated filings of patents with the FDA "without regard to their validity, enforceability, or listability," and repeated filing of false state- ments with government agencies-constituted "a clear and systematic pattern of anticompetitive misuse of the govern- ment process," and thus was outside the scope of Noerr's protection.25 The Report, which advocates limiting Noerr to its two core purposes articulated by the Supreme Court, was another opportunity to **enhance the ability of antitrust enforcers to reach abuses of government processes**. Accordingly, it embraces the positions adopted by the Commission in Buspirone, Unocal, and BMS and recommends areas in which to clarify the reach of Noerr without impinging the values Noerr protects.

## 1AR

**1AR – FTC CP**

**Agency decisions are reviewed by courts---they’ll apply the consumer welfare standard.**

Despina **Pachnou 19**. Competition Expert at the OECD and manager of the OECD Working Party. "The standard of review by courts in competition cases - Background Note." OECD. 06-04-2019. https://one.oecd.org/document/DAF/COMP/WP3(2019)1/en/pdf

1. General Overview of U.S. Competition Enforcement Process

1.In the United States, the competition laws are enforced by two dedicated federal government agencies: the Antitrust Division of the U.S. Department of Justice and the U.S. Federal Trade Commission. But competition enforcement authority in the United States is not vested exclusively in the federal enforcement agencies. State governments can also enforce their own competition laws and some federal statutes, and sometimes they work together to bring cases. Most U.S. competition cases are brought by private citizens, seeking redress from the courts for the antitrust injuries they have suffered.

2.The U.S. federal **courts** play a central role in reviewing antitrust enforcement actions. Although the decision about whether or not to take enforcement action is committed to agency discretion, the DOJ is a law enforcement agency that has **no adjudicative power** on its own. Thus, in order to enforce the federal antitrust statutes under its purview (the Sherman Act and the Clayton Act), the DOJ, like a state or private enforcer, **must file an action in a federal** district (trial) **court**. **The court is the arbiter** of whether the law has been violated and, if so, orders appropriate remedies. The court is also responsible for resolving disputes over DOJ’s investigatory powers (e.g., enforcement of subpoenas and other requests for information; authorization of search warrants, etc.). In addition, **courts review cases that the FTC decides** through its internal adjudicative process, discussed in more detail below.

3.Regardless of whether a case is initiated by one of the federal enforcers, a state enforcer or a private citizen, the process is adversarial: the parties submit their evidence and arguments regarding the relevant facts to a judge (or potentially a jury in criminal cases). Based on the parties’ submissions, the judge (or jury) determines the ultimate facts and the court decides the case in accordance with the controlling law and precedent.

4.The U.S. judicial system provides significant due process protections to the defendant before liability can be imposed. For example, both the plaintiff and defendant may seek subpoenas for documents and sworn testimony, seek expedited dismissal of unfounded claims, cross-examine each other’s witnesses and argue the merits of their positions before a neutral decision-maker. The burden of proof for a violation of law lies with the enforcer or civil plaintiff. The defendant never needs to affirmatively prove their innocence in the United States.

5.In civil matters, the plaintiffs and defendants also enjoy the right to appeal an adverse ruling on the ultimate merits to an appellate judicial body, composed of neutral decision-makers. A corporate or individual defendant convicted in a criminal case also has the right to appeal.

6.U.S. courts evaluate mergers based on whether they tend substantially to lessen competition. In assessing whether conduct is anticompetitive, except for a small group of restraints that are per se unlawful because they “always or almost always tend to restrict competition,” U.S. courts evaluate single-firm conduct and agreements between competitors under the “rule of reason.” Naked price-fixing, bid rigging, and horizontal market allocation agreements are condemned without a factual inquiry into their actual competitive effects. When applying the rule of reason for other types of conduct, courts rely on a burden-shifting framework. Under this framework, the plaintiff has the burden to prove that the challenged restraint has, or is likely to have, a substantial anticompetitive effect **that harms consumers**. If the plaintiff meets its initial burden, the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the plaintiff must show that the procompetitive justification could be reasonably achieved through less anticompetitive means or that the anticompetitive harm outweighs the procompetitive benefits.

**It’s struck down – the whole point of noerr pennington is that *only* antitrust law is strong enough to carve out an exemption to petition. Trying to regulate sham litigation violates**

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.**

**Options are restricted**

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

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

**Can’t do anything**

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

IV. IMPLICATIONS OF CURRENT DOCTRINE Questions about the appropriate doctrinal basis for limiting government power to regulate patent enforcement—the Supremacy Clause, the Noerr doctrine, or the long-standing good faith rule—are not merely academic. As discussed above, the Supremacy Clause arguably gives the states authority to condemn deceptive schemes of patent enforcement.303 The rule of good faith immunity, as understood prior to the Federal Circuit’s creation, would limit that authority somewhat, but **the Federal Circuit’s expansive application of Noerr immunity renders the states—and the federal government—almost powerless.** To properly frame a normative analysis of current Federal Circuit doctrine, it is worth highlighting several practical implications of the status quo for government efforts to address questionable tactics of patent enforcement.

**1AR – FTC DA**

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

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

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

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

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

Although both the Teva and Perrigo suits were ultimately settled by AbbVie, the FTC filed a September 2014 lawsuit in the Eastern District of Pennsylvania alleging that AbbVie’s lawsuits were sham lawsuits **meant purely to delay**

the market entry of generic versions of AndroGel. The district court ordered AbbVie to pay $448 million in disgorgement, finding that the lawsuits met the sham exception to Noerr-Pennington doctrine, which immunizes private companies from federal antitrust suits under an interpretation of the First Amendment when those companies are litigating valid rights that create anticompetitive effects. The sham litigation exception to Noerr-Pennington required the FTC to prove (1) that AbbVie’s lawsuits were objectively meritless; and (2) that AbbVie’s subjective intent in filing the suits was only to interfere with the business interests of its competitors.

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

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

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

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

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

FTC Enforcement Actions Against AbbVie Are Far from Over

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

**The PRE two-prong test is grounded in the First Amendment. Congress can barely touch it**

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

C. Implications for Federal Law and Law Enforcement **Because the Federal Circuit has grounded its two-part “preemption**” **test in the Petition Clause of the First Amendment**, the federal government also has limited power to combat questionable patent enforcement tactics. As part of an investigation into MPHJ, the Federal Trade Commission (“FTC”) filed a complaint against the company alleging that it had engaged in deceptive trade practices in violation of Section 5 of the Federal Trade Commission Act.344 The FTC claimed that the company violated Section 5 in two ways. First, it alleged that MPHJ said it would “initiate legal action for patent infringement” if the recipient did not respond to its demand letters when, in fact, MPHJ was “not prepared to initiate legal action and did not intend to initiate legal action.”345 Second, the FTC alleged that MPHJ falsely or misleadingly stated “that substantial numbers of businesses who had received the . . . letters agreed to pay substantial compensation to license the . . . [p]atents.”346 Because MPHJ settled with the FTC, the First Amendment implications of the FTC’s investigation were never adjudicated.347 However, **a court easily could have determined** that the FTC’s **complaint** **infringed MPHJ’s right to petition** as interpreted by the Federal Circuit and the lower federal courts. The FTC’s first theory was based on MPHJ’s lack of subjective intent to file suit, which is insufficient under Federal Circuit law to impose civil liability on a patent holder.348 Moreover, that theory, as well as the theory that MPHJ misrepresented the number of businesses that had purchased licenses, could have run into the same problem as the plaintiffs in Innovatio and the Nebraska attorney general in Activision: attempting to impose liability based on false statements that had nothing to do with the merits of the infringement claims. In response to concerns about patent holders targeting end users, Congress has begun to contemplate legislation that would regulate patent enforcement conduct. **Under the courts’ interpretation of the Petition Clause, however, Congress’s options are limited**. A recent bill, the Targeting Rogue and Opaque Letters (“TROL”) Act, defines several types of communications related to alleged patent infringement as unfair or deceptive acts under Section 5 of the FTC Act.349 For example, the bill would make it unlawful to, “in bad faith,” state or represent that “legal action for infringement of the patent will be taken against the recipient” or that “persons other than the recipient purchased a license for the patent asserted.”350 The bill then outlines three ways in which bad faith can be shown, defining the term as follows: The term “bad faith” means . . . that the sender— (A) made knowingly false or knowingly misleading statements, representations, or omissions; (B) made statements, representations, or omissions with reckless indifference as to the false or misleading nature of such statements, representations, or omissions; or (C) made statements, representations, or omissions with awareness of the high probability of the statements, representations, or omissions to deceive and the sender intentionally avoided the truth.351 Some members of Congress have objected that the bad faith requirement will make it too difficult for the FTC to prove that a patent holder violated the statute,352 **but that requirement is**, as this Article has shown, **mandated by the Federal Circuit’s interpretation of the Petition Clause**. Moreover, even the narrow definition of bad faith in the bill may encompass conduct that is immunized under current law. For example, **the bill** **condemns** any **misleading statement** in a demand letter, including statements that are peripheral to the infringement allegations, such as braggadocio about past licensing success. **Yet, as Innovatio and Activision illustrate**, such peripheral misrepresentations cannot be the basis for civil liability under current law. A bill recently introduced in the Senate, the Protecting American Talent and Entrepreneurship (“PATENT”) Act, raises similar difficulties The bill would outlaw numerous specific actions taken by persons who engage in the “widespread sending” of demand letters, such as engaging in a pattern of falsely threatening infringement litigation, making statements related to patent validity, enforceability, or infringement that “lack a reasonable basis in fact or law,” or sending letters “likely to materially mislead a reasonable recipient” because the letters do not contain information about the patent holder, the asserted patent, or the recipient’s alleged infringement.353 Under the bill, these prohibitions would be enforced by the FTC through its existing authority.**354 The PATENT Act contains many of the same vulnerabilities as the other statutes discussed thus far**. For example, **it condemns false threats of litigation, which the Federal Circuit has suggested cannot be done.**

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**Although the bill acknowledges the concept of objective baselessness by condemning assertions that lack a reasonable basis in fact or law, the Federal Circuit has held that objective baselessness alone is not sufficient to strip a patent holder of immunity**—the patent holder also must know that the allegation is baseless or act in reckless disregard for whether the allegation is true or false. In sum, reasonable minds might differ about whether policing unfair or deceptive patent assertions is a function that should be handled by an administrative agency, such as the FTC, or through legislation. Those who support a legislative solution might also reasonably disagree about the precise terms of any new statute and, of course, whether such a statute should be passed by Congress or by state legislatures. But the Federal Circuit’s expansive immunity standard precludes all three branches of government at both the state and federal levels from regulating the enforcement tactic that is most troublesome: sending demand letters that contain weak (but not frivolous) allegations of infringement and that use misleading, deceptive, or false statements in an attempt to intimidate recipients into quickly purchasing a license. Fortunately, federal law already contains an alternative immunity standard that would allow governments to outlaw those tactics: the flexible good faith standard applied by courts before the Federal Circuit adopted its current, Noerr-based immunity rule. V. RETHINKING PETITIONING IMMUNITY IN PATENT CASES Although state governments and the federal government are increasingly interested in regulating patent enforcement, **the Federal Circuit has left them powerless**. Yet the court has offered **no** persuasive justification for extending the broad antitrust immunity conferred by Noerr to all civil claims challenging patent enforcement conduct. **Accordingly, the Federal Circuit en banc or the Supreme Court should force a return to a narrower, more flexible immunity standard that accommodates the courts’ historical practice of condemning unfair and deceptive acts of patent enforcement**.