

Federalism, First Amendment & Patents: The Fraud Fallacy

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Problems related to aggressive patent assertion and so-called patent trolling have been the subject of considerable federal legislative and regulatory attention in recent years. The states, however, have been largely sidelined. Citing doctrines related to the First Amendment right to petition government, recent Supreme Court decisions related to freedom of corporate speech, and Supremacy Clause analyses, appellate courts and commentators suggest that the states have little or no role to play. Such conclusions, however, are based on a subtle twisting of logic that shifts the analyses far from their precedential roots. The issues are further complicated by the fact that areas such as pre-emption and corporate speech are in a state of flux in modern jurisprudence.

This paper examines the complex weave of First Amendment protections for businesses, Supremacy Clause dictates, and the domain of the Patent Act. In so doing, the manuscript helps to illuminate the appropriate boundaries of these areas for the business of patent assertion and more.