

3LP

America Invents Act Roundtable

Council on Foreign Relations
New York, NY

October 31, 2011

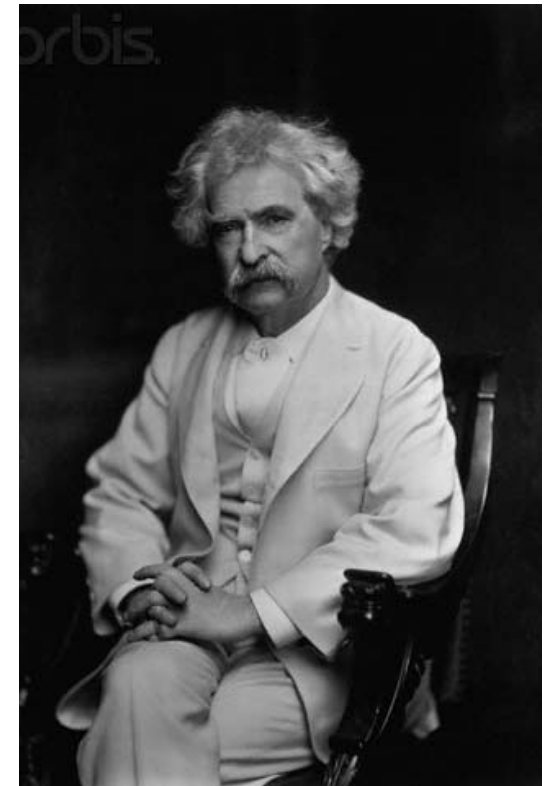


Harnessing the power of innovation

“The very first official thing I did in my administration—and it was on the very first day of it too—was to start a patent office; for I knew that a country without a good patent office and good patent laws was just a crab, and couldn’t travel any way but sideways or backwards.”

Mark Twain

A Connecticut Yankee in King Arthur’s Court,
1889



Overview

Starting from a false premise

- Why fix what wasn't broken?

How false premises lead to bad law and policy

- How should we judge the America Invents Act?

Conclusions

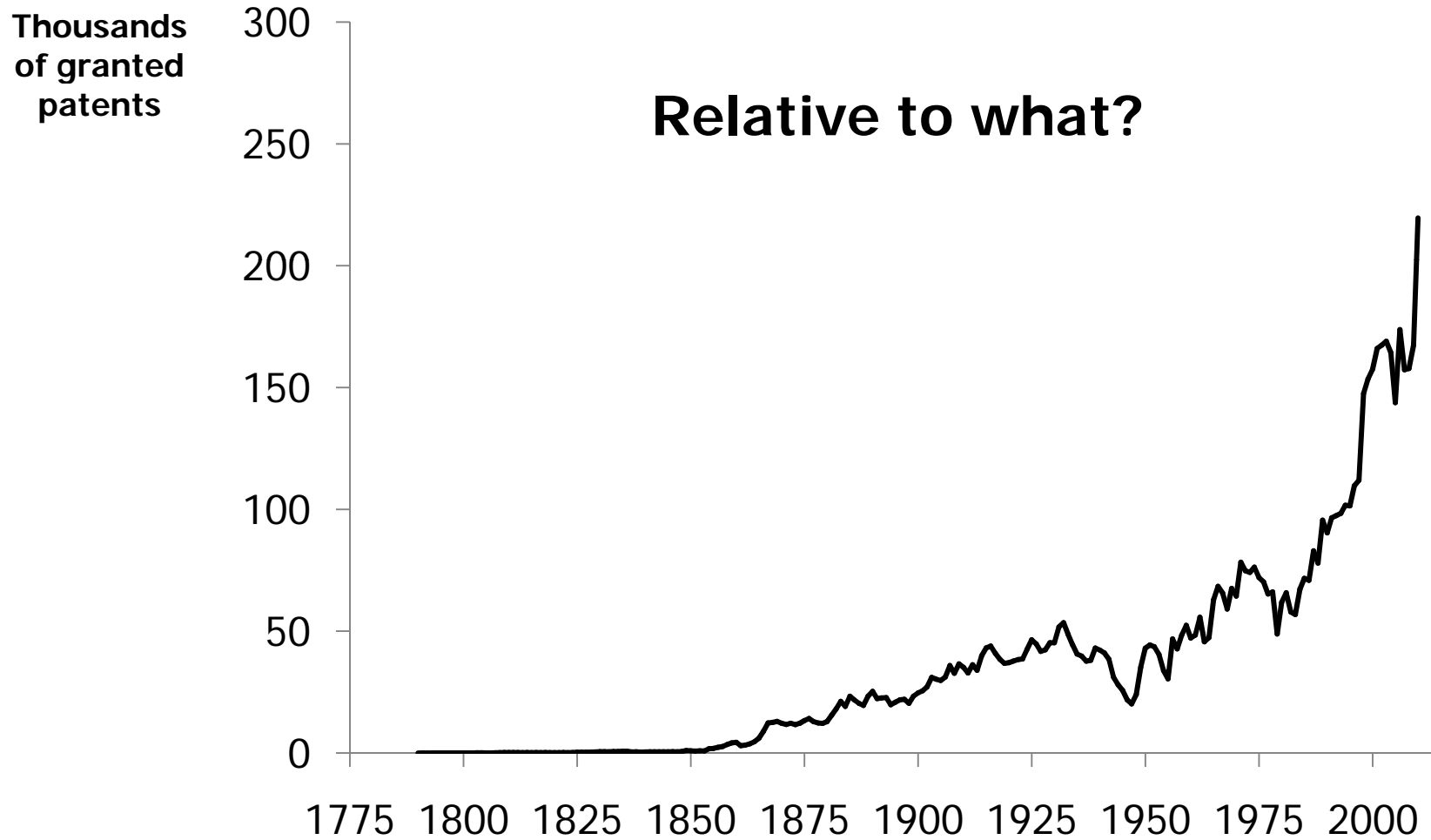
The “Patent Crisis”: a false premise

Too many patents?

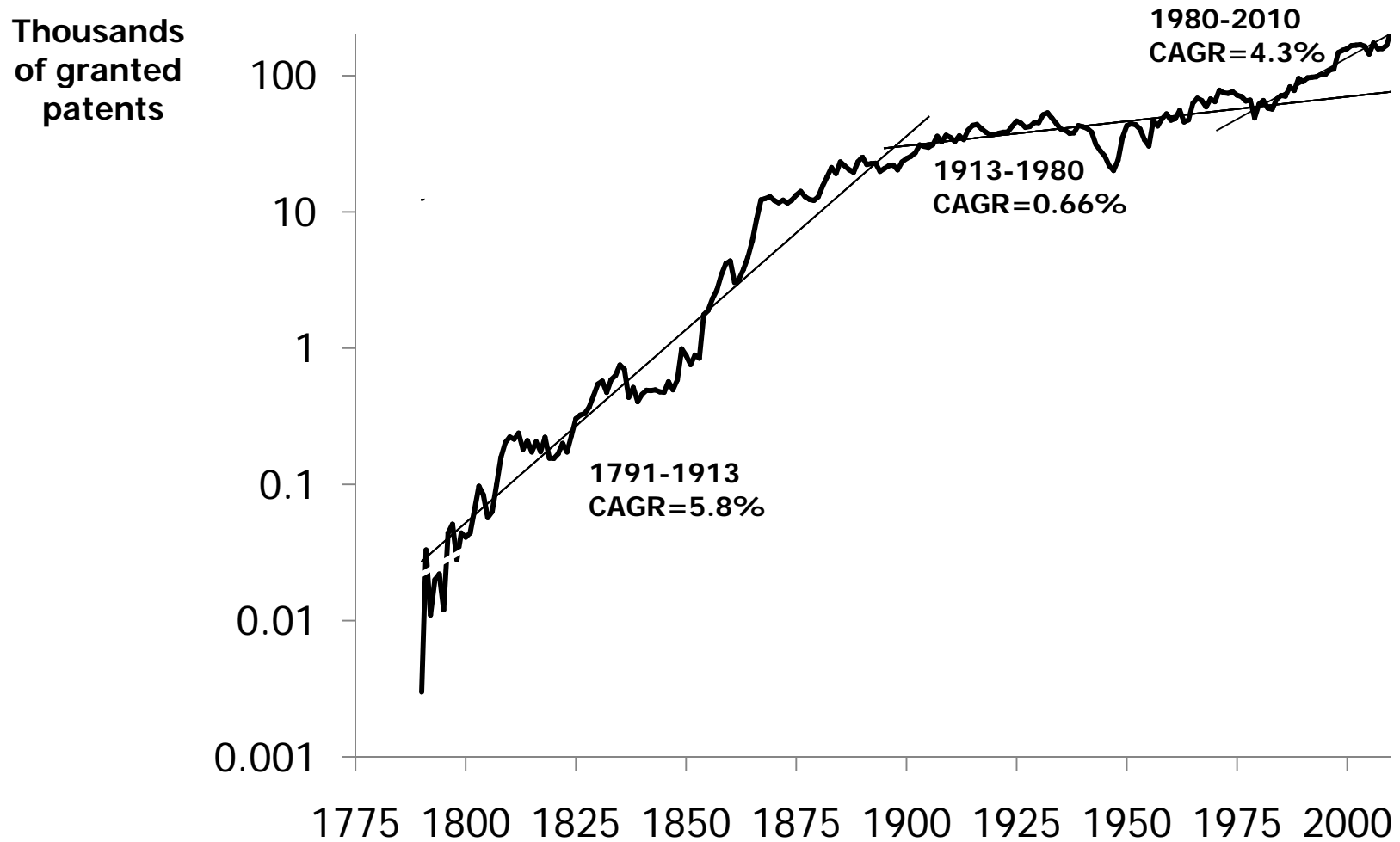
Too much litigation?

Or, simply too much economic change for Large Technology Integrators to accept?

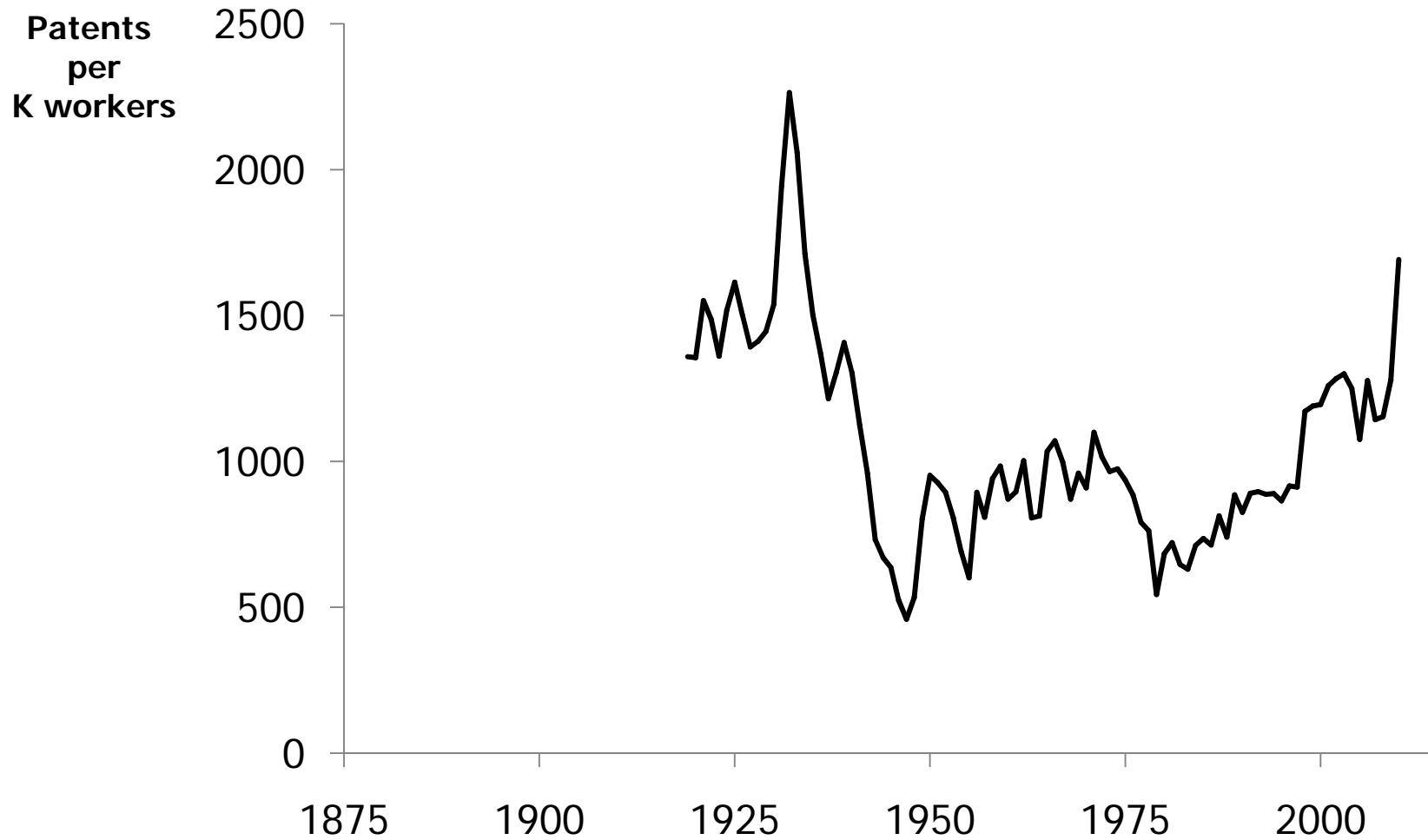
Too many patents?



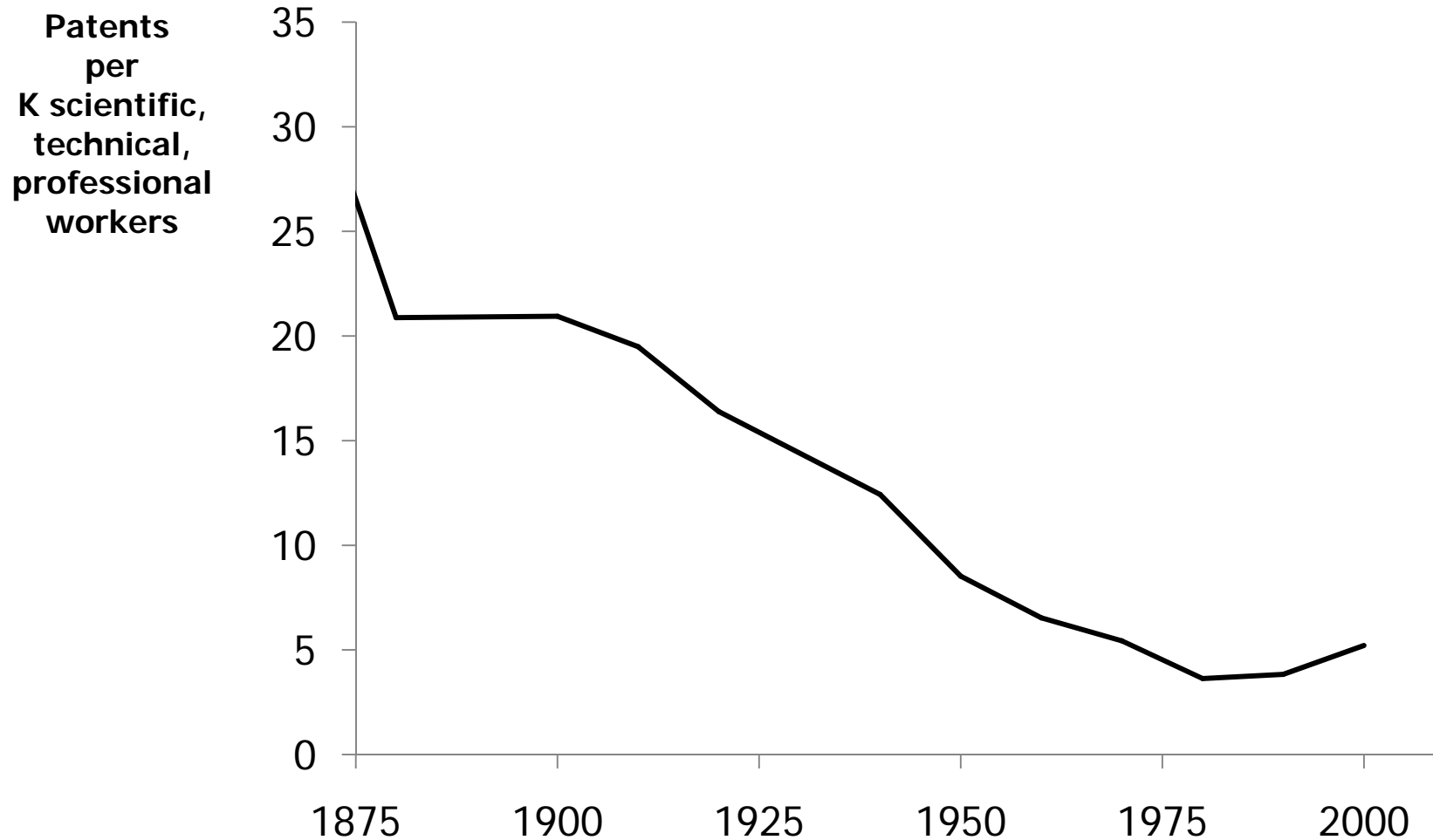
Relative to the historical trend?



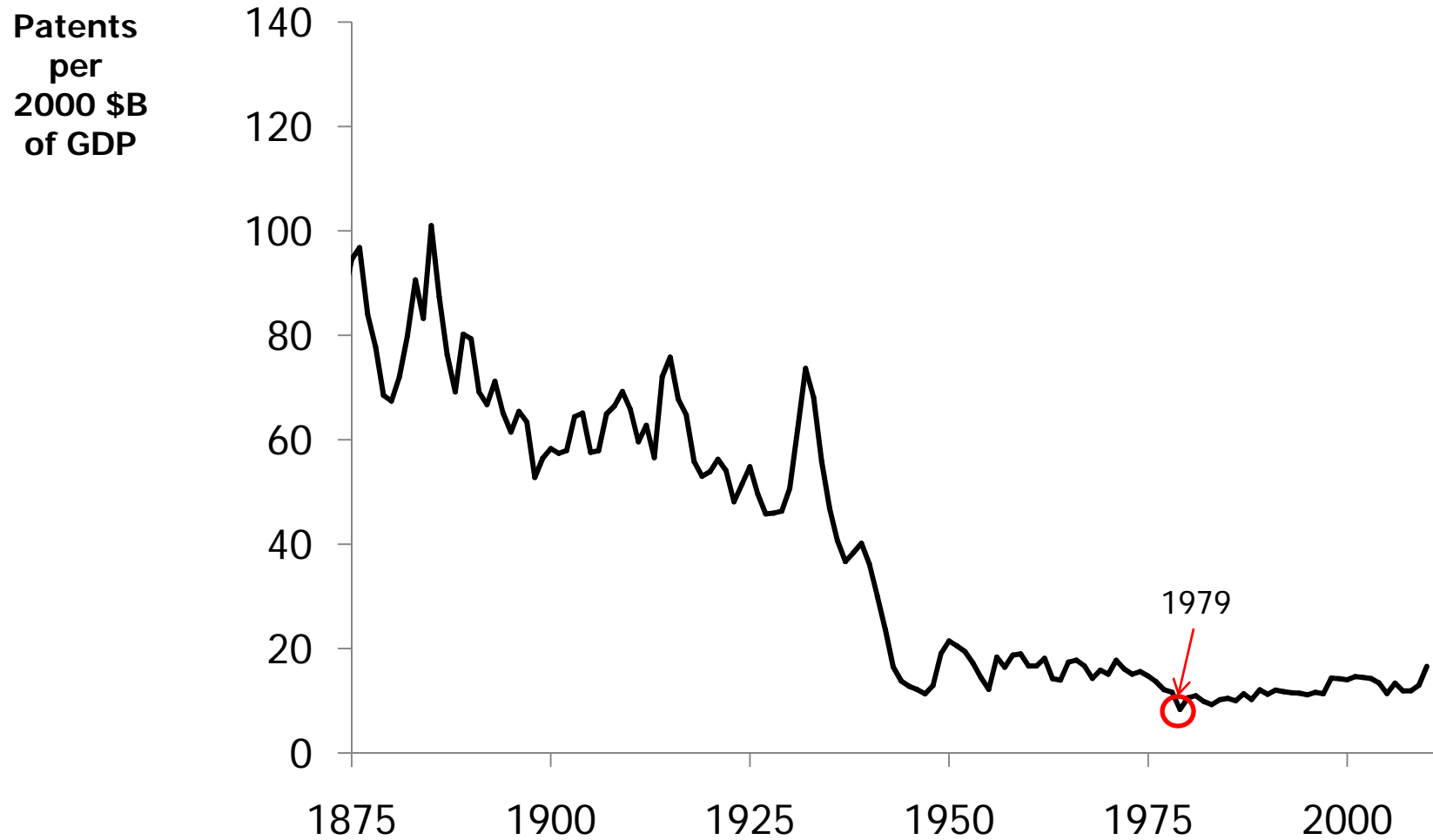
Relative to the non farm labor force?



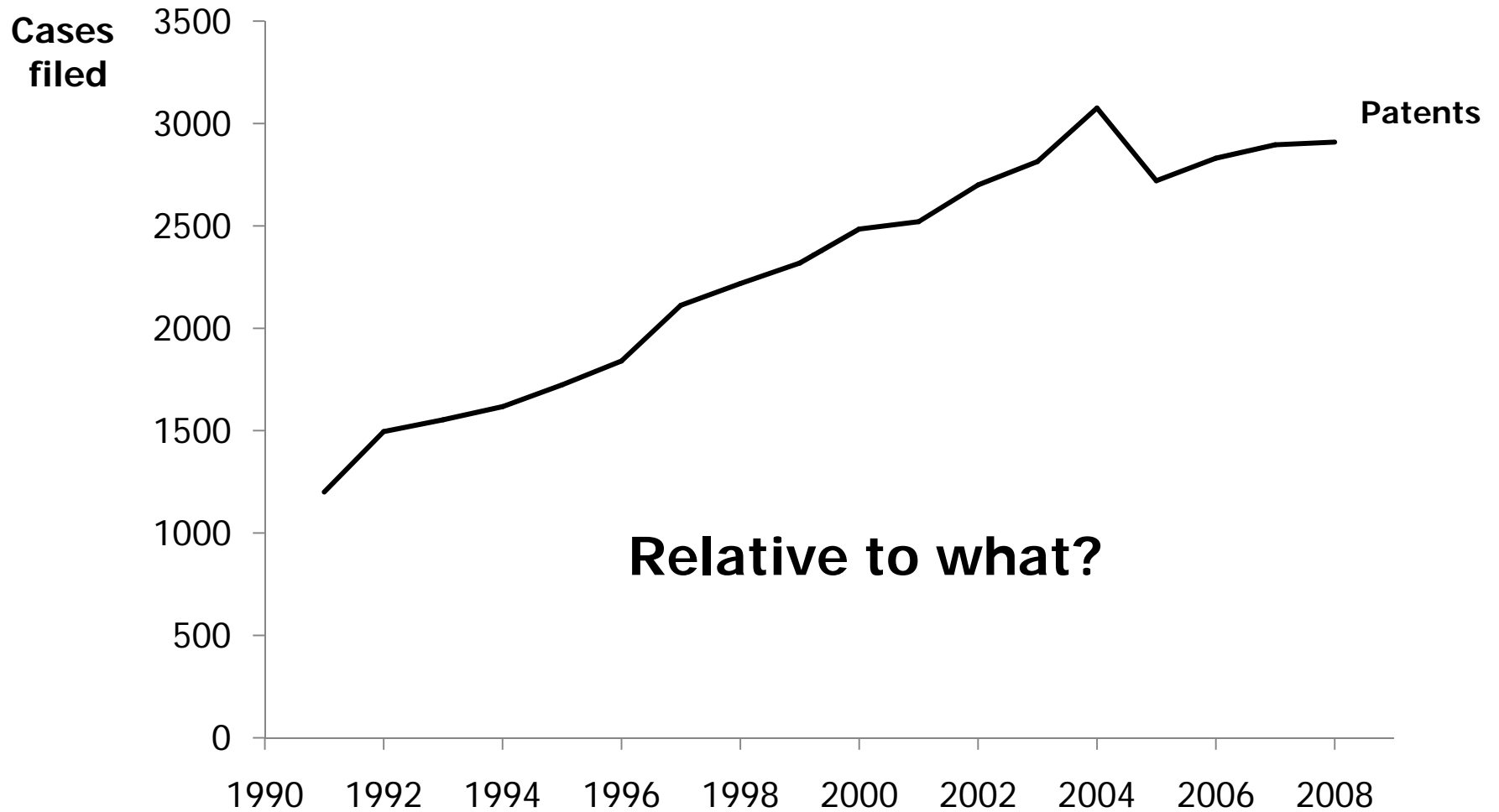
Relative to knowledge workers?



Relative to the economy?

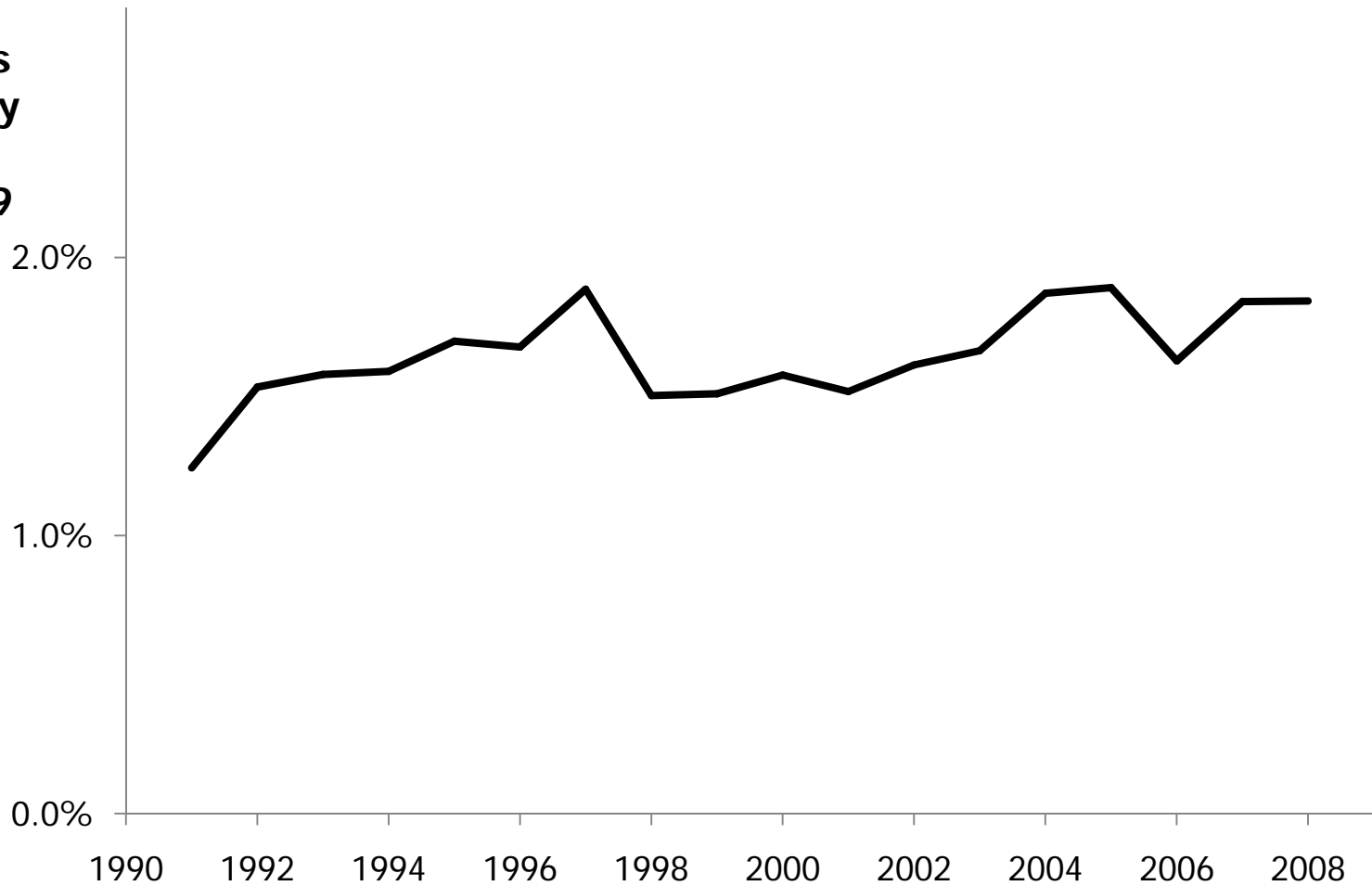


Too much litigation?



Relative to patents granted?

**Percent of
US patents
litigated by
year,
1991-2009**



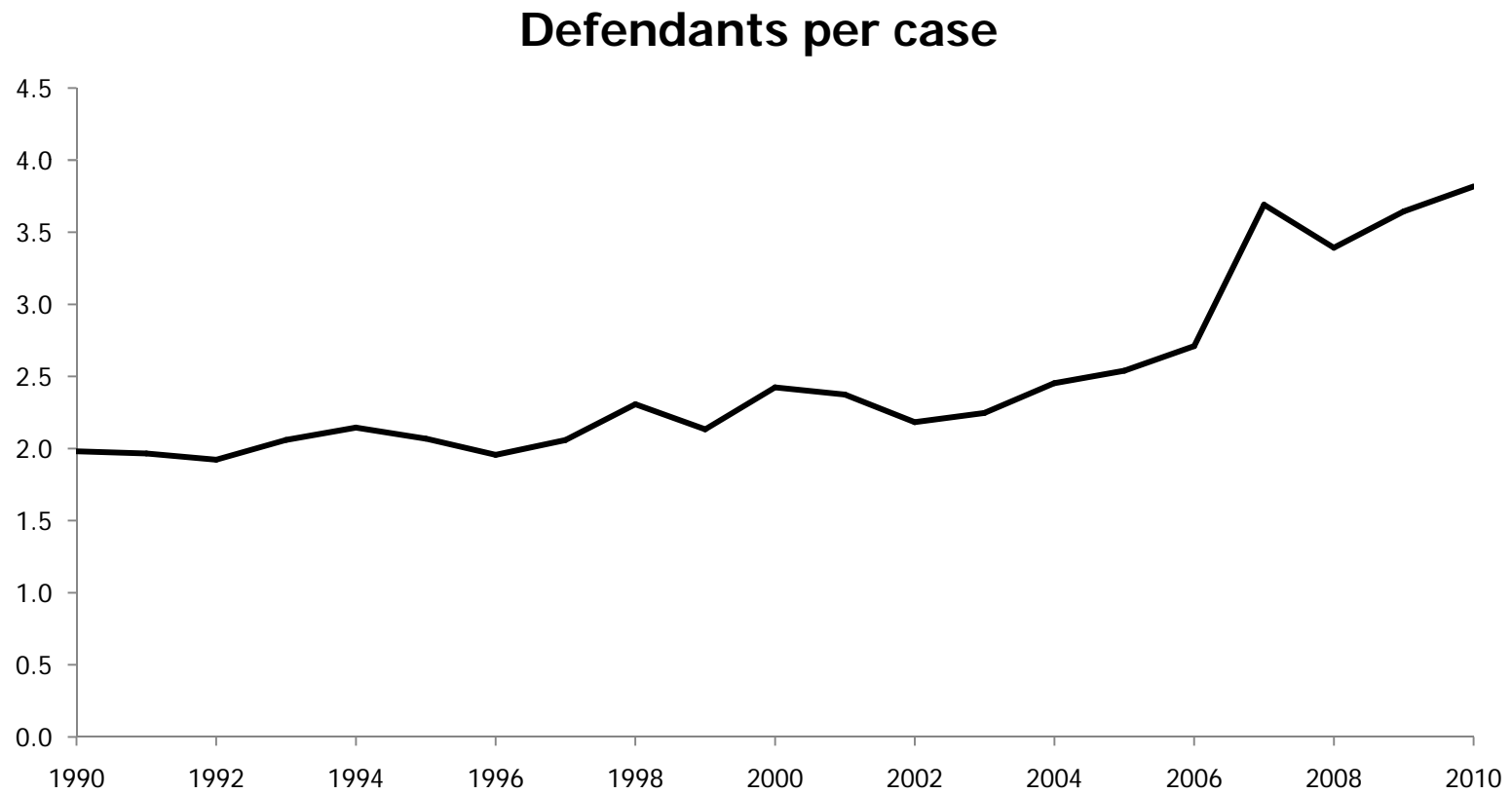
Relative to the historical trend?

**Percent of
U.S. patents
litigated by
decade,
1800-2000**



Source: Zorina Khan, personal communication

One material change



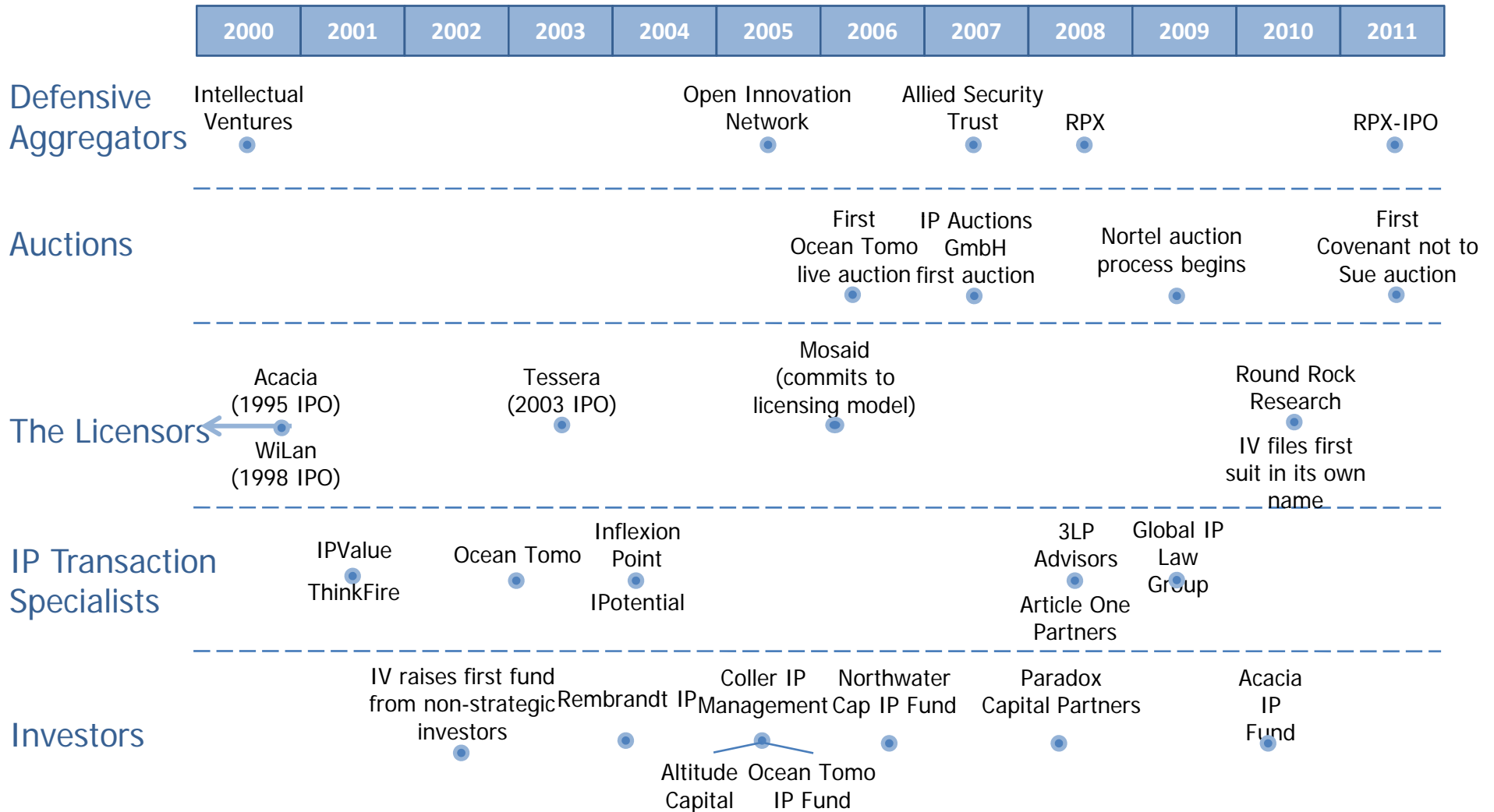
And the one material change is...

A natural result of increased specialization

	From	To
Technology markets	Barter trade, cross licensing	Price-based exchange, licensing contracts
Business models	Bundled with products	Open market exchange
Nature of cases	One to one	One to many
Nature of defendants	Product competitors	Large technology integrators (LTIs)
Firm structure	Vertical integration	Specialization

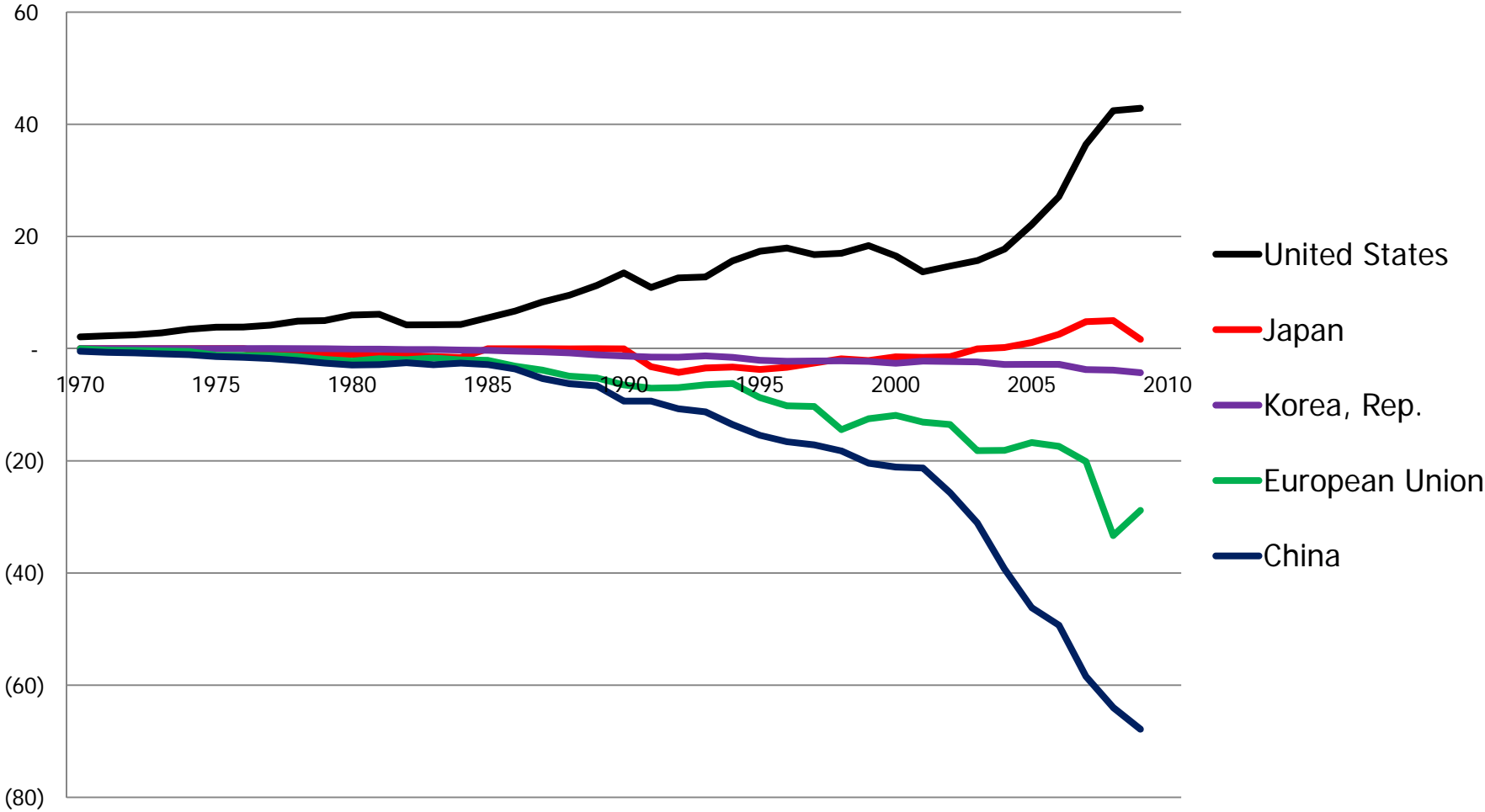
The IP marketplace in action

A timeline of specialization



The global IP economy in action: The main source of America's competitive advantage

Balance of trade
(\$B)



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American Invents Act

How should we judge the outcome?

Status quo	Neutral/positive	Harmful
Damages/apportionment	First to file	Fee diversion continues
Gatekeeper role for court	Prior art	Selected exclusions*
Claim construction appeals	Inter partes reform	Post grant proliferation
Injunctions	Fee setting authority	Joinder ban
Venue: limited changes		
Willfulness: limited changes		

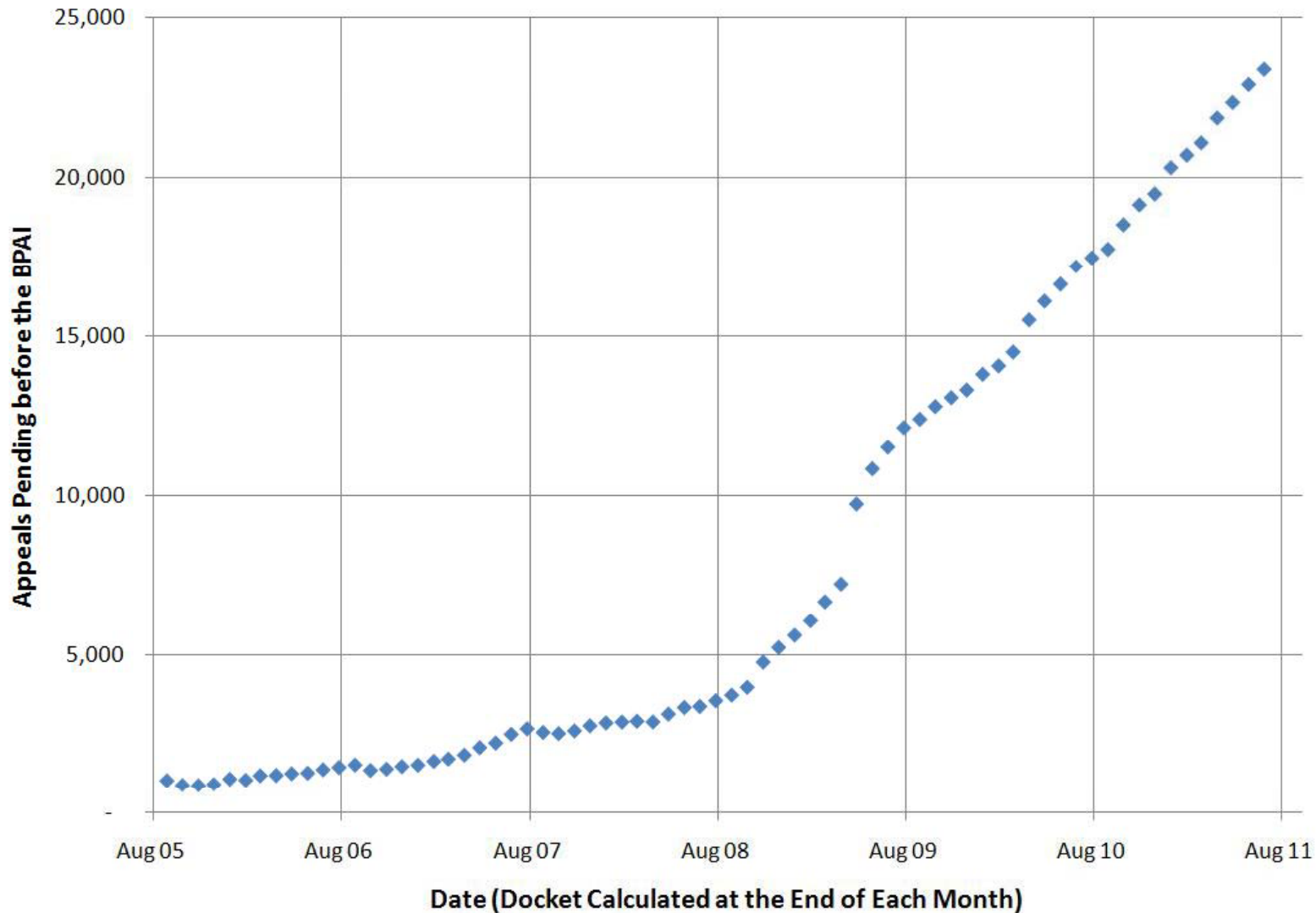
* Tax strategies and human organisms

A proliferation of post grant processes

Pre 1999	1999-2011	America Invents Act
Ex partes reexam	Ex partes reexam	Ex partes reexam (modifications)
	Inter partes reexam	Inter partes reexam (phasing out)
		Inter partes review (new)
		Post grant review (new)
		Business method patent review (new)
		Supplemental exam (new)

Making a serious problem seriously worse

The BPAI (now PTAB) case backlog



A coming proliferation of patent cases

New Sec. 299: Joinder

In any civil action in a U.S. court relating to patent infringement, accused infringers may not be joined as defendants or counterclaim defendants, or have their actions consolidated for trial, unless the action arises “with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences” relating to the infringement; and questions of fact common to all defendants or counterclaim defendants will arise in the action.

▪Bad lawmaking

- Manager’s amendment surprise

▪Bad civil procedure

- Proliferation of cases, participants and redundant activities
- Legislature taking control of court operations and scheduling

▪Bad quality legal experience for plaintiffs *and* defendants

- Proliferation of potential outcomes: validity, claim construction, infringement
- Proliferation of appeals, increasing backlog at CAFC

Conclusions

There is no patent crisis

- Increased patent filings are driven by the opportunity in technology investments and are a sign of an advanced and thriving knowledge-based economy

There is no litigation crisis

- Patent suits are an expected and necessary part of a functioning patent system. There is no evidence of rising abuse or increased bias in favor of patent owners. Indeed, the trend is the opposite.
- One material change is an expanding market for technology exchange and the business response to these increasingly open and liquid markets. What's wrong with that?

Acting on a false premise, a sustained assault on patent owner rights is putting America's national competitiveness at risk

The America Invents Act, despite some modest improvements, inflicts material harm on patent owner rights, the overall health of the world's leading innovation economy and the proper functioning of our patent system