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Few arguments echo as strongly throughout United States constitutional history as those related to the role of the states in the federal union. Although scholars debate the extent to which federal and state powers were ever strictly separated, the states and the federal government today occupy overlapping spheres. In the modern context of overlapping powers, the preemption doctrine manages the intricate areas of overlap, with topics ranging from banking, to food and drug laws, to immigration. As a general matter, overlapping and concurrent powers are the norm, even when the federal government has staked out considerable territory.

In one critical modern arena, however, the role of the states has been relegated to little more than the curtailment of active fraud. It is an insidious notion, rooted in a mistaken twist of precedent that then winds its way through various doctrines, increasingly circumscribing the ability of the states to act. Patent law is this arena, and here, the various threads come together resulting in a positive chokehold on any state activity.

Paralysis for the states is occurring at a particularly important time in the history of patent law. Government actors at many levels are grappling with the emergence of a new business model in patents. It is popularly called patent trolling or, more tamely, non-practicing entity (NPE) activity or patent assertion entity (PAE) activity. In this model, the core business involves licensing and litigating stripped patent rights, as opposed to making products with those patents. The rapid expansion of this business model over the last decade has left courts and legislators grappling with its legal implications.

The misinterpretation of precedent begins with what is known as the Noerr-Pennington doctrine. This set of Supreme Court cases from the 1960s regarding a citizen's First Amendment right to petition government without fear of antitrust liability holds that no antitrust liability can attach when one petitions the government, even if that

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1. Summarized and excerpted from Robin C. Feldman, *Federalism, First Amendment & Patents: The Fraud Fallacy*, 17 COLUM. SCI. & TECH. L. REV. 30 (2015).

petition would harm one's competitors. The *Noerr/Pennington* cases embody the notion that antitrust law cannot be allowed to chill the exercise of one's right to speak to the government.

The Federal Circuit has extended *Noerr*'s rule regarding the limitations of federal antitrust law to limit state laws that might affect patents. This is a particularly odd theoretical leap. *Noerr* can be understood as celebrating states' rights, in essence finding that citizens should be able to tell their state legislatures how they want to be governed and that federal law should stay out of the way. Thus, it is ironic that the Federal Circuit dispatches *Noerr* to serve the opposite master—that is, preventing states from responding to their citizens' concerns. Most importantly, missing from the Federal Circuit's logic is the Supreme Court's focus on the chilling effect that antitrust's treble damages might have on one's ardor for speaking to the sovereign. Such treble damages concerns do not apply in the patent realm.

In addition to stretching the *Noerr* line of cases, the Federal Circuit supports its preemption decisions with a series of thin and shaky patent cases. The series begins with a breathtakingly short decision from the early years of the Federal Circuit's existence—a ruling noting simply that a patent holder has the right to threaten infringers with a lawsuit. While the statement is undoubtedly true, it does not answer the question of the limits to which a patent holder may go in enforcing those rights, not to mention whether a state can regulate such actions. With only slightly more analysis and support, the Federal Circuit later declared that patent holder demands cannot be challenged unless those demands are in bad faith—defined as whether the speaker believes in the truth of the statement. From these shaky foundations, the Federal Circuit has constructed a rule that states are preempted from regulating any patent demand behavior unless that behavior is both objectively and subjectively baseless.

If the Federal Circuit's logic is weak and without basis, however, how should patent preemption apply in these circumstances? After all, patent law is a federal scheme, and it cannot be true that states are free to rummage around in everything related to patents. The answer lies in Supreme Court preemption doctrine, both as the doctrine applies to intellectual property and to other areas of law. These cases demonstrate that state law cannot be entirely displaced simply because a particular commercial behavior relates to patents. Rather, states must have some space in which they can express local

preferences in relation to the business of patent demands. The Federal Circuit has ignored this aspect of Supreme Court precedent, leading to an improper limitation of the power of the states.

Another additional key theme bubbles up through a number of modern Supreme Court preemption decisions. One can call this concept "heart and periphery." Specifically, a state law that goes to the heart of federal legislation is more likely to be problematic; a state law that affects the periphery is more likely to be accepted. The heart/periphery concept differs from the familiar "congressional purpose" test in preemption analysis, which has become a wide-ranging and open-ended inquiry in which courts have reached well beyond what Congress articulated.

Applying this analysis to the Patent Act, issues such as validity, infringement, and procedures for challenging a patent lie at the heart of the federal scheme. Thus, a state's ability to establish its own rules related to these areas is more likely to be preempted. In contrast, issues such as notice requirements, transparency, protection against pressure sales tactics, basic contract principles, and others stand at the periphery, and states should have breathing space to establish their own dictates.

Importantly, in moving through preemption analysis, none of the possible approaches for analyzing a state's proper role would suggest that a state should be limited to policing fraud and bad faith. That notion should be abandoned.