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**1AC – Innovation**

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

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

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

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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

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

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

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

**Innovation solves a litany of existential risks**

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

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

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

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

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

[Abstract]

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

[Introduction]

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

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

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

**Impact outweighs**

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

**1AC – Lobbying**

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

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

**The plan solves**

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

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

**Anticompetitive lobbying entrenhces**

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

**Populism driven nationalist blocks make conflicts inevitable**

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

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

### 1AC – Citizen Petioning

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

\*footnotes omitted\*

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

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

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

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

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

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

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

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

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

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

B. **JUDICIAL GUIDANCE**

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

i. Reduce Judicial Participation

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

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

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

2. Define the Court's Role

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Drivers of Drug Spending**

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

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

**Aging crisis causes international wars**

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

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

**Chronic diseases cause extinction**

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

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

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

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

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

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

**Cultivated meat solves extinction**

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

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

CULTIVATED MEAT IS MUCH BETTER FOR THE ENVIRONMENT

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

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

CULTIVATED MEAT CONSERVES LAND & WATER RESOURCES

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

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

### 1AC – Solvency

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

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

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

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

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

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

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

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

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

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

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

## 2AC

**T Prohibitions (Per Se)**

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

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

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

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

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

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

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

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

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

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

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

**The dissent from the 1NC’s case proves. Rule of reason can be a prohibition and there is no clear separation.**

William Joseph **Brennan** Jr. **90**, Justice, Supreme Court of the United States, “FTC v. Superior Court Trial Lawyers Ass'n,” 493 U.S. 411, Lexis

**The Court's concern for the vitality of the per se rule,** moreover, **is misplaced, i**n light of the fact that we have been **willing to apply rule-of-reason analysis in a growing number of group-boycott cases**. See, e. g., Indiana Federation of Dentists, 476 U.S., at 458-459; [\*\*\*885] Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 293-298 (1985); [\*\*\*\*77] National Collegiate Athletic Assn., 468 U.S., at 101; Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 9-10 (1979) (criticizing application of per se rule because "literalness is overly simplistic and often overbroad"). 9 **We have recognized that "there is** [\*453] **often no bright** [\*\*791] **line separating per se from Rule of Reason analysis**. **Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct."** National Collegiate Athletic Assn., supra, at 104, n. 26.

**Anticompetitive practices means business practices aimed at reducing competition**

**OECD 3** (Glossary of Industrial Organisation Economics and Competition Law, compiled by R. S. Khemani and D. M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, 1993, <https://stats.oecd.org/glossary/detail.asp?ID=3145>, y2k)

Definition:

**Anticompetitive practices** refer to a wide range of **business practices** in which a firm or group of firms may engage in order to **restrict** inter-firm **competition** to maintain or increase their relative market position and profits without necessarily providing goods and services at a lower cost or of higher quality.

**Cap K**

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

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

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

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

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

**Alternatives built on opposition fail to gain leverage, concessions, and creates space necessary for truly radical politics. Only the perm solves**

**Vassallo 11/4/21** (Justin, writer and researcher who specializes in party systems and ideology, political economy, American political development, and modern Europe. “Radical Movements and Political Power”, <https://bostonreview.net/politics/justin-h-vassallo-radical-movements-and-political-power>) Neolefitism “an attempt within leftwing groups to “prefigure . . . the kind of participatory democracy and popular control that they expected from a future, postcapitalist society” in order to preempt a turn toward oligarchy within their own movements.”

At the same time, Renaud does not shy away from evaluating neoleftists’ shortcomings, **including frustrating instances of myopia and**, sometimes, the **dissociation from concrete political goals and conditions**, despite—or perhaps because of—their own experiences of state violence and exile. Perhaps ironically, both Leninists and moderate social democrats would criticize neoleftists for their “**infantile” and romantic anti-capitalism**. But as New Lefts amply documents, neoleftists, by virtue of the intermediate position they carved out between Social Democracy and Soviet Communism, generated powerful new insights about political institutions, culture, sex, gender, and imperialism that the usual party forms and traditional party insiders could not produce.

On the perennially thorny issue of pragmatism and reform, New Lefts mostly withholds final judgments about the lessons activists and policy oriented leftists today might draw from the legacy of mid-twentieth century new lefts. Renaud stresses that “political power was never the main goal. . . . Young militants . . . were not interested in building a new parliamentary coalition.” He adds, “Seizing the state was peripheral to the neoleftist project, despite what antileftists might have feared.”

For many, however, this neoleftist fixation on “renewal” will come across as excessively romantic and, perversely, borderline **anti-political**. In retrospect, at a moment when the right has only strengthened its grip across the United States and parts of Europe, this **refusal to pursue specifically political**—as opposed to social or cultural—power will look to some like a grave mistake. New Lefts imparts a feeling that neoleftists, **at peak moments** of direct action and grassroots democracy, were consumed by the rapture of anticipation—of a cataclysm, or even **total social revolution**. Yet their reflexive opposition to the party form **impeded greater leverage**, and thus the recognition that some **concessions from capital and the state are worth getting,** that **better conditions need not come at the expense of still more radical goals**. It is undeniable, furthermore, that the welfare state made it possible for the sixties New Left to emerge as it did and occupy the cultural and political space it chose. This does not mean its critiques were unfounded; on the contrary, they were absolutely essential. **But one must be clear-eyed about the limits of rejecting the pursuit of political power**.

Today, far-sighted activists will have to discern how to weave in and out of institutions, building power in one key while nurturing the fire of radicals in another.

Though it is not a conclusion New Lefts pursues explicitly, a lesson one might draw from Renaud’s book is that the central problem for a radicalism committed foremost to critique rather than to political power is that actually implementable welfare state programs for distributional change and decommodification begin to appear objectionably conciliatory or reformist. This orientation runs the risk of leaving the world as it is, perpetually deferring a better world to a time that never comes. In this sense, any leftism without a concrete policy agenda—and the tactical focus needed to win the formal power to implement it—**is ultimately a betrayal of its overriding aim**: to create a more just world. An **ideology of strict opposition**, legible only to fervent insiders, ultimately **abandons the practice of world-building to others**, from those who circumscribe and redefine human rights to suit **maximal market freedom** to those who **recreate a fortress nation-state** along chauvinist ethnocultural lines.

In his epilogue, Renaud suggests that contemporary social movements, particularly the wave of Black Lives Matter protests over the summer of 2020, are channeling the most vibrant aspects of previous new lefts. The boundaries between radicals and institutions, civic or political, do appear more porous than they have been in a long time. In the United States, there are once again elected progressives in the mold of social democrats—Alexandria Ocasio-Cortez, Rashida Tlaib, Ilhan Omar, Pramila Jayapal, and Cori Bush, among others—and they have been empowered through diverse constituencies and a multitude of strategies, in turn amplifying ideas that were once only aired in a university, small radical book club, marginal nonprofit, or underground magazine or blog.

Some observers, of course, will conclude that the modern course of electoral and legislative politics in the United States confirms that a neoliberal logic of social and fiscal discipline will prevail over even highly pragmatic reforms. The steady erosion, thus far, of Biden’s economic agenda by intransigent centrist Democrats is only the latest reflection of the Democratic Party’s decades-long capacity for self-inflicted damage, Senators Joe Manchin and Kyrsten Sinema only the most visible of the stubborn obstacles preventing the party “realignment” once envisioned by the authors of the Port Huron Statement. At all levels of government there are Democratic **defenders of the status quo** that the left must contend with, and still other institutional obstacles—from the Supreme Court to gerrymandering—besides. Nor are the obstacles unique to the United States. In Germany’s recent parliamentary elections, Die Linke’s disappointing results underscore that leftwing infighting and a lack of clearly defined political objectives continue to harm the broader public’s reception to progressive challenges to the status quo.

Still, there is some cause for optimism—and it will be needed, given the immense challenges before us. Through a still-evolving mix of grassroots mobilization and electoral politics, the U.S. left has accrued influence it simply did not have even ten years ago, raising the profile of social democracy in the process. Indeed, the idea of Bernie Sanders serving as chairman of the Senate Budget Committee would have been inconceivable before his 2016 campaign. Any young European leftist must welcome the possibility that a true break from neoliberalism in the United States might consequently alter perceptions in Europe. In that case, the U.S. left could justly be credited with helping to dismantle an international policy regime that has fueled inequality and maintained poverty across much of the globe for decades. And while it is necessary to closely scrutinize the tempo of change and the actual policy results, it is at the very least clear, through the rhetoric of American progressives, that crucial links between egalitarian economic goals and other forms of social justice have been reestablished.

The amalgamation of putatively non-party and coalition-building strategies further reflects the unprecedented transnational, multiracial character of modern lefts in the West. While many factors might lead one to conclude that they are incurably weak and incapable of transformative agency, the prominence of nonwhite leftists—who know the difficult legacies of racialized and stratified welfare states but nonetheless seek to retrieve and update their best mechanisms—signals that social democracy has the potential to be reborn, as it was in Europe’s apocalyptic landscape of 1945. In this context, New Lefts reminds us that world-building can take many forms. But at the same time, it also reminds us that **neither a position defined through the negative—such as antifascism—nor a political-economic blueprint can suffice on its own**. In the face of the climate crisis and rampant social and economic inequality, far-sighted activists will have to discern how to weave in and out of institutions, building power in one key while nurturing the fire of radicals in another.

**System sustainable**

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Discourse on food ethics often advocates the **anti-capitalist idea** that we need **less capitalism, less growth, and less globalization** if we want to make the world a better and more equitable place, with arguments focused on applications to food, globalization, and a just society. For example, arguments for this anti-capitalist view are at the core of some chapters in nearly every handbook and edited volume in the rapidly expanding subdiscipline of food ethics. None of these volumes (or any article published in this subdiscipline broadly construed) focuses on a defense of globalized capitalism.1

More generally, discourse on global ethics, environment, and political theory in much of academia—and in society—increasingly features this anti-capitalist idea as well.2 The idea is especially prominent in discourse surrounding the environment, climate, and global poverty, where we face a nexus of problems of which capitalism is a key driver, including climate change, air and water pollution, the challenge of feeding the world, ensuring sustainable development for the world's poorest, and other interrelated challenges.

It is therefore important to ask whether this anti-capitalist idea is justified by **reason and evidence** that is as strong as the degree of confidence placed in it by activists and many commentators on food ethics, global ethics, and political theory, more generally.

In fact, many **experts** argue that this anti-capitalist idea is **not supported by reason and argument and is actually wrong**. The main contribution of this essay is to explain the structure of the leading arguments against the anti-capitalist idea, and in favor of the opposite conclusion. I begin by focusing on the general argument in favor of **well-regulated globalized capitalism** as the key to a **just, flourishing, and environmentally healthy world**. This is the most important of all of the arguments in terms of its consequences for health, wellbeing, and justice, and it is endorsed by experts in the **empirically minded disciplines** best placed to analyze the issue, including experts in long-run global development, human health, wellbeing, economics, law, public policy, and other related disciplines. On the basis of the arguments outlined below, well-regulated capitalism has been endorsed by recent Democratic presidents of the United States such as Barack Obama, and by progressive Nobel laureates who have devoted their lives to human development and more equitable societies, as well as by a wide range of experts in government and leading **n**on**g**overnmental **o**rganization**s**.

The goal of this essay is to make the structure and importance of these arguments clear, and thereby highlight that discourse on global ethics and political theory should engage carefully with them. The goal is not to endorse them as necessarily sound and correct. The essay will begin by examining general arguments for and against capitalism, and then turn to implications for food, the environment, climate change, and beyond.

Arguments for and against Forms of Capitalism

The Argument against Capitalism

Capitalism is often argued to be a key driver of many of society's ills: inequalities, pollution, land use changes, and incentives that cause people to live differently than in their ideal dreams. Capitalism can sometimes deepen injustices. These negative consequences are easy to see—resting, as they do, at the center of many of society's greatest challenges.3

And at the same time, it is often difficult to see the positive consequences of capitalism.4 What are the positive consequences of allowing private interests to clear-cut forests and plant crops, especially if those private interests are rich multinational corporations and the forests are in poor, developing countries whose citizens do not receive the profits from deforestation? Why give private companies the right to exploit resources at all, since exploitation almost always has some negative consequences such as those listed above? These are the right questions to ask, and they highlight genuine challenges to capitalism. And in light of these challenges, it is reasonable to consider the possibility that perhaps a different economic system altogether would be more equitable and beneficial to the global population.

The Argument for Well-Regulated Capitalism

However, **things are more complicated than the arguments above would suggest**, and the benefits of capitalism, especially for the world's poorest and most vulnerable people, are in fact myriad and **significant**. In addition, as we will see in this section, many experts argue that **capitalism is not the fundamental cause of the** previously described **problems** but rather an essential component of the **best solutions** to them and of the best methods for promoting our goals of health, well-being, and justice.

To see where the defenders of capitalism are coming from, consider an analogy involving a response to a pandemic: if a country administered a rushed and untested vaccine to its population that ended up killing people, we would not say that vaccines were the problem. Instead, the problem would be the flawed and sloppy policies of vaccine implementation. Vaccines might easily **remain** absolutely **essential** to the correct response to such a pandemic and could also be essential to promoting health and flourishing, more generally.

The argument is similar with capitalism according to the leading mainstream arguments in favor of it: Capitalism is an essential part of the best society we could have, just like vaccines are an essential part of the best response to a pandemic such as COVID-19. But of course both capitalism and vaccines can be implemented poorly, and can even do harm, especially when combined with other incorrect policy decisions. But **that does not mean that we should turn against them**—quite the opposite. Instead, we should **embrace them as essential** to the best and most just outcomes for society, and educate ourselves and others on their importance and on how they must be **properly designed and implemented** with other policies in order to best help us all. In fact, the argument in favor of capitalism is even more dramatic because it claims that much more is at stake than even what is at stake in response to a global pandemic—what is at stake with capitalism is nothing less than **whether the world's poorest and most vulnerable billion people will remain in conditions of poverty and oppression**, or if they will instead finally gain access to what is minimally necessary for basic health and wellbeing and become increasingly affluent and empowered. The argument in favor of capitalism proceeds as follows:

Premise 1. Development and the past. Over the course of recorded human history, the majority of historical increases in health, wellbeing, and justice have occurred in the last two centuries, largely as a result of societies adopting or moving toward **capitalism**. Capitalism is a relevant cause of these improvements, in the sense that they could not have happened to such a degree if it were not for capitalism and would **not have happened to the same degree under any alternative** noncapitalist approach to structuring society. The argument in support of this premise relies on observed relationships across societies and centuries between indicators of degree of capitalism, wealth, investments in public goods, and outcomes for health, wellbeing, and justice, together with econometric analysis in support of the conclusion that the best explanation of these correlations and the underlying mechanism is that large increases in health, wellbeing, and justice are largely driven by increasing investments in public goods. The scale of increased wealth necessary to maximize these investments requires **capitalism**. Thus, as capitalist societies have become dramatically wealthier over the past hundred years (and wealthier than societies with alternative systems), this has allowed **larger investments in public goods**, which simply has not been possible in a sustained way in societies without the greater wealth that capitalism makes possible. Important investments in public goods include investments in basic **medical knowledge**, in health and nutrition programs, and in the institutional capacity and know-how to **regulate** society and **capitalism** itself. As a result, capitalism is a **primary driver** of positive outcomes in **health and wellbeing** (such as increased **life expectancy**, **lowered child and maternal mortality**, adequate calories per day, **minimized infectious disease rates**, a lower percentage and number of people in **poverty**, and more reported **happiness**);5 and in **justice** (such as reduced deaths from **war** and homicide; higher rankings in **human rights** indices; the reduced prevalence of **racist, sexist, homophobic opinions** in surveys; and higher literacy rates).6 These **quantifiable positive consequences of global capitalism** dramatically **outweigh**

the negative consequences (such as deaths from pollution in the course of development), with the result that the net benefits from capitalism in terms of health, wellbeing, and justice have been greater than they would have been under any known noncapitalist approach to structuring society.7

Premise 2. Economics, ethics, and policy. Although capitalism has often been ill-regulated and therefore failed to maximize net benefits for health, wellbeing, and justice, **it can become well-regulated** so that it maximizes these societal goals, by including mechanisms identified by economists and other policy experts that do the following:

* optimally8 **regulate negative effects** such as pollution and monopoly power, and invest in public goods such as education, basic healthcare, and fundamental research including biomedical knowledge (more generally, policies that correct the failures of free markets that economists have long recognized will arise from “externalities” in the absence of regulation);9
* ensure equity and distributive justice (for example, via wealth redistribution);10
* ensure basic rights, justice, and the rule of law independent of the market (for example, by an independent judiciary, bill of rights, property rights, and redistribution and other legislation to correct historical injustices due to colonialism, racism, and correct current and historical distortions that have prevented markets from being fair);11 and
* ensure that there is no alternative way of structuring society that is more efficient or better promotes the equity, justice, and fairness goals outlined above (by allowing free exchange given the regulations mentioned).12

To summarize the implication of the first two premises, **well-regulated capitalism** is **essential** to best achieving our ethical goals—which is true even though capitalism has certainly not always been well regulated historically. Society can still do much better and **remove the large deficits** in terms of health, wellbeing, and justice **that exist under** the current inferior and **imperfect** versions of **capitalism**.

Premise 3. Development and the future. If the global spread of capitalism is allowed to continue, desperate **poverty can be** essentially **eliminated** in our lifetimes. Furthermore, this can be accomplished **faster** and in a more just way via **well-regulated** global **capitalism** than by **any alternatives**. If we instead opt for **less capitalism**, less growth, and less globalization, then desperate **poverty will continue** to exist for a significant portion of the world's population into the further future, and the world will be a **worse and less equitable** place than it would have been with more capitalism. For example, in a world with less capitalism, there would be more **overpopulation, food insecurity**, air **pollution**, ill health, injustice, and other problems. In part, this is because of the factors identified by premise 1, which connect a turn away from capitalism with a turn away from continuing improvements in health, wellbeing, and justice, especially for the developing world. In addition, fertility declines are also a consequence of increased wealth, and the size of the population is a primary determinant of **food demand and other environmental stressors**.13 Finally, as discussed at length in the next section of the essay, capitalism can be naturally combined with optimal **environmental regulations**.14 Even bracketing anything like optimal regulation, it remains true that sufficiently **wealthy nations reduce environmental degradation** as they become wealthier, whereas developing nations that are nearing peak degradation will remain **stuck at the worst levels of degradation if we stall growth**, rather than allowing them to transition to less and less degradation in the future via capitalism and economic growth.15 In contrast, well-regulated capitalism is a key part of the best way of coping with these problems, as well as a key part of **dealing with climate change**, global **food production**, and other specific challenges, as argued at length in the next section. Here it is important to stress that we should favor well-regulated capitalism that includes correct investments in public goods over other capitalist systems such as the neoliberalism of the recent past that promoted inadequately regulated capitalism with inadequate concern for externalities, equity, and background distortions and injustices.16

Conclusion. Therefore, we should be in favor of capitalism over noncapitalism, and we should especially favor well-regulated capitalism, which is the ethically optimal economic system and is essential to any just basic structure for society.

This argument is impressive because, as stated earlier in the essay, it is based on **evidence** that is so striking that it leads a bipartisan range of open-minded thinkers and activists to endorse well-regulated capitalism, including many of those who were not initially attracted to the view because of a reasonable concern for the societal ills with which we began. To better understand why such a range of thinkers could agree that well-regulated capitalism is best, it may help to clarify some things that are not assumed or implied by the argument for it, which could be invoked by other bad arguments for capitalism.

One thing the argument above does not assume is that health, wellbeing, or justice are the same thing as wealth, because, in fact, they are not. Instead, the argument above relies on well-accepted, **measurable indicators** of health and wellbeing, such as increased lifespan; decreased early childhood mortality; adequate nutrition; and other empirically measurable leading indicators of health, wellbeing, and justice.17 Similarly, the argument that capitalism promotes justice, **peace**, freedom, human rights, and tolerance relies on empirical metrics for each of these.18

Furthermore, the argument does not assume that because these indicators of health, wellbeing, and justice are highly correlated with high degrees of capitalism, that therefore capitalism is the direct cause of these good outcomes. Rather, the analyses suggest instead that something other than capitalism is the direct cause of societal improvements (such as improvements in knowledge and technology, public infrastructure, and good governance), and that capitalism is simply a **necessary condition** for these improvements to happen.19 In other words, the richer a society is, the more it is able to invest in all of these and other things that are the direct causes of health, wellbeing, and justice. But, to maximize investment in these things societies need well-regulated capitalism.

As part of these analyses, it is often stressed that current forms of capitalism around the world are highly defective and must be reformed in the direction of well-regulated capitalism because they lack investments in public goods, such as basic knowledge, healthcare, nutrition, other safety nets, and good governance.20 In this way, an argument for a particular kind of **progressive reformism** is an essential part of the analyses that lead many to endorse the more general argument for well-regulated capitalism.

Although these analyses are nuanced, and appropriately so, it remains the case that the things that directly lead to health, wellbeing, and justice require resources, and the best path toward generating those resources is well-regulated capitalism. And on the flip side, according to the analyses behind premise 1 described above, an anti-capitalist system would not produce the resources that are needed, and would thus be a **disaster**, especially for the **poorest billion** people who are most desperately in need of the resources that capitalism can create and direct, to escape from extreme poverty.21

### Civil RICO CP

**CP is struck down**

**Hrdy 18** (Camilla A. Hrdy, Assistant Professor, University of Akron School of Law, THE REEMERGENCE OF STATE ANTI-PATENT LAW, 89 U. Colo. L. Rev. 133, y2k)

Following the **Federal Circuit's** lead, courts **currently** rely on either implied conflict preemption analysis 381 or on the Federal Circuit's **expansive interpretation** of the **First Amendment Petitioning Immunity Doctrine**. 382 There are several reasons to prefer the historic approach.

1. Rooted in History and Relevant Supreme Court Precedent

First, the historic approach is not only rooted in history, but in accordance with Supreme Court precedent. This cannot be said for implied conflict preemption, which comes from Supreme Court case law addressing state patent-like rights, not state anti-patent laws. As explained in the prior section, these two fields of law are distinct and should not be assessed using the same preemption standard. 383 Nor can it be said for Petitioning Immunity, which is imported from case law involving federal antitrust liability. No Supreme Court case has said that the Petition Clause should apply to state laws that regulate patents, or that the Petition Clause represents a particularly high level of immunity for patentees.

[\*211]

2. Recognizes a Constitutional, as Opposed to Merely a Statutory, Barrier to State Anti-Patent Laws

Second, implied conflict preemption analysis wrongly assumes that congressional intent to preempt a state anti-patent law is required. Congress's implied intention to preempt a state anti-patent law is not required. Rather, the mandate to preempt a local law that interferes with the patentee's exclusive right comes from the Intellectual Property Clause itself. 384 The historical Intellectual Property Clause analysis recognizes that the true limit to state authority to pass anti-patent laws is the Intellectual Property Clause.

3. Preserves a Slice of State Authority to Regulate Patents

Third, the Intellectual Property Clause analysis preserves a not-insignificant slice of state authority to regulate patent assertions and other activity involving patents. So long as the state anti-patent law does not impose an "unreasonable" burden on the patentee's exclusive right, it is not preempted. In Allen, the Court found a registration statute that sought to ensure patents were genuine (not expired or revoked) was not unreasonable. Several other state regulations can avoid preemption under this reasonableness standard, so long as they survive the balancing test described above, i.e., the burden on the patentee does not outweigh the state's valid interest in passing the law.

The reasonableness assessment thus avoids one of the major problems with the Federal Circuit's utilization of First Amendment Petition Clause Immunity to address state restrictions on patentees' ability to enforce their patents: the standard is arguably overly strict and weighs in favor of preemption in most conceivable cases. 385 As discussed above, one of the problems may be that it is simply too difficult to determine whether a patent assertion is "objectively baseless" or not, especially before litigation commences. Thus, the safe route may simply be to lean towards finding the patentee was [\*212] not wrong to bring a potentially meritorious claim.

Notably, the Petitioning Immunity analysis is not the only place we see the courts erring on the side of preemption. When applying conflict preemption analysis, the Federal Circuit has been quite patentee-protective. For instance, in Biotechnology Industry Organization v. District of Columbia, the Federal Circuit held that a state law restricting the prices patentees could charge for their patented drugs was preempted merely because it limited the pecuniary reward patentees could make from their patents. 386 Plaintiffs urged that the District of Columbia's Prescription Drug Excessive Pricing Act, which prohibited charging "excessive" prices for patented prescription drugs, conflicted with "Congress's intention to provide [pharmaceutical patent holders] with the pecuniary reward that follows from the right to exclude granted by a patent." 387 The Federal Circuit agreed, determining that a major boon of the "right to exclude" is the "opportunity to obtain above-market profits during the patent's term." 388 "By penalizing high prices - and thus limiting the full exercise of the exclusionary power that derives from a patent" the Act conflicted with the congressional "purpose and objectives" of the patent laws. 389 "The underlying determination about the proper balance between innovators' profit and consumer access to medication, though, is exclusively one for Congress to make." 390

Such pronouncements comport with many nineteenth-century courts' views about the allocation of power between Congress and the states. 391 However, under the rule of Allen, the true test should be whether the burden on the exclusive right is one of "reasonableness." A state price restriction law that does not significantly affect patentees' incentive to invent and commercialize should not be preempted.

[\*213]

4. Asks the Right Question

Fourth, the Intellectual Property Clause standard asks precisely the right question. By balancing the burden on patentees' exclusive rights against the state's legitimate interests, such as its interest in regulating fraud, this rule directly addresses what we actually care about at a policy level: Namely, does the state law make it so difficult to enforce or profit from a patent that it effectively undermines the federal patent incentive? If the law's burden or compliance cost is high, then (as Justice Kent observed long ago) the law should be preempted because otherwise the state is essentially taking away what Congress has given through the patent. 392 If there is little or no cost to the patentee, and there is a high payoff for the state, then we should not care that the state law imposes a minimal compliance cost on patentees in order to achieve its legitimate purpose. 393 This singular focus on the burden to the patentee's Intellectual Property Clause rights contrasts with both obstacle preemption's open-ended balancing test and the Petition Clause's futile efforts to assess the merits of the patentee's cause of action prior to determining the validity of the patent and of the infringement claim. 394

5. More Practical to Apply

Fifth, the historic approach is a far more practical standard for courts to apply. As explained, purposes and objectives analysis is unwieldy and circuitous, and it wrongly relies on congressional intent to preempt. Meanwhile, the Petitioning Immunity analysis is not workable for the majority of state laws to which it is presently applied. Petitioning Immunity requires determining whether a patentee has been prevented from making an "objectively reasonable" patent assertion. 395 This is not a workable rule for adjudging patent assertions brought early in a patent dispute's lifetime. Except [\*214] in the most egregious cases, no court - state or federal - can know before at least claim construction whether a patent is valid or infringed. 396 In contrast, assessing the compliance cost of a local law on patentees is at least something that courts (even state courts) can do, and that they can do even before a patent lawsuit has been filed. As explained, courts can order parties, including private parties as well as state attorneys general who bring public actions against patentees, to collect evidence on a state law's compliance cost on patentees in order to get a sense of whether the exclusive right has been unreasonably burdened by the law.

6. Applies Only to State, Not to Federal, Regulation of Patents

Lastly, returning to the Intellectual Property Clause as the benchmark for assessing the constitutionality of state anti-patent laws avoids the issue noted by Gugliuzza, if the Federal Circuit uses an **expansive notion** of Petitioning Immunity under the First Amendment equivalently with preemption, this case law would apply to **both** state regulation of **patents** and **federal regulations**. 397 This is **highly** problematic. Historically, courts that struck down state anti-patent laws were clear that they were not prohibiting regulation of patents entirely; rather, they were holding that this regulation could only be imposed by a federal body. 398

AND– **Anti-trust key to detrrence**

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General’s Office, Antitrust Bureau. 8-21-14. “Antitrust Liability for Maintaining Baseless Litigation” <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2783&context=lawreview>

IV. ANALYSIS As evidenced by the cases discussed, filing and maintaining baseless lawsuits may have anticompetitive effects. And while the cases focused primarily on initiation of litigation, it was recognized that maintaining the actions was also improper. Indeed, where maintaining baseless litigation has anticompetitive effects, there is no compelling rationale for creating a legal distinction between the filing and maintaining of a baseless action.145 And in situations where a litigant is able to offer a questionable but potentially legitimate basis for filing an action (thereby making the suit unlikely to qualify as a sham), the greater need for imposing liability for continuing to litigate after it becomes clear that the action is meritless. Consequently, this section provides the argument for antitrust liability for maintaining baseless litigation. A. Antitrust Sham Litigation for Maintaining Baseless Litigation is Good Policy There are several justifications for imposing antitrust liability for continuing to litigate a baseless action for anticompetitive purposes. And where such litigation may cause anticompetitive effects—such as in Hatch-Waxman litigation—the potential for incurring antitrust liability may be an important deterrent. First, **antitrust liability** **is needed** **because laws** prohibiting frivolous and bad faith litigation (such as Section 285 or Rule 11), **are inadequate deterrents** in many situations. Granting fees under Section 285 is largely within a court’s discretion, and thus a court may decline to impose fees in even egregious circumstances.146 Similarly, Rule 11 is not only discretional, but several courts have interpreted it as only governing the filing of litigation and thereby rejected its application to conduct done in the course of litigation (including continuing to maintain a baseless action).147 **Moreover, the remedies available** under these provisions—mostly payment of defendant’s fees and costs—**are not particularly onerous** **and thus not likely to discourage frivolous litigation**.

**\*\*MARKED\*\***

As monopoly profits may be quite large, a firm may well be quite content risking having to pay fees and even sanctions (**in contrast to the risk of treble damages for antitrust violations**). Second, to the extent that continuing to litigate a baseless action is anticompetitive, there is no rational basis for only imposing liability on the filing of the action but not on maintaining it. And where the litigation circumvents legislative policies, such as those created by the Hatch-Waxman Act, it should be prevented to the fullest extent possible. Thus, imposing liability on both filing and maintaining baseless, anticompetitive litigation would likely have the favorable effect of further deterring such deleterious conduct. **Third, successfully proving an antitrust claim is a difficult task**, requiring not only demonstrating anticompetitive effects in most cases, but also various procedural hurdles. Consequently, concerns that imposing antitrust liability for maintaining baseless litigation could “open the floodgates” to additional antitrust litigation is unwarranted.148 Indeed, outside of the context of the Hatch-Waxman Act (or a similar type of regulatory scheme), proving anticompetitive effects of sham litigation may well be difficult.

**Regulations CP**

**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.

**States CP**

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

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

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

**FTC DA**

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

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

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

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

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

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

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

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

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

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

**FTC overload now.**

**Burke ’21** [Henry and Andrea; May 28; B.A. in Political Science and Labor Studies from the University of California at Los Angeles; Research Assistant, B.A. in Economics from the University of Maryland; Revolving Door Project, “Hobbled FTC Lacks Budget to Combat Corporate Buying Spree,” <https://therevolvingdoorproject.org/hobbled-ftc-lacks-budget-to-combat-corporate-buying-spree/>]

Even if the **will** to stop it exists, the FTC doesn’t have the **funding** to stop this boom. In fact, it hasn’t had the funding to **keep up** with a **steady uptick** in mergers in **years**. Aside from the recent spike, the **total** number of premerger filings [**increased**](https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf) by **80 percent** over the last 10 years. In 2010, corporations filed 1166 premerger notifications. By 2019, yearly filings almost **doubled** to 2089.

While the **number** of transactions the FTC is charged with regulating has **increased** steadily, the **number** of enforcement actions — challenges to anticompetitive mergers or conduct — has **stagnated**.  A 2020 paper from Equitable Growth showed that while the number of [enforcement actions](https://equitablegrowth.org/wp-content/uploads/2020/11/111920-antitrust-report.pdf) from both the FTC and DOJ hovered at about 40 challenges per year from 2010 to 2019, even as the number of corporations seeking merger approval grew. The FTC’s enforcement actions over the past ten years show the agency hasn’t kept up with increased HSR filings: while FY 2010 saw **22** enforcement actions for **1166** reported mergers, a ratio of approximately one enforcement action for every 53 mergers, FY 2019 saw a mere 21 enforcement actions for **2089 mergers**, meaning there was **only one** FTC enforcement action for **every 99** mergers.

Overall **funding** and **staffing levels** at the FTC have similarly **stagnated**. Then-FTC commissioner Rebecca Slaughter said in 2020 that it is an “[**indisputable**](https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf)” fact that FTC funding has **not kept up** with market demands; according to Slaughter, the FTC budget has only increased by **13%** since 2010 and the employee headcount **decreased**. This budget increase has not come from increased discretionary appropriations from Congress however, but from a massive increase in merger filings and their accompanying fees. Startlingly, Slaughter notes that “the FTC had roughly **50% more** full-time employees at the beginning of the **Reagan** Administration than it does today.” The situation has become so dire that increased budgets for the enforcement agencies has become a rare [bipartisan](https://www.law360.com/articles/1368496/klobuchar-says-congress-has-rare-shot-at-antitrust-overhaul) issue in the Senate.

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

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

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

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

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

Although both the Teva and Perrigo suits were ultimately settled by AbbVie, the FTC filed a September 2014 lawsuit in the Eastern District of Pennsylvania alleging that AbbVie’s lawsuits were sham lawsuits **meant purely to delay** the market entry of generic versions of AndroGel. The district court ordered AbbVie to pay $448 million in disgorgement, finding that the lawsuits met the sham exception to Noerr-Pennington doctrine, which immunizes private companies from federal antitrust suits under an interpretation of the First Amendment when those companies are litigating valid rights that create anticompetitive effects. The sham litigation exception to Noerr-Pennington required the FTC to prove (1) that AbbVie’s lawsuits were objectively meritless; and (2) that AbbVie’s subjective intent in filing the suits was only to interfere with the business interests of its competitors.

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

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

In the agency’s brief in opposition, counsel for the FTC argued that the Supreme **Court could simply deny AbbVie’s petition**

**n** 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.

**Zero risk of AI impact**

**Bentley 18**—Honorary Professor and Teaching Fellow at the Department of Computer Science, University College London (Peter J., March 2018, “The Three Laws of Artificial Intelligence: Dispelling Common Myths”, Should we fear artificial intelligence?, European Parliamentary Research Service, PE 614.547, <http://doc989.consiglioveneto.it/oscc/resources/EPRS_IDA(2018)614547_EN.pdf#page=8>)

One of the **most extraordinary claims** that is oft-repeated, is that AI is somehow a danger to humankind, even an “existential threat”. Some claim that an AI might somehow develop spontaneously and ferociously like some exponentially brilliant cancer. We might start with something simple, but the intelligence improves itself out of our control. Before we know it, the whole human race is fighting for its survival (Barrat, 2015). It all sounds absolutely terrifying (which is why many science fiction movies use this as a theme). But despite earnest commentators, philosophers, and people who should know better than spreading these stories, the ideas are **pure fantasy**. The **truth is the opposite**: AI – like all intelligence – **can only develop slowly**, under arduous and painful circumstances. It’s not easy becoming clever. There have always been two types of AI: reality and fiction. Real AI is what we have all around us – the voice-recognising Siri or Echo, the hidden fraud detection systems of our banks, even the number-plate reading systems used by the police (Aron, 2011; Siegel, 2013; Anagnostopoulos, 2014). The reality of AI is that we build hundreds of different and highly-specialised types of smart software to solve a million different problems in different products. This has been happening since the birth of the field of AI, which is contemporary with the birth of computers (Bentley, 2012). AI technologies are already embedded within software and hardware all around us. But these technologies are simply clever tech. They are the computational equivalents to **cogs and springs** in mechanical devices. And like a broken cog or loose spring, if they fail then that particular product might fail. Just as a cog or spring cannot magically turn itself into a murderous killing robot, our smart software embedded within their products **cannot turn itself into a malevolent AI**. Real AI saves lives by helping to engage safety mechanisms (automatic braking in cars, or even selfdriving vehicles). Real AI helps us to optimise processes or predict failures, improving efficiency and reducing environmental waste. The only reason why hundreds of AI companies exist, and thousands of researchers and engineers study in this area, is because they aim to produce solutions that help people and improve our lives (Richardson, 2017). The other kind of AI – comprising those super-intelligent general AIs that will kill us all – is fiction. Research scientists tend to work on the former kind of AI. But because this article needs to provide balance in favour of rational common sense, the following sections will dispel several myths in this area. In this article, I will introduce “Three Laws of AI” as a way to explain why the myths are fantastical, if not ludicrous. These “Laws” are merely a summary of the results of many decades of scientific research in AI, simplified for the layperson. Myth 1: A self-modifying AI will make itself super-intelligent. Some commentators believe that there is some danger of an AI “getting loose” and “making itself superintelligent” (Häggström, 2016). The first law of AI tells us why this is not going to happen. First law of AI: Challenge begets intelligence. From our research in the field of artificial life (ALife) we observe that intelligence only exists in order to overcome urgent challenges. Without the right kinds of problems to solve, intelligence cannot emerge or increase (Taylor et al., 2014). Intelligence is only needed where those challenges may be varied and unpredictable. Intelligence will only develop to solve those challenges if its future relies on its success. To make a simple AI, we create an algorithm to solve one specific challenge. To grow its intelligence into a general AI, we must present ever-more complex and varied challenges to our developing AI, and develop new algorithms to solve them, keeping those that are successful. Without constant new challenges to solve, and without some reward on success, our AIs will not gain another IQ point. AI researchers know this all too well. A robot that can perform one task well, will never grow in its abilities **without us** forcing it to grow (Vargas et al., 2014). For example, the automatic number plate recognition system used by police is a specialised form of AI designed to solve one specific challenge – reading car number plates. **Even if** some process were added to this simple AI to enable it to modify itself, it **would never increase its intelligence** without being set a new and complex challenge. Without an urgent need, intelligence is simply a waste of time and effort. Looking at the natural world this is illustrated in abundance – most challenges in nature do not require brains to solve them. Only very few organisms have needed to go to the extraordinary efforts needed to develop brains. Even fewer develop highly complex brains. The first law of AI tells us that artificial intelligence is a tremendously difficult goal, requiring exactly the right conditions and considerable effort. There will be **no runaway AIs**, there will be **no self-developing AIs out of our control**. There will be **no singularities**. AI will only be as intelligent as we encourage (or force) it to be, under duress. As an aside, **even if we could create a super-intelligence**, there is **no evidence** that such a superintelligent **AI would ever wish to harm us**.

Such claims are **deeply flawed**, perhaps stemming from observations of human behaviour, which is indeed very violent. But **AIs will not have human intelligence**. Our real future will almost certainly be a continuation of the situation today: AIs will **coevolve with us**, and will be **designed to fit our needs**, in the same way that we have manipulated crops, cattle and pets to fit our needs (Thrall et al., 2010). Our cats and dogs are not planning to kill all humans. Likewise, a more advanced AI will fit us so closely that it will become integrated within us and our societies. **It would no more wish to kill us than it would kill itself**. Myth 2: With enough resources (neurons/computers/memory) an AI will be more intelligent than humans. Commentators claim that “more is better”. If a human brain has a hundred billion neurons, then an AI with a thousand billion simulated neurons will be more intelligent than a human. If a human brain is equivalent to all the computers of the Internet, then an AI loose in the Internet will have human intelligence. In reality, it is not the number that matters, it is how those resources are organised, as the second law of AI explains. Second law of AI: **Intelligence requires appropriate structure**. There is no “one size fits all” for brain structures. Each kind of challenge requires a new design to solve it. To understand what we see, we need a specific kind of neural structure. To move our muscles, we need another kind. To store memories, we need another. Biology shows us that you do not need many neurons to be amazingly clever. The trick is to organise them in the right way, building the optimal algorithm for each problem (Garner and Mayford, 2012). Why can’t we use maths to make AIs? We do use a lot of clever maths and because of this some Machine Learning methods **produce predictable results**, enabling us to understand exactly what these AIs can and cannot do. However, most practical solutions are unpredictable, because they are so complex and they may use randomness within their algorithms meaning that our mathematics cannot cope, and because they often receive unpredictable inputs. While we do not have mathematics to predict the capabilities of a new AI, we do have mathematics that tells us about the limits of computation. Alan Turing helped invent theoretical computer science by telling us about one kind of limit – we can never predict if any arbitrary algorithm (including an AI) will ever halt in its calculations or not (Turing, 1937). We also have the “No Free Lunch Theorem” which tells us there is no algorithm that will outperform all others for all problems – meaning we need a new AI algorithm tailored for each new problem if we want the most effective intelligence (Wolpert, 1996; Wolpert and Macready, 1997). We even have Rice’s Theorem which tells us that it is impossible for one algorithm to debug another algorithm perfectly – which means that, even if an AI can modify itself, it will never be able to tell if the modification works for all cases without empirical testing (Rice, 1953). To make an AI, we need to design new structures/algorithms that are specialised for each challenge faced by the AI. Different types of problem require different structures. A problem never faced before may require the development of a new structure never created before. There is no universal structure that will suit all problems – the No Free Lunch Theorem (Wolpert, 1996; Wolpert and Macready, 1997) tells us this (see box). Therefore, the creation of ever greater intelligence, or the ability to handle ever more different challenges, is a continual innovation process, with the invention of new structures required that are tailored to every new challenge. A big problem in AI research is figuring out which structures or algorithms solve which challenges. **Research is still in its infancy** in this area, which is why today all **AIs are extremely limited** in their intelligences. As we make our AIs cleverer (or if we ever manage to figure out how to make AIs that can keep altering themselves) we encounter yet more problems. We cannot design the intelligence in one go, because we have no mathematics to predict the capabilities of a new structure, and because we have insufficient understanding of how different structures/algorithms map to which challenges. Our only option in designing greater intelligences is an incremental, try-and-test approach. For each new structure, we need to incorporate it into the intelligence without disrupting existing structures. This is an extremely difficult thing to achieve, and may result in layer upon layer of new structures, each carefully working with earlier structures – as is visible in the human brain. If we want an even cleverer brain like ours, we can also add in the ability of some structures to repurpose themselves if others are damaged – changing their structures until they can at least partially take over the role of lost functions. We have little idea how to achieve this, either. The second law of AI tell us that resources are not enough. We still have to **design new algorithms and structures** within (and in support of) the AIs, for every new challenge that the AI faces. It is for these reasons that we cannot create general purpose intelligences using a single approach. There is no single AI on the planet (not even the fashionable “Deep Learning”) that can use the same method to process speech, drive a car, learn how to play a complex video game, control a robot to run along a busy city street, wash dishes in a sink, and plan a strategy to achieve investment for a company. When one human brain performs such tasks, it uses myriad different neural structures in different combinations, each designed to solve a different sub-problem. We do not have the capability to make such brains, so instead we build one specialised smart solution for each problem, and we use them in isolation from each other. Myth 3: As the speed of computers doubles every 18 months, AIs will exploit this computing power and grow exponentially cleverer. Commentators claim that sheer brute calculating speed will overcome all challenges in the creation of AI. Use computers that are fast enough and an AI will be able to learn and out-think us. Since the speed of computer processors has been doubling approximately every 18 months for decades, this is surely an inevitability. Sadly, this point of view fails to recognise the impact of an opposing exponential that works as a significant brake on the development of AIs: testing. Third law of AI: **Intelligence requires comprehensive testing**. Higher intelligence requires the most complex designs in the universe. But every tiny change made in an attempt to improve the design of an intelligence has the potential to destroy any or all of its existing capabilities. It doesn’t help that we have no mathematics capable of predicting the capabilities of a general intelligence (see box). For these reasons, every new design of intelligence needs **complete testing on all the problems** that it exists to solve. Partial testing is not sufficient - the intelligence must be tested on all likely permutations of the problem for its designed lifetime otherwise its capabilities may not be trustable. All AI researchers know this hard truth only too well: to make an AI, it is necessary to train it and test all its capabilities comprehensively in its intended environment at every stage of its design. As Marvin Minsky, founder of the field of AI said, “…there's so many stories of how things could go bad, but I don't see any way of taking them seriously because it's pretty hard to see why anybody would install them on a large scale without a lot of testing.”(Achenbach, 2016) More than any other aspect, it is the process of testing that **requires the most time**. This time constraint produces a brake to the process of designing intelligence. At worst, the level of testing is exponential for each incremental gain in intelligence. To understand why, imagine an intelligence that can recognise 10 different colours and needs to distinguish two types of object using this one feature, colour. In this case, the AI can understand at most 10 different kinds of item and classify them into two classes. If its capabilities are expanded to handle two features – say colour and 10 shades of brightness, then it can understand at most 100 different kinds of item. If it could handle 100 features, it can understand 10, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000, 000 items. How do we know that the AI will classify them all correctly? This becomes a very important question for safety-critical applications. Imagine the AI is driving your car and the two classes of object are “road” and “obstacle”. In reality, it’s much more complex. Many biological intelligences can distinguish unimaginable numbers of items, using thousands or millions of features, each of which could take thousands or millions of values. The testing of these intelligences takes a very long time indeed. This should be no great surprise. Evolution creates its biological brains by testing countless trillions of brains in parallel in every possible scenario for thousands of millions of years, only permitting the successful brains to contribute to future brain designs. This is a highly efficient and effective method of testing that we can only dream of performing. The tremendous need to test AIs has significant implications. We cannot design better AIs without testing them at each stage. Google has performed years of testing for its self-driving cars, and continues to do so. (By June 2016, Google had test-driven their fleet of vehicles, in autonomous mode, a total of 2,777,585 km) (Google, 2016). All AI engineers and researchers know that we cannot make use of AIs in any safety-critical application until appropriate testing is performed. In the near future, we will also need certification so that we know exactly how well an AI performs for well-defined tasks. And if the AI continues to learn or it is updated, we cannot assume that because it passed one test earlier it will continue to do so – like a human pilot, any AI that continues to learn must be continuously retested to ensure it remains certified.1 The third law of AI tell us that as intelligence increases, the time required for testing may increase exponentially. Ultimately, testing may impose practical limits to achievable artificial intelligence, and trustable artificial intelligence. Just as it becomes harder and harder to go faster as we approach the speed of light, it becomes harder and harder to increase intelligence as we build cleverer brains. Again, this is a fundamental reason why AI research and application is dedicated to finding smart solutions to very specific problems.2

**Court Clog**

**COVID uniquely stacks the backlog now**

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

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

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

**Non-UQ – There are over 500,000 backlogged cases in the federal courts right now**

**US Courts 20 –** the Administrative Office of the United States Courts files the statistics of the US Courts caseloads, 2020, “Federal Judicial Caseload Statistics 2020” https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020

U.S. District Courts Combined filings in the U.S. district courts for civil cases and criminal defendants increased by 49,183 (up 13 percent) to 425,945. Terminations held steady, falling by 564 (down less than 1 percent) to 389,102. As filings exceeded terminations, **the total for pending civil cases and criminal defendants rose by 36,419 (up 8 percent) to 511,666**. Civil Filings Civil filings in the U.S. courts increased 16 percent (up 46,443 cases) to 332,732. Filings of cases involving diversity of citizenship (i.e., disputes between citizens of different states and/or between U.S. citizens and citizens of foreign nations) rose 49 percent to 140,812. Personal injury/product liability filings surged 97 percent (up 45,523 cases) as cases involving other personal injury/product liability climbed by 55,121 filings (up 548 percent). Most were part of multidistrict litigation filed in the Northern District of Florida that alleged injuries sustained while using 3M Combat Arms earplugs. Personal injury filings related to airplanes rose by 183 cases (up 1,220 percent) due mainly to cases filed in the Northern District of Illinois against Aerovias de Mexico, S.A. de C.V. and the Boeing Company following the crash of Ethiopian Airlines Flight ET 302. Filings with the United States as defendant increased 6 percent to 38,919. Environmental matters filings climbed 54 percent (up 65 cases). Civil filings involving immigration grew 28 percent (up 519 cases) to 2,388. Contract filings rose 16 percent (up 42 cases to 311) as cases involving recovery of overpayments and enforcement of judgments increased 26 percent (up 37 cases). Prisoner petition filings grew 9 percent (up 991 petitions) to 12,118 as motions to vacate sentence increased 16 percent (up 885 cases) and petitions for writs of habeas corpus by alien detainees rose 10 percent (up 137 cases). Cases addressing civil rights dropped 6 percent (down 54 cases) to 832. Social Security case filings went up 1 percent (up 197 cases) to 17,776 as cases involving disability insurance increased 3 percent (up 243 cases) to 9,396. Filings with the United States as plaintiff dropped 8 percent to 4,021. Contract actions declined 39 percent (down 206 cases). Cases involving recovery of overpayments and enforcement of judgments decreased 60 percent (down 244 cases) as defaulted student loan filings fell 71 percent (down 257 cases). Federal question filings decreased 1 percent to 148,976. Cases dealing with environmental matters dropped 68 percent (down 527 cases). Cases addressing cable and satellite television declined 39 percent (down 204 cases). Intellectual property rights filings fell 17 percent (**down 2,277 cases**) as cases involving copyright decreased 34 percent (down 2,170). Contract filings went down 12 percent (down 559 cases) as insurance cases declined 33 percent (down 559 cases). Civil rights filings grew 2 percent (up 703 cases) as cases involving claims under the Americans with Disabilities Act (Other) rose 5 percent (up 594), while cases addressing housing and accommodations dropped 14 percent (down 139 cases). Civil case terminations declined 2 percent to 300,372. The Southern District of West Virginia terminated 20,170 cases. Most were part of multidistrict litigation related to pelvic repair products. The Southern District of Ohio terminated 2,577 cases. Most were part of multidistrict litigation alleging personal injuries or wrongful deaths arising from drinking water contaminated with C-8, a chemical also known as perfluorooctanoic acid (PFOA) or ammonium perfluorooctanoate (APFO). **Pending civil cases rose 9 percent to 397,492.**

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

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

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

**Patent trolls cause court clog**

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

G. Detriments of Patent Trolling

1. **Clogs the Legal System**

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

**Antitrust suits are still a high bar post affirmative – the link turn outweighs the link**

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

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

**Wave of litigation theory is wrong for antitrust – existing procedural devices solve**

**O'Daniel 78** (David, JD Candidate @ Vanderbilt, "Denial of Standing to Private,Noncommercial Consumers Under Section 4 of the Clayton Act," https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=3090&context=vlr)

Private consumers alleging injury to their pocketbooks because of artificially higher prices generated by antitrust violations are injured in their property and should be granted standing under section 4. Denial of standing to private consumers frustrates the goals of the antitrust laws and in many instances will allow antitrust violations to go unchecked. **Fear of a tidal wave of litigation probably is unfounded**, **but even if existent, such a threat could be controlled by existing procedural devices** such as interpleader, joinder, and consolidation. Decisions like those by the Eighth Circuit in Reiter and the Northern District of California in Weinberg ignore these safeguards at the expense of viable antitrust enforcement. In the future, courts addressing the issue of private consumer standing should emulate the position of the district court in Theophil and allow private consumers standing under section 4.

## 1AR

**Cap K**

**Resources are sustainable but degrowth and alternatives are worse—Economics. Green growth is coming and solves---their ev ignores recent shifts.**

Andrew **McAfee 20**, principal research scientist at MIT, codirector of the MIT Initiative on the Digital Economy at the MIT Sloan School of Management, Doctorate from Harvard Business School, two Master of Science and two Bachelor of Science degrees from MIT, "How we can have 'Green Growth,' increasing human population and prosperity while taking better care of our planet," Newsweek, 2-10-2020, https://www.newsweek.com/how-we-can-have-green-growth-increasing-human-population-prosperity-while-taking-better-care-1486342

Fifty years ago it might have been reasonable to fear that because of our bottomless desire for growth, we humans were going to strip our planet bare and poison it with pollution. But not anymore. The past half-century has shown us that **we can increase human population and prosperity while** also **taking better care of the planet we all live on.**

We still face real challenges now and in the years ahead, of which global warming is the most pressing. The good news is that we now know the playbook for effectively meeting these challenges. The bad news is that we're not doing a great job of following that playbook at present. We have to do better. We have to get smarter about meeting the problems we face.

In 1970, people took to the streets on the first Earth Day because of how we were treating our world. It's easy to see why they were so concerned. The 20th century, and in particular the post-war decades, witnessed by far the fastest growth in human history. Around the world, populations grew more quickly than ever before, and economies grew even faster as people strove for a higher standard of living. Unfortunately, it seemed that along with this growth came three side effects, all of which were both inevitable and terrible.

First, we were using up the earth's natural resources at an ever-faster clip. In the U.S., for example, consumption of aluminum, fertilizer and other important materials was growing even more quickly than the overall economy was in the years leading up to Earth Day. On a finite planet, this was a scary trend. If it continued, disaster seemed unavoidable.

At MIT, a team led by biophysicist Donella Meadows built a computer simulation of the global economy and used it to run scenarios about how the future would unfold. Their conclusions, published in the 1972 bestseller The Limits to Growth, were stark: "We can thus say with some confidence that, under the assumption of no major change in the present system, population and industrial growth will certainly stop within the [twenty-first] century, at the latest. The system...collapses because of a resource crisis."

The second bad side effect of growth was pollution. Air, water and land were all getting steadily dirtier in the years leading up to Earth Day. Levels of atmospheric sulfur dioxide in the U.S. increased by more than 60 percent in the three decades after 1940, and in 1969, the Cuyahoga River caught fire in downtown Cleveland. There seemed no end in sight to the pollution. Life magazine reported in 1970 that "Scientists have solid experimental and theoretical evidence to support...the following predictions: In a decade, urban dwellers will have to wear gas masks to survive air pollution....By 1985, air pollution will have reduced the amount of sunlight reaching earth by one half."

The third negative consequence of constant growth was extinction of creatures that we share the planet with. The passenger pigeon showed that even huge numbers provided no guarantee of survival. It was an abundant bird early in the nineteenth century, yet gone by 1914. Animals from the North American bison to the sea otter to the snowy egret to the blue whale came close to extinction during the industrial era, and it seemed clear that many others would vanish. As U.S. Senator Gaylord Nelson wrote in 1970, "Dr. S. Dillon Ripley, secretary of the Smithsonian Institution, believes that in 25 years, somewhere between 75 and 80 percent of all the species of living animals will be extinct."

If we wanted to save species, reduce pollution and avoid running out of natural resources, it seemed that we had to do one thing above all else: stop growing. Perhaps the broadest idea coming out of Earth Day and the nascent environmental movement was degrowth: deliberate shrinkage—rather than expansion—of our populations and economies over time. Degrowth wouldn't be easy and it might not be popular with everyone, but it seemed like a necessity. Philosopher André Gorz spoke for many when he wrote in 1975, "The point is not to refrain from consuming more and more, but to consume less and less—there is no other way."

It's important to be very clear on the following: people and societies around the world have not embraced degrowth since Earth Day. Global economic and population expansion did decelerate a bit after 1970, but this is largely because the 25 years after the end of World War II were a time of extraordinarily fast growth as countries rebuilt themselves. Except for that brief period, growth in the world's economies and populations has never in human history been as fast as in the years since 1970. **Degrowth is nowhere to be found.**

So what has happened with the three nasty side effects of growth: resource depletion, pollution and species loss? They must all have increased, just as populations and economies have, right?

Not at all. In the years since Earth Day, something weird and wonderful has happened: we ingenious humans figured out how to tread more lightly on our planet, even as we become more numerous and prosperous over time. This happy phenomenon is most advanced in the richest countries, but it's spreading around the world. Almost nobody anticipated that it would happen, and even today very few people are aware that the apparently ironclad trade-off between human prosperity and the state of nature has been eased. But it has. To see this, let's take another look at the three big problems.

First, resource depletion. The surest sign that something is becoming more scarce is that it's becoming less affordable. But without exception, important resources like fuels minerals, and foods have been getting more affordable, not less, for the world's average worker (in other words, not just for people in rich countries). Researchers Marian Tupy and Gale Pooley have calculated this hypothetical worker's ability to buy each of 50 resources over time—everything from crude oil to coffee to cotton. They find that the same market basket of all 50 that could be bought with one hour of labor in 1980 could be bought with only a bit more than 20 minutes of work in 2018. Not a single resource became more "time expensive" to the world's average worker over this period.

How can this be? One of the most important reasons is that many if not most resources are not nearly as scarce as we used to think. 1972's Limits to Growth provides a fascinating demonstration of this because it included a list of the proven reserves of several natural resources, along with predictions about how long these resources would last under various scenarios. If exponential economic growth continued, one of the team's main computer models showed that the planet would run out of gold within twenty-nine years of 1972; silver within forty-two years; copper and petroleum within fifty; and aluminum within fifty-five.

These weren't accurate predictions. We still have gold and silver, and we still have large reserves of them. In fact, the reserves of both are actually much bigger than in 1972, despite almost half a century of additional consumption. Known global reserves of gold are almost 400 percent larger today than in 1972, and silver reserves are more than 200 percent larger. And it's probably not too early to say that we're not going to run out of copper, aluminum and petroleum as quickly as estimated in Limits to Growth. Known reserves of all are much larger than they were when the book was published.

One other thing to keep in mind about natural resources is that **in much of the rich world we're now using less of them year after year.** And not just less per person, but less in total. In the U.S., which accounts for about 25 percent of global GDP, annual consumption of resources as diverse as copper, paper, water for agriculture, timber, nitrogen (a critical fertilizer component) and cropland is now trending downward. In addition, **total American energy use has been essentially flat since 2007**, even as the economy has grown by almost 20 percent. Developing countries, including fast-growing ones such as India and China, are not yet de-materializing. But I predict that in the not-too-distant future they'll start decreasing their consumption of some resources, just as high-income countries have.

As I explain in my book More from Less, two powerful forces are combining to drive this de-materialization of the economy. The first is tech progress, especially progress with all things digital (think of how much better and lighter today's LCD computer screens are than the cathode ray tube [CRT] monitors that preceded them). The second is capitalism, or intense competition among profit-seeking companies (think how much pressure CRT makers faced as LCDs took over their markets). This competition provides **strong incentives for companies to save money on resources, and tech progress provides plenty of opportunities to do exactly that.** So internal combustion engines are simultaneously lighter, more powerful and more fuel-efficient; smartphones replace entire shelves full of devices; and the economy de-materializes in countless other ways.

It's true that we live on a finite planet. But when it comes to thinking about resource consumption and availability, this fact is essentially irrelevant. Our experience since Earth Day has demonstrated that our planet is easily vast enough to supply us with all the materials we'll need, for as long as we'll need them. The real danger is not that our growth will deplete the planet, but instead that it will befoul it. So let's look at pollution next.

As every Economics 101 student learns, pollution is the classic negative externality, or bad outcome from a transaction that affects people who are not part of the transaction. If a factory pollutes a nearby river with its waste, for example, people living downstream suffer even if they don't buy any of the factory's products. Competitive markets do a lot of things well, but they don't deal with externalities. Instead, they often create them. So governments need to step in by forbidding the pollution (as we've done with the chlorofluorocarbons that were responsible for the hole in the ozone layer), placing an upper limit on it, or placing a price on it.

The logic of the latter approach is simple: if pollution is expensive, companies will work to reduce how much they spend on it, just like they work to reduce their spending on other materials. The cap-and-trade program adopted in the U.S. and other rich countries in recent decades to reduce atmospheric pollution is an attempt to reduce pollution by making it costly.

**Cap and trade has been a huge success**. As Smithsonian magazine summarized, it "continues to let polluters figure out the least expensive way to reduce their...emissions. As a result, the law costs utilities just $3 billion annually, not $25 billion [as they originally estimated]....It also generates an estimated $122 billion a year in benefits from avoided death and illness, healthier lakes and forests and improved visibility on the Eastern Seaboard."

The bans, limits, pricing programs and other pollution-control efforts established in high-income countries since Earth Day have been extraordinarily successful. They've caused pollution levels to go down in the rich world, even as economies and populations have continued to grow. The U.S economy is more than two-and-a-half times as big as it was in 1970, yet atmospheric sulfur dioxide levels have declined by more than 90 percent, and other kinds of air, water and land pollution have also declined dramatically.

A half-century ago, the conventional wisdom was that pollution was an unpleasant but unavoidable consequence of economic progress; as an American mayor said during debates in 1970 about strengthening the Clean Air Act, "if you want this town to grow, it has got to stink." But we now know that this is not true at all. To depollute, we don't have to embrace degrowth. We just have to put smart anti-pollution measures in place, then enforce them.

In recent decades, rich countries have done both. And what about low-income countries? Here the news is not as good. As researchers Hannah Ritchie and Max Roser summarize, "We see that the death rates [from air pollution] tend to be highest across Sub-Saharan Africa and South Asia...Outdoor air pollution tends to increase as countries industrialize and shift from low-to-middle incomes."

This is not a surprising finding. There's a hypothesis, based on the work of the economist Simon Kuznets, that low-income countries will pollute as their economies grew, but only up to a point. As people escape poverty and have more of their basic needs met**, they will start to demand a cleaner environment.** The government will respond to these demands, and **overall pollution will start to go down, even as economic growth continues.**

This pattern of rising-then-falling pollution is known as the environmental Kuznets curve (EKC), and in recent years we've seen it with air pollution in China. In March of 2014, Premier Li Keqiang announced to the National People's Congress, "We will resolutely declare war against pollution as we declared war against poverty." The government mandated that coal plants reduce their emissions, shelved plans to build new ones in highly polluted regions and even removed coal furnaces from many homes and small businesses (without, in some cases, providing anything to replace them).

These efforts worked. Economist Michael Greenstone found reductions in fine-particulate pollution of more than 30 percent throughout the country by 2018. He estimated that these reductions, if they were maintained, would add 2.4 years to the life of the average Chinese citizen. As Greenstone wrote, "It took about a dozen years [after passage of the 1970 Clean Air Act] and the 1981–1982 recession for the United States to achieve the 32 percent reduction China has achieved in just four years."

The EKC tells us something fundamental: that economic growth is at first the cause of pollution, then the cure for it. So to reduce pollution, we don't have to pursue degrowth; instead, we should encourage growth around the world. China's example gives us confidence that this approach works, and that growing countries will turn the corner and start polluting less in the years ahead.

We all need this to happen, because some kinds of pollution are global, not local. For example, the huge amount of plastic trash in the world's oceans that doesn't come from ships comes mainly from rivers that flow through low-income countries in Asia and Africa. The surest way to stop this flow of garbage is to make people in these countries prosperous enough that they can afford to care about the environment. We also need to ensure that rich countries don't start backsliding on their environmental successes. The Trump administration's moves to roll back wetlands protections, methane pollution standards and other safeguards are moves in the wrong direction, and should be reversed.

Of course, the greenhouse gases like carbon dioxide that cause global warming are the pollution most damaging to the long-term health of our planet and ourselves. Reducing future greenhouse-gas emissions is a major challenge, requiring political will and technological innovation. But **it won't require any other radical departures** from our current trajectory. Instead, the same approach that has worked for reducing other kinds of atmospheric pollution—namely, making it expensive—would also be effective at lowering greenhouse gas emissions.

A carbon dividend is an ingenious way to both make greenhouse gases expensive and to help people afford the resulting price increases. This dividend is a tax on carbon with an important twist: instead of keeping the money collected from companies, the government sends it right back out to the people as a "dividend" to each household. William Nordhaus was one of the winners of the 2018 Nobel Prize in economics in large part for his work on the carbon dividend. Clearly, it's an idea whose time has come.

Species loss is one of the most heartbreaking predicted consequences of global warming. Our greenhouse gas emissions could make some habitats uninhabitable, adding more animals to the sad parade of those already eliminated by our actions. But **the threat of extinctions doesn't imply a need for degrowth**. Instead, it makes more urgent the opposite: a world of nations and people prosperous enough to be good stewards of our planet and the life on it. Over the past 50 years we've seen remarkable increases in this kind of stewardship. In 1982, for example, most nations agreed to a complete moratorium on the hunting of whales, and populations are rebounding.

In addition to protecting species, we're also protecting territory. In 1970, less than 2.4 percent of the earth's land area was designated as parkland or otherwise conserved, and only 0.04 percent of the world's waters. **By 2018 these figures had increased to 13.4 percent and 7.3 percent,** respectively. In China, which has long been the world's largest market for endangered animal products, another important EKC has taken shape. As the country got wealthier, it eventually applied less pressure, not more, to some important animals. Strict bans are in place on buying, selling and possessing rhino and tiger products, and trade in ivory has been prohibited since 2017.

Are **efforts like these help**ing in the **fight** against **extinction**s? They are. **Documented extinctions** appear to have **slowed down in recent decades**; for example, no marine creatures have been recorded as extinct in the past fifty years. It is far too early to declare victory over the forces of annihilation, but not too early to say that we know what works. Less pollution and more protection and prosperity are core elements of a winning strategy for protecting life on Earth.

Degrowth is not. The past half-century has exposed it as an unreasonable idea (given human nature), and an unnecessary one. This is not the same as saying that environmentalism is unnecessary. We should all be deeply grateful to the modern environmental movement born around Earth Day. On that day and countless others, concerned people took to the streets; put pressure on businesses, policymakers and elected officials; and otherwise advocated that we take better care of the planet we all live on. It worked.

But gratitude toward environmentalism does not mean continuing to support all of its original ideas. We now know that the core idea of degrowth—that there is no other way to conserve the earth for future generations—is simply wrong. With a few smart moves, including limiting pollution and protecting vulnerable species, we can have both greater human prosperity and a healthy, endlessly abundant planet. So let's get to work on building one.

**Renewables prove doucpling**

**ISF 19** (Institute for Sustainable Futures, “Responsible minerals sourcing for renewable energy”, https://earthworks.org/assets/uploads/2019/04/MCEC\_UTS\_Report\_lowres-1.pdf)

The renewable energy industry is very aware of issues around supply risks for key metals. The main concern of the industry is the ability to guarantee long-term supply of key metals at a stable price, rather than a concern over supply restrictions or long-term sufficiency of supply. The industry experts interviewed for this project noted that the solar PV industry are concerned about the price for silver, and that the battery and EV industry see cobalt and nickel as difficult to obtain but are not concerned with long-term supply compared to reserves, especially for lithium.

6.1 Reducing demand through efficiency, substitution and recycling

Current industry responses:

The **r**enewable **e**nergy industry has made significant improvements to the efficiency of technologies, to improve performance, minimise **demand for materials** and reduce production costs. This has a benefit to reducing supply risks, although in most cases this is not the main driver. The battery industry has been focused on improving the material efficiency of lithium-ion batteries which have significantly improved in efficiency and reduced in cost, dropping 24% in cost from 2016 to 2017.251 Battery manufacturers have reduced the amount of cobalt in batteries, however the low cobalt chemistry has a higher nickel content that has increased nickel demand, and a further shift towards cobalt-free lithium-sulfur batteries would increase lithium demand.252 EV manufacturers are also developing motor technologies that replace neodymium and dysprosium with lower cost rare earths or different materials altogether.253

The industry experts interviewed noted that secondary supply would be an important source for manufacturing in addition to primary supply. At this early stage of deployment there is not yet a large volume of these technologies that have reached “end-of-life” and current recycling infrastructure remains underdeveloped and/or not optimised for high value metal recovery. The wider application of lithium-ion batteries is driving advances in recycling and the industry is very aware of the looming volumes from EV. Recycling of lower-value metals from wind turbines relies on existing scrap recycling so it is comparatively mature (excluding rare earth permanent magnets). PV recycling is demonstrated but not optimised for high value metal recovery. These are either industry-led schemes (such as EV battery take-back schemes) or part of regulatory requirements in major markets (such as the EU).

The main driver for industry-led take-back and recycling schemes **is corporate responsibility and capturing the economic value** of materials, whereas ensuring supply of materials appears to be a secondary motivation, according to interviewees. In the EU, the regulations are also driven by a motive to ensure security of resources for European industry. Safety concerns around fire risk has also provided a driver for managing end-of-life batteries that are used in a broader range of applications than EVs and stationary storage.

**requires a long, drawn out, multigenerational struggle on a scale unseen since the 60s—The ALT causes right-wing populism.**

Milena **Büchs and** Max **Koch 19**, Dr Milena Buchs is an environmental social scientist and specialises on sustainable welfare and wellbeing, Max Koch is Professor in the School of Social Work at Lund University, “Challenges for the degrowth transition: The debate about wellbeing,” Futures, Volume 105, January 2019, Pages 155-165, https://www.sciencedirect.com/science/article/pii/S0016328718300715

3.2. Implications of rapidly transforming social systems

The social practices lens is also useful for thinking about possible wellbeing implications of rapid social change more generally, and a transition away from a growth-based economy specifically. While the concept of social practices inherently implies the possibility of change (with its focus on agency and creativity), it equally strongly highlights the structural aspects of practices which provide stability and orientation. During times of **rapid social transitions**, social norms and ‘mental infrastructures’ often **lag behind**, creating **disorientation**, **social conflict,** and **negative impacts** on **wellbeing** (Büchs & Koch, 2017: ch. 6).

Stability of structural dimensions of social practices offers **orientation** and some extent of **predictability** of how oneself and other people are likely to act in the future, providing a framework within which flexibility and change are possible. This orienting function of structural dimensions of practices is likely to be an important condition for people to form reasonably **stable identities** and **relationships** – key ingredients for wellbeing. Examples from classical and contemporary sociological and psychological research suggest that different speeds of changing social structures can establish misalignments and disruptions of social practices which can, in turn, negatively influence health and other wellbeing outcomes. For instance, in his classical study, Durkheim presents suicide at least partly as an outcome of a failure of cultural resources to provide meaning and orientation in the context of other, more rapid social changes (Durkheim, 2006; Vega & Rumbaut, 1991: 375). This idea also links to Bourdieu’s concept of the “**hysteresis effect”.** Here, Bourdieu emphasises that, especially during phases of **social transition**, people’s habitus and “**objective**” social circumstances can become **disjointed**: as a result of hysteresis, dispositions can be “out of line with the field and with the ‘collective expectations’ which are constitutive of its normality. This is the case, in particular, when a field undergoes a **major crisis** and its **regularities** (even its rules) are **profoundly changed”** (Bourdieu, 2000: 160). This can contribute to a **deterioration of people’s wellbeing** as it makes them feel “**out of place**” or let them be perceived that way, “**plung[ing] them deeper into failure**” (Bourdieu, 2000: 161) because they cannot make use of new opportunities or are mistreated or socially excluded by others.

Empirical research which partly builds on the idea of hysteresis has shown that wide-ranging **organisational change** can have a range of **negative effects** on people’s **health** and **mortality** (Ferrie et al., 1998; McDonough & Polzer, 2012). One study found that across 174 countries, several measures of wellbeing and social performance, including life satisfaction, health, safety and trust, voice and accountability, were highest in periods of economic stability, but lower in times of GDP growth or contraction (O’Neill, 2015); and other studies concluded that life expectancy can be negatively affected by both rapid economic growth and contraction (Notzon et al., 1998; Szreter, 1999).

**Several scholars** have recently highlighted the potential for **social conflict** **inherent** in **(rapid) social change.** For instance, Maja Göpel (2016: 49) remarks: “Unsurprisingly, the **navigation** or **transition phase** in **shifting paradigms** as well as **governance solutions** is marked by **chaos**, **politicization**, **unease** and **power-ridden struggles**”. Wolfgang Streeck has issued similar warnings (Streeck et al., 2016: 169). It is not difficult to see how such scenarios bear the potential of **undermining** some of the **fundamental conditions** that are **necessary for the satisfaction of basic needs** as discussed above, and hence the danger of generating **substantial wellbeing losses** for current and near-future generations.

In the current context, it is very **difficult to imagine** that we might be able to observe a **rapid** and **radical cultural change** in which people adopt **identities** and related lifestyles that value **intrinsically motivated activities** over pursuing **satisfaction** and **status** through **careers** and **consumption**. Even more worryingly, political events in Europe, the United States and elsewhere since the ‘Great Crash’ of 2008 indicate that times of **negative** or **stagnant growth** can provide a **breeding ground** for **populist**, **nationalistic** and **anti-democratic movements.** **Economic insecurity**, a perceived **threat** of established identities through **migrants**, and **deep mistrust** against ‘**elite’ politicians** are amongst the main explanations for previously **unimaginable events** such as the **Brexit** vote, **Trump** presidency, and recent **electoral successes** for **far right-wing parties** in a range of European countries.

**Civil RICO CP**

**1st Amendment Pic**

**Greene 15** (Hillary Greene, Professor of Law, University of Connecticut School of Law, MUZZLING ANTITRUST: INFORMATION PRODUCTS, INNOVATION AND FREE SPEECH, 95 B.U.L. Rev. 35, y2k)

2. **First Amendment Interfaces** in **Non-Antitrust** Contexts

The foregoing discussion identified non-immunized speech such as price fixing (no First Amendment solicitude) and **immunized speech** such as **government petitioning** (**absolute** First Amendment protection) as two extreme points on the First Amendment and antitrust spectrum. This Section examines two non-antitrust contexts in which the Supreme Court created more nuanced legal standards to better protect the First Amendment as well as other, potentially conflicting, values. The first example concerns commercial speech, i.e., advertising, for which the Court explicitly adopts an "intermediate" [\*59] approach. More specifically, government restrictions on **commercial speech** are subject to a **unique** level of **constitutional review**, intermediate scrutiny, in contrast to either strict or rational basis scrutiny. The second example concerns defamatory speech and the adoption of a "conditional privilege" if a certain condition is met, i.e., no actual malice by the speaker. This approach to defamation contrasts with recognizing an absolute privilege or no privilege at all. While these two examples differ from the antitrust circumstances at issue herein, they represent important examples wherein the Court transcended unduly simplistic approaches to protecting speech

a. Commercial Speech

Throughout much of the twentieth century, "commercial speech" received little or no direct First Amendment solicitude in the context of government restrictions. In particular, earlier in the century, several Supreme Court cases expressly rejected any such constitutional protection. 116 Over time, even though the Court did not champion First Amendment protection for commercial speech, it avoided reaffirming the exclusion of commercial speech from protection. In 1976, the Court explicitly held in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. 117 that commercial speech, in the form of unadorned advertising, deserved some measure of First Amendment protection. The case invalidated a state law prohibiting certain advertising by pharmacies. 118

Virginia State Board of Pharmacy introduced several key themes that would receive further amplification in later years. The Court recognized that the economy's operation is clearly a matter of vital importance and political significance to society, and that the exchange of commercial information is critical to the functioning of economic actors. 119 It observed, moreover, that individuals may at times find information regarding commercial goods to be as important as, or more important than, political discourse. 120 The importance of commercial speech is a function of multiple interests: the speakers (sellers), the [\*60] potential audience (buyers), and society as a whole. 121 While acknowledging the immense importance of commercial speech, the Court also established its subordinate position in the First Amendment hierarchy. The First Amendment provided a basis for "insuring that the stream of commercial information flows cleanly as well as freely," but such speech receives a different, lesser, standard of protection. 122

The commercial speech standard received its seminal articulation in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York. 123 The majority further emphasized many of the general themes characterizing Virginia State Board of Pharmacy. 124 Central Hudson's most important contribution, however, lay in its delineation of an intermediate scrutiny framework.

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. 125

**Intermediate scrutiny** is an additional treatment category applicable to the constitutional analysis of government **restrictions** on speech. Through development of this category, the Court recognized that commercial speech can be **vital** to **society**, and at the same time imposed some limits on when that speech enjoys First Amendment protection. The success of this intermediate approach would depend on developing a workable definition of "commercial speech" and a workable form of intermediate scrutiny. 126

As always, **the lines drawn** within one case almost **invariably** spawn further **litigation** to identify where the line falls in more ambiguous cases. 127 What [\*61] would become a long-simmering debate regarding what constitutes a "substantial government interest" (the second prong of intermediate scrutiny) arose with regard to severe restrictions on truthful and non-deceptive information undertaken for what is deemed paternalistic purposes. This Article will discuss the intermediate scrutiny standard subsequently when considering the Supreme Court's 2011 ruling in Sorrell v. IMS Health, Inc.

**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. 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**.

**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.**