Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine

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by
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Because business competes for the favor of government as much as for the trade of customers,1 government has become an alternative marketplace for corporate America.2 It is thus not surprising to find corporations, trade associations, and their political action committees working,


2. American business corporations working through political action committees (PACs), trade associations, and "grass-roots" lobbyists have had an enormous influence over the substance and nature of the political process. See, e.g., T. Edwards, The New Politics of Inequality (1984); B. Jackson, Honest Graft: Big Money and the American Political Process (1989); C. Lindblom, Politics and Markets (1977); D. Vogel, Fluctuating Fortunes: The Political Power of Business in America (1989); see also D. Schlozman & J. Tierney, Organized Interests and American Democracy (1986) (empirical investigation illustrating the substantial power of interest groups to influence government decisions). Critics have observed that there has been a marked revival of corporate lobbying power in Washington since the early 1970s. See, e.g., D. Vogel, supra, at 193-227 (describing how the business community, frustrated by the political setbacks of Watergate, launched a coordinated effort to revive its status as a political power). Thomas Eddall reports that "[i]n 1974 there were 89 corporate PACs, in 1978 there were 784, and by the end of 1982 there were 1,467." T. Edsall, supra, at 131. One study indicates that all but a few of the 4,828 PACs active in 1988 were established to make direct contributions to political candidates during the last Presidential election. See R. Baker, The New Fat Cats: Members of Congress as Political Benefactors (1989). Vogel notes that by 1980 "more than 80 percent of the Fortune 500 companies had established a unit responsible for managing the external environment." D. Vogel, supra, at 195. Between 1968 and 1978, the number of corporations with "public-affairs" offices in Washington increased from 100 to 500. Id. at 197. By 1980, the number of persons employed by private industry to represent industry interests in Washington exceeded the number of federal employees in the Washington metropolitan area. Id. at 198. In 1989, the forced resignations of the House Speaker, James Wright, and the House Majority Whip, Anthony Coelho, dramatically illustrated the destructive influence of the power and greed of big money and big business. See generally E. Drew, Politics and Money: The New Road to Competition (1983) (discussing the power of money and business in Congress).
unilaterally or in concert, to manipulate state and local government for purely private economic advantage. Nor is it surprising to learn that corporate interests have reaped the benefits of legislation and administrative regulations that subsidize private interests adverse to the public interest, causing distortions and inefficiencies in the normal operation of market competition. Truly surprising, and deeply troubling, is the fact that the courts have been largely unable to develop a workable legal framework under the Sherman Antitrust Act to regulate predatory conduct of business in the governmental sphere even though such conduct presents potentially serious danger to market competition.

The Sherman Antitrust Act declares in the broadest possible language that restraints of trade and acts of monopolization are illegal.

3. See, e.g., D. Vogel, supra note 2. A growing chorus of academic opinion has expressed "considerable dissatisfaction" with the ability of special interest groups to transform the lawmaking process of government "into a series of accommodations among competing elites." Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 29 (1985); see also Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 223 (1986).

4. See, e.g., M. Olson, The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities (1982) (arguing that legislation advancing the needs of special interests undermines economic efficiency); Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1684-86 (1975) (describing how administrative agencies have been captured by the interests they are charged to regulate); Wiley, A Capture Theory of Antitrust Federalism, 99 Harv. L. Rev. 713, 723-25 (1986) (describing how the benefits of regulation have been captured by private interests at the expense of the public interest).

5. The antitrust dangers of this form of non-price predation were recognized in a recent antitrust enforcement guideline of the Department of Justice, International Operations Antitrust Enforcement Policy, Nov. 10, 1988 (CCH Supp.), which stated that the "use of governmental processes to disadvantage a competitor and thus to increase market power is in general a more plausible anticompetitive strategy than is pricing below cost, because a firm may be able to trigger significant litigation costs and other administrative burdens at little cost to itself." Id. at 26; see also Hurwitz, supra note 1, at 68-76 (demonstrating how abuse of governmental processes may harm market competition by making rivals suffer additional costs; this is accomplished by erecting entry and mobility barriers, or by facilitating collusion and other anticompetitive behavior). Even antitrust scholars who are skeptical of the concept of business predation in other contexts agree that predation in the governmental sphere represents serious dangers to the process of competition. See, e.g., R. Bork, The Antitrust Paradox: A Policy at War With Itself 347 (1978) ("Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition.").

6. Section 1 of the Sherman Act provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1982).

Section 2, in turn, provides in relevant part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . . " 15 U.S.C. § 2 (1982).
The Act’s drafters used broad terms to avoid the folly of “particularization” that might defeat the drafters’ purpose by providing loopholes for escape.\(^7\) When a group of competitors or a single firm influence governmental process for the purpose of restraining trade or monopolizing the market, the statutory objectives of the Sherman Act are placed in serious jeopardy. The broad language of the antitrust statute ought to compel the federal courts to regulate this form of predatory “petitioning of government” that threatens federal competition policy. To do otherwise might defeat the purpose of antitrust law by allowing competitors to use governmental process as a “loophole” to escape antitrust proscriptions.

Under the *Noerr-Pennington* doctrine,\(^8\) however, the Supreme Court has immunized the vast majority of government-petitioning cases from antitrust attack, even when the petitioning is for the purpose of restraining trade and even if the restraint causes an antitrust injury. The doctrine provides that when a restraint of trade is the result of valid governmental action, as opposed to private action, no violation of antitrust law is established.\(^9\) In concluding that the right to petition government

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While the doctrine has been regarded by some as an antitrust exemption, see, for example, Litton Systems, Inc. v. American Tel. & Tel. Co., 700 F.2d 785, 806-07 (2d Cir. 1983), *cert denied*, 464 U.S. 1073 (1984), the better view is that the doctrine establishes antitrust immunity and not an antitrust exemption. *See, e.g.*, Handler & De Sevo, *The Noerr Doctrine and Its Sham Exception*, 6 CARDozo L. REV. 1, 5 (1984).

is a fundamental first amendment freedom, essential to a representative democracy, the Supreme Court has determined that antitrust law should play little or no role in regulating "genuine" political activity designed to influence governmental action.\textsuperscript{10} The Court thus has sacrificed federal antitrust policy to protect other values and rights perceived as fundamental to a representative government.

Unfortunately, the Supreme Court has provided the lower courts with confusing and inconsistent rationales for determining whether the \textit{Noerr-Pennington} doctrine applies in particular contexts. Indeed, the current state of the doctrine has been characterized as "uncertain," "inconsistent," "disintegrating," and representing an antitrust "quagmire."\textsuperscript{11} The Supreme Court's case-by-case approach to this important area of antitrust law has been unfruitful because adjudication has failed to raise, let alone resolve, serious analytical difficulties at the core of the \textit{Noerr-Pennington} doctrine. The problems endemic to this doctrine require a theoretical focus of inquiry that extends beyond particular litigation. A fresh examination of the allegedly "unassailable"\textsuperscript{12} premises of the doctrine is required.

In particular, the \textit{Noerr-Pennington} doctrine has proceeded on the basis of unexamined assumptions about the nature of interest groups in government. One such assumption involves the separation of politics and the market: the idea that the first amendment and principles of representative government autonomously define a sphere of political activity independent of market activity that is subject to antitrust regulation. Another assumption, paradoxically, is that interest groups are essential

\begin{notes}
\item[10] In \textit{Noerr}, the Court concluded that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." \textit{Noerr}, 365 U.S. at 136.
\item[11] See, e.g., Calkins, \textit{supra} note 9, at 327; see also Costilo, \textit{supra} note 9, at 333.
\item[12] Even antitrust scholars who acknowledge that predation in the governmental context represents a serious antitrust concern assume that the Court's \textit{Noerr-Pennington} doctrine is based upon "unassailable" premises. See, e.g., R. Bork, \textit{supra} note 5, at 350 (arguing that the Supreme Court's decision in \textit{Noerr} was based on an "unassailable" premise, namely "that where a restraint upon trade or monopolization is the result of a valid governmental action, as opposed to a private action, no violation of the Act can be made out."); \textit{Id.} (quoting and citing United States v. Rock Royal Co-op., 307 U.S. 533 (1939); Parker v. Brown, 317 U.S. 341 (1943)).
\end{notes}
for upholding political freedoms precisely because they mimic the logic of the marketplace. A related assumption accepts, again paradoxically, the logic of the marketplace as an objective medium for structuring and ordering both political and commercial activity. The vision of political and market activity as a dichotomy for some purposes, but not others, is the source of the instability and confusion that has plagued the Noerr-Pennington doctrine since its inception.

This Article asserts that the courts should adopt a new antitrust approach for resolving the business petitioning of government cases—an approach that transcends the politics and market dichotomy by placing greater antitrust limitations upon the right of business interest groups to petition government while protecting legitimate forms of true political expression. Courts should adopt an antitrust immunity standard and an understanding of the first amendment that carefully limits petitioning activity when such activity is part of a profit-maximizing strategy for monopolizing markets, regardless of context. Such an approach can be developed from an understanding of the “sham exception” to the Noerr-Pennington doctrine that would permit the exception to cover petitioning activity directed at capturing the benefits of governmental process through corrupt or improper means. The recommended approach then can be utilized to provide a more principled justification for

13. Paradoxically, the Supreme Court has recognized the need for an exception to the Noerr-Pennington doctrine in cases in which the claimed petitioning activity is found to be “a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.” Noerr, 365 U.S. at 144; see infra text accompanying notes 77-104. This “sham exception” was stretched by the Supreme Court in California Motor Transport v. Trucking Unlimited, 404 U.S. 508, 509-14 (1972), to cover a wide variety of cases involving antitrust claims asserting that litigation instituted in the courts or before quasi-judicial administrative agencies was brought for bad faith purposes. See also infra text accompanying notes 196-226. In the legislative and executive context, however, the sham exception has had little or no application even though these arenas are where the danger of business predation is likely to be the greatest. The antitrust danger presented in such cases is especially troubling given the awesome purchasing power available to corporations and business interests to influence governmental policy. See, e.g., Baker, Realizing Self-Realization: Corporate Political Expenditures and Redish’s The Value of Free Speech, 130 U. Pa. L. Rev. 646, 647 & nn.6-8 (1982); see also C. Lindblom, supra note 2, at 214.

14. The courts need not inquire into the “genuineness” of the petitioning motive. They can identify and isolate predatory activity by focusing on those petitioning methods that distort and corrupt the deliberative process of government. For example, in other areas of antitrust law, the courts have made distinctions between legitimate forms of competition—competition on the “merits”—and illegitimate forms of illegal predation. A firm competes on the merits when it seeks to “win the field by greater efficiency, better services, or lower prices reflective of cost savings or modest profits.” L. Sullivan, Handbook of the Law of Antitrust 111 (1977). A “predatory firm,” however, “tries to inhibit others in ways independent of the predator’s own ability to perform effectively in the market . . . [by] imposing] losses on other firms, not to garner gains for itself. . . .” Id.; see also Hurwitz, supra note 1, at 69.
protecting petitioning activities of business and other private interest groups that are not instrumentally structured by predatory market considerations. Such an approach is supported by modern interest group theory.

Part I of this Article re-examines the policy underlying the Noerr-Pennington doctrine. Part II identifies the interest group theory that supports this doctrine. This Part brings to bear some of the insights of the recent literature dealing with problems of interest groups in American politics that cast serious doubt on the Supreme Court's rosy assumptions about interest group politics. Part III documents and explains that the


The second strand, antitrust capture theory, is related to the first. Antitrust capture theory seeks to describe how the legislative process has become captured by private lobbies and special interest groups. The literature is surveyed and analyzed in Wiley, supra note 4, at 723-28. Capture theory is frequently identified with the work of conservative economists who have been critical of the public interest concept of regulation and have argued instead for deregulation. See Stigler & Friedland, What Can Regulators Regulate? The Case of Electricity, 5 J.L. & ECON. 1 (1962). But capture theory has also been used by the left to advance a similar critique of regulation. See G. Kolko, THE TRIUMPH OF CONSERVATISM (1963).

Finally, the third strand, republicanism, is borrowed from a new breed of public law scholars who express deep dissatisfaction with legislative outcomes generated by the political process, and who question the legitimacy of allowing special interest groups to influence the legislative process free of governmental restraint. These new "republican" critics question the basic legitimacy of the pluralistic premises that underlie the views of public choice, capture, and more traditional theorists. See, e.g., Michelman, Law's Republic, 97 YALE L.J. 1493 (1988) [hereinafter Michelman, Law's Republic]; Michelman, The Supreme Court, 1985 Term—Foreword: Traces of Self-Government, 100 HARV. L. REV. 4 (1986) [hereinafter Michelman, Traces of Self-Government]; Sunstein, Beyond the Republican Revival, 97 YALE
modern application of the Noerr-Pennington doctrine is fraught with uncertainty and confusion. Finally, Part IV proposes and defends a new test for resolving antitrust claims involving government petitioning in legislative, administrative, and judicial settings. This test seeks to develop an alternative antitrust analysis based on the view that at least one goal of the Sherman Antitrust Act is political—to regulate and restrain the redistributive consequences of corporate power. 16

I. The Policy Underpinnings of the Noerr-Pennington Doctrine

The Warren Court created the Noerr-Pennington doctrine in a pair of cases decided in the early 1960s. 17 In these two cases, the Court concluded that the antitrust consequences of predatory attempts to influence the political process were beyond the reach of the antitrust laws. The Court assumed that interest group lobbying, even with an anticompetitive purpose, is an essential component of our representative government and arguably a constitutionally protected activity under the Bill of Rights. The Noerr and Pennington cases thus were decided under a particular vision of interest group politics—a vision that the Warren Court believed was justified by an uncontroversial political conception of the representative process and an uncontroversial constitutional principle.


16. See, e.g., Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 HASTINGS L.J. 65 (1982) (arguing that antitrust policy seeks to restrain producer efforts to appropriate wealth consumers would realize in a competitive market); Peritz, The “Rule of Reason” in Antitrust Law: Property Logic in Restraint of Competition, 40 HASTINGS L.J. 285 (1989) (arguing that antitrust legislation was the product of competing “logics” that recognize antitrust as a series of sociopolitical choices about the legitimacy of different distributions of wealth); see also Pitofsky, The Political Content of Antitrust, U. PA. L. REV. 1051, 1051 (1979) (arguing that “it is bad history, bad policy, and bad law to exclude political values in interpreting the antitrust laws”).

17. The fact that the doctrine is the “child” of the Warren Court is ironic when considered in light of the antitrust philosophy normally attributed to Chief Justice Earl Warren. In antitrust law, the Warren Court has been associated with a strong commitment to the policy of market deconcentration and the protection of small business. See, e.g., R. BORK, supra note 5, at 200-02 (discussing how the Warren Court merger policy reflected a deconcentration policy emphasizing the importance of retaining local control over industry and the protection of small business). On the other hand, the development of the Noerr doctrine is perfectly consistent with the egalitarian and pluralistic philosophy that has come to characterize the work of the Warren Court in public law fields. See, e.g., THE SUPREME COURT UNDER EARL WARREN (L. Levy ed. 1972).
A. The Noerr and Pennington Cases

(1) Eastern Railroad Presidents Conference v. Noerr Motor Freight\(^{18}\)

For nearly three decades the railroad and the trucking industries were locked in an "economic life or death"\(^{19}\) struggle for the lucrative long-haul freight business. The railroads once had a monopoly in the industry, which they struggled to maintain as an increasing number of long-haulers turned to the flexible alternative offered by trucks.\(^{20}\)

By the early 1930s, the railroads established a committee to consider the trucking problem.\(^{21}\) Working in conjunction with the Association of State Highway Officials, the committee approved standards for road construction that included a road weight restriction for heavy vehicles. The committee's recommendations and reports subsequently were used by the railroad industry to launch a massive state and federal lobbying effort to promote antitruck legislation. From its inception, the railroads' lobbying was based on a single objective: "[T]o impede truck and bus competition by the erection and enforcement of legal barriers."\(^{22}\)

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20. Noerr Motor Freight v. Eastern R.R. Presidents Conference, 155 F. Supp. 768, 775-77 (E.D. Pa. 1957). Long-distance trucks established themselves as worthy competitors during World War I, when railroads were nationalized to ensure speedy transportation of military troops and war supplies, thus forcing the suspension of shipment of other freight. See D. ROBYN, BREAKING THE SPECIAL INTERESTS: TRUCKING DEREGULATION AND THE POLITICS OF POLICY REFORM 12 (1987). The railroads returned to private control by 1920, but by then trucks had been accepted as an alternative form of transportation. Id. By 1938, railroads lost at least two billion dollars in revenue to trucks. Wheeler Report, supra note 19, at 8. It was not until the end of World War II, however, when the interstate highway system was created and truck sizes were increased, that trucking presented serious competition to transport by railroads. Id. at 15.
22. Id. at 776; see also Wheeler Report, supra note 19, at 8 (describing how the railroads' publicity campaign was a "program planned to impede truck and bus competition by the erection and enforcement of legal barriers") The Wheeler Report subsequently condemned the railroad's lobbying effort for being "more concerned with the selfish interests of a few rather than the needs of the transportation industry as a whole." Noerr, 155 F. Supp. at 776.

By the 1940s, however, the trucking industry established its own national and state organizations to lobby for increased road weight legislation. The truckers' lobby, aided by increased demand for long-haul transportation during the war, scored some initial successes in raising the minimum weight limits in some states. Id. at 777. In Pennsylvania, for example, the 1941 weight limit of 18,000 pounds per axle was increased to 20,000 pounds, first as a temporary war measure, but then as a permanent legal limit. Id. To counteract the truckers'

A key player in the lobbying strategy was Carl Byoir & Associates, a New York public relations firm retained at a yearly fee of 250,000 dollars plus expenses.\(^2\) The Byoir firm launched a massive lobbying campaign to generate public resentment against the trucking industry and to create demand for legislation to "penaliz[e] the truckers either by limitation of size and weight or imposition of user taxes which would make their operation unprofitable."\(^3\) The Byoir firm, experienced in the art of manipulating public opinion for industry,\(^4\) created an antitrust lobbying "kit"—a composite of statistical information,\(^5\) magazine articles,\(^6\) films,\(^7\) and other sources containing half-truths, distortions, and false-

successes, the railroads embarked on a new ambitious round of concerted action to defeat pro-trucking legislation by creating a demand for antitrucking legislation. \(\text{Id.} \text{ at 777-78.}\)

\(^23\) The firm had two accounts with the Eastern Railroad Presidents Conference, which represented a group of 24 eastern railroad lines, for $75,000 each per year including all expenses incurred as well as the salaries of all Byoir personnel working full time on the accounts. It was reported that the total cost incurred by the railroads was in excess of $500,000, a substantial expenditure when measured in 1950s dollars. See The Railroad-Trucker Brawl, supra note 19, at 198.

\(^24\) \(\text{Noerr,} 155 \text{ F. Supp. at 778.}\)

\(^25\) While a Byoir spokesperson was reported to have said at the time of the \(\text{Noerr}\) litigation that "presenting the facts is our business," \(\text{NEWSDAY,} \text{ Jan. 26, 1953, at 78, the firm apparently did more than just present the facts. The Byoir firm was found guilty of violating the antitrust laws involving a similar public relations campaign to further an illegal conspiracy to restrain trade on behalf of the Atlantic & Pacific Tea Company. See United States v. New York Great Atl. & Pac. Tea Co., 67 F. Supp. 626 (D. Ill. 1946), aff'd, 173 F.2d 79 (7th Cir. 1949). The public relations campaign for the railroads was also condemned by a Senate committee report on the railroad industry issued in October 1941. See Wheeler Report, supra note 19; see also \text{Noerr,} 155 \text{ F. Supp. at 776, 817.}\)

\(^26\) The Byoir firm attempted to give its negative publicity campaign an aura of legitimacy by supporting its assertions with statistics and data from various research studies of the trucking industry. \(\text{Noerr,} 155 \text{ F. Supp. at 780. While the statistics were apparently drawn from bona fide research studies, the studies themselves were conducted by the Byoir firm or the railroads to ensure the desired outcome. One such study was conducted by the New Jersey Citizens Tax Study Foundation, a supposedly independent public interest group that was actually headquartered in the Byoir offices and whose executive director and most dominant member was on the Byoir payroll. \(\text{Id.}\) Not surprisingly, by using a questionnaire designed to make a weight-distance tax of long-haul truckers seem the best possible source of tax revenues, the study found public support for the measure. \(\text{Id.}\) In another study, Dr. John Sly, head of Princeton Surveys, worked closely with a Byoir ally in preparing a questionnaire that included questions slanted in such a way as to bring about the desired response. \(\text{Id.}\) at 781. The district court also found that the railroads indirectly paid for a report conducted by an allegedly independent research group that in fact received substantial financial and directorial support from the railroads. \(\text{Id.}\) at 782. Further statistical support for its campaign against the truckers came from allegedly distorted interpretations of objectively gathered material. \(\text{Id.}\) at 791.

\(^27\) Some of the more renowned articles generated by the campaign included antitruck articles in \(\text{Harpers,} \text{ the Saturday Evening Post, Country Gentleman, and the National Grange Monthly.} \(\text{Id.}\) at 781-89.

\(^28\) The Byoir firm produced and distributed a number of propaganda films about the trucking industry. One widely distributed film was an edited version of a documentary pro-
hoods about the trucking industry. This "kit" then was utilized in conjunction with a media campaign in a number of key states to generate hostile public reaction against the trucking industry, and to create demand for antitruck legislation.  

A grassroots campaign aimed at convincing state and local legislators that the voting public favored antitruck legislation was launched in conjunction with the media campaign. To accomplish their purpose, the railroads, aided by the Byoir firm, set up "dummy" groups to be used as citizen-fronts to create the false impression that the voting public was overwhelmingly in favor of antitruck legislation. Allegedly disinterested persons were paid to declare their support for such legislation.  

duced by the Interregional Council on Highway Transportation about the results of a Maryland road test conducted to determine the extent of damage, if any, to the state's highways caused by trucks. The edited version of the film, narrated by a competent Washington news commentator, created the impression that big trucks were responsible for damage to the state's highways. Omitted from the edited version of the film were statements indicating that highway damage was the result of "fine silt or clay soil subgrade" used in the construction of the roadways, not vehicle weight. In reviewing the edited version of the film, the district court found that: "[t]he profound impact . . . of the short film was that big trucks per se were the sole cause of damage to the highways, [and that] important language which would have made clear the results of the test, particularly with respect to [the road conditions was] entirely eliminated." Id. at 793. The district court labelled these actions a "deliberate distortion of a fine scientific achievement." Id. at 806. The Byoir firm made the film available free for media distribution, and copies were given to movie houses and television stations, which gave the film significant airtime. Id. at 793.

29. Editors of local and national magazines and newspapers were given the kit and encouraged to write stories hostile to the trucking industry. Id. at 796. At the same time, the Byoir firm flooded the media with a barrage of pictures depicting sensational truck accidents, as well as pre-prepared photo montages of sports and public figures with horror shots of trucking mishaps. Id. at 781, 786-89. A document recovered by the railroads from the Byoir firm, see infra note 37, indicated that the Byoir firm was seeking to accomplish three objectives: "[first to] crystallize the resentment of virtually every motorist over the delays, inconveniences, and perils of modern highway travel resulting from commercial heavy truck operation over public roads; second to arouse the public generally to the need for more equitable and productive methods of financing public highways; and third, to make the public conscious of the benefits they themselves will attain from such methods." The Railroad-Trucker Brawl, supra note 19, at 200.

30. Noerr, 155 F. Supp. at 781, 786. Through the use of these "third-party tactics," the railroads were able to distort segments of the truth into falsehoods and thereby exploit the benefits of inadequate information to the voting public as well as governmental officials. The district court called the use of these tactics the "Big Lie," the "use of dramatic segments of truth distorted . . . into complete falsehoods." Id. at 799. The "third-party tactic" was described by the Supreme Court in Noerr as "giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups." Noerr, 365 U.S. at 140. The apparent goal was to stimulate an outpouring of antitruck publicity through bogus grassroots lobbying coupled with a direct lobbying effort aimed at voters, legislators, and other governmental officials. Noerr, 155 F. Supp. at 780. The Byoir firm thus had two public relations strategies: first, a strategy aimed at the general public to stir up public resentment against the trucking industry, and second, a propaganda strategy aimed at convincing govern-
dependent public interest groups either were induced to support antituck legislation by contributions, or were infiltrated by employees sympathetic to the railroads' cause and then manipulated to provide support for the railroads' interests.\textsuperscript{31}

The truckers also engaged in extensive lobbying to obtain favorable trucking legislation and to counteract the railroads' opposition campaign.\textsuperscript{32} The railroads' publicity campaign, however, was far more significant in terms of effort as well as expenditures.\textsuperscript{33} Moreover, the railroads' petitioning activity, unlike that of the truckers, was highly successful. In Ohio, the Byoir firm's propaganda campaign obtained the aid of the Director of the Ohio Department of Highways and the Governor of the state in publicly supporting the railroads' opposition to the truck-

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\textsuperscript{31} Byoir personnel infiltrated pre-existing special interest groups, such as the Grange, the Citizens Tax League of Rochester, N.Y., and the Citizens Public Expenditure Survey, Inc. To gain entry into these organizations, the Byoir organization gave substantial donations to these groups, paid off key personnel in the groups for the use of their name and position, and enlisted the aid of sympathetic members already installed in these groups. Id. at 782. Thus, the railroads were successful in persuading these groups to disseminate antitrust literature and adopt resolutions that took a hard line against the trucking industry, and in lobbying for tougher measures and penalties for violators of the weight-distance tax imposed on trucks by some states. Id. at 783. The firm even employed a 99-year-old great-grandmother, Bessie Q. Mott, who was a professional "club woman" to lobby women's clubs, notably the State Federation of Women's Clubs of New York, on behalf of the railroads' cause. The Railroad-Trucker Brawl, supra note 19, at 200. Her fee was $500 a month, plus expenses. Id. at 203.

\textsuperscript{32} Most of the truckers' lobbying effort was focused in Pennsylvania. Noerr, 155 F. Supp. at 803. Like the railroads, the truckers used a variety of propaganda techniques to lobby various state legislatures for pro-truck legislation. The truckers solicited legislators to support bills increasing the weight of trucks; had industry representatives write and make personal contacts with legislators without disclosing their ties with the trucking industry; and distributed news releases of legislators' statements in support of their position. Id. at 803. In at least one instance, the truckers prepared a manual suggesting that the railroads had not paid their "fair share" of taxes. Id.; see also Noerr, 365 U.S. at 134 n.10.

\textsuperscript{33} While the truckers' campaign was based primarily on direct lobbying activity that sought to obtain favorable legislation, the railroads' effort was almost entirely a negative "grassroots" effort designed to ruin the good will of a competitor. Noerr, 155 F. Supp. at 799. The inability of the trucking industry to obtain favorable legislation may stem from the fact that the industries' lobbying group was not as strong as that of the railroads'. The large number of trucking operators may have posed serious collective action problems creating obstacles for effective interest group petitioning. See infra notes 150-02 and accompanying text. The trucking industry may also have been at a disadvantage since its industry was subject to potential competition from substitute transporters such as railroads. Indeed, there is persuasive evidence suggesting that subsequent ICC regulation of the trucking industry enabled the industry to enjoy greater monopoly power by eliminating competition of alternative carriers. See Bailey & Baumoul, Deregulation and The Theory of Contestable Markets, 1 YALE J. ON REG. 111, 133-34. (1984).
ing industry, ultimately leading to the imposition of a thirty percent increase in fees and weight-distance taxes on truckers. In New York and New Jersey, the Byoir firm successfully influenced local and state legislators to enact significant antitruck legislation, including a New York Mileage Tax Bill, which imposed a substantial mileage tax on trucks. In Pennsylvania, the Byoir group successfully persuaded the Governor to veto the “Fair Truck Bill,” which would have increased the weight limit for trucks in that state.

Finding their access to the long-haul freight market was threatened by state regulations, and discovering the true nature of the railroads’ lobbying efforts from documents obtained from the Byoir firm, the truckers turned to the courts for relief. The truckers filed suit in district court alleging that the railroads, acting through the Byoir firm, had violated the first and second sections of the Sherman Antitrust Act by engaging in a massive publicity campaign explicitly designed to destroy the goodwill and competitive position of the long-haul trucking industry. The railroads’ counterclaim raised similar antitrust allegations against the truckers.

The district court sustained the truckers’ complaint and dismissed the railroads’ counterclaim. The district judge emphasized that the defendant railroads did more than just attempt to influence the passage of new legislation or enforcement of the new laws. In the district judge’s opinion, the sole purpose underlying lobbying by the railroads’ interest group was to damage the truckers’ business in every way possible, with

34. Id. at 785.
35. Id. at 784.
36. Id. at 794-99.
37. Much of the sensation caused by the railroad-trucker “brawl” was based on “purloined” documents obtained by a secretary from the office of her former employer at the Byoir firm. See The Railroad-Trucker Brawl, supra note 19, at 139. This secretary bundled over 200 Byoir documents relating to their publicity campaign against the truckers and shipped them to the American Trucking Association in Washington, with a cover letter explaining their importance. Id. at 139. Many of these documents became evidence in the subsequent antitrust litigation brought by the truckers against the railroads. Whether the secretary was fired or resigned is unknown, nor is her motivation for sending the documents to the truckers known. Id.
38. The complaint was filed on behalf of 41 Pennsylvania truck operators and their trade association, the Pennsylvania Motor Truck Association. Noerr, 365 U.S. at 129.
39. Named as defendants were 24 eastern railroads, an association of the presidents of those railroads known as the Eastern Railroad Presidents Conference, and the Byoir public relations firm. Id.
or without legislation. Finding that the district court’s decision was based on substantial evidence, the Third Circuit affirmed.

When the Noerr litigation reached the Supreme Court there was little settled law on the question of whether the Sherman Act applied to joint lobbying efforts by competitors seeking to induce governmental restraints of trade. There were, however, existing antitrust doctrines relevant to the question. In 1943, the Supreme Court had decided in Parker v. Brown that the Sherman Act did not warrant the invalidation of a state regulatory program as an unlawful restraint of trade. Similarly, in American Banana Co. v. United Fruit Co. the Court held that Congress did not intend the Sherman Act to apply to an alleged monopoly grounded on a seizure of property pursuant to a sovereign act of a foreign state. While the “state action” doctrine of Parker and the “act of state” doctrine of American Banana suggested that governmental acts of state were immune from the federal antitrust proscriptions, those cases involved substantively different problems of “antitrust federalism” and “foreign relations.” It was also unclear whether the analysis of these

40. See id. at 142. According to the Supreme Court, the district court conclusions were based on findings showing that the defendant railroads had resorted to “the negative approach of injuring the competitor rather than adjusting their facilities to meet the growing needs of competition.” 155 F. Supp. at 816.

The railroad’s counterclaim against the truckers was dismissed because the district court viewed the petitioning activity of the truckers as legitimate lobbying for beneficial legislation, aimed at influencing legislative decisions on the merits rather than influencing decisions on the basis of falsehoods for the predatory motive of destroying a competitor. The district court found that “there [was] one very important distinction in the use of the [lobbying] technique by the parties:

[T]he [truckers] always used [propaganda] for the affirmative purpose of seeking legislation which would be beneficial to themselves rather than to burden the railroads. . . . [T]he [railroads] did not go out and seek to meet the new mode of competition by adjusting their facilities to the public demand, but rather sought to destroy the good will built up by this new competitor through the campaign as outlined. This public relations battle of bogus organizations and distortion of facts and vilification was not a climate of competition into which the defendants were injected. They created it.

Id.


42. 317 U.S. 341 (1943). In an earlier decision, United States v. Rock Royal Co-op, Inc., 307 U.S. 533, 568-73 (1939), the Court held that when a restraint of trade is the result of valid governmental action, as distinguished from private action, no violation of the antitrust Act could be sustained.

43. 213 U.S. 347 (1909); see also United States v. Sisal Sales Corp., 274 U.S. 268 (1927) (the fact that control over production was aided by a foreign legislature does not prevent punishment in the U.S.).

44. American Banana was justified on the ground that the challenged conduct took place abroad and was approved and facilitated by a foreign government. American Banana, 213 U.S. at 357-59.
cases would apply when competitors utilize illegitimate and improper petitioning to influence governmental action.

Moreover, although little case law had been decided concerning the right to petition, it was beyond dispute that the right to seek favorable governmental action was deeply embedded in first amendment jurisprudence. The Supreme Court, however, had never concluded that this right was absolute. In United States v. Harriss, the Court rejected a constitutional challenge to the Federal Regulation of Lobbying Act, which regulates federal lobbying expenditures, on the ground that the right to petition government is subject to the limitation of overriding governmental interests. In upholding Congress' authority to regulate lobbying activities of special interest groups, the Court emphasized that the rights protected by the first amendment must yield to the right of government to protect the deliberative process of government from the pressures of special interests. The Supreme Court, however, had never defined the right of petition in the context of a case involving the Sherman Antitrust Act. Nor had the Court declared or defined the precise scope of the Act's competition policy as applied to attempts to restrain trade in the governmental sphere.

In this context, the Court's decision in Noerr is truly remarkable. While the question posed in Noerr was a difficult one, the Court treated the case as if it were an easy one, involving an obvious solution: antitrust judges should not regulate "genuine" political activity designed to influence governmental action. The Court thus reversed both the district court and the Third Circuit on the ground that the Sherman Act fails to cover railroads' petitioning activity. Justice Black delivered the Court's opinion in conclusive terms: "[w]e think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."

45. In United States v. Cruikshank, 92 U.S. 542 (1875), the Court held that the right to petition was implicit in "[t]he very idea of a government, republican in form." Id. at 552. See generally B. Schwartz, The Bill of Rights—A Documentary History 198 (1971).
48. The Act requires, inter alia, that persons engaged in lobbying activities keep "detailed and exact" accounts of contributions; render receipts of money spent to the donor; file with the clerk of the House of Representatives a complete account of donations received worth 500 dollars or more; and provide the contributor with an accounting of expenditures made on her behalf. See 2 U.S.C. §§ 262-266 (1946).
49. Harriss, 347 U.S. at 625.
While the decision in favor of the railroads was unanimous, it lacked a unified principle or harmonious analysis—at least four reasons were given for the decision. Justice Black first emphasized the "essential dissimilarity" between agreements to petition government and the traditional agreements condemned by the antitrust laws. Focusing on the consequences of limiting petitioning activity under the Sherman Antitrust Act, Justice Black reasoned that a contrary holding would "substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade." Moreover, in his view, the effort to apply the antitrust laws to the lobbying activities of special interests "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatsoever in the legislative history of that Act." Finally, Justice Black concluded that a contrary construction of the Act would raise important constitutional questions, given that lobbying activity implicates the constitutionally protected right to petition government. According to Justice Black, "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Justice Black also underscored some additional points. First, he asserted that the district court's finding that the railroads' lobbying effort was motivated to destroy the truckers as competitors was legally inconclusive. According to Justice Black: "It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors." Moreover, Justice Black saw a broader principle at stake:

A construction of the Sherman Act 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 and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.

51. Id.
52. Id. at 137.
53. Id.
54. Id. at 138.
55. Id.
56. Id. at 139.
57. Id. at 139-40. Justice Black apparently thought that it would be inconsistent to condemn the railroad for using the third-party tactic while at the same time dismissing the railroads' counterclaim against the truckers. According to Justice Black, the record was "undisputed that the truckers were as guilty as the railroads of the use of the technique." Id. at 141. While it is true that "both sides used, or wanted to use, fronts and/or the propaganda technique," see Noerr, 155 F. Supp. at 816, there were substantial findings in the district
In Justice Black's view, if the Sherman Act established a code of ethics, it was "a code that condemns trade restraints, not political activity." Hence, he stated with amazing confidence that the Court's decision "restored what appears to be the true nature of the case—a no-holds-barred fight between two industries seeking to control a profitable source of income." In his view, deception, fraud, misrepresentation, and competitive injury are expected when business competes in the governmental sphere. Apparently, Justice Black believed that antitrust proscriptions could be tailored specifically for commercial markets, and that politically motivated activity in political arenas could be left safely to the regulation of the political marketplace of ideas.

Justice Black acknowledged, however, the possibility of an exception to the Court's immunity doctrine. In dictum, he stated that "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." The railroads' publicity campaign was not found to fall within this exception because "[n]o one denie[d] that the railroads were making a genuine effort to influence legislation and law enforcement practices."

This was a stunningly surprising conclusion, given the extensive findings of the district judge that were affirmed by the Third Circuit.

court's opinion that the railroads' propaganda campaign was designed to destroy a competitor, and that the railroads' negative propaganda campaign was both qualitatively and quantitatively different when compared to the meager publicity campaign waged by the truckers. Noerr, 365 U.S. at 142.

58. Noerr, 365 U.S. at 140.
59. Id. at 144. As Justice Black explained:

Inherent in such fights, which are commonplace in the halls of legislative bodies, is the possibility, and in many instances even the probability, that one group or the other will get hurt by the arguments that are made. . . . And that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned. Id. at 144-45.

60. Justice Black suggested that antitrust immunity might have been denied in Noerr if the district judge's findings of predatory intent included "specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers." Id. at 142. Concerted refusals to deal or agreements between competitors to boycott other competitors have been found to be unlawful under the antitrust laws. See, e.g., Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941). In Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959), the Supreme Court held that a concerted refusal to deal could be a per se violation of section one of the Sherman Act. See generally H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 10.1 (1985). In Noerr, Justice Black found that the record failed to sustain such a claim. Noerr, 365 U.S. at 142.

61. Noerr, 365 U.S. at 144.
62. Id.
While the railroad characterized its publicity campaign as a "genuine" effort to influence legislation, the truckers' complaint alleged, and there was evidence supporting those allegations, that the campaign was motivated solely by the railroads' desire to injure the trucking business and destroy it as a competitor. According to Justice Black, however, the sham exception can be established only if the petitioning was for the exclusive purpose of harassing competitors without the hope or expectation of obtaining favorable governmental action. The exception would apply only when a petitioning campaign is conducted without a genuine intent to influence governmental action.

Of course a producer group seeking to restrain the trade of a competitor through governmental action would always "genuinely" want to influence governmental action. What better way to eliminate competition then by having the government impose a barrier to competition of rivals? By limiting Noerr's sham exception to cases lacking a genuine intent to influence governmental action, Justice Black created an exception that simply makes no sense in the legislative context. The fact that governmental process is involved, or that lobbying is characteristically "political," fails to explain why the courts should immunize profit-motivated forms of political activity seeking predatory market objectives that attempt to influence governmental action through subversion and corruption of governmental process.

Without question, the political activity in Noerr was connected intrinsically to profit-maximizing objectives to alter the market structure through legislation by creating a barrier to competition. Certainly the railroads' petitioning was not a "genuine" effort to provide legislators with disinterested and objective information about the trucking industry so that legislators could render better and more intelligent regulatory decisions. The railroads' goal was to use government process as a conduit for effectuating a barrier to the competition posed by the trucking indus-

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63. Noerr's sham exception might apply in cases where a producer group petitions government for purely strategic purposes, without any genuine desire to influence governmental action. For example, a producer group might seek to increase the cost of rivals by forcing them to incur the added financial burden of conducting their own petitioning to counter false and misleading petitioning information. However, why would a producer group ever limit its petitioning effort to strategic cost objectives, when doing so risks the possibility of sham liability, and when the very same objectives can be achieved more effectively through a successful attempt to influence regulatory action? Even if a producer group has risked sham petitioning, there would be serious evidentiary obstacles in proving sham liability. As Professors Areeda and Turner have noted, the difficulties involved in proving Noerr's sham exception in the legislative context are so insurmountable that "there is very strong ground for conclusively ignoring as unprovable an allegation that a defendant sought legislation solely to harass and without hope of success." P. AREEDA & D. TURNER, ANTITRUST LAW 41 (1978).
try. Justice Black's political activity distinction thus became the justification for a major loophole in the antitrust laws. Private petitions are seen as "political," even when petitioning parties understand that their activity is economic or commercial in nature.64

In Noerr, Justice Black assumed that political freedoms trump antitrust values. Justice Black underestimated the possibility that democratic and competitive values might also be at risk when private interests seek to subvert the deliberative processes of government in order to harm the economic interests of competitors. Corporate resources may, on a given issue, be sufficient to dominate policy decisionmaking and judgment. Protecting the right of special interests to petition government through abusive propaganda practices may undermine the democratic process upon which market and political freedom depend. Antitrust and politics, in Justice Black's view, involve totally different worlds.

(2) United Mine Workers of America v. Pennington65

In Pennington, the United Mine Workers sued the president of the Phillips Brothers Coal Company to recover royalty payments due under the Welfare and Retirement provisions of the National Bituminous Coal and Wage Agreement of 1950.66 The 1950 agreement resulted from protracted collective bargaining negotiations between the union and the ma-

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64. Economic theory would suggest that the railroads' interest in Noerr was motivated by the desire to erect a barrier to competition. For example, economists have recently recognized that the railroad industry is more "contestable" (i.e., more competitive) than has been traditionally recognized because there is strong competitive pressure from other modes of transportation, such as trucks. See Bailey & Baumol, supra note 33, at 125. Economic theory of contestable markets suggests that the railroads' lobbying campaign was motivated to stem the strong competitive pressure of trucking.

"Contestability analysis tells us that even in markets in which such costs are substantial, pricing power may be held in check by the availability of substitute suppliers whose cost structure is compatible with contestability." Id. A market is contestable, if entry and exit are easy. Id. at 111. The trucking industry is perhaps the most contestable of industries because of the availability of a vast number of actual and potential substitute transporters. Id. at 133.

More generally, the supposedly bright line Justice Black drew in Noerr between political and business activity is far from clear. Since the market is structured by baseline entitlements established by economic and legal regulations, including those established by the antitrust laws, the distinction between political and market activity is untenable. See generally Sunstein, Lochner's Legacy, supra note 15, at 874. A legal doctrine that assumes market and political activity are somehow dichotomous is ill-suited to determine whether concerted efforts to influence government should be subject to antitrust regulation. Indeed, by insulating predatory market conduct from antitrust laws merely because a group of competitors genuinely attempt to influence the political process, the Court has allowed private business to reap the benefits of predatory market objectives through legislatively created, but privately engineered, restraints of trade.

jor coal producers that ended in labor strife in the mines. Both the union and the large coal producers concluded that excess supply caused by over-production was the industry's major problem, and the 1950 agreement was their solution to this "problem."

To "solve" the over-production problem, the union agreed to permit large coal producers to use labor-saving technology (which meant fewer jobs for its members) in exchange for increased wages and royalty payments to the union's welfare fund. The union also agreed to seek the same higher wage rates from all other producers, regardless of their ability to pay. The problem of over-production was to be "solved" by the imposition of a wage scale that only the large operators could afford. Since smaller coal operators had a labor intensive scale of operation, they would no longer be competitive due to an increased cost of production. The large producers who could absorb the higher wage scale as a result of labor-saving technology, would produce coal at a lower cost, and thus enjoy the competitive benefits of capital-intensive production. The 1950 wage agreement established a classic "barrier to entry"—a device economists consider essential to successfully secure a monopoly advantage.

To achieve their objective, the union and two of the large coal-producing companies successfully lobbied the Secretary of Labor for a high minimum wage for coal miners under the Walsh-Healey Act. At the same time they lobbied the Tennessee Valley Authority (TVA) to cease purchasing coal from mines not paying the minimum wage. By securing a high minimum wage from the Secretary of Labor, the union and large coal operators erected a barrier to market competition that small, labor-intensive producers would never be able to surmount.

In its complaint, the union asserted that Phillips Coal breached its promise to make welfare and retirement payments under the 1950 agreement. In its answer, Phillips alleged that the 1950 agreement constituted an illegal restraint of trade under the first section of the Sherman Act. In response, the union alleged that the agreement was exempt from the antitrust laws as a result of the antitrust exemption for labor unions. The

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67. For an analysis of the industry, including an economic analysis of the facts relevant to the Pennington litigation, see Williamson, Wage Rates as a Barrier to Entry: The Pennington Case in Perspective, 82 Q.J. Econ. 85 (1968).
68. Pennington, 325 F.2d at 807.
69. Pennington, 381 U.S. at 659-60; see also Williamson, supra note 67, at 96.
70. 41 U.S.C. §§ 35-45 (1970). Section 35(b) authorizes the Secretary of Labor to determine a minimum wage for employees of governmental contractors. Id. § 35(b).
district court sustained a jury verdict against the union and the Sixth Circuit court of appeals affirmed.\textsuperscript{72}

When the Pennington litigation reached the Supreme Court, the parties and the Court primarily emphasized the labor exemption issue, which was complicated as well as perplexing.\textsuperscript{73} The Noerr issue thus took second stage to the drama surrounding another, quite different problem. Nevertheless, the Court's decision on the Noerr issue was significant because it extended the Noerr result to cover joint lobbying efforts to influence executive officials who exercise commercial functions. Indeed, the Pennington result conflicts with the distinction Justice Black drew between agreements to lobby for legislation and agreements traditionally condemned by the Sherman Act.\textsuperscript{74}

Moreover, in finding that both the court of appeals and the district court had failed to take "proper account" of Noerr, Justice White announced a rule derived from an extremely broad reading of Noerr: "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."\textsuperscript{75} According to Justice White,
"[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition" because "[s]uch conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."76

The Court's Pennington decision explicitly recognized the legitimacy of interest group influence, even when the government acted as an economic agent. Pennington thus cuts against the rationale Justice Black established in Noerr for immunizing private attempts to influence the political or "policy" decisions of government. Pennington also failed to explain why the distinction between political and commercial activity did not apply.77 Finally, the Pennington Court did not explain why its Noerr immunity rule, fashioned specifically in light of the legislative context, makes sense in the executive context.78

B. California Motor Transport: The Constitutionalization of Noerr?

The Warren Court's Noerr-Pennington doctrine reached a point of constitutional apogee during the early years of the Burger Court. In California Motor Transport v. Trucking Unlimited,79 the Burger Court faced a controversy between two trucking firms doing business in California. The plaintiffs operated intrastate and the defendants operated interstate. The complaint alleged that the defendants conspired to oppose all applications by plaintiffs for operating rights to engage in interstate trucking before the California Public Utilities Commission or the Interstate Commerce Commission.80 The plaintiffs' allegations, like the common-law actions of abuse of process and malicious prosecution, asserted that the defendants raised protests and objections to every application regardless of the merits, and adverse decisions were appealed to the highest possible

76. Id. The Court did not consider whether the first amendment required defendant's antitrust immunity.
77. See also Fischel, supra note 7, at 84.
78. Executive officials administer the law, adjudicate claims under the law, and sometimes, by establishing and enforcing policy, make the law. The lines separating these functions are most often quite indistinct in the executive context. See, e.g., Sessions Tank Liners, Inc. v. Joor Mfg., 827 F.2d 458, 468 (9th Cir. 1987). While Noerr immunity might make sense in cases when executive action involves law making, see P. AREEDA & H. HOVENKAMP, ANTITRUST LAW 44 (Supp. 1989), it is far from clear whether Noerr should immunize executive action when executive officials are acting to administer established legal policy. The notion that interest group lobbying serves to immunize the exercise of political power of special interests seeking to influence the administration or enforcement of legal policy seems flatly inconsistent with the ideals of a representative democracy emphasized by Justice Black in Noerr.
The plaintiffs claimed that the resulting conspiracy had the purpose of restraining and monopolizing the highway common carriage business in California and elsewhere. The district court dismissed the action on the ground that relief was barred by the Noerr-Pennington doctrine. The Ninth Circuit reversed.

The Supreme Court, in an opinion by Justice Douglas, agreed that Noerr-Pennington failed to bar relief. According to Justice Douglas, it would be destructive of the rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors.

The complaint in California Transport was found to state a valid cause of action because it raised allegations sufficient to raise a claim under Noerr's sham exception.

In California Transport, Justice Douglas suggested, without actually deciding, that Noerr-Pennington was constitutionally required, but that the contours of the protection afforded might be quite different when applied in different governmental spheres. Antitrust immunity was seen to involve special concerns in the adjudicatory sphere because judicial law-making required a process free from the unethical and corrupting influ-

81. Id.
82. Id.
83. Id. The court of appeals stated that the “fundamental reason” for immunizing petitioning activity before the legislative and executive branches of government under the Noerr-Pennington doctrine does not apply to judicial and administrative adjudicative processes because governmental action does not contemplate the policy determination involved in adopting or enforcing laws. Because governmental officials lack the power to make such determinations, the court concluded that “[i]t would be pointless to limit the reach of the Sherman Act” in this sphere. Id. at 758. The court further concluded that even if the Noerr-Pennington doctrine does apply, relief was not barred because the real purpose of the defendants’ joint activity was to restrain competitors directly, rather than through the medium of governmental action. Id. at 760-61.
85. Id.
86. While Justice Douglas concluded that the first amendment granted the petitioners a right to petition courts or administrative bodies, he also stated that such right “does not necessarily give them immunity from the antitrust laws.” Id. at 513. That statement is impossible to reconcile with Douglas’s statement quoted in the text. Supra text accompanying note 85; see also Fischel, supra note 7, at 88. The statement is also at odds with Noerr. As Justice Stewart retorted in his concurring opinion: “It is difficult to imagine a statement more totally at odds with Noerr. For what that case explicitly held is that the joint exercise of the constitutional right of petition is given immunity from the antitrust laws.” California Motor Transp., 404 U.S. at 517 (Stewart, J., concurring). It is, however, highly unlikely that Justice Douglas intended to limit Noerr, given that his decision actually extended Noerr immunity to a new context—attempts to influence adjudicatory bodies. Fischel, supra note 7, at 88.
ences of private interests. Unethical conduct condoned in the political arena was not immunized in the adjudicatory process. Hence, petitions before adjudicatory bodies were entitled to a different (lower) degree of immunity protection than that afforded petitions before legislative bodies.  

*California Transport* is an ironic decision. While the Court implied that the *Noerr-Pennington* doctrine was premised upon a constitutional principle applicable to petitioning activity before all branches of government, the decision also acknowledged the likelihood of antitrust liability for certain forms of unethical petitioning in the judicial setting. Moreover, while "sham" petitioning in the legislative arena may be as indefensible as bad faith litigation, antitrust liability for legislative lobbying was extremely unlikely since the Supreme Court was more willing to condone such activity, even with a predatory, anticompetitive motive.  

Justice Douglas apparently feared that unethical forms of interest group influence might undermine the judiciary's pivotal function of maintaining an "objective" process for institutional settlement. As the primary arena for dispute resolution, the judicial sphere of government requires, in Justice Douglas's view, special protection against improper forms of interest group influence. Thus, courts were allowed to adopt an exception to *Noerr* that would deny antitrust immunity to interest groups seeking to influence judicial outcomes through sham litigation.

87. For example, in reviewing the railroads' political campaign in *Noerr*, Douglas noted that while deception, misrepresentation, and unethical tactics are normally objectionable, the *Noerr* Court was mindful of the special nature of the deliberative process of "political" branches of government. *California Motor Transp.*, 404 U.S. at 512 ("Congress [had] traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities ... caution [that] would go for naught if [the Court] permitted an extension of the Sherman Act to regulate [such] activities [in the legislative context]." (citing *Noerr*, 365 U.S. at 141)). Douglas also noted that "misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *Id.* at 513. Insofar as administrative or judicial processes are concerned, Douglas was of the view that unethical conduct "cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'" *Id.*


89. Clearly, bad faith petitioning can more readily establish antitrust liability in the adjudicatory setting given Justice Douglas's views of the special nature of judicial and administrative proceedings. Commentators, however, have voiced concern that the "sham" exception has become an exception without boundaries. Professor Areeda, for example, has noted that the "sham principle calls for frivolous or otherwise unreasonable action in the use of governmental machinery, and this test will not often be satisfied." P. AREEDA, ANTITRUST LAW 9 (Supp. 1982). More recently, Areeda and Hovenkamp have been critical of courts and commentators who use the term "sham" as "a catchall for any activity that is not afforded *Noerr* protection." P. AREEDA & H. HOVENKAMP, *supra* note 78, at 16.
It was the need to legitimate judicial lawmaking that explains Justice Douglas' view that unethical conduct in the adjudicatory arenas of government should be subject to antitrust regulation, and why an exception to *Noerr* for litigation was deemed necessary. If special interest groups were allowed to ply the judicial branches of government with unethical forms of influence, such conduct might serve to undermine the pivotal function performed by adjudicatory bodies.\(^{90}\) If adjudicatory bodies are captured by special interests, or if they are utilized to accomplish purely private interests, the effectiveness of judicial review is undermined, thus calling into question the role of the judiciary in maintaining a "sound process" for institutional settlement of disputes.\(^{91}\) The delicate balance of power resulting from interest group struggle in legislative arenas thus was seen to depend on a system of judicial review that stands as a guardian over procedure, but remains aloof about the "political" outcomes of government. In this way, *California Transport* is consistent with the central premises of the *Noerr-Pennington* doctrine.\(^{92}\)

What the Supreme Court failed to consider was the real possibility that it may be easier to corrupt the legislative spheres of government because, unlike the adjudicative spheres, legislative bodies may lack adequate internal controls to check the raw political power of corporate interests utilized to dominate and influence the electoral, referendum, and legislative process.\(^{93}\) The dynamics of interest group representation is

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\(^{90}\) See, e.g., Clipper Express v. Rocky Mountain Motor Tariff Bureau, 690 F.2d 1240 (9th Cir. 1982) (falsehoods and misrepresentations not acceptable in the adjudicatory sphere because judges and administrators, unlike legislators, must rely on the parties for the accuracy of information to render decisions), cert. denied, 459 U.S. 1227 (1983).

\(^{91}\) Legitimating judicial lawmaking was a central concern of the legal process theory associated with the highly influential work of Henry Hart and Albert Sacks that dominated legal thinking during the fifties and sixties. See H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (10th ed. 1958); see also infra notes 118-22 and accompanying text.

\(^{92}\) While Justice Douglas concluded that *Noerr* immunity generally applies to administrative adjudicatory bodies, he nevertheless held that the complaint in *California Motor Transp.* properly stated a claim for relief because the allegations raised a bona fide claim under the sham exception. According to Justice Douglas, the allegations in the truckers' complaint in *California Motor Transp.* were sufficient to bring the case within the sham exception since the plaintiffs had alleged that the "power, strategy, and resources of the petitioners were used to harass and deter respondents in their use of administrative and judicial proceedings so as to deny them 'free and unlimited access' to those tribunals." *California Motor Transp.*, 404 U.S. at 511. In Douglas's view, antitrust liability is necessary to prevent competitors from abusing judicial-type process to "bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process." *Id.* at 512. Contrary to the view of some commentators, see, for example, Fischel, supra note 7, the Court's decision should not be read as constitutionalizing *Noerr*.

likely to be both qualitatively and quantitatively different in the legislative context because the representation and regulatory process is more vulnerable to the political influence of special interests. The economic power of interests can deny effective representation of certain interests having unequal power or representation in governmental processes. If governmental process is exposed only to certain interests and policy perspectives, minority interests and opinions will likely not be considered. Consequently, certain interests can more easily manipulate the deliberative process of government for private advantage. In the pluralist system, however, the courts are blind to these problems because judges are supposed to refrain from interfering with the ongoing political struggle occurring in the legislative spheres of government.

C. The Warren Court's Vision of Interest Groups, Political Freedom, and Antitrust

By the mid-1970s, the Noerr-Pennington doctrine had become an "unassailable" bedrock principle in antitrust law. The doctrine came to signify an important civil liberties exception to antitrust regulation, one that appeared to stand on solid, albeit unexamined, constitutional ground. Conventional wisdom of antitrust scholars argues that the doctrine is premised upon "powerful reasons." The doctrine is thought necessary to protect the constitutional privilege of citizens to petition their government. Commentators argue that genuine efforts to influence governmental action cannot be grounds for an antitrust violation because "the government's decision to act reflects an independent governmental choice, constituting a supervening 'cause' that breaks the link between a private party's request and the party's injury." It is believed that a
contrary rule would improperly cast the courts in the untenable position of second-guessing the motives or behavior of legislators simply because improper lobbying influence was brought to bear on the legislative process.97

antitrust plaintiff complains was proximately 'caused' by the government itself.” Id. According to Areeda and Hovencamp, judges will never be able to know for sure if impermissible petitioning activity was the cause in fact of legislation action since it is always possible that individual legislators may have voted for the particular legislative outcome anyway. Id. Finally, Areeda and Hovencamp argue that principles of policy argue in favor of such a view. To allow the court to inquire into the motives of legislation would, in their view, be condoning too much interference in the legislative sphere of government; necessitating improper judicial inquiry into motives and behavior of legislators. Id. at 65.

Areeda’s and Hovencamp’s idea of causation is highly positivistic in that it assumes that there is a stable and determinant basis for reaching conclusions about legal causation. Their arguments are premised upon a debatable factual interpretation that focuses on a particular contingent event—governmental action—as the crucial causal link to antitrust injury. Their analysis ignores the existence of other events, such as producer subversion of the governmental decisionmaking process, as an equally plausible cause of antitrust injury. Their characterization of causation is also justified by a policy argument that makes sense if one assumes that their interpretation of “what happens” in these cases is accepted as the only possible interpretation. Different factual interpretations, drawn from different policy perspectives, support different normative conclusions about what judges “ought” to be doing in the government petitioning cases. See Horowitz, The Doctrine of Objective Causation, in POLITICS OF LAW 201 (D. Kairys ed. 1982); Malone, Ruminations on Cause-In-Fact, 9 STAN. L. REV. 60, 61 (1956).

Alternative factual interpretations and policy conclusions are surely possible, especially if one focuses on the danger posed by the potential abuse of unregulated power exercised by interest groups in the legislative sphere. See supra note 2. If producer groups are able to subvert the deliberative process of government and thereby dictate legislative outcomes, then the courts would be justified in finding that attempts to instrumentally use economic power to capture governmental regulation, rather than governmental action itself, is the legal cause of plaintiff’s antitrust injuries. Evidence of political subversion, rather than governmental action, could have been seen as the cause of the antitrust injury in Noerr. Rather than breaking the chain of causation, governmental action was merely a conduit of a private conspiracy to restrain trade. The Noerr Court thus could have condemned the conduct of a producer group without inquiring into the motives or behavior of legislators.

97. See P. AREEDA & D. TURNER, supra note 63, at 49 (citing Fletcher v. Peck, 10 U.S. (Cranch) 87, 130 (1810)); A. BICKEL, THE LEAST DANGEROUS BRANCH 208-21 (1962). In Fletcher, the notorious Yazoo Land Fraud case, Chief Justice Marshall upheld a highly suspicious land grant made by the Georgia legislature, one that was influenced in part by bribery, on the ground that the courts should refrain from questioning the motives of legislators, no matter how corrupt those motives might be. Yet, Marshall’s decision in Fletcher is hardly beyond criticism; the Court might have held the original grant in Fletcher was invalid because the grant was the result of legally proscribed conduct independent of legislative motives—bribery of legislators. Indeed, Areeda and Turner recognize that Noerr should not apply to legally proscribed conduct. See P. AREEDA & D. TURNER, supra note 63, at 47 (“To predicate antitrust sanctions on an outright bribe, for example, is not to deprive the government of anything useful, to chill permissible behavior, to intrude upon legislative functions, or otherwise to sail on uncharted waters.”). Evidence calling into question the legitimacy of the legislative process should itself be reason for the exercise of judicial review. Professor Bickel’s theory of judicial restraint expressed in The Least Dangerous Branch is not to the contrary, for Bickel’s theory of the judicial review assumes that the legislature is democratic and institution-
The conventional wisdom in support of the Noerr-Pennington doctrine makes perfect sense if one accepts the Warren Court's political vision of interest group politics. This vision assumes that legislative outcomes influenced by private interest groups warrant respect and that unethical conduct in the legislative arena is irrelevant for antitrust purposes. Petitions that seek to influence governmental action thus are insulated from antitrust regulation because it is thought that petitions, even if anticompetitive in purpose or effect, are essential to uphold political freedoms. The Supreme Court assumed that interest groups are essential to political freedom because they create and preserve a marketplace of ideas. Private anticompetitive conduct that normally would be proscribed by the antitrust laws is left unchecked because it is assumed that the antitrust injury of private plaintiffs is "caused" by governmental, not private, action. And whatever the factual link may be, the courts are admonished not to second guess the motives and behavior of legislators.

The Warren Court's approach to government-petitioning cases, and the justifications that have developed to support that approach, are heavily laden with presuppositions about the impropriety of judicial regulation of interest group lobbying in the legislative context. Interest group activity is insulated from antitrust regulation because such activity is political, and not market-oriented. Paradoxically, it was the logic of the market that served to justify the Warren Court's belief that private interest group activity is necessary to preserve political freedom. Marketplace ideas have served as legal constructs for structuring both political and market activity, though the underlying justification for establishing antitrust immunity is premised upon a contrary view—that petitioning activity in the legislative sphere is political, not market activity. The effort to draw lines between market and political activity has created a highly manipulable legal doctrine from which lawyers have generated contradictory arguments.


98. Political freedom, as distinguished from personal freedom, entails the right of citizens to participate in the political process as a necessary condition of self-realization of personal and economic liberty. As Professor Michelman has defined the term, "[b]y 'political freedom' I mean the redemption or achievement of personal freedom from or through the institutionalized social power that regulates social conflicts, given a perception of need for some form of such power." Michelman, Law's Republic, supra note 15, at 1494 n.2.

99. The marketplace of ideas theory has also served as the Court's logic for finding that profit-oriented speech of corporations and their political action committees are entitled to first amendment protection. See, e.g., First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (holding statute that prohibits corporate speech unconstitutional); C. Baker, supra note 93, at 221-23.
The Warren Court left future generations with a federal policy dilemma. By refusing to intervene in the political arena, the Court has tacitly allowed special interests to influence, and potentially to determine, the quality and character of governmental policy. Interest group petitioning threatens to undermine the legitimacy of the deliberative process of government, thereby frustrating the ability of government to establish economic regulations serving the public interest. The danger posed by the exercise of unregulated corporate power in the legislative spheres of government was overlooked due to optimism that sustained the Warren Court's understanding of interest group politics. The problem was that the Supreme Court had internalized a flawed understanding of the actual nature of the legislative process.

The dilemma posed by the exercise of unregulated power of interest groups might have been avoided had the Court adopted an alternative perspective; one that accepts the notion that both competitive policy and political freedom require regulation of certain abusive and harmful forms of corporate interest group lobbying. This pessimistic perspective would question the view that interest groups invariably establish a marketplace of ideas that advances rather than hinders political freedom. In adopting such a perspective, judges might then decide that some forms of anticompetitive corporate petitioning cannot be justified as protected political expression, especially when government is a mere conduit for a private conspiracy in restraint of trade. In such cases, plaintiff's antitrust injuries would be "caused" by private, not governmental action.

The policy underpinnings of Noerr-Pennington, however, reflect the Warren Court's commitment to a different understanding of special interest group politics, one that optimistically accepts the perspective of political pluralism. According to pluralists, the influence of powerful private groups over legislative and administrative processes is not an evil,

100. In political science, the term pluralism has a rich meaning. See R. Dahl, A Preface to Democratic Theory (1956); E. Latham, The Group Basis of Politics (1952); D. Truman, The Governmental Process (1951); see also infra note 109. Interest group pluralism has dominated the thinking of political scientists for much of this century. See A. Bentley, The Process of Government (1967); W. Binkeley & M. Moos, A Grammar of American Politics (1950); R. Dahl, supra; V.O. Key, Politics, Parties, and Pressure Groups (4th ed. 1958); D. Truman, supra; see also W. Eskridge & P. Frickey, supra note 15, at 46-56. Political pluralists must be distinguished from those who merely celebrate diversity in society. See Michelman, Law's Republic, supra note 15, at 1507; see also Sunstein, supra note 3, at 32 (using the term "pluralist" to define a political conception of government distinct from that associated with democratic pluralism). There are thus various meanings of pluralism (normative and analytical, pluralism as dispersed power, pluralism as dispersed preferences) that must be distinguished from ideas of political pluralists. See, e.g., Miller, Pluralism and Social Choice, 77 Am. Pol. Sci. Rev. 734, 734-36 (1983).
but rather an affirmative requisite for advancing the public interest. From the pluralist's perspective, the results of the political process normally should be respected. Once it is established that a legislature has made a rational policy decision, the courts' duty is to enforce the statutory purpose. It should make no difference that special interest groups influence the legislatures' deliberative process. Disparities in influence are expected in politics, and the fact that one interest prevails over another is the nature of a pluralist democracy.

In the 1960s, there was substantial academic opinion supporting the Warren Court's *Noerr-Pennington* doctrine. Most political scientists of that time subscribed to the view that the political process reflects a healthy equilibrium of private power. Because organized interests were thought to be necessary for both effective representation and the advancement of the public interest, it was thought that the role of the judiciary should be limited to ensuring that all groups have access to the political process and to upholding agreements worked out among competing interests. The overall political objective was to maintain the balance of group pressure in government. In the *Noerr*, *Pennington*, and *California Transport* cases, prevailing conceptions of pluralism encouraged the Court to see federal competition policy under the Sherman Antitrust Act as "at war" with the central premises of a democratic government. There is now a growing consensus that seriously questions the *Noerr* doctrine and the underlying pluralistic perspective it reflects.

II. Modern Interest Group Theory and Antitrust: Reassessing the Policy Underpinnings of the *Noerr-Pennington* Doctrine

The policy underpinnings of the *Noerr-Pennington* doctrine can be criticized. A group of competitors or a single firm seeking to utilize the machinery of government to obtain, maintain, or strengthen monopoly power might employ a host of tactics, strategies, and ploys.\textsuperscript{101} Legislative lobbying by corporate interests is the paradigmatic case. Large lobbying expenditures by a group of competitors can be used to "drown

\textsuperscript{101} Collaborators or a single firm might seek to perfect an antitrust purpose through overt measures such as bribery, collusion, campaign contributions, promises of campaign support, or by indirect, less obvious means, designed to overwhelm the process and stifle effective lobbying by others. Overt measures involving bribery and collusion represent the easy cases, since such tactics are illegal in and of themselves. The difficult cases involve the pursuit of anticompetitive objectives through covert, less obvious means. See generally P. AREEDA & D. TURNER, *supra* note 63, at 36-37.
out" opposing views of rivals. An aggressor may seek to exploit its strategic position as market leader, devoting greater expenditures to lobbying, thus enjoying superior access to the political process. A single firm or a group of competitors might adopt a predatory lobbying strategy to exploit cost asymmetries by manipulating governmental process to increase rivals' cost of doing business. A related strategy might involve pressing for governmental decisions that impose barriers to entry by making it difficult for actual and potential competitors to compete. Joint lobbying even for legitimate purposes also creates the possibility that concerted action will provide an inviting opportunity for competitors to conspire for anticompetitive purposes. Finally, free rider and collective action problems suggest that consumers may be unable to organize opposing lobbies to make their wishes known on most public policy matters, thus leaving the field open to special interest groups to inordinately influence decisionmaking.

Petitioning in the legislative context can be a means for producer groups to capture the legislative process to achieve benefits at the expense of others. Perhaps the most effective and dangerous capture strategy involves control of information in the deliberative process. In controlling the flow of information on complex issues, predators can effectively "'distort congressmen's thinking on an issue' " by inundating legislators with misleading, incorrect, or misrepresented information. Lies,

102. See, e.g., M. Tushnet, Red, White and Blue: A Critical Analysis of Constitutional Law 283 (1988). The most recent empirical investigations of D. Schlozman & J. Tierney, supra note 2, at 317, indicate that interest groups have substantial resources that can determine legislative outcomes especially when the interest group is seeking to block rather than obtain legislation, when the group's goals are narrowly focused and involve low-profile issues, when the group has substantial support from other factions, and when the group is able to direct its influence in a favorable forum. Id. at 314-15, 398; see also Farber & Frickey, Jurisprudence, supra note 15, at 887.
103. Hurwitz, supra note 1, at 70-73; Klein, Strategic Sham Litigation: Economic Incentives in the Context of the Case Law, 6 INT'L. REV. OF L. & ECON. 241, 244 (1986).
104. See Hurwitz, supra note 1, at 73-5; M. Tushnet, supra note 102, at 283.
105. Hurwitz, supra note 1, at 75-76.
107. See Wiley, supra note 4, at 715. In conceiving regulation as capture by producers, Professor Wiley has seriously questioned the wisdom underlying the public interest concept of regulation that has informed some of the pivotal Supreme Court decisions involving the conflict between state regulation and federal antitrust policy. Wiley argues that the Supreme Court's state action decisions should more explicitly adopt a concept of regulation "as a product not of broad political consensus but of the capture of lawmakers by producer groups seeking benefit at the expense of others." Id.
misrepresentations, and distortions are difficult to counteract when sophisticated means are used to cover and conceal the truth. It is even more difficult to counteract the effect of repeated distortions implemented by firms with large financial resources. Because the exercise of overwhelming influence can neutralize the impact of competing lobbies and petitioning efforts, the danger exists that petitioning will stifle the deliberative process and render legislative decisionmaking less effective.

On the other hand, corporate involvement in governmental policy is undoubtedly essential for intelligent decisionmaking. Policymakers need to have input from the business community when business interests are, or arguably might be, affected by contemplated legislation. Information concerning corporate interests is an essential ingredient for government officials exercising authority to render policymaking decisions, applying discretionary criteria, and performing other sorts of legislative functions. Therefore, undue restrictions on the right of corporate interests to petition government to influence government action would be unwise.

Obviously, a more selective analysis is required in the government-petitioning cases. What is needed is an approach that carefully regulates the offensive anticompetitive aspects of interest group petitioning while preserving the essential function petitioning serves in a representative democracy. To develop a more intricate analysis of the petitioning of government cases—one that responds to and respects federal competition policy as well as the values of political expression and debate—it is necessary to re-examine the central premises and assumptions of Noerr-Pennington in light of modern interest group theory.

A. The Theory of Interest Group Pluralism

Pluralism, in the 1960s, provided a conception of politics that optimistically accepted the legitimacy of interest group influence in the political process.109 Since de Tocqueville, it has been recognized that special

109. While pluralists during the early 1960s accepted interest group influence in government, they were optimistic about the role interest groups would play in government, believing that "interest groups would not result in mere shifting, temporary majorities." Eskridge, supra note 15, at 281 (describing the optimistic perspective of the pluralists in the 1960s).

Robert Dahl's study of New Haven politics is frequently cited for empirical support of the optimism that pluralists project about how interest groups promote the public interest in politics. See R. DAHL, WHO GOVERNS? (1961); R. DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL (1982) [hereinafter R. DAHL, DILEMMAS]. Modern pluralist theorists argue that interest group factions work to disperse power and curb domination of the state through mutual control of diverse interests. See V.O. KEY, supra note 100, at 8; R. DAHL, DILEMMAS, supra, at 36 ("special interest groups can transform domination of the state into a system of mutual controls"). According to the pluralist vision, the legislature is an arena in which interest group conflict is played out. See A. BENTLEY, supra note 100, at
interest groups, or "factions," are essential to the representative processes of American government. No one denies this fundamental characteristic of large republics. Today, the question is whether interest group regulation is needed to promote a more virtuous government or whether such regulation is itself a threat to the effective functioning of the political process.

Pluralists believe that interest group autonomy is a desirable feature of American politics and that political ordering is essentially private activity. In their view, interest groups must remain autonomous so that the pursuit of self-interest will, like the "invisible hand" mechanism of the market, lead to the aggregate social welfare. Interest groups are seen to have unified interests and engage in rational decisions similar to those of "rational" people buying and selling products in the market.

260-61. Legislative outcomes are said to "mirror the equilibrium of competing group pressures." Farber & Frickey, Jurisprudence, supra note 15, at 884 (citing E. Latham, supra note 100, at 35). Today most pluralists are much less optimistic about the role of interest groups in government; many raise doubts about the ability of government to "accommodate" special interest groups. See, e.g., R. Dahl, Dilemmas supra, at 166 ("organizational pluralism may also play a part in stabilizing inequalities, deforming civic consciousness, distorting the public agenda, and alienating final control over the public agenda by the citizen body").

109. R. Dahl, Dilemmas, supra note 109, at 31. The problem of "factions" was a serious source of difficulty during the debates leading to the ratification of the Constitution. See Sunstein, supra note 3, at 35-45; W. Eskridge & P. Frickey, supra note 15, at 38-40. Federalists, such as James Madison, who supported ratification of the Constitution and the creation of a strong central government, argued that the influence of factions would be moderated by "checks and balances" and "separation of powers." Madison's The Federalist No. 10, for example, can be seen as a "conventional pluralist document" advancing the belief that the problem of factions would be overcome in a large democracy where sufficient numbers would serve as a "built-in check against the likelihood of factional tyranny." Sunstein, supra note 3, at 39-40. The "Anti-Federalists" who believed in the republican ideal of "civic virtue" opposed ratification because they believed that a decentralized government was necessary to control the corrupting influence of special interest group factions over the deliberative processes of government. The fear was that "[r]ule by remote national leaders would attenuate the scheme of representation, rupturing the alliance of interests between the rulers and the ruled." Id. at 37. Sunstein suggests the Federalists ultimately "achieved a kind of synthesis" of the two positions by arguing that the "mechanisms of accountability" and "separation of powers" would ensure that politics through interest group struggle would approximate the republican ideal of "deliberation and discussion about the public good." Id. at 47.

111. Sunstein, supra note 3, at 34. The commitment to democratic process is said to justify the idea that interest groups should be allowed to exercise independence and autonomy in their activities. See also R. Dahl, Dilemmas, supra note 109, at 32. According to the pluralist view, citizens are motivated to form different faction groups in order to participate in the process of lawmaking. The participation of different factions within government is said to strengthen solidarity and division, cohesion and conflict, by bringing to bear the full range of constituents' interests in the deliberative process of government. Id. at 44. In this sense, "[p]olitical ordering is . . . assimilated to market ordering." Sunstein, supra note 3, at 33.

112. See, e.g., Sunstein, Beyond the Republican Revival, supra note 15, at 1542. In adopting a pragmatist philosophy, pluralists favor "a practical, functional inquiry which contextual-
Pluralists favor an unregulated political process. Regulation of interest group activity would, in their view, cause distortions in the market-like mechanisms of the political process. Because interest group lobbying is assumed to take place in a democratic process, it is presumed that the ensuing political struggle between different competing interest groups will establish the ultimate legitimacy of lawmaking. For this reason, process-oriented legal pluralists believe that political lawmaking establishes the "ultimate authority over lawmaking by other institutions—courts, administrative agencies and private parties." In thinking of groups from an individualistic perspective, pluralists argue that the political freedoms of citizens are rendered effective through group participation in the political arena. The possibility that excessive expenditures of particular interest groups might "drown out" the views of others is not considered to be a problem because in a pluralist system each side of an issue is presumed to have the same opportunity to appeal for financial support. The drowning out of some views on an issue is to be expected when a particular view is adopted on the "merits."
In legal theory, the pluralist perspective helped shape the influential theory of legal process advocated by Henry Hart and Albert Sacks. The legal process school of legal analysis accepted the pluralist concept of politics in advancing a new legal methodology for doing legal analysis—a methodology that promised an objective "process" for resolving subjective questions of "public policy." Underlying process theory is the belief that a system of rational principles can be devised for legal analysis that respects normative requirements for a just democracy without violating the law and politics distinction.

The jurisprudential project of process theorists also reflected the optimistic perspective of political pluralists who believe that majoritarianism and rational policy are safe in a governmental process structured by interest group politics. While Hart and Sacks acknowledged that most legislation is enacted in response to the pressures of special interest groups, they assumed that the legislative branch of government would act pursuant to rational purposes. Hart and Sacks apparently believed that legislative policy decisionmaking would be responsive and democratic so long as interest groups' influence was subject to a "sound process" for reaching legislative enactments. The courts would ensure that the correct "procedures" are followed, but questions of "substance" would be resolved through the political process of institutional settlement.

118. H. HART & A. SACKS, supra note 91; see also Eskridge, supra note 15, at 281-83; Peller, supra note 97, at 568-72.

119. Legal process theory focuses on questions of institutional competence, reasoned elaboration, and democratic government. See, e.g., Greenawalt, The Enduring Significance of Neutral Principles, 78 COLUM. L. REV. 982, 982-83 (1978); see also Minda, The Jurisprudential Movements of the 1980s, 50 OHIO ST. L.J. 1, 44-46 (1989). Process theorists argue that the power of common-law judges and administrative agency officials could be rendered consistent with democratic principles through adherence to an objective legal process which limited judicial choices to the level of "process," i.e., the level of procedure and jurisdiction. Questions concerning "substance," would be resolved through adherence to the principles of "institutional settlement" which specified the political competence of the various institutions of government to render decisions.

120. Eskridge, supra note 15, at 283.


122. H. HART & A. SACKS, supra note 91, at 715 ("[T]he best criterion of sound legislation is the test of whether it is the product of a sound process of enactment."). Hart and Sacks, however, ignored the possibility that interest group influence might corrupt the deliberative process of government. See Eskridge & Frickey, supra note 121, at 697.

123. The "principle of institutional settlement" was invoked by the process theorists to distinguish legitimate and illegitimate exercises of official power by determining the competent institution capable of settling particular types of disputes. See Peller, supra note 97, at 568-72. By focusing on jurisdiction and procedure, the crucial question for the process theorist was
Hart and Sacks assumed that without some showing to the contrary, the "legislature was made up of reasonable persons pursuing reasonable purposes reasonably." Their notion of a deliberative legislative process is extremely optimistic because they assumed that interest group influence could be mediated by an inherently democratic process. Process theorists following the Hart and Sacks paradigm have since argued for deference to the political process precisely because they assume that the judiciary is incompetent to make the type of value choices that can only be rendered by the "political process" of government. Because there was no neutral way to resolve such questions, decisionmakers in the judicial spheres are encouraged to enforce the legislative outcomes dictated by interest group pressures.

In first amendment jurisprudence, the pluralistic premises of interest group theory share a strong affinity with the "marketplace of ideas" theory that has dominated the Supreme Court's views about political speech. According to the "marketplace of ideas" theory, expression is protected by the first amendment whenever it promotes discussion and "Who decides?"—i.e., "which institutions' determination would govern in case of conflict." Id. at 570. Principles of institutional settlement were then developed to determine which institution "ought" to decide particular questions. Id.

125. The flaw in Hart & Sacks theory of the legal process is that the theory embraced an extremely naive and overly optimistic conception of the legislative process—one that failed to appreciate the role of special interest groups in determining the content of legislation. See Sunstein, Interpreting Statutes In The Regulatory State, 103 HARV. L. REV. 407, 435 (1989). Of course, as Professor Sunstein has noted, this is not an "unsurprising omission in light of the fact that most of the relevant literature has emerged in the last generation." Id.
126. See H. HART & A. SACKS, supra note 91, at 1414. This view was also the central thrust of the theory of judicial review advocated by Herbert Wechsler in his broadside attack on Brown v. Board of Ed., 347 U.S. 483 (1954). See Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959); see also Peller, supra note 97, at 564.
127. While some argued that judges should have a more active role in determining the "reasonableness" of legislation, see, for example, Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 VAND. L. REV. 395, 399 (1950), it was generally accepted that the judicial role should be strictly limited. See Sunstein, supra note 125, at 434-35. As Sunstein has argued, because there was no neutral way to resolve value questions involved in legislation, judges were admonished to focus on the "context of the statute's application rather than to its background and development." Id. at 435.
128. The classic statement of the marketplace of ideas, the notion that truth is discovered through competition with falsehood, can be found in J.S. MILL, ON LIBERTY ch. 2 (1947). The marketplace of ideas concept filtered into first amendment jurisprudence as a result of Justice Holmes' famous dissent in Abrams v. United States, 250 U.S. 616, 630 (1919) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."). See also Whitney v. California, 274 U.S. 357, 375-78 (1927) (Brandeis, J., concurring). For a recent perceptive and compelling critique of the marketplace of ideas theory in first amendment jurisprudence, see C. BAKER, supra note 93.
enhances information dissemination necessary for robust debate and the search for truth. Political expression is protected by the first amendment because restrictions on expression would suppress information and discussion, undermine the market for ideas, and prevent the discovery of truth. In the marketplace of ideas, everything worth saying on a subject should be said.

Since expression of widely different views is required to eliminate the possibility of mistakes in judgment, suppression of expression is not justified unless there is a clear and present danger or unless the expression lacks redeeming social values, as does obscenity. Hence, it has been said that "[f]or true pluralists, good politics can only be a market-like medium through which variously interested and motivated individuals and groups seek to maximize their own particular preferences." The political vision of true pluralists supports Justice Black's fear in \textit{Noerr} that antitrust regulation of the political activity of interest groups might offend first amendment values.

\textbf{B. Pessimistic Pluralists}

By the mid-1960s, a subsequent generation of pluralists became pessimistic about the ability of government to accommodate special interests. Some raised empirical objections concerning the ability of interest groups to perform the representative function in government that other pluralists had assumed would be performed by special interests struggling for political favors. Still others questioned the ability of in-

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\bibitem{129} C. Baker, \textit{supra} note 93, at 194.
\bibitem{130} \textit{Id.} at 24.
\bibitem{131} \textit{Id.} at 8-9; \textit{see e.g.}, Sunstein, \textit{Pornography and the First Amendment}, 1986 DUKE L. J. 589.
\bibitem{132} Michelman, \textit{Law's Republic}, \textit{supra} note 15, at 1508.
\bibitem{134} \textit{See e.g.}, L. Milbrath, \textit{The Washington Lobbyists} (1959) (systematic survey of lobbyists conducted during the 1950s suggesting that interest groups did not play a central role in governing); R. Bauer, I. Pool \& L. Dexter, \textit{American Business and Public Policy} (1963) (study of interest groups suggests that realities of organizational life make it unlikely that interest groups can sustain effective influence over government). The more recent empirical study by Schlozman and Tierney discusses factors that are likely to enable interest groups
terest groups to adequately present the multitude of interests within society. As one critic put it: "The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent." Even the founder of some of the most optimistic pluralistic theories of political science, Robert Dahl, acknowledged that interest groups may use their independence to "play a part in stabilizing inequalities, deforming civic consciousness, distorting the public agenda, and alienating final control over the public agenda by the citizen body."

In recognizing that organized interest groups must be both autonomous and yet subject to legal controls, modern pluralist thinkers have attempted to locate master problems in the theory of interest group pluralism. Some have suggested that interest group pluralism might be premised upon a fundamental contradiction—what Dahl has called the "dilemmas of pluralist Democracy." While Dahl accepts the notion that independent organized interests are both inevitable and indispensible for large-scale democracies, he also recognized that "independence and autonomy... create an opportunity to do harm."

Dahl's modern notion of pluralism can be understood in terms of a paradox basic to any pluralistic understanding of interest groups. Independent interest group organizations are both necessary and threaten-

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136. R. Schattschneider, supra note 133, at 35.
137. R. Dahl, Dilemmas, supra note 109, at 166 (one of the founding fathers of modern pluralist theory in the 1950s). As Robert Dahl now explains:

Independent organizations are highly desirable in a democracy, at least in a large-scale democracy. Whenever democratic processes are employed on a scale as large as the nation-state, autonomous organizations are bound to come into existence...

Yet as with individuals, so with organizations; independence or autonomy (I use the terms interchangeably) creates an opportunity to do harm. Organizations may use the opportunity to increase or perpetuate injustice rather than reduce it, to foster the narrow egoism of their members at the expense of concerns for a broader public good, and even to weaken or destroy democracy itself.

Id. at 1. The pluralist perspective advanced by Professor Dahl in the 1980s thus appears to be much more pessimistic than the one he advanced in the 1950s. See, e.g., R. Dahl, Preface, supra note 115, at 16; R. Dahl, Who Governs?, supra note 109, at 1-3.

138. R. Dahl, Dilemmas, supra note 109, at 1. Dahl argues that independent interest group organizations are desirable because they "help curb hierarchy and domination of majoritarian rule." Id. at 32. Dahl argues that autonomous interest organizations are inevitable because they are "a necessary element in large-scale democracy, both as a prerequisite for its operation and as an inevitable consequence of its institutions." Id. at 36. Dahl nevertheless argues that independent organizations give rise to the possibility of harm. See supra note 109.
ing to a representative democracy because without interest groups a representative democracy cannot operate properly, and yet the very existence of independent groups pressuring government is dangerous to democracy. The simultaneous need for independence and control is unavoidable in the pluralist system.

Today, modern pluralist thinkers have attempted to develop structures that manage and contain two diametrically opposed policies—one seeking to affirm the independence of interest groups, the other seeking to maintain regulatory control over their activities. For example, Dahl has argued that the boundaries between the public and private spheres of government should be restructured radically to permit public ownership of private property to achieve the democratic ideals of a more egalitarian pluralism.

Dahl and other modern pluralists now acknowledge that the distinction between private interest and public power has eroded as interest groups have become more powerful in government. The erosion of the distinction between public and private has made the task of drawing lines or making choices between upholding the independence of private interest groups or protecting the public interest from the threat of private interest influence an incoherent and meaningless task. The pessimism of modern pluralists serves to question the perspective of those who assume that legal doctrines can be created to make sharp distinctions between the exercise of private and public power.

Since the exercise of private power can be as coercive as any governmental authority, and since private interests are largely unaccountable, there is reason to question the wisdom of an antitrust doctrine that allows private interest groups to influence governmental process without governmental control. At least two related groups of modern pluralists, public choice and capture theorists, offer criticism relevant for meaning-


141. He would thus restructure privately owned, market-oriented economies toward public ownership, transfer private ownership into public ownership, and generally call for the establishment of a civic virtue committed to the public good. See R. Dahl, Dilemmas, supra note 109, at 166-205. Dahl was unable to conclude, however, that his remedies for restructuring government would be sufficient to cure the "defects in the American system of organizational pluralism." Id. at 205.
ful re-examination of the policy underpinnings of the Noerr-Pennington doctrine.

(I) Public Choice Theorists

Public choice theory challenges the premises of interest group pluralism by asserting an economic analysis of the political process.\(^{142}\) Rejecting the "romantic and illusory set of notions about the working of governments" projected by the pluralistic perspective, these theorists call for a more hard-headed and rigorous political analysis, what Professor James Buchanan calls "politics without romance."\(^{143}\) Accordingly, they treat the political and legislative process as if it were a microeconomic system subject to the disciplinary impulses of a market structured by the individual pursuit of self-interest.\(^{144}\) Interest groups are seen as "rent-seekers"\(^{145}\) who influence the political process to achieve their selfish economic interests, and legislators are seen as motivated to advance their own self-interest, especially their interest in re-election.

Perhaps the best description of public choice theory as it relates to the new economic approach to interest groups and legislation is given by Professor William Landes and Judge Richard Posner:

In the economists' version of the interest-group theory of government, legislation is supplied to groups or coalitions that outbid rival seekers of favorable legislation. The price that the winning group bids is determined both by the value of legislative protection to the group's members and the group's ability to overcome the free-rider problems that plague coalitions. Payments take the form of campaign contributions, votes, implicit promises of future favors, and sometimes outright

145. "Rent-seeking" refers to the attempt to obtain economic rents (i.e., payments for the use of an economic asset in excess of the market price) through government intervention in the market. A classic example of rent-seeking is a corporation's attempt to obtain monopolies granted by government. Such monopolies allow firms to raise prices above competitive levels. The increased income is economic rent from government regulation.

bribes. In short, legislation is "sold" by the legislature and "bought" by the beneficiaries of the legislation.146

Public choice theorists reject the optimistic vision of the political process of pluralism on various grounds. First, public choice theorists utilize game theory to reveal how "political processes are fundamentally chaotic and unpredictable, that almost anything can happen."147 Public choice theorists also offer a theoretical justification for believing that majoritarian rule will fail to accommodate conflicts of interest among different special interest groups. Raising the paradox presented by "Arrow's Impossibility Theorem," these theorists have argued that "majority rule may be unable to resolve the choice among three or more mutually exclusive alternatives."148 While legislatures may seek to skirt "Arrow's Paradox" by adopting various "structures, rules, and norms" to eliminate the necessity of choosing between three or more mutually exclusive

146. Landes & Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J.L. & ECON. 875, 877 (1975). Judge Posner has since argued for a cautious approach to statutory interpretation. See R. Posner, supra note 15, at 286-93 (arguing that judges must seek to implement legislative outcomes, but only if the compromise reached by legislation is reasonable). Judge Easterbrook, on the other hand, appears to be less cautious in applying public choice theory to statutory interpretation. See Easterbrook, Statutes' Domain, supra note 15, at 544 (arguing that legislatures are unable to articulate clear policies because they do not act purposefully); see also Farber & Frickey, Jurisprudence, supra note 15, at 880-82.


148. See K. Arrow, Social Choice and Individual Values (2d ed. 1963). Professors Farber and Frickey, have used the following example to explain "Arrow's Paradox":

In some circumstances, majority rule may be unable to resolve the choice among three or more mutually exclusive alternatives. For a simple example, assume that three children—Alice, Bobby, and Cindy—have been pestering their parents for a pet. The parents agree that the children may vote to have a dog, a parrot, or a cat. Suppose each child's order of pet preferences is as follows: Alice—dog, parrot, cat; Bobby—parrot, cat, dog; Cindy—cat, dog, parrot. In this situation, if pairwise voting is required, then majority voting cannot pick a pet, as the reader can verify. Farber & Frickey, Jurisprudence, supra note 15, at 902. Arrow illustrates how "no method of voting, or any other method of making social decisions, can avoid the possibility of such paradoxical results." Id. However, there may be some situations that permit one to skirt the paradox. As Farber & Frickey explain:

In the example above, a majority decision is possible if the children agree that a pet's size is the only relevant factor and merely differ in their conception of the ideal size. Such a case is an example of a population with 'uni-peaked preferences'; this situation avoids Arrow's result and allows consistent, noncyclical majority rule. Similarly, in a legislature, voting paradoxes can be avoided if each legislator ranks her choices on a liberal-to-conservative scale, and differs only in her preferred location on the scale. Furthermore, Arrow's Paradox need not occur if the result involves more than a head count. For instance, strength of preferences may be somehow considered or the legislators may agree to debate until one side persuades the other. These escapes from Arrow's paradox may play a significant role in legislatures, particularly in smaller groups such as committees.

Farber & Frickey, Jurisprudence, supra note 15, at 902.
alternatives, there are other technical problems that these theorists raise in questioning the operation of political systems structured by interest group pressure.

For example, drawing from Mancur Olson's work on collective choice, public choice theorists have argued that since rational individuals can be expected to take a "free ride" on the efforts of others, it may be difficult to organize large groups of citizens to advance the public interest implicated in the allocation of public goods. "If the group is large, individual members have little incentive to participate because participation is personally costly and contributes little to the group's chances for successful joint action." Public choice theorists thus predict that political activity is likely to be dominated by small interest groups seeking to advance their own special interests, frequently at the expense of the public good.

Olson's collective action problem also casts doubt on the pluralist assumption that interest group pressure yields a distribution of legislative choices that reflects the public interest. Public choice theorists, relying upon Olson's work, argue that the market for legislation is inefficient precisely because private organizations will fail to spring up and represent the needs and interests of certain groups within society. Because free rider problems work to the advantage of small special interest groups, the market for legislation is seen as dysfunctional in allowing too much rent-seeking legislation at the expense of the public interest. Public choice theorists thus pose a serious challenge to optimistic pluralists who believe that interest groups press legitimate grievances and bring a variety of socioeconomic perspectives into political debate.

Finally, public choice theorists also question the efficacy of the "proceduralism" of legal process scholars who, following the process tradition of Hart and Sacks, uncritically assumed that judges can devise procedural standards to mediate and curb the dominating influence of special interest groups in government. Public choice theorists argue that the procedural mechanisms of the deliberative process actually "exacer-

149. Farber & Frickey, Jurisprudence, supra note 15, at 904.
151. Wiley, supra note 4, at 724; see also Farber & Frickey, Jurisprudence, supra note 15, at 892. For a recent illustration of how pre-existing institutional structures may enable a large group of producers to get around collective action problems see Miller, Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine, 77 Calif. L. Rev. 83, 89-104, 130 (1989).
152. M. Olson, supra note 150, at 126-31; see also Eskridge, supra note 15, at 285. But see Miller, supra note 151, at 30 (illustrating how a "mass of five million dairy farmers and many thousands of factory owners and merchants" coalesced power to stamp out competition from oleomargarine).
bate the tendency of the legislature not to pass public goods legislation but will not much impede its ability to pass rent-seeking laws. They point to examples such as the Smoot-Hawley Tariff Act of 1930, the history of which vividly illustrates how the proceduralism of legislation allowed industry interest to draft, with little interference from Congress, unreasonably high tariffs to protect against foreign competition. These theorists give reason for doubting the validity of Justice Black's optimistic understanding of how interest groups actually operate in a representative government.

(2) Antitrust Capture Theorists

Drawing on public choice theory, a new breed of antitrust scholar questions the public interest concepts of legislation that have informed some of the pivotal Supreme Court decisions involving conflict between state regulation and federal antitrust policy—problems that pose issues of "antitrust federalism." In reviewing recent decisions that seem to narrow the state action doctrine of Parker v. Brown, Professor John Wiley has argued that the Supreme Court's recent state action decisions appear to move toward a concept of regulation "as the product not of broad political consensus but of the capture of lawmaking bodies by producer groups seeking benefit at the expense of others." In developing a theory of antitrust capture to explain these cases, Professor Wiley has lent

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155. See Wiley, supra note 4, at 714.
156. 317 U.S. 341 (1943). In Parker v. Brown, the Supreme Court held that anticompetitive arrangements may be exempt from the antitrust laws if they are part of a state regulatory regime. If a government-created restraint of trade is exempt from the Sherman Act as a result of Parker, then it might seem logically necessary to confer a similar immunity for legitimate means designed to induce the government to establish the restraint. See Note, Application of the Sherman Act, supra note 9, at 848. The problem with such a suggestion is that whatever constitutes a legitimate means is not self-evident; deference to representative processes should not be required if those processes have been captured by special interests. See Wiley, supra note 4, at 715, 723-28.

support to the view of public choice theorists who are critical of the public interest concept of legislation underlying interest group pluralism.

Wiley's proposal for transforming the current doctrine of state action under *Parker* is motivated by a desire to encourage antitrust decisionmakers to take into account the dangers of regulatory capture. Wiley concludes that public choice theory and studies of the regulatory process, while failing to establish a comprehensive theory of regulation, offer a persuasive description of the "mechanics and resulting evils of regulatory capture." In drawing from such sources, Wiley proposes a new approach to state action problems that respects both the antitrust rationale of market efficiency as well as the concern for political legitimacy of the democratic process. He argues that state regulatory regimes should be preempted by the federal antitrust laws whenever four criteria have been satisfied: (1) the regulation restrains market rivalry; (2) the regulation is not protected by an antitrust exemption; (3) the regulation lacks a market efficiency justification, and (4) the regulation is the product of producer capture "in the sense that it originated from the decisive political efforts of producers who stand to profit from its competitive restraint."

158. Id. at 725.

159. In addition to the public choice theory previously discussed, Professor Wiley also relies upon case studies by economists, political scientists, and others of the left and right political perspectives to support his view. See id. at 724 (citing R. CAVES, AIR TRANSPORT AND ITS REGULATORS (1962); G. KOLKO, supra note 15; P. MACAVOY, THE ECONOMIC EFFECTS OF REGULATION (1965); Hilton, The Consistency of the Interstate Commerce Act, 9 J.L. & ECON. 113 (1966); Moore, The Purpose of Licensing, 4 J.L. & ECON. 93 (1961); Plott, Occupational Self-Regulation: A Case Study of the Oklahoma Dry Cleaners, 8 J.L. & ECON. 195 (1965); Stigler & Friedland, What Can Regulators Regulate? The Case of Electricity, 5 J.L. & ECON. 1 (1962)).

160. Wiley, supra note 4, at 743. The first two criteria (state action that restrains competition and state action not protected by a statutory preemption) merely restate requirements that are already recognized in the state action doctrine under *Parker*. See, e.g., Spitzer, Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory, 61 S. CAL. L. REV. 1293, 1300-01 (1988). The third criterion, that state regulation lacks a market efficiency justification, expresses a concern that economists have raised in favor of antitrust regulation. The underlying notion is that "[i]f the antitrust laws are aimed at fostering efficiency and the state regulation promotes efficiency, then there is no conflict between the two and the state regulation should not be preempted." Id. at 1318; see also Cirace, An Economic Analysis of the "State-Municipal Action" Antitrust Cases, 61 TEX. L. REV. 481 (1982).

Professor Cirace argues that efficiency should be the acid test for determining the appropriateness of federal preemption of state or local legislation when there is a conflict with federal antitrust policy. See id. at 515 (arguing that, except for a state-owned monopoly entitled to a state antitrust exemption, "[f]ederal antitrust preemption should prohibit states or their subdivisions from displacing competition unless substantial market failures, imperfections, or instabilities are inherent in these markets, or competitive displacement is no greater than the scope of the market inadequacies at which it is aimed . . . ."). Professor Cirace's efficiency test, carried to its logical conclusion, would transform the Supreme Court's state action doctrine
Professor Wiley's fourth criterion, the capture requirement, is crucial to the preemption test he proposes. This requirement establishes the basis for accommodating the conflicting policies posed by the state action doctrine. The state action doctrine seeks to preserve the proper institutional balance between state and federal regulatory policy under principles of antitrust federalism. Capture theory, however, justifies federal court review of state and local regulatory policies when such policies lack a broad political consensus, because these policies are captured by special interest groups. Without the capture requirement, federal courts, in an effort to enforce federal competition policy, would intrude too much into state and local economic policy creating what Wiley calls the problem of "antitrust imperialism."¹⁶¹

The capture criterion seeks to minimize problems of "antitrust imperialism" by restricting the power of federal judges to attack only state regulations that advance private interests adverse to federal competition policy. As Wiley explains, "[The capture] criterion is necessary if the proposed preemption test is to accommodate both sides of the conflict between state and local regulatory policy and federal antitrust policy."¹⁶² As critics of Wiley's proposal have stressed,¹⁶³ capture theory makes facts surrounding the enactment and enforcement of legislation—such as lobbying—highly relevant to the antitrust preemption analysis.

Legislative lobbying should be a highly relevant factor for proving regulatory capture.¹⁶⁴ If capture were established and the other criteria satisfied, preemption then would be the penalty for the plaintiff's petitioning effort. Critics have argued that the capture test is likely to chill protected activity more than would a monetary penalty imposed directly on lobbying itself, for it applies what for the lobbyist must be the ultimate sanction . . . . After all, why lobby for a bill which, once it passes the legislature, must fail in the courts because of [the] lobbying.¹⁶⁵

¹⁶¹ See Wiley, supra note 4, at 764.
¹⁶² See Wiley, supra note 4, at 764.
¹⁶³ Id.
¹⁶⁵ Cf. Wiley, supra note 4, at 769 ("The most direct way to build into a preemption test a filter sensitive to the problem of regulatory capture would be to examine the facts surrounding a regulation's origin.").
Surprisingly, Professor Wiley fails to defend his theory against those who claim that capture theory calls for improper modifications of Noerr-Pennington, or undermines the policies established under it.\textsuperscript{166} Clearly, such a defense is possible. Why require courts to defer to the right to petition government if it has been shown that the petitioning is part of a scheme to subvert and capture the benefits of governmental process? If there is reason to apply Wiley’s preemption test to state and local legislation to guard against the problem of producer capture, there certainly is reason to apply the capture rationale to questions of antitrust immunity under Noerr.

To argue that the first amendment denies such a result is hardly decisive. The right to petition government is not absolute; nor is every form of expression entitled to first amendment protection.\textsuperscript{167} What may be describable as “speech” or “expression” may be untouched by the first amendment.\textsuperscript{168} Overriding governmental interests permit limits to the

\textsuperscript{166} However, in a footnote in his \textit{Capture Theory} article, Wiley states: “For reasons of free speech and access to government, a private actor’s lobbying or petitioning activities generally cannot serve as the basis for antitrust claims.” Wiley, supra note 4, at 773 n.280 (citing Noerr, Pennington, and contrasting California Motor Transport). This statement may not indicate the exact position Wiley holds on the relevance of capture theory to Noerr-Pennington issues since the statement was made in reference to a discussion about remedies in the main text of his article. The statement appears to be at odds with Wiley’s capture test since he acknowledges that the facts surrounding the enactment of legislation, which presumably would include interest group lobbying, also would be relevant for establishing capture motive.

\textsuperscript{167} White v. Nicholls, 472 U.S. 479 (1985). \textit{Smith v. McDonald} involved the application of the Noerr-Pennington doctrine in a non-antitrust context. The litigation was precipitated by a series of letters McDonald sent to President Reagan and other federal officials opposing Smith’s appointment as United States Attorney. Smith v. McDonald, 562 F. Supp. 829, 832 (M.D.N.C. 1983). The defendant sent copies of the letters to the President, to several members of Congress, to Edwin Meese, then Chief Counselor to President Reagan and chairman of his transition team, and to William Webster, Director of the FBI. \textit{Id.} Smith, whose appointment failed, brought suit against McDonald alleging that the letters contained knowingly or maliciously false statements. \textit{Id.} at 832. McDonald claimed that the letters were absolutely privileged as an exercise of his right to petition. Smith v. McDonald, 737 F.2d 427, 427 (4th Cir. 1984). Under the common law of North Carolina, where the litigation originated, communications to public officials are entitled only to a qualified privilege. Smith, 562 F. Supp. at 834. The district court and the Fourth Circuit denied McDonald’s motion to dismiss the action. The Supreme Court held that while the right to petition is “cut from the same cloth as the other guarantees of [the first amendment],” \textit{White}, 472 U.S. at 482; the right is not intended to provide absolute immunity for libel actions. \textit{Id.} at 484-85. The Court upheld the standard that “the defendant’s petition was actionable if prompted by ‘express malice,’ which was defined as ‘falsehood in the absence of probable cause.’” \textit{Id.} at 485; see also infra text accompanying notes 351-70.

\textsuperscript{168} See, e.g., Schauer, \textit{The Aim and Target in Free Speech Methodology}, 83 NW. U.L. REV. 562, 563 (1989) (“The defendant in a Sherman Act price-fixing case whose sole activity consists of transmitting to a competitor the prices her company is about to charge is treated the same way as any other antitrust defendant despite the fact that her activities were restricted to speech used for the purpose of communicating information.”).
exercise of the right in some instances. Argumentative claims seeking to advance the principles of representative government hardly seem decisive because underlying Wiley's capture requirement is the desire to preserve the political legitimacy of governmental process by curbing the abuses of producer capture. Legislative influence resulting in producer capture may undermine the political legitimacy of governmental action since special interests, and not the electorate, dictate legislative outcomes. The *Noerr* doctrine may actually work to undermine the political legitimacy of government by immunizing interest group lobbying aimed at distorting the flow of information needed for intelligent policymaking.

C. Republicanism

Since interest group influence affects the nature and quality of the deliberative processes of government, there is reason to question the wisdom of an antitrust immunity policy that permits the pursuit of private interests in the "political" spheres of government to subordinate the public good to the pursuit of private interests. A new group of legal scholars who accept the pessimism of interest group pluralism, but oppose the pluralistic tradition in American politics, have urged judicial intervention to protect the political process from the abusive practices of powerful private interests. Professors Bruce Ackerman, Cass Sunstein, Frank Michelman, Morton Horwitz, Suzanna Sherry, Mark Tushnet, and others,169 have taken a more optimistic stance in arguing in favor of a

169. See Wiley, supra note 4, at 768.


In developing the republican approach relevant to this Article, I have focused almost exclusively on Professor Sunstein's scholarship because his scholarship focuses mainly on problems involving interest group politics in the legislative branch of government. Other republicans have focused on the deliberative process in other settings. See, e.g., Michelman, *Law's Republic*, supra note 15 (judicial); Ackerman, *supra* (everyday politics). For this reason, Sunstein's republican scholarship has the most to offer for understanding interest group problems relevant to antitrust.

Sunstein's republican scholarship is subject to a variety of theoretical and political criticism. For a criticism of Sunstein's view from the left, see Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 Yale L.J. 1623 (1988); Mensch & Freeman, *supra* note 140, at 581. For criticism from the right, see Epstein, *Modern Republicanism—Or the Flight from Substance*, 97 Yale L.J. 1633 (1988); see also Fallon, *Commentary: What Is
civic republicanism, offering a political conception of interest group government that differs radically from the conceptions claimed by both optimistic and pessimistic pluralists.

Republicans argue that the prerequisite of sound government should be the development of a deliberative process that subordinates private interest to the public good. Interest group influence in the political process is a problem to republicans because they believe that interest groups can corrupt the deliberative process by promoting special interests at the expense of the common good. In their view, pluralism "disregards the sources and effects of bad preferences, [and thus] produce[s] unacceptable [social] results." While republicans accept the pessimism of public choice theorists, they question the premise that the political process can be understood as merely a strategic interaction aimed at reaching bargains between competing groups.

Republicans argue that pluralists of all stripes mistakenly assume that political actors have predetermined or exogenous preferences. The pluralist system is interpreted by republicans as one of "aggregating citizen preferences" under an approach which "takes the existing distribution of wealth, existing background entitlements, and existing preferences as exogenous variables." According to the republican understanding of politics, preferences are not assumed to be exogenous (independent of, prior to political activity), rather they are assumed to be shaped and determined by the deliberative process itself.

Republican legal scholars tend to distinguish between two different models of political discourse: deliberative and strategic. As Professor Michelman has explained, deliberative discourse "connotes an argumentative interchange among persons who recognize each together as equal in authority and entitlement to respect, jointly by them towards arriving at a reasonable answer to some question of public ordering ... an answer that all can accept as a good faith determination of what is to be done when some social choice is demanded by the circumstances." Michelman, Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation, 56 Tenn. L. Rev. 291, 293 (1989). Deliberative discourse is neither a method of reasoning nor a cognitive quality; rather it refers to "a certain attitude toward social cooperation, namely, that of openness to persuasion by reasons referring to the claims of others as well as one's own." Id. Strategic interaction is the conception of politics that republicans associate with interest group pluralists and public choice theorists.

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172. Sunstein, Beyond the Republican Revival, supra note 15, at 1544.

173. Id. at 1543.

174. Id. at 1549. Republicans argue that the deliberative process of government influences and shapes the prevailing conception of law and politics. For example, Professor Michelman,
can view, the political process of government requires political actors to engage in conscious preference selection, but from a critical distance removed from the competing claims of particular interest groups engaged in political struggle.

Republicans accept the notion that interest groups must be allowed to participate in the deliberative process of government and make known their "existing desires" through that process.175 They argue, however, that the deliberative process must be insulated from undue interest group influence to allow policy decisionmakers to select preferences, to revise existing choices "in light of collective discussion and debate, bringing to bear alternative perspectives and additional information."176 What is important to the republican vision of political deliberation, is not that everything worth saying on a subject be said, but rather that everyone have an opportunity to speak.

The republican commitment to an aspirational and critical understanding of politics,177 motivates these theorists to advocate a reformist theory of judicial review. These theorists argue that judges should create "structural mechanisms" that "would insulate representatives, to a greater or lesser degree, from constituent pressures, in the hope that they will deliberate more effectively on the public good."178 Professor Sunstein thus argues that judicial power should be deployed strategically in focusing on constitutional discourse in the Supreme Court, advances the notion of a "dialogic tradition" in constitutional law adjudication that gives priority to political engagement as a "positive human good" necessary for human self-realization. See Michelman, Law's Republic, supra note 15, at 1503. For Michelman (and for Sunstein) "republican thought thus demands some way of understanding how laws and rights can be both the free creations of citizens and, at the same time, the normative givens that constitute and underwrite a political process capable of creating constitutive law." Id. at 1505. To these republicans, deliberative discourse is essential for securing fundamental political rights. See, e.g., Michelman, Conceptions of Democracy in American Constitutional Argument: Voting Rights, 41 FLA. L. REV. 443, 452 (1989); Sunstein, Beyond the Republican Revival, supra note 15, at 1548-51. It is not clear, however, whether the deliberative republican ideal is truly distinctive from the theory of liberalism that posits that at least some fundamental rights are "grounded in a 'higher law' of trans-political reason or revelation." Baker, Republican Liberalism: Liberal Rights and Republican Politics, 41 FLA. L. REV. 491, 492 (1989).

175. For republicans, deliberation is made possible by "civic virtue" in government to be realized. Sunstein, Beyond the Republican Revival, supra note 15, at 1541. "[C]ivic virtue is necessary for participation in public deliberation, and it is instrumental to a well-functioning deliberative process." Id. at 1541 n.8. The idea of civic virtue requires the subordination of self-interest to that of the community. Id.

176. Id. at 1549

177. According to Sunstein, the republican understanding of law is "aspirational and critical rather than celebratory and descriptive." Id.

178. Sunstein, supra note 3, at 34.
the legislative spheres of government to minimize the polluting influences of interest group pressure.\textsuperscript{179}

Professor Sunstein's specific proposals dealing with campaign finance regulation are especially illustrative of the type of structural solutions which republicans offer.\textsuperscript{180} The law of campaign financing essentially has been deregulated as a result of the Supreme Court's first amendment analysis in \textit{Buckley v. Valeo}.\textsuperscript{181} In \textit{Buckley}, the Court was called upon to review the constitutionality of a federal regulation that imposed a campaign expenditure ceiling for contributions to candidates and political parties. The government claimed that the regulation was premised upon a rational and wise congressional purpose—to equalize the ability of individuals and groups to influence outcomes in elections by limiting the amount of political contributions permitted in federal elections. The regulation was necessary to level the disparities in influence caused by unequal distribution of wealth in society.\textsuperscript{182} The government also claimed that restricting the financial ability of some to further certain kinds of speech was necessary to promote first amendment interests in diversity of expression.

The Supreme Court rejected the government's defense of the regulation, finding that the government's claim that regulation might be necessary to enhance the relative voice of others was repugnant to the first amendment.\textsuperscript{183} \textit{Buckley} holds that it is an impermissible governmental purpose for Congress to attempt to equalize the deployment of wealth in politics. Disparities in wealth, and consequently, the fact that certain interests might drown out the voices of others, was seen as an acceptable

\textsuperscript{179} Professor Sunstein argues that "intimidation, strategic and manipulative behavior, collective action problems, adaptive preferences, or—most generally—disparities in political influence" attributable to interest group politics should be judicially regulated. Sunstein, \textit{Beyond the Republican Revival, supra} note 15, at 1550. As Sunstein explains his approach to regulation:

\begin{quote}
Thus, for example, republicans will attempt to design political institutions that promote discussion and debate among citizenry; they will be hostile to systems that promote lawmaking as 'deals' or bargains among self-interested private groups; they may well attempt to insulate political actors from private pressure; and they may also favor judicial review designed to promote deliberation and perhaps to invalidate laws when deliberation has not occurred.
\end{quote}

\textit{Id.} at 1549.

\textsuperscript{180} See Sunstein, \textit{Lochner's Legacy, supra} note 15, at 883-84; Sunstein, \textit{Beyond the Republican Revival, supra} note 15, at 1576-78.

\textsuperscript{181} 424 U.S. 1 (1976); \textit{see also} Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985) (invalidating a congressionally imposed limit on independent expenditures made by political action committees in publicly financed presidential elections).

\textsuperscript{182} See Sunstein, \textit{Lochner's Legacy, supra} note 15, at 884.

\textsuperscript{183} \textit{Buckley}, 424 U.S. at 48-49; \textit{see also} Sunstein, \textit{Lochner's Legacy, supra} note 15, at 884.
consequence of "free expression"—matters that are outside the scope of relevant inquiry under the first amendment.\textsuperscript{184} The Buckley Court thus relied upon the first amendment "marketplace of ideas" notion, with its strong pluralistic overtones, to support its view that restrictions on the speech of the wealthy was repugnant to free speech.\textsuperscript{185}

Several years later, a sharply divided Supreme Court relied upon the same marketplace of ideas notion to invalidate state regulation placing limits on corporate political expenditures for public referenda in \textit{First National Bank v. Bellotti}.\textsuperscript{186} In Bellotti, a majority of the Court concluded that corporate expression should be treated as a form of speech for first amendment purposes. As a result of decisions such as Buckley and Bellotti, corporate interest groups have been allowed to exercise unregulated political power with the predictable consequence that corporate political expenditures are more often than not significantly greater than those of other interests.\textsuperscript{187}

\begin{itemize}
  \item \textsuperscript{184} Sunstein, \textit{Lochner's Legacy}, supra note 15, at 884; see also M. Tushnet, \textit{supra} note 102, at 283.
  \item \textsuperscript{185} The marketplace of ideas theory has also been an important component of the Court's commercial speech doctrine. See C. Baker, \textit{supra} note 93, at 194.
  \item \textsuperscript{186} 435 U.S. 765 (1978) (state statute prohibiting certain corporate political expenditures held unconstitutional). The Supreme Court, in rejecting a state's attempt to limit the ability of corporate interests to make expenditures on matters submitted to public referenda, relied upon the marketplace of ideas theory in finding that "speech indispensable to decisionmaking in a democracy" is no less protected because it "comes from a corporation rather than an individual." \textit{Id.} at 777. The continuing vitality of Bellotti and the question concerning the power of government to regulate corporate speech has remained in doubt. See, e.g., Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197 (1982) (upholding a government restriction on the ability of corporate entities to solicit funds for political speech); see C. Baker, \textit{supra} note 93, at 222.
  \item \textsuperscript{187} See Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 307-08 & nn. 2-4 (White, J., dissenting); Baker, \textit{supra} note 13, at 647-48 n.8; see also C. Baker, \textit{supra} note 93, at 222-23 (describing a 1979 public power referendum in Westchester County, New York, in which a local public utility contributed $1.2 million to defeat the proposal—an expenditure that was approximately eighty times the $16,000 spent by the consumer group promoting the proposal). The continuing validity of the pluralistic premises of decisions such as Buckley and Bellotti now remains in doubt, especially in light of the Supreme Court's most recent decision dealing with the power of federal and state governments to restrict direct corporate expenditures in political campaigns. In Austin v. Michigan State Chambers of Commerce, —U.S.L.W. —, No. 88-1569 (March 27, 1990), the Court upheld, six to three, a Michigan campaign finance regulation that prohibited corporations from making direct political contributions on behalf of political candidates. In rejecting a first amendment claim raised against the Michigan legislation, Justice Marshall, writing for the majority, concluded that the state had a "compelling rationale" for restricting "the correlative and distorting effects of immense aggregations of wealth that are accumulated with the corporate form." \textit{Id.} at —. The Court's decision in \textit{Austin} may thus signal a new pessimistic judicial attitude that rejects the optimistic premises of the marketplace of ideas theory underlying subsequent corporate speech and campaign regulation cases. The Court's decision in \textit{Austin} was limited, however in that the Court
Without doubt, legal restrictions on campaign expenditures limit the exercise of speech and thereby constrain the free marketplace of ideas. Some believe, however, that such restrictions would bring about better, more just political decisions. According to Professor Sunstein, a republican slant to the first amendment would require a different result in *Buckley* for that very reason. Buckley as well as *Bellotti* can be criticized on republican grounds because they lack a compelling normative justification for allowing naked interest group transfers. In Professor Sunstein’s view, the government should have the authority to regulate maldistributions in the exercise of political power.

In adopting the language and the logic of the “marketplace of ideas” concept of the first amendment, the *Buckley* Court assumed that the existing distribution of wealth is “natural”; the decision not to intervene in the political process is conceived as “no decision at all.” Because pluralists believe that self-interest motivation will lead to the aggregate good of society, they assume that governmental intervention in the political arena to equalize disparities resulting from differences in wealth would be impermissible. *Buckley* and *Bellotti* thus permit deregulation of campaign financing because market ordering is assumed to be the proper mechanism for both commodities and ideas.

Professor Sunstein objects to the pluralistic premises of *Buckley* because those premises disable a useful measure designed to reduce the effects of income differences in the political process—differences that

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188. See C. Baker, supra note 93, at 21. Professor Baker argues that a liberty theory of the first amendment, as distinguished from the marketplace of ideas theory, supports the conclusion that restrictions on corporate political speech are necessary to advance the value of individual human liberty embedded within the first amendment.

189. Sunstein, Beyond the Republican Revival, supra note 15, at 1577. As Sunstein explains:

Under a republican approach to the First Amendment, campaign finance regulation would be treated far more hospitably. At least some forms of regulation would be seen as plausible efforts to promote rather than to undermine First Amendment purposes, by countering the distortions brought about by expenditures on political campaigns. A deliberative conception of the First Amendment, incorporating a norm of political equality, would lead to a quite different analysis from the marketplace model, which has significant pluralist overtones. Above all, the *Buckley* Court’s hostility to redistributive rationales for regulation would dissipate.

Id. at 1577.

190. Sunstein, Lochner’s Legacy, supra note 15, at 884 (describing the logic of the Court’s decision in *Buckley*). A very similar rationale based on the marketplace of ideas theory was also instrumental in supporting a sharply divided Supreme Court to invalidate state regulations on corporate speech in *Bellotti*. See C. Baker, supra note 93, at 222.
republicans find repugnant to the exercise of political freedom. In his view, the courts should reject "naked interest-group transfers" that redistribute the benefits of legislation on the basis of raw political power, and nothing more. Central to Sunstein's brand of republicanism is the notion that "political equality depends on economic equality." Sunstein sees both political equality and economic equality as indispensable to the promotion of "civic virtue" in government. Sunstein's republican analysis has direct bearing on the issues raised by the Noerr-Pennington doctrine.

The application of the antitrust laws to the lobbying activities in Noerr involves issues closely analogous to those in Buckley and Bellotti. In Noerr, a private litigant sought to invoke federal law to curb the anticompetitive consequences of a rival's well-financed political activity. The plaintiff in Noerr, like the government in Buckley and Bellotti sought judicially imposed limits on the deployment of economic power in the political arena. In each case, limitations affecting the right to petition government were disallowed under an interpretation of the first amendment that gave preference to profit-oriented expression. In all three cases, the Supreme Court assumed that disparities in free expression caused by differences in economic power are accepted as part of the natural consequences of a representative government.

Noerr, like Buckley and Bellotti, reflects a view of interest group politics that assumes that the public interest is achieved in a market-like preference selection process. In each case the Supreme Court assumed that political actors act strategically to realize preferences that are endogenous to the system. In each case the Court ignored the possibility that expenditures for lobbying, like product advertising, can shape policy decisionmakers' preferences in the same way that consumer preferences

191. Sunstein, Beyond the Republican Revival, supra note 15, at 1552. Professor Sunstein has thus argued that equalization of political participation is necessary to correct "a maldistribution of private power that interferes with a well-functioning political marketplace." Sunstein, supra note 131, at 619. The justification for legal regulation of political expression is premised on the view that maldistribution in political expression is a form of market failure that must be "corrected in order to perfect the marketplace function of free expression." Id.

192. See Sunstein, Naked Preferences, supra note 15. By implication, Sunstein's criticism of Buckley should apply to the commercial speech doctrine of Bellotti that has allowed corporate interests to exercise unregulated political power. Both Buckley and Bellotti can be criticized for allowing naked interest group transfers to go unregulated.

193. Sunstein, Beyond the Republican Revival, supra note 15, at 1553. This does not mean that Professor Sunstein believes in economic equality in the sense that everyone have the same amount of scarce resources in society. Rather, the notion is that economic differences should have as little weight as possible in politics.

194. Id.
are shaped in the marketplace. In this important sense, all three cases promote a view of government that tolerates, if not encourages, the creation of legal policy standards indifferent to substantive equality and true political freedom.

D. Implications—Interest Group Theory and Antitrust

The optimistic premises of the 1960s version of interest group pluralism that characterize the policy underpinnings of the Warren Court’s Noerr-Pennington doctrine can be criticized in light of the theoretical insights now offered by modern theories of interest group pluralism and its alternative, republicanism. Public choice theorists offer strong reasons for doubting the claims that optimistic pluralists once asserted about the ability of special interest groups to generate socially-desirable policy outcomes by accurately aggregating the social preferences of citizens. Olson’s collective action problem and Arrow’s impossibility theorem reveal serious theoretical flaws in the internal logic of pluralist theory: collective action problems, strategic behavior, agenda problems, and other difficulties that question the ability of interest groups to ensure that citizen preferences are accurately represented. On the other hand, the behavioral assumptions that public choice theorists make about political behavior are hardly convincing. Public choice theory has been criticized for its unrealistic assumptions about political behavior, assumptions that critics claim overlook important aspects of the nature of preference selec-

195. See, e.g., Baker, Commercial Speech: A Problem in the Theory of Freedom, 62 IOWA L. REV. 1 (1976); see also C. BAKER, supra note 93, at 194-224. It is worth noting that Professor Baker’s analysis of the marketplace of ideas theory in the Supreme Court’s commercial speech decisions led him to conclude that “[t]he extension of first amendment rights to commercial association would . . . undermine the foundations of antitrust laws.” Id. at 224.
tion in politics. Critics also claim that public choice theory fails to perform empirically.

Antitrust capture theory is useful in illustrating how Olsonian capture can be used to expose and criticize the pluralistic premises of interest group theory that are embedded within the state action doctrine and the Noerr-Pennington doctrine. On the other hand, because antitrust capture theory is wedded to public choice theory, it too accepts a rather naive theory of political behavior. Moreover, like public choice theorists,

196. See Kelman, supra note 145. The weakest point in public choice theory is the assumption that political actors have exogenous preferences. This assumption appears to rest on a naive theory of human behavior because the theory assumes that economic actors are mutually independent, capable of forming preferences that exist prior to the inquiry of the analyst. See Minda, supra note 119, at 12 n.49 (discussing a similar behavioral assumption in the law and economics movement); see also Kornhauser, Legal Rules as Incentives, in LAW AND ECONOMICS 27 (N. Mercuro ed. 1989). Public choice theorists assume that the pre-existing preferences of autonomous economic actors are the source of "objective" information about desires. This assumption commits the public choice theorist to the view that rational, self-interested calculation of individual cost and benefit is the key to understanding and evaluating political behavior. See also Minda, Toward a More "Just" Economics of Justice—A Review Essay (Book Review), 10 CARDOZO L. REV. 1855, 1866-67 (1989). A more sophisticated behavioral claim would require the public choice theorist to reject the assumption of exogenous preferences, a theoretical move which Cass Sunstein has claimed must be made by any theory hoping to coherently describe the true nature of interest group politics. See Sunstein, Beyond the Republican Revival, supra note 15, at 1543-44. Such a claim would require judges to reconsider assumptions embedded in the Noerr doctrine about the independent nature of preference selection and political practice.

197. See, e.g., Farber & Frickey, Jurisprudence, supra note 15, at 895. Sunstein, however, argues that "[t]he empirical work points in both directions," citing evidence suggesting that sometimes public officials respond to their own conception of the public interest. Sunstein, supra note 125, at 449 (citing M. DERTHICK & P. QUIRK, THE POLITICS OF DEREGULATION (1985); Kalt & Zupan, Capture and Ideology in the Economic Theory of Politics, 74 AM. ECON. REV. 279 (1984)). As Sunstein admits, there is enough evidence in support of public choice theory to provide its advocates with evidentiary grounding.

198. Antitrust capture theory has been severely criticized for many of the reasons that have led others to criticize public choice theory. See, e.g., Page, supra note 163, at 618; Page, Capture, Clear Articulation, and Legitimacy: A Reply to Professor Wiley, 61 S. CAL. L. REV. 1343 (1988). For Professor Wiley's reply, see Wiley, A Capture Theory of Antitrust Federalism: Reply to Professors Page and Spitzer, 61 S. CAL. L. REV. 1327 (1988). Critics claim that antitrust capture theory gives too much consideration to the goal of economic efficiency or that it insufficiently explains the relationship between producer capture and political legitimacy. See, e.g., Spitzer, Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory, 61 S. CAL. L. REV. 1293, 1310 (1988). Pluralists, such as Professor Page, criticize Wiley's state action proposal precisely because Wiley rejects the optimistic premises of interest group pluralism. See Page, supra note 163, at 629-32. These critics presumably favor a "do-nothing approach" to interest group problems. But a "do-nothing approach" is unwise, especially in light of the overwhelming evidence establishing the influence of special interest groups over the political process. See supra note 3.
antitrust capture theorists such as Professor Wiley recognize economic efficiency as the sum total of normative content in substantive justice.\textsuperscript{199}

The republican alternative offered by Professor Sunstein suggests how a normative theory of interest groups may be utilized in developing a restructured legal theory of interest groups—one that promises a stronger moral and democratic justification.\textsuperscript{200} In rejecting the naive behavioral claim of public choice theorists, republicans make insightful points about the relation between behavior and the prevailing legal and political culture. Republicans argue that preference selection of political actors is a function of the existing practices, legal and political, that have defined the deliberative process of government. These analysts also make powerful arguments for understanding how pluralism has worked to justify a system of law that accepts the consequences of disparities in wealth as a natural and legitimate characteristic of politics. Obviously, the work of these scholars, especially that of Professor Sunstein, bears relevance to any serious reconsideration of the theoretical foundations of Noerr-Pennington.

If legislation is to be understood in terms of “deals” or naked interest group transfers, as public choice and antitrust capture theorists have argued, then republicans offer a normative argument for advancing a theory of judicial regulation that preserves the essential governmental function performed by interest group representation, while curbing the potential abuses such representation may entail. Hence, even if public choice and antitrust capture theory fail to explain the entire corpus of political behavior—and they do—the criticism these theories offer is important to reveal the blind spots in traditional legal analysis inspired by interest group pluralism.\textsuperscript{201} Contrary to the right-wing conclusions drawn by conservative public choice analysts, public choice theory may ultimately work to support the progressive governmental reforms advocated by republican scholars.

While republican theory may be too inchoate at this time for the development of a comprehensive legal theory,\textsuperscript{202} its normative criticism

\textsuperscript{199} Professor Wiley argues that the normative concerns of equality can be filtered into antitrust discourse in advancing the dominant antitrust policy objective of advancing economic efficiency. He claims that while sometimes there is conflict between the efficiency and equality goals, they are more often than not “congruent.” \textit{See} Wiley, \textit{supra} note 198, at 1335.

\textsuperscript{200} While republicans differ in terms of their institutional perspective, see, for example, Abrams, \textit{Law's Republicanism}, 97 \textit{Yale L.J.} 1591 (1988), they accept the view that the inspiration of political pluralism has worked to bring about legal results that undermine fundamental values that any legal system committed to democratic process, economic liberty, and political freedom must respect.

\textsuperscript{201} \textit{See also} Farber & Frickey, \textit{Jurisprudence}, \textit{supra} note 15, at 900-01.

\textsuperscript{202} For example, while Professor Sunstein’s brand of republicanism offers the promise of
is extremely important for understanding flaws in the pluralistic premises of the Noerr-Pennington doctrine, already weakened by the descriptive criticism of public choice theory. Anyone concerned about maintaining the legitimacy of the legislative process must face the criticism of modern theory and the reality that "[w]e live in a time of widespread dissatisfaction with the legislative outcomes generated by the political process."203

escape from the dilemmas of the pluralist system, Sunstein fails to detail an adequate design or blueprint for the type of legal restructuring that republicans claim is required to achieve civic virtue. At this time, all that has been offered is the promise of a new theoretical vision and proposals advancing modest law reform. Critics on the left argue that Sunstein's republicanism does not go far enough in pushing the legal and political system to the goals of substantive equality and real democratic decisionmaking. See Brest, supra note 170 (Brest's criticism is more a quibble about the lack of a radical vision in Sunstein's brand of republicanism). Critics on the right claim that Sunstein's republicanism lacks a coherent substantive understanding of self-interest and that it is too quick in its rejection of the pluralist theory. See Epstein, supra note 170 (highly dubious notion that there exists a set of fixed notions of libertarian and economic philosophy that define a nonrepublican concept of law). Still others wonder whether republican criticism will undermine the "authority" of law, or establish a theory that would "found law in the destruction of the conditions of law." Kahn, supra note 170, at 85 (assumes that it is possible to separate the republican values from authoritarian notions of law—an implausible, and highly untenable, assumption).

The most troublesome aspect of Sunstein's republicanism, however, is his claim that a universal "practical reason" can be designed to enable judges to discover substantively correct results to legal problems. See Sunstein, Beyond the Republican Revival, supra note 15, at 1555. The claim of a universal "practical reason," with its strong Hart and Sacks overtones, may itself be too "pluralistic" to sustain the normative claims he makes about law. It is not evident how the community of judges is supposed to develop the "practical reason" needed for discovering civic virtue. Nor is it evident that there exists "out there" a shared consensus of the common good. There may be no "objective" or "unsituated" perspective "out there" to make Sunstein's notion of a "practical reason" operational. See, e.g., Abrams, supra note 199, at 1600-01; Sullivan, Rainbow Republicanism, 97 YALE L.J. 1713, 1716-18 (1988). Professor Sunstein believes, however, that judges should be able to discover determinant results by taking into account the limiting factors of context and culture. See Sunstein, supra note 125, at 441-42. In my opinion, Sunstein's argument on this point discounts the contingent nature of legal descriptions that seek grounding in context or culture. While the meaning of the law requires a culture-bound context, culture as a context is boundless. Culture is boundless in the sense that any given cultural context is open to further redescription. Any attempt to describe culture will always be subject to a form of criticism that asserts the existence of a different description of context for establishing a different meaning of culture, criticism now made popular by the critical legal studies movement. See Minda, supra note 119, at 614, 622; see also Minda, Crazy Quilts, 2 C.L.S. 54, 59 (Nov. 1989). This is not to suggest that agreement and commitment are impossible, but that consensus must be won through political struggle. See Michelman, Bringing the Law to Life: A Plea for Disenchantment, 74 CORNELL L. REV. 256 (1989).

203. Macey, supra note 3, at 223. This is not to suggest that pluralism lacks advocates who defend against the criticism of modern interest group theory. The pluralistic premises of the Court's Noerr doctrine have been affirmatively defended by Professor Page. Page, supra note 163, at 626-44. Page's defense is historical and political—he seeks to show how the pluralistic premises of cases like Parker v. Brown and Noerr can be defended from the position advanced by James Madison and the Federalists during the ratification debate regarding the Federal Constitution. Federalists such as Madison were strong supporters of the interest
The new theories of interest group politics collectively suggest that the legitimacy of government has been threatened because private economic power has been allowed to be deployed in the governmental sphere free of any effective antitrust or other legal restraint. Each theory, in its own way, reveals flaws in the policy perspective that have justified the deployment of private economic power in the political arena free of governmental restrictions.

III. Uncertain Doctrine—The Dilemmas of Pluralism

In recent years, the Supreme Court has exhibited cautious skepticism in applying the Noerr-Pennington doctrine to new contexts. While the Warren Court displayed extraordinary confidence in creating the doctrine, the Supreme Court has since become increasingly pessimistic about the wisdom of allowing special interest groups to improperly influence government for anticompetitive purposes. The Court also has exhibited a marked willingness to establish exceptions and limitations to police the anticompetitive consequences of interest group petitioning and to cut off defenses based on Noerr and the first amendment. Subsequent application of these principles by lower courts has resulted in uncertain decisionmaking and confusion.204 Like modern pluralists, judges have become increasingly pessimistic about the pluralistic premises that shape the Noerr-Pennington doctrine.

A. The Noerr Exception Takes on New Meaning—Sham Litigation

While the Supreme Court has recognized the applicability of the Noerr-Pennington doctrine to the judicial spheres of government, it also has recognized that an exception to Noerr is required to allow antitrust liability to be found in so-called “sham” cases—when litigation is brought on frivolous and unreasonable grounds.205 The lower courts have developed group pluralism. Republican theorists, however, have now seriously questioned the historical position advanced by Page. Republican scholars have argued that a non-pluralistic, civic-republican alternative existed at the time of ratification, and that this “republican” alternative can better explain the constitutional form of government the drafters intended to create by their founding document. See, e.g., Michelman, Law’s Republic, supra note 15, at 1503-04. Moreover, modern pluralist theorists as well as republican critics now question the underlying assumptions that Madison drew in advancing the particular theory of interest groups Professor Page has identified with the interest groups theory of the Supreme Court. See Page, supra note 163, at 626-44.

204. See, e.g., Calkins, supra note 9, at 327-28.
205. See, e.g., P. Areeda & D. Turner, supra note 63, at 41-42. Conversely, the “sham” exception almost never justifies recovery in the legislative context. Id. This is because the success of establishing antitrust liability under the sham exception varies depending on which sphere of government is involved. As Areeda and Turner have concluded, “[i]t is difficult
a new antitrust theory of regulation to curb the alleged abuses of sham litigation. This new theory is the curious offspring of an exception to antitrust immunity that has grown into a full-fledged theory of antitrust regulation, one premised upon the view that competitors might utilize litigation as a predatory strategy to destroy a competitor.206

In theory, bad faith litigation might be used to deter the entry of a competitor in the marketplace in restraint of trade. On the other hand, the antitrust laws should not be invoked to regulate litigation or adjudicatory action that involves genuine, nonfrivolous, or otherwise reasonable conduct. If the antitrust laws are utilized in this way, the purpose of antitrust regulation as well as other legislative schemes that depend on courts or agencies as enforcement mechanisms might be defeated. Moreover, since the private and social cost of litigation may diverge, the legal theory of sham litigation, focusing as it does on private litigation costs, may fail to take into account the total social value of litigation. A lawsuit may have a low probability of success and yet have a high social value in being brought.

There is thus good reason to question the legitimacy of extending the Noerr-Pennington doctrine to litigation. First, it might be argued that the theory of Noerr should not be invoked in the adjudicatory context because Noerr only immunizes attempts to influence the policymaking functions of government. Noerr should not apply because courts and

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206. For an attempt to develop an economic theory of predatory sham litigation, see Klien, Strategic Sham Litigation: Economic Incentives in the Context of the Case Law, 6 INT'L REV. L. & ECON. 241 (1968). Klien argues that sham litigation can be explained in terms of a "post-entry strategy" aimed at "raising [the] rival's costs" by forcing the rival to incur higher litigation costs. Id. at 244. Professor Klien's theory of strategic behavior, however, is incomplete. In seeking to raise a rival's costs through litigation, the predator also would be incurring greater litigation costs, which may or may not offset the rival's litigation costs. If the rival wins the lawsuit on the merits there is always the possibility that the rival will be awarded costs. If the litigation is brought for bad faith purposes, there is the possibility that a judge would levy costs against the predator for bringing a bad faith and malicious lawsuit. Even Klien recognizes that the social cost of allowing sham litigation is the cost of chilling legitimate antitrust litigation—a cost that may far exceed the dangers of sham litigation. This is not to suggest that an economic theory of sham litigation is impossible. Economic models of legal disputes based on game theory and strategic bargaining theory have made substantial contributions to understanding the litigation process. See, e.g., A. M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS ch. 14 (2d ed. 1989); Cooter & Rubinfeld, Economic Analysis of Legal Disputes and Their Resolution, J. ECON. LIT. 1067 (1989). Unfortunately, the relevant economic literature has failed to offer a satisfactory economic theory of litigation necessary for establishing a more persuasive theory of sham litigation. See generally id. at 1094.
administrative agencies acting in an adjudicatory capacity are thought to render the type of “political” decisions rendered by legislative and executive bodies. The fear that antitrust regulation might inhibit political debate may not represent a serious concern in the judicial spheres of government since the adjudicatory functions of government are thought to be less political and certainly more limited in the type of petitioning permitted.

The sham litigation cases, however, have led to judicial acceptance of the idea that the private cost of litigation can itself be imposed on a rival to accomplish predatory market objectives. In doing so, the sham litigation issue has spawned considerable confusion and uncertainty. One troublesome question concerns the proper standard for establishing sham claims. In California Transport, Justice Douglas seemed to suggest an objective standard that would require proof that the defendants had brought a “pattern of baseless, repetitive claims” to block a competitor’s access to adjudicatory tribunals. In a separate concurring opinion, however, Justice Stewart seemed to suggest that a subjective standard was required to establish that “the real intent of the conspirators was not to invoke the processes of the administrative agencies and courts, but to discourage and ultimately to prevent the respondents from invoking those processes.” The crucial difference between these two standards is that they contemplate different elements of proof for establishing sham claims.

For example, a particularly troublesome question is whether the sham exception could be invoked to establish antitrust liability in a case in which only one of a number of claims is challenged as a sham. Fol-

207. The notion that the courts do not render political decisions has now been discredited by critical legal theorists. See, e.g., Peller, The Metaphysics of American Law, 73 CALIF. L. REV. 1151 (1985).
208. See, e.g., Calkins, supra note 9, at 327-28.
210. Id. at 518.
211. See P. AREEDA & H. HOVENKAMP, supra note 78, at 16-22. Professors Areeda and Hovenkamp argue that a subjective standard could condemn either more or less than an objective standard:

The subjective standard would condemn less where the antitrust defendant believed honestly, though unreasonably, that he had valid claim to the governmental action he sought . . . .

The subjective standard would condemn more where the antitrust defendant had a reasonable claim in the other forum but did not subjectively know it.

Id. at 20. Professors Areeda and Hovenkamp argue for an “objective” test that would evaluate the intention of the actor based upon “the expectation of a reasonable person.” Id. However, the subjective/objective distinction on which Areeda and Hovenkamp rely is an untenable distinction. See, e.g., Frug, supra note 139, at 1363-68.
lowing Justice Douglas’ suggestion in California Transport, some courts have concluded that a single baseless lawsuit cannot constitute a sham. \(^{212}\) Other courts have followed Justice Stewart’s suggestion, finding that even a single lawsuit instituted without reasonable cause can establish sham liability. \(^{213}\)

An even more intriguing set of problems involves whether a suit that has a basis in law or fact may establish sham liability. While most courts agree that a successful judicial action is not a sham, regardless of motive, \(^{214}\) it is not clear whether an unsuccessful claim, or the success of one claim in a pattern of unsuccessful suits, is sufficient to establish sham liability. The Court emphasized in California Transport that a sham claim could be established by proof that a baseless pattern of claims was brought with or without probable cause. \(^ {215}\)

In Grip-Pak, Inc. v. Illinois Tool Works, \(^{216}\) Judge Posner of the Seventh Circuit concluded that sham liability can be established even if the underlying lawsuit alleged to be a sham was in fact premised upon a colorable claim. \(^{217}\) In finding that the common-law tort of abuse of process does not require the plaintiff to show that the challenged litigation was brought without probable cause, \(^{218}\) Judge Posner reasoned that “it is

\(^{212}\) See, e.g., Hospital Bldg. Co. v. Trustees of Rex Hosp., 691 F.2d 678, 687-88 (4th Cir. 1982), cert. denied, 464 U.S. 904 (1983); see also Handler & De Sevo, supra note 8, at 29 n.135 (citing cases in which the courts limited the sham exception to cases involving repetitive litigation). In Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977), Justice Blackmun and Chief Justice Burger concluded that a single lawsuit would not be sufficient to give rise to a sham claim. Id. at 644. In the dissenting opinion, Justice Stevens and three other justices concluded that the sham exception could be sustained even if only one suit is pending. Id. at 661-62. In Vendo the Court held that section 16 of the Clayton Act, 15 U.S.C. § 26 (1982), does not authorize injunctions against allegedly sham suits pending in state courts. Id. at 645.

\(^{213}\) See, e.g., MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1154-55 (7th Cir.), cert. denied, 464 U.S. 891 (1983); Feminist Women’s Health Center v. Mohammad, 586 F.2d 530, 543 n.6 (5th Cir. 1978); National Cash Register Corp. v. Arnett, 554 F. Supp. 1176, 1177-78 (D. Colo. 1983); Handler & DeSevo, supra note 8, at 29 n.137. Professors Areeda and Hovenkamp argue that this is the correct approach, since “a single lawsuit can be instituted without reasonable cause and injure a rival.” P. AREEDA & H. HOVENKAMP, supra note 78, at 27.

\(^{214}\) See, e.g., Columbia Pictures Indus. v. Redd Horne, Inc., 749 F.2d 154, 161 (3d Cir. 1984). Some courts, however, have concluded that “success is . . . only one factor to consider in determining whether an action is a ‘sham.’” Suenergy Communities, Inc. v. Aristek Properties, 535 F. Supp. 1327, 1331 (D. Colo. 1982). Still others have suggested that success on the merits “create[s] a presumption that the action was [not a sham].” Manpower, Inc. v. Foley, 212 U.S.P.Q. (BNA) 445, 449 (D. Mass. 1980); see Handler & De Sevo, supra note 8, at 31.

\(^{215}\) California Motor Transp., 404 U.S. at 515.

\(^{216}\) 694 F.2d 466 (7th Cir. 1982), cert. denied, 461 U.S. 958 (1983).

\(^{217}\) Id. at 470-71.

\(^{218}\) Judge Posner concluded that “[t]he existence of a tort of abuse of process shows that it has long been thought that litigation could be used for improper purposes even when there is probable cause for the litigation; and if the improper purpose is to use litigation as a tool for
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premature to hold that litigation, unless malicious in the tort sense, can never be actionable under the antitrust laws." To conclude otherwise, in his view, might contemplate that all nonmalicious litigation is immunized under the first amendment—a result that would question the constitutionality of the abuse of process tort.

According to Judge Posner, liability for sham litigation should attach only to litigation that would not have been brought but for the injury that a rival suffers from litigation, regardless of outcome. In his view, "the line is crossed when [the plaintiff]'s purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself—regardless of outcome—of litigating." Whether the underlying litigation was with or without probable cause was irrelevant to Judge Posner's analysis.

suppressing competition in its antitrust sense . . . it becomes a matter of antitrust concern." Id. at 472.

219. Id.

220. Thus, Judge Posner reasoned that California Motor Transport cannot be read to immunize all nonmalicious litigation even if based on probable cause. Handler and De Sevo argue that Judge Posner's decision in Grip-Pak was based upon "improper assumptions about both the doctrinal basis for the sham exception and the elements of the tort of abuse of process." Handler & De Sevo, supra note 8, at 36. In their view, the Noerr decision was a statutory, not a constitutional decision: "For the question of whether Congress intended to apply the antitrust laws to petitioning conduct is vastly different, implicating vastly different concerns, than whether that conduct is constitutionally protected." Id. at 37. Moreover, they argue the tort of abuse of process requires both an ulterior motive and "a definite act or threat that was not authorized by the process." Id. (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 121 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 682 & comment a (1977)).

221. See Hurwitz, supra note 1, at 96-97. Other courts have followed an approach that seeks to judge the good faith of litigation on the basis of whether the good faith desire of the plaintiff was a "substantial" or "significant motivating factor." See Coastal States Mktg. v. Hunt, 694 F.2d 1358, 1372 (5th Cir. 1983). Professor Hurwitz argues that "[b]oth Coastal States and Grip-Pak focus less on whether the petitioner’s ‘vexatious’ incentives exceed his ‘legitimate’ ones than on whether his genuine intent is sufficient, in and of itself, to justify immunity." Hurwitz, supra note 1, at 97.

222. Coastal States, 694 F.2d at 472. Professor Hurwitz suggests that Judge Posner's approach is consistent with that taken by the Supreme Court in Walker Process and other patent cases. Hurwitz, supra note 1, at 96. Walker Process and its progeny did not, however, involve Noerr-Pennington issues. Indeed, the similarity that Professor Hurwitz notes between these different lines of antitrust precedent should be cause to wonder whether it makes sense for the courts to create a special theory of antitrust for sham litigation cases.

223. See Coastal States, 694 F.2d at 472. Professors Areeda and Hovenkamp have argued that Judge Posner's reasoning on this point was "very speculative." P. AREEDA & H. HOVENKAMP, supra note 78, at 25. Rather than adopting a categorical rule, Areeda and Hovenkamp favor a "strong presumption . . . that successful litigation cannot be a sham." Id. They posit three powerful reasons for rejecting Judge Posner's position. First, a successful suit may be the product of "a serious misuse of discovery." Second, "the successful suit may have...
In Judge Posner’s favor, it may be said that the common-law tort of abuse of process provides an apt analogy for understanding the antitrust theory of sham litigation. On the other hand, Judge Posner failed to explain why a treble damage remedy under the antitrust laws is needed to prevent abuse of judicial process. If the theory of sham litigation merely tracks the tort of abuse of process, then tort remedies are available to guard against such abuses. While the deterrent effect of treble damages may discourage illegal conduct, it also may chill legitimate litigation seeking to enforce important federal policies. Moreover, Judge Posner failed to provide a meaningful standard to determine when an otherwise legitimate litigation should be protected from antitrust liability as a form of political expression protected by the first amendment. It is far from clear when the line drawn by Judge Posner between legitimate, constitutionally protected litigation and sham litigation would in fact be crossed.

Judge Easterbrook, in Premier Electrical Construction Co. v. National Electrical Contractors Association, however, took Judge Posner’s analysis to its logical conclusion in finding that the Grip-Pak decision established that sham liability depends on whether the lawsuit would be cost-justified:

We elaborated further in [Grip-Pak], holding that a suit brought only because of the costs litigation imposes on the other party also may fit the “sham” exception to the Noerr-Pennington doctrine. We explained . . . “many claims not wholly groundless would never be sued on for their own sake; the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation.” If the expected value of a judgment is $10,000 (say, a 10% chance of recovering $100,000), the case is not ‘groundless’; yet if it costs $30,000 to litigate, no rational plaintiff will do so unless he anticipates some other source of benefit. If the other benefit is the costs litigation will impose on a rival, allowing an elevation of the market price, it may be treated as a sham.

According to the gloss Judge Easterbrook gave to Grip-Pak, antitrust liability for sham litigation can be imposed for bringing colorable claims, if the results of the litigation cannot be justified in terms of a cost-benefit analysis. In his view, antitrust liability attaches only to litigation that cannot, after the fact, be cost-justified. Claims having a high market

been wrongly decided.” Third, there is also the possibility that the antitrust defendant “conspired” with the other tribunal rendering the successful outcome. Id. at 26.

224. 814 F.2d 358 (7th Cir. 1987).

225. Id. at 372; see also Calkins, supra note 9, at 360 (lawsuit is a “sham” unless objectively cost-justified). Other courts have expressed a contrary view, reasoning that the existence of probable cause raises at least a rebuttable presumption that an action was not brought for sham purposes. See, e.g., Westmac, Inc. v. Smith, 797 F.2d 313, 318 (6th Cir. 1986), cert. denied, 479 U.S. 1035 (1987).
value would foster cost-justified litigation, while claims with a low market value would not. Hence, most private antitrust lawsuits would be cost-justified since the expected value of a treble damage remedy would be greater than expected litigation costs, especially if those costs can be recovered. Litigation seeking to vindicate non-pecuniary rights would probably not be cost-justified since the expected value of a judgment would be less than the expected cost of litigation. Under this test, even nonmalicious litigation based on probable cause might give rise to antitrust liability if not cost-justified. Easterbrook did not explain why antitrust litigants should have the benefit of a federal antitrust claim for sham liability in some, but not all of these cases. There appears to be something missing in Judge Easterbrook's analysis of sham litigation.

What is missing is a persuasive rationale for defining sham litigation purely on the basis of a marketplace analysis. Some litigants seek to vindicate their rights at any cost. Moreover, even if litigation is not cost-justified, it still might realize important social values. The value of establishing a legal right may far exceed immediate monetary recovery, especially when a litigant seeks a ruling necessary for advancing federal statutory policies. Litigation seeking to enforce federal competition policy may confer societal costs or benefits by maintaining or curbing the redistributive consequences of monopoly power. A purely economic test for determining antitrust liability for sham litigation would have federal competition policy turn on private determinations of costs and benefits under the single normative standard of economic efficiency.

Such an approach would narrow the right to petition to cost-justified efficient conduct. It is one thing to hold Noerr inapplicable to judicial and administrative settings; it is quite another to conclude that Noerr applies in the adjudicatory setting, but only if litigation would be cost-justified to the plaintiff. In basing the right of petition on an analysis of private costs and benefits, Judge Easterbrook's construction of Grip-Pak embraces a highly controversial theory of sham litigation; one that ig-

226. See also, Hurwitz, supra note 1, at 107. Noting, however, the great difficulty in forecasting costs and benefits, Hurwitz posits these questions:

How does one account for the legitimate strategic and psychological benefits of peti-
tioning, such as the personal satisfaction or formidable business reputation achieved by vigorously protecting one's rights? In addition, how does one account for com-
plexities such as multiple causes of action or counterclaims; unpredictable litigation strategies; narrow or expansive statutory interpretations; uncertainties about jury se-
lection, scheduling, discovery scope and results, evidentiary rulings, and the varying goals, perspectives, and levels of risk aversion held by the parties and their counsel?

Id.

227. The common understanding of sham litigation assumes that antitrust regulation of litigation is necessary to guard against predators who utilize strategic forms of litigation as an...
nores the potential chilling effect of sham claims in deterring legitimate, nonmalicious litigation. The sham litigation test advanced in the Seventh Circuit lacks an acceptable theoretical basis to warrant antitrust regulation of litigation, especially litigation based on reasonable cause.

We do not expect litigants in judicial or administrative proceedings to engage in the type of lobbying activities that occur in the legislative setting because we expect judges to be unbiased and uninfluenced decisionmakers. While special interest groups do engage in various sorts of lobbying activities designed to influence adjudicatory decisions,228 decisionmakers in the judicial spheres of government attempt to insulate themselves from such pressures, making legislative-type lobbying less likely as a strategy of influence. Nor is it apparent that antitrust immunity is needed in the judicial sphere to protect the Court’s concern for “democracy’s interest in . . . governmental access to as many sources of ideas and information as possible.”229 The rules of procedure and doctrines of legally relevant and admissible evidence presently limit the

entry-deterring strategy aimed at increasing a rival’s costs by forcing the rival to incur greater costs through litigation. See Klien, supra note 206; see also H. Hovenkamp, supra note 60, at 158 (arguing that “[s]uch claims are best characterized as mechanisms for raising a rival’s costs disproportionately to those of the incumbent”). Unfortunately, economic models of litigation have labored under an unsatisfactory state of strategic and bargaining theory that has presented obstacles and resistances for the development of more persuasive theory to justify the prevailing notions of sham litigation. See Cooter & Rubinfeld, supra note 206.

As an entry-deterring strategy, sham litigation may backfire. In seeking to raise a rival’s costs through litigation, the predator would also incur costs, which may or may not offset those of the rival. If the rival wins the lawsuit on the merits there is always the possibility that the rival will be awarded costs. If the litigation is brought for bad faith purposes, a judge might sanction the predator for instituting malicious litigation. Finally, litigation may have a low probability of success and still represent a high social value in being brought.

228. Non-litigation tactics available to special interest groups seeking to influence judicial bodies are relatively limited, at least when compared to the variety of tactics and strategies available to pressure groups lobbying the legislative or executive branches of government. See D. Schlozman & J. Tierney, supra note 2, at 360. Actions by interest groups seeking to influence judicial outcomes without filing a lawsuit include picketing the courthouse, instituting letter-writing campaigns, attempts to influence the selection of judges, and attempts to shape opinion in the legal community about a particular issue or set of issues. Id. at 361. Grassroots letter campaigns have met with mixed success. The recent letter campaign spawned by the abortion controversy surrounding the Webster decision suggests the limits of such a strategy. The practice of some sitting judges is not to read such material. For example, Justice Black, in response to a similar letter campaign involving a stay of execution in a capital punishment case, insisted that he would never read letters about a pending decision. Justice Black announced that “the courts of the United States are not the kind of instruments that can be influenced by such pressure.” Id. (citing Vose, Litigation as a Form of Pressure Group Activity, ANNALS 28-29 (1958)). The same pressure activities occurring in the legislative arena may be more effective, as the outcome of the failed Supreme Court nomination of Robert Bork illustrates. See, e.g., E. Bronner, Battle For Justice: How the Bork Nomination SHOOK AMERICA (1989).

229. See Note, Application of the Sherman Act, supra note 9, at 849.
sources of ideas and information possible in adjudication. Hence, while adjudicatory branches of government are political forums in which organized interests are active, such "petitioning activity" is already highly regulated by a elaborate system of legal rules and procedures designed to monitor competing claims and interests. In fact, courts and administrative agencies are careful to minimize the type of pressure tactics that lobbyists utilize in adjudicatory settings. Finally, judges have had little difficulty in rooting out forms of sham litigation based on corrupt or unethical predatory conduct.

In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, for example, plaintiffs sought to block a rival's access to the market by enforcing a patent privilege allegedly procured through fraud. The Court found that the assertion of a fraudulently obtained patent could constitute the offense of attempted monopolization. While judicial process was utilized as an instrument for creating a barrier to entry in *Walker Process*, the Noerr-Pennington doctrine was irrelevant to the anti-


231. This does not mean that litigation should never be the basis for imposing antitrust liability. Entry-deterring strategies that rely upon fraud and deception in the enforcement of legal rulings to block a competitor's access to the marketplace can represent a serious antitrust concern. Monopolies and cartels cannot exist over time unless they operate behind a barrier to entry. See J. Bain, *Barriers to New Competition* (1956); see also H. Hovenkamp, *supra* note 60, at 150-51 (discussing vertical integration as a potential barrier to entry). The anticompetitive potential for single-firm monopolization or concerted attempts to cartelize markets is not likely to be significant if entry to the market is easy. See, e.g., Dewey, *Antitrust and Economic Theory: An Uneasy Friendship* (Book Review), 87 Yale L.J. 1516, 1521-22 (1978).

232. 382 U.S. 172 (1965). In *Walker Process*, the Supreme Court held that "the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act . . . ." *Id.* at 174. Without mentioning *Noerr*, the Court determined that Sherman Act liability could be sustained for attempting to restrain trade by enforcing a patent obtained through fraud. *Walker Process* thus established a post-Noerr antitrust principle for applying the Sherman Act to agreements seeking to use litigation as a pre-entry strategy to restrict a rival's access to the market. A similar holding was reached in United States v. Singer Mfg., 374 U.S. 174 (1963). But see Fischel, *supra* note 7, at 112 (arguing that Singer is no longer good law in light of the Court's decision in *California Motor Transport*). For a contrary view, see Bien, *supra* note 9, at 51 n.35. See also Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286 (5th Cir. 1971). In *Woods*, the defendants conspired to prevent the plaintiff from competing in the production of gas from the Appling Gas Field in Texas. The plaintiff alleged that the defendants had filed false production quotas with a state commission that regulated the amount of allowable production for each firm. The Fifth Circuit held that *Noerr* did apply to protect the defendants from antitrust liability because there was no attempt by the defendants to influence the policies of a governmental agency. *Id.* at 1298. Thus, the defendants filed false information to thwart the application of a rule previously promulgated. Since *Woods* was decided before *California Motor Transport*, it is not clear whether the appellate court would have reached the same result today. On the other hand, one can argue that *Woods* is controlled by *Walker Process*, not *California Motor Transport*, because both cases involved attempts to thwart the legal application of a rule or right previously promulgated.
trust issues since the defendant’s counterclaim alleged and specifically identified improper conduct representing a clear antitrust harm.\textsuperscript{233} The plaintiff seeking to enforce an invalid patent in \textit{Walker Process} was treated as any other antitrust defendant despite the fact that litigation was used as the medium for restraining trade.

If there is a danger posed by sham litigation it is the real possibility that antitrust treble damages may chill others from bringing legitimate litigation serving important social values. The social cost of this chilling effect may far exceed the dangers of sham litigation. In the case of antitrust litigation, the possibility of treble damage liability for sham antitrust claims may work to cancel the social benefits underlying the deterrent effects of the treble damage remedy for other traditional substantive antitrust violations. A litigant may think twice before bringing an antitrust or other legal claim if there is a possibility that the courts might penalize colorable, but unsuccessful claims, as sham litigation.\textsuperscript{234} The threat of sham liability may magnify the incentives for “settlement blackmail” by defendants who raise strategic sham claims to force plaintiffs to settle them. While bad faith litigation may entail serious dangers, judges may be capable of monitoring competing interests and, when nec-

\textsuperscript{233} See P. Areeda & D. Turner, supra note 63, at 138 (arguing that “impropriety in procuring an invalid patent should be deemed an ‘exclusionary act’ where the patentee misrepresented or improperly failed to disclose facts material to patentability, whether or not the Patent Office thought them material”). Hence, it is irrelevant whether the “Patent Office might have incorrectly issued the patent anyway.” \textit{Id.}

One might distinguish \textit{Walker Process} on the ground that it was a special case involving patents, but the existence of a patent hardly seems the basis for a meaningful distinction. A more persuasive argument is that \textit{Walker Process} is distinguishable from \textit{Noerr} because there was no attempt by the plaintiff in \textit{Walker Process} to influence the policies of government. In \textit{Walker Process}, the plaintiff filed false information with the patent office with the intent of monopolizing a market through subsequent enforcement of the patent. When the plaintiff sought to enforce the patent claim in court, it attempted to establish a right previously promulgated. The defendants in \textit{Walker Process} thus attempted to use litigation as a mere conduit for perfecting a scheme to enforce a fraudulently obtained patent. There was no claim that litigation itself was the basis for the antitrust violation. The \textit{ex parte} filing with the patent office might be viewed as a form of adjudication. \textit{See}, e.g., P. Areeda & H. Hovenkamp, supra note 78, at 48. That “adjudication” was nevertheless independent of the improper conduct involved in \textit{Walker Process}.

\textsuperscript{234} Empirical studies of private antitrust litigation indicate that antitrust litigation that has a low probability of success will be discouraged from being brought. See Salop & White, \textit{Private Antitrust Litigation: An Introduction and Framework}, in \textit{PRIVATE ANTITRUST LITIGATION} 3, 19 (L. White ed. 1988). Sham litigation claims may increase the uncertainty of legitimate antitrust litigation and thereby discourage such litigation. Moreover, the corresponding fears of “extortion by litigation” has limits. “[T]he courts have discretion to make plaintiffs who file frivolous claims liable for the defendant’s expenses. . . . This sanction restricts the credibility of [a sham] plaintiff’s threat.” \textit{Id.} at 28. Nor is it “obvious which side has the overall advantage” in such cases. \textit{Id.}
essary, can invoke a host of existing common-law and statutory remedies and sanctions to curtail sham litigation. Thus, the Seventh Circuit theory of sham litigation, premised as it is on ideas of cost-justified conduct, fails to explain why the judiciary needs special remedies to guard against abusive litigation. What is needed is a more realistic and believable theory of sham litigation.

B. Retreat from the Noerr-Pennington Doctrine—Petitioning Nongovernmental Bodies

The Supreme Court cast some doubt on the Noerr-Pennington doctrine last term in Allied Tube & Conduit Corp. v. Indian Head, Inc. In Indian Head, the Court considered whether Noerr-Pennington immunity protects attempts to influence the standard-setting process of a private association for the alleged purpose of driving a competitor from the market. The legal controversy arose out of the competitive struggle between two manufacturers of conduit utilized in construction. The plaintiff, Indian Head, had developed a plastic conduit that threatened
the market position of the defendant, Allied Tube, the leading manufacturer of steel conduit utilized in the building trades and specifically approved for electrical transmission by most construction codes. Indian Head alleged that Allied Tube had conspired with other steel conduit manufacturers to exclude its product from the market by improperly influencing a private standard-setting association to delay approval of Indian Head's plastic conduit.

The standard-setting association, the National Fire Protection Association (NFPA), promulgates the National Electrical Code, which establishes the product and performance requirements for the design and installation of electrical wire. The Association's Code is routinely adopted with little or no change as part of the building codes of a substantial number of state and local governments. Indian Head claimed that the defendants "packed" a crucial meeting of the Association with 230 persons recruited for the purpose of defeating a proposal that would have granted Code approval for Indian Head's product. The Allied Tube representatives dominated the meeting and blocked Code proposals favorable to Indian Head by a vote of 394 to 390. The result was that

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238. Indian Head, 108 S. Ct. at 1934. The Court noted that NFPA's privately promulgated code is "the most influential [electrical] code in the nation." Id.

239. The Code is also used by private underwriters to certify products for insurance purposes. Id.

240. Id. Indian Head was seeking to have the NFPA adopt a new Code standard that would have approved the type of plastic conduit it manufactured. Id. at 1935. To obtain approval, a proposal would had to have been adopted at the NFPA's annual meeting, during which it could have been adopted or rejected by a simple majority of the membership present at the meeting. The Code is revised every three years by the NFPA through a majority vote of the membership in attendance at annual meetings. Id. at 1934-35.

241. These individuals were recruited to attend the meeting and to vote against their adversaries' proposals, which they did, to the economic detriment of Indian Head. Id. at 1935. Allied Tube allegedly paid over $100,000 for the membership, registration, and attendance expenses of the persons it recruited to attend the meeting. Indian Head, 817 F.2d at 940. These individuals "were instructed where to sit and how and when to vote by group leaders who used walkie-talkies and hand signals to facilitate communications." Indian Head, 108 S. Ct. at 1935. Few had any technical knowledge relevant to the plaintiffs' proposal, and none spoke at the meeting to give reasons for opposing the proposal. Id. In order to ensure that the plastic conduit would not receive National Electric Code (NEC) approval, Allied Tube instructed its representatives to vote against all proposals for approval without discussion. Id. Allied prepared box lunches for its representatives so that they would not have to leave their seats at any time during the meeting. Id. The Allied-controlled members were instructed to remain in their seats during the meeting until two a.m., when the NFPA voted to reject a proposed amendment that would have given the association's approval for the use of plastic conduit. Id.

242. Indian Head, 817 F.2d at 941.
Indian Head's plastic conduit could not be used in the vast majority of construction work throughout the nation.\textsuperscript{243}

Indian Head brought suit in district court alleging that the defendants had conspired to restrain trade in violation of section one of the Sherman Act. The jury returned a verdict in favor of the plaintiff, awarding Indian Head damages of 3.8 million dollars, before trebling.\textsuperscript{244} The district judge granted Allied's motion for a judgment notwithstanding the verdict\textsuperscript{245} finding that Noerr immunized Allied actions because the NFPA was "akin to a legislature," and because the defendants had engaged in forms of petitioning activity "consistent with acceptable standards of political action."\textsuperscript{246} The Second Circuit reversed, holding that Noerr did not apply to immunize petitioning activity before a private standard-setting organization.\textsuperscript{247}

The federal circuits were split on the question posed in Indian Head.\textsuperscript{248} The Ninth Circuit, in Sessions Tank Liners, Inc. v. Joor Manu-

\textsuperscript{243} The economic loss to Indian Head was considerable, since it stood to lose not only the prospective profits from sales of its product, but also the total investment in research and product development of a socially valuable product. See Hovenkamp, Antitrust's Protected Classes, 88 Mich. L. Rev. 1, 19 (1989).
\textsuperscript{244} Indian Head, 817 F.2d at 939. The jury, responding to special interrogatories, concluded that Allied Tube's conduct was based, at least in part, on genuine safety concerns. Indian Head, 108 S. Ct. at 1935. The jury also found, however, that while Allied Tube had not violated NFPA rules, it had subverted the decisionmaking process of the association. \textit{Id.} Finally, the jury concluded that Allied Tube had failed to utilize the least restrictive alternative for expressing its legitimate concerns of opposition to Indian Head's product. \textit{Id.} at 1936.
\textsuperscript{245} The case was submitted to the jury for decision and the jury returned a treble damage award of $3.8 million for lost profits resulting from defendant's unlawful actions. \textit{Id.} at 1936.
\textsuperscript{246} \textit{Id.}
\textsuperscript{247} Indian Head, 817 F.2d at 943. The Second Circuit justified its decision on the "unique nature of petitions directed to the government" in Noerr, involving "concerns that do not apply with equal force" to private organizations. \textit{Id.} The court emphasized the fact that private associations are not politically accountable to the general public and do not have partisan safeguards that check the power of private interest groups in the legislative setting. \textit{Id.} at 944. The court also raised a number of "serious practical problems" that it believed would arise if Noerr-Pennington applied to private organizations:

- How many and which governmental bodies must enact a code before the organization takes on a quasi-legislative nature? To what extent does a code have to be enacted? If the governmental bodies decide to amend a code before adopting it, how extensive can the changes be before the members of the organizations lose Noerr-Pennington protection?

\textit{Id.} The Second Circuit was of the view that the difficulty of answering such questions was itself reason for limiting Noerr-Pennington immunity to direct petitioning before governmental bodies. \textit{Id.}
\textsuperscript{248} There are reasons for concluding that private petitions before nongovernmental bodies should be protected by the Noerr doctrine. Petitioning a nongovernmental body is no different from other forms of petitioning protected by the first amendment, especially when the nongovernmental body is relied upon by a governmental body for information and technical support. As Professors Areeda and Hovenkamp note, "petitioning a private body may be the
facturing, Inc., disagreed with the Second Circuit’s position in Indian Head, concluding that Noerr-Pennington immunity applies to protect a private standard-setting organization promulgating Uniform Fire Codes routinely adopted by governmental authorities. In the Ninth Circuit’s view, private standard-setting organizations are functional partners in the legislative process such that lobbying activity before such bodies should generally enjoy the antitrust immunity the Supreme Court granted to direct lobbying in Noerr. The court, however, acknowledged that antitrust immunity would be denied if petitioning constituted a “sham.”

In Indian Head, Justice Brennan, writing for a 7-2 majority, affirmed the Second Circuit’s decision. The Court concluded that Noerr immunity failed to cover the petitioning activity, not because Noerr was limited to governmental petitioning as the Second Circuit had concluded, but rather because the source, context, and nature of the petitioning war-

only effective means of reaching a public one.” P. Areeda & H. Hovenkamp, supra note 78, at 76-77. On the other hand, because a private, nongovernmental entity was involved, there are also reasons for questioning the applicability of an antitrust immunity doctrine designed to protect political activity within the governmental sphere.

249. 827 F.2d 458 (9th Cir. 1987), vacated. 108 S. Ct. 2862 (1988). The Supreme Court vacated and remanded the Ninth Circuit’s decision in Sessions in light of the Court’s decision in Indian Head.

250. In Sessions, the defendant manufactured metal tanks used for the underground storage of hazardous fluids, including gasoline. Sessions, 827 F.2d at 460. Sessions, the plaintiff, developed a technique for repairing leaks in such tanks while they were still underground. Removing a tank to repair a leak was so costly that it would be cost effective to purchase a new tank if Sessions’ underground repair process were not available. The defendant was a member of a crucial subcommittee of the Western Fire Chiefs Association, a private standard-setting organization that promulgates uniform fire codes routinely adopted by state and local governments. Id. at 460-61. Sessions claimed that the defendant improperly influenced the association to adopt a safety standard that precluded the use of Sessions’ underground repair technique. Sessions asserted that the defendant utilized deceptive and misrepresented facts to subvert the organization’s process and to otherwise exploit such process through the defendant’s membership on the association’s subcommittee on safety. Id. at 461, 466, 467. The Ninth Circuit held that Noerr-Pennington applies to the private standard-setting organization, but that antitrust immunity would be lost if the petitioning activity was found to be a sham. Id. at 462, 466-69. The court also concluded that any misrepresentations made by the defendant in the pursuit of its legislative goals were “fully protected under Noerr-Pennington,” but that misrepresentations seeking to influence administrative action of member officials would not be protected. Id. at 468-69.

251. Sessions, 827 F.2d at 466-69. Hence, while the Second Circuit in Indian Head was of the view that Noerr-Pennington immunity should be restricted to direct petitioning of governmental bodies, the Ninth Circuit was of the view that Noerr-Pennington should extend to petitioning before “quasi-legislative” bodies performing a generally accepted role in the legislative process. In the Ninth Circuit’s view, such petitioning would be protected by Noerr unless the petitioner utilized improper means for influencing governmental action. Id.

252. Indian Head, 108 S. Ct. at 1942.
ranted traditional antitrust scrutiny. The Court found that the nature of the petitioning raised traditional antitrust concerns because it occurred within a private organization comprised of competitors who were biased by economic self interest in restraining the competition of potential rivals. After considering these factors, Justice Brennan concluded that "the validity of [defendant's petitioning] efforts must, despite their political impact, be evaluated under the standards of conduct set forth by the antitrust laws that govern the private standard-setting process."  

*Indian Head* is significant because the Court announced for the first time that the *Noerr* doctrine does not extend to "every concerted effort that is genuinely intended to influence governmental action." The validity of petitioning private trade associations in *Indian Head* was subjected to antitrust sanctions, despite the incidental political effect of the petitioning, and even though Allied's claim was acknowledged by the Court to have "some force." The Court rejected the *Noerr* immunity claim because Allied and its conspirators had "other avenues" available for exercising their right of petition through "direct lobbying, publicity campaigns, and other traditional avenues of political expression." The majority also emphasized that its decision did not preclude Allied from presenting the standard-setting organization with accurate scientific evidence or to present its claims in a nonpartisan manner. What Allied was precluded from doing, without exposing itself to antitrust liability, was "staking the private standard-setting body with decisionmakers sharing their economic interest in restraining competition." In opting for a functional approach that rejects sham considerations, and instead focuses on the source, context, and nature of petitioning activity, the Court established a new limit to the *Noerr* antitrust immunity doctrine.

While the result reached by Justice Brennan is sound, the analysis he employed to reach that result was far from perfect. Unfortunately, Justice Brennan authored a cryptic opinion in *Indian Head*. While he

253. *Id.* at 1936-38.
254. *Id.* at 1942.
255. *Id.*
256. *Id.* at 1938 ("We cannot agree with petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action.").
257. *Id.* at 1942. Justice Brennan stated that the Court had "no difficulty" concluding that the challenged restraint involved private action since "the restraint [was] imposed by persons unaccountable to the public and without official authority, many of whom [had] personal financial interests in restraining competition" with the plaintiff. *Id.* at 1938.
258. *Id.* at 1942.
259. *Id.*
260. *Id.*
agreed with the Second Circuit that the private association could not be treated as a "quasi-public" body merely because "legislatures routinely adopt the Code the Association adopts," he accepted the view that Noerr immunity might apply if the Allied's commercial interests "were incidental to a valid effort to influence governmental action." On the other hand, Justice Brennan also concluded that Noerr immunity should be denied if the nature and context of the conduct in question "can more aptly be characterized as commercial activity with a political impact." Since the antitrust problem in Indian Head involved subversion of the decisionmaking process of the standard-setting organization by Allied, as Justice Brennan acknowledged at the conclusion of his opinion, why engage in the burdensome analysis of factors seeking to establish the commercial character of conduct? Withheld was the key to determining when the context and nature of the activity justifies denying Noerr immunity to petitioning activity before a private standard setting process, and the relevance of improper petitioning conduct.

261. Id. at 1937.
262. Id. at 1938. The Court thus rejected the absolutist position of the Second Circuit that Noerr-Pennington immunity was limited to direct petitioning before governmental bodies. On the other hand, the Court also rejected the equally absolutist position that "the Noerr doctrine immunizes every concerted effort that is genuinely intended to influence governmental action." Id. at 1938.

263. Id. at 1941. Indian Head was, of course, complicated by the fact that governmental entities routinely adopt the code standards of the NFPA. Characterizing Allied Tube's conduct as commercial activity merely because the petitioning took place in a private context would overlook the reality that Allied's petitioning was incidental to a genuine attempt to influence governmental action. On the other hand, it was far from clear whether injuries to the antitrust plaintiff were caused by governmental or private action. The exclusion of Indian Head's product from the market was the result of governmental action, but that action was influenced by the decisions reached by the private association. Justice Brennan was thus right to recognize that Allied's "claim to Noerr immunity [had] some force," even though he was also justified in expressing concern about the validity of Allied's conduct in the context of a private association. Id. at 1938-39.

264. Indian Head creates unnecessary uncertainty. The plaintiff's allegation should have been found sufficient to establish that the defendants' petitioning effort was based on a predatory market design seeking to capture the benefits of a private standard-setting process. In other words, Justice Brennan might have found, as the Ninth Circuit had concluded in the Sessions case, that Noerr's sham exception denies antitrust immunity when petitioning seeks to influence governmental action through subversion of the deliberative process of a private standard-setting organization relied upon by government for model codes. See Sessions, 827 F.2d at 465. Justice Brennan, however, expressly rejected the Sessions approach. He found that the petitioners' effort in Indian Head to stack the private standard-setting organization with biased decisionmakers could not be characterized as sham petitioning, given that a number of state governments had adopted the code standards of the NFPA as part of their local ordinances. Indian Head, 108 S. Ct. at 1938. In Justice Brennan's view, Noerr's sham exception is inapplicable in cases where a restraint of trade is the result of valid governmental action, id. at 1936 (citing Noerr, 365 U.S. at 136; Pennington, 381 U.S. at 671), or where the challenged conduct is based on a genuine attempt to influence governmental action. Id. at 1941 n.10.
One wonders what relevance, if any, the *Noerr* doctrine now has in cases involving petitioning before private standard-setting organizations.\(^{265}\) While *Indian Head* involved antitrust immunity, Justice Brennan's opinion reads more like a decision dealing with substantive antitrust violations. The Court concluded that *Noerr* immunity failed to protect Allied's petitioning activity because the activity in question raised a serious anticompetitive harm found in a context routinely regulated by the antitrust laws.\(^{266}\) Since trade associations have been traditional objects of antitrust scrutiny, the majority saw no reason to extend *Noerr* immunity to protect anticompetitive harms resulting from a conspiracy to subvert the processes of a private standard-setting association.\(^{267}\)

Despite Justice Brennan's attempt to limit *Indian Head* to the context of private standard-setting associations,\(^{268}\) his opinion promises to alter the development of *Noerr*-Pennington jurisprudence. In rejecting the "absolutist position" that *Noerr*-Pennington immunizes every concerted effort genuinely intended to influence governmental action, Justice Brennan has created considerable uncertainty not only about the reach of the antitrust laws to standard-setting activities of private associations,\(^{269}\) but also about the continued vitality of the Warren Court's immunity

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265. Justice Brennan seemed to suggest as much when he stated that "[t]he issue of immunity in this case thus collapses into the issue of antitrust liability." 108 S. Ct. at 1942.

266. In looking to context, Justice Brennan emphasized that "private standard-setting associations have traditionally been objects of antitrust scrutiny." *Id.* at 1937. He also emphasized that "members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm." *Id.* This did not mean, in Justice Brennan's view, that the standard-setting process of private associations will be prevented from performing legitimate governmental functions for fear of antitrust violations. According to Justice Brennan, producers and their private associations are still entitled to the protection of "full antitrust immunity" for concerted attempts to influence governmental action through "direct lobbying, publicity campaigns, and other traditional avenues of political expression." *Id.*

267. What distinguished *Indian Head* from *Noerr*, in Justice Brennan's view, was the fact that the petitioning activity occurred in a context in which the nature of the activity gave rise to potentially greater antitrust harms. The "relevant context" of a private association was deemed important because members of such associations have horizontal and vertical business relations that create incentives for conspiracies to restrain trade. *Id.* at 1937 (citing 7 P. Areeda, *supra* note 89, at 343).

268. In a footnote, Justice Brennan emphasized the limited nature of his decision: "Our holding is expressly limited to cases where an 'economically interested party' exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants." *Id.* at 1942 n.13.

doctrine itself.\textsuperscript{270} After Indian Head, it can no longer be said that Noerr extends to every concerted effort to influence governmental action.\textsuperscript{271}

The uncertainty surrounding the future of the Noerr immunity doctrine prompted a strong dissent by Justice White, joined by Justice O'Connor. The dissent argued that the majority's decision was flatly inconsistent with the Noerr doctrine.\textsuperscript{272} In their view, petitioning conduct that is otherwise punishable under the antitrust laws either becomes

\begin{itemize}
\item \textsuperscript{270} By emphasizing traditional antitrust analysis for judging the validity of the petitioning conduct in Indian Head, the Court suggests that Noerr immunity depends on whether the nature and context of the conduct in question establish a violation of the antitrust laws. This suggestion may create unnecessary uncertainty by encouraging decisionmakers to confuse antitrust immunity analysis with antitrust analysis applicable to substantive violations. Conduct unprotected by Noerr does not necessarily translate into an antitrust violation; Noerr's immunity protection may be denied, and unimmunized conduct may still be found not to constitute a substantive antitrust violation. See Fischel, supra note 7, at 81-82 ("An important point, but one that is easily lost sight of, is that the Noerr-Pennington line of cases concerns the scope of an exemption from the antitrust laws. It must be emphasized at the outset that conduct unprotected by Noerr does not necessarily constitute an antitrust violation."). If Indian Head is read as establishing the principle that Noerr immunity is irrelevant if the nature and context of the conduct violates the antitrust laws, then Noerr would collapse and cease to exist as a meaningful doctrine.
\item \textsuperscript{271} While the Court's decision in Indian Head must be understood in terms of its particular facts, the language and tenor of Justice Brennan's majority opinion casts a spell of doubt over the continuing validity of Noerr. Justice Brennan acknowledged this in Indian Head; in concluding that if every genuine attempt to influence governmental action were immunized under Noerr, then:
\begin{quote}
\textsuperscript{Id.} at 1939. While some of Justice Brennan's examples seem to stretch to find a connection with political activity and thus appear farfetched, the more general point he raises about the necessity of focusing on the anticompetitive consequences resulting from the application of the Noerr doctrine is important.
\end{quote}
\item \textsuperscript{272} As Justice White, joined by Justice O'Connor, stated in dissent:
\begin{quote}
\textsuperscript{Id.} at 1944. While some of Justice Brennan's examples seem to stretch to find a connection with political activity and thus appear farfetched, the more general point he raises about the necessity of focusing on the anticompetitive consequences resulting from the application of the Noerr doctrine is important.
\end{quote}
\end{itemize}
immune from the operation of those laws when it is part of a larger design to influence the passage and enforcement of laws or the conduct is nothing but a "sham." According to Justice White, the sham exception denies Noerr immunity whenever the petitioning effort involves "flagrant abuse." The majority, however, concluded that the dissent had "distorted" the meaning of the sham exception in suggesting that it covers the activity of a defendant who "genuinely seeks to achieve his governmental result, but does so through improper means."

If one accepts the central premises of interest group pluralism, then Justice Brennan was right to conclude that petitioning efforts to influence governmental action cannot be characterized as a "sham." Under the policy underpinnings of the Noerr doctrine, petitioning cannot be a sham if the activity was genuinely intended to influence governmental action. The contrary suggestion offered by Justice White in dissent, that the sham exception should apply in cases where the petitioning effort involved "flagrant abuse," however, also makes sense if one adopts the pessimistic view of modern interest group theorists. The disagreement between the majority and dissent over the proper definition of the sham exception may involve more than just semantics; the disagreement may be the glimmer of a shift in judicial attitudes concerning fundamental conceptions of the nature of interest groups and the role of antitrust regulation in the political arena.

Indeed, despite their differences, the majority and dissenting justices in Indian Head agreed on a number of important issues. The majority and the dissent agreed that Noerr immunity applies to genuine petitioning activity before private bodies, even if an anticompetitive purpose generated the activity. The justices also agreed that certain types of petitioning abuses might support an antitrust violation. Both the majority and the dissent suggested that the abuses in Indian Head were probably sufficient to sustain a finding of antitrust violation, though the petitioning was before a private nongovernmental body. While the

274. Id.
275. Id. at 1941 n.10. According to Justice Brennan, the sham exception of Noerr only describes activity that was not genuinely intended to influence governmental action. Justice Brennan also noted that the dissent's definition of sham exception, like that of the Ninth Circuit in Sessions, was "no more than a label courts could apply to activity they deem unworthy of antitrust immunity (probably based on unarticulated consideration of the nature and context of the activity), thus providing a certain superficial certainty but no real 'intelligible guidance' to courts or litigants." Id.
276. See, e.g., P. Areeda & H. Hovenkamp, supra note 78, § 206.2, at 80 (arguing that the "dissenting and majority opinions [in Allied Tube] were closer than they seemed.")
277. See Indian Head, 108 S. Ct. at 1941 n.10; id. at 1945 (White, J., dissenting).
justices disagreed on critical issues concerning the scope of Noerr immunity and the sham exception, they agreed that improprieties and flagrant abuses might justify antitrust intervention even if such conduct subsequently influences governmental action. Hence, the overall consensus of opinion among the justices in Indian Head evinced doubt about the wisdom of allowing the private interest of producer groups to dictate ultimate governmental policy through domination of private standard-setting organizations, which can be seen to run counter to the optimism of the Warren Court in its embrace of interest group pluralism.

C. Retreat from the First Amendment—Political Boycotts and the First Amendment Defense

The first amendment rationale underlying Noerr-Pennington also has weakened as the courts have begun to ponder questions concerning the scope of protection to be afforded profit-oriented forms of political expression. Beginning in the 1970s, the lower courts created what one commentator has called a "new" Noerr-Pennington doctrine—"one offering immunity from civil liability for petitioning activity as long as the petitioning is not a 'sham.'"278 This "new" Noerr-Pennington doctrine has in fact worked to extend Noerr by establishing a unique first amendment defense for petitioning activity in addition to Noerr's immunity defense created for political activity.279

By far, the most significant cases illustrating the development of a first amendment defense for political activity have involved alleged "political" boycotts directed against government or private parties.280 These cases have required the courts to determine if the first amendment penumbra of Noerr extends to insulate political boycotts from the reach of the antitrust laws, or any other law imposing civil liability. Initially, the lower courts began to recognize a broad immunity principle for politically motivated activity challenged under the antitrust laws.

278. Note, Right to Petition, supra note 9, at 1256; see, e.g., Sierra Club v. Buz, 349 F. Supp. 934 (N.D. Cal. 1972) (Noerr immunity protects against tort liability for interference with advantageous business relations). This new twist given to Noerr-Pennington was in part encouraged by the Court's decision in Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

279. See generally P. AREEDA & H. HOVENKAMP, supra note 78, § 113.1, at 3-9.

280. See, e.g., id. at 4-6.
In *Missouri v. National Organization for Women (NOW)*,\(^{281}\) for example, the Eighth Circuit held that NOW's political boycott of convention sites within states that had failed to ratify the Equal Rights Amendment (ERA) was immune from Sherman Act liability even though the success of NOW’s boycott was intended to inflict economic harm in the offending states.\(^{282}\) In distinguishing *Noerr*, the NOW court emphasized that the challenged petitioning activity in *Noerr* sought to accomplish legislative objectives that would help the railroads “financially, economically, and commercially.”\(^{283}\) NOW’s boycott was found to be distinguishable because the ERA was not a “financial,” “economic,” or “commercial piece of legislation,” and because the basic orientation of the parties in seeking to support or defeat the ERA was “not one of profit motivation.”\(^{284}\) The court emphasized that NOW’s political activity did not involve the type of abusive or improper conduct engaged in by the railroads in *Noerr*.\(^{285}\)

The Eighth Circuit’s decision in *NOW* often is cited for the view that economic boycotts seeking essentially political objectives are immune from the antitrust laws because neither “the Sherman [nor] Clayton Act[.] [was] designed to be applied to *noncommercial* activities.”\(^{286}\) NOW’s boycott may in fact represent the paradigmatic case involving the type of political activity that the Supreme Court intended to insulate

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282. NOW, 620 F.2d at 1315.

283. Id. at 1311.

284. Id. at 1312.

285. 620 F.2d. at 1315. The plaintiffs in *NOW* never claimed that the defendant NOW had engaged in sham petitioning. The plaintiffs argument conceded that the sole purpose of the boycott was to pressure state governments to ratify the ERA. *Id.* at 1314. The Eighth Circuit thus found that NOW's boycott was “privileged” by the first amendment right of petition that the Supreme Court in *Noerr* had protected when the right “collides with commercial effects of trade restraints” proscribed by the antitrust laws. *Id.* at 1319.

from antitrust liability under the *Noerr* doctrine. The Eighth Circuit’s decision in *NOW* expressly endorsed such a view.

A first amendment defense for political boycotts lacking commercial objectives was recognized by the Supreme Court in *NAACP v. Claiborne Hardware Co.* In that case, African-American civil rights groups in Mississippi instituted a boycott of white merchants who discriminated on the basis of race. The Mississippi Supreme Court upheld a massive common-law tort judgment of the trial court. The Supreme Court overturned the verdict on the ground that it impermissibly infringed expressive conduct ordinarily protected by the first amendment. In finding that the boycott involved constitutionally protected activity, Justice Stevens, writing for the Court, concluded that the “right of the States to regulate economic activity could not justify a complete prohibition against a non-violent, politically-motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.”

The Eighth Circuit in *NOW* can be seen as establishing an immunity principle based on statutory construction—the drafters of the Sherman Act never intended their legislation to regulate noncommercial boycotts solely motivated by political objectives. However, it is reasonably clear that the framers of the Sherman Act were deeply concerned about the abuse of economic power as a social and political, as well as economic, problem. There is evidence to support the view that the framers of the antitrust laws were concerned that the unregulated exercise of economic power was a problem because such power would pose a threat to political democracy. See Lande, *supra* note 16, at 98-99; Pitofsky, *supra* note 16, at 1060-65. The problem, of course, is that debates about legislative intent on particular issues involved in the government-petitioning cases are likely to be inconclusive given the ambiguity of the relevant legislative record. On the other hand, it is extremely doubtful that the drafters of the antitrust laws intended their legislation to regulate politically motivated or noncommercial forms of “political” activity.

The court read the Supreme Court’s decision in *Noerr* as establishing a broad immunity principle that insulates “political” activity from antitrust scrutiny. However, the Eighth Circuit’s decision in *NOW* may be unique in that the plaintiffs conceded that the defendants’ boycott was for the sole purpose of influencing legislation. *Id.* Indeed, NOW’s boycott was premised upon what the court saw as a clear and unambiguous political objective—to secure ratification of the ERA. Certainly, one would have to stretch to argue that NOW’s boycott was motivated by profit-oriented objectives. While it is conceivable that some women members of NOW might reap economic benefits if the ERA were enacted, the nexus between their economic interest and ratification was tenuous at best. See P. AREEDA & H. HOVENKAMP, *supra* note 78, § 113.1, at 6. The possibility of realized financial gain for NOW women was never established; and in any event, there would be no financial benefit from ratification for the men who supported NOW’s boycott. *Id.*

The trial court had sustained a judgment under both state tort and antitrust laws. See *Claiborne Hardware*, 458 U.S. at 890-92. The Mississippi Supreme Court refused to sustain the judgment under state antitrust law that tracked the language of federal law, concluding that the United States Supreme Court had “seen fit to hold [that] boycotts to achieve political ends are not a violation of the Sherman Act.” *Id.* at 894.

*Id.* at 914.
turned on the fact that the boycott was based solely on political objectives and motives.292

_Claiborne Hardware_ was factually similar to _NOW_ in that the participants in both boycotts sought no special economic advantage for themselves. What was not present was the possibility of a dual motive boycott; one where the participants of the boycott seek both economic and political objectives. It is quite possible that most boycotts would be motivated by multiple purposes and diverse interests.293 Not everyone in

292. The Supreme Court, however, took a seemingly contrary position in a labor case, International Longshoremen's Ass'n v. Allied Int'l, 456 U.S. 212 (1982), decided the same term as _Claiborne_. See Bartosic & Minda, _Labor Law Myth in the Supreme Court, 1981 Term: A Plea for Realistic and Coherent Theory_, 30 UCLA L. Rev. 271 (1982). In _Allied International_, longshoremen protesting the Soviet invasion of Afghanistan refused to handle cargo on vessels from or bound for the U.S.S.R. The longshoremen did not seek any labor objective from the boycotted employers, nor did their union have a dispute with them. The longshoremen's boycott, like the civil rights boycott in _Claiborne_, was politically motivated to influence public opinion about political issues of important concern. In _Allied International_, the issue was whether the first amendment protected the boycott from liability under the secondary boycott provision of federal labor law, 29 U.S.C. § 158(b)(4)(B) (1976). The violation gives rise to a damage suit under Taft-Hartley section 303, 29 U.S.C. § 187 (1976). The Court, in a unanimous decision, held that politically motivated boycotts by labor could be proscribed as an illegal secondary boycott under federal labor law. While the civil rights boycott was upheld in _Claiborne_ on first amendment grounds, the Court in _Allied International_ dismissed the first amendment claim in a brief paragraph, concluding that "conduct designed not to communicate but to coerce... merits still less consideration under the first amendment." _Allied Int'l_, 465 U.S. at 226-27. The Court defended its conclusion with the statement that: "The labor laws reflect a careful balancing of interests... [and there are] many ways in which a union and its members may express their opposition to Russian foreign policy without infringing upon the rights of others." _Id._

It is true that the different outcomes in the two cases might be explained in terms of different conclusions judges have reached after balancing interests and making reasonable distinctions. On the other hand, judicial balancing and reasonableness in this area of the law has covered a "strongly ingrained, habitual way of thinking," reflecting biases about the constitutionality of regulation. See C. Baker, _supra_ note 93, at 126 (analyzing the ideology of judicial balancing and reasonableness concerning the constitutionality of regulations of assemblies and parades). _Allied International_ may illustrate the unstated and unrecognized biases that judges historically have exhibited against labor combinations. Labor boycotts have been feared throughout much of legal history because of the power of labor combinations. See, e.g., Minda, _supra_ note 139 (discussing the double standard in the law applicable to combinations of labor and capital). A similar bias has been discovered in first amendment jurisprudence. See Baker, _supra_ note 13, at 656 (arguing that the Supreme Court's commercial speech doctrine has reflected an "unprincipled preference for corporate over union speech"); see also C. Baker, _supra_ note 93, at 223 n.143. Compare _First Nat'l Bank v. Bellotti_, 435 U.S. 765 (1978) (regulation restricting corporate expenditures seeking to influence voting on referendum held unconstitutional) with _Abood v. Detroit Bd. of Ed._, 431 U.S. 209 (1977) (upholding the constitutionality of similar limitations on labor unions in order to protect dissenting members).293

293. _See_ P. Areeda & H. Hovenkamp, _supra_ note 78, § 113.1, at 6. Hence, Professors Areeda and Hovenkamp argue that the Eighth Circuit's decision in _NOW_ might have come out differently if evidence established that some of the participants in the boycott stood to gain financially from the boycott. As they explain: "[S]uppose that the boycotters [in the _NOW_
a political boycott shares the group's political aspirations; some may have a financial interest in the activity. It is also conceivable that the same individual may be motivated by differing motives: some altruistic or political, others purely self-interested and economic. Untangling commercial from political intentions may be difficult; judges may not be able to agree on how to unravel intentions, especially in cases involving concerted activity driven by mixed motives and diverse interests. The task of untangling motives takes on Herculean dimensions when the participants of a boycott stand to gain economically from a boycott allegedly designed to advance a political cause that benefits other interests. The Supreme Court considered such an issue in Superior Court Trial Lawyers Association v. Federal Trade Commission, a case involving a mixed-motive political boycott by a nontraditional labor group.

In Trial Lawyers, a group of private criminal defense attorneys and their association, Superior Court Trial Lawyers Association (SCTLA), agreed not to represent indigent criminal defendants in the District of Columbia until the District increased the fees it paid for the lawyers' services. Under the District of Columbia Criminal Justice Act (CJA), lawyers appointed by the courts to represent indigent criminal defendants earned fixed rates of compensation established by the legislature. These rates (thirty dollars per hour for court time and twenty dollars per hour for out-of-court time) were widely regarded as excessively low.

The possibility of multiple actors with different motives raises formidable problems for judicial decisionmaking. Assuming such distinctions could be made in practice, the courts would be warranted in denying first amendment protection only to those boycotters having a financial or economic stake in the outcome of the boycott. When the participants have dual motives, political and commercial, then the courts would be faced with determining which motive dominates. Professors Areeda and Hovenkamp have suggested that in cases such as these the courts should adopt a presumption that the boycott was based on an economic motive, justifying the denial of first amendment protection. P. Areeda & H. Hovenkamp, supra note 78, § 113.1, at 7. The presumption would then be "defeated only when the economic motives appear trivial in comparison with clearly established political motives." Id. It is far from evident, however, that a motivation test based on the "weight" of motive is any more workable. There is the very real danger that judges, forced by the necessity of rendering a decision, might rely upon their own subjective intuition in assessing whether the commercial motive underlying a political boycott is de minimis or substantial. Those judges who seek to make careful distinctions would be faced with the burdensome task of analyzing the motives of each participant in the boycott, only to discover that the value of political expression cannot be easily weighed.

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296. Id. at 771. Most appointments went to approximately 100 lawyers ("CJA regulars"), even though more than 1200 registered for CJA appointments. Id.
297. The fees were established by the Federal Criminal Justice Act of 1964 (18 U.S.C.
While most politicians, including Mayor Barry, expressed sympathy for the plight of CJA lawyers, legislative proposals to increase lawyer’s rates failed because governmental officials believed that the political climate would not support increased governmental expenditures, especially in a period of fiscal austerity. \footnote{298}

After unsuccessful attempts to raise lawyer fees through direct lobbying efforts, CJA lawyers and their association voted to create a “strike committee.” \footnote{299} The committee thereupon agreed that the only “viable way” of getting an increase in fees was to boycott new CJA appointments. \footnote{300} A petition announcing the lawyers boycott was distributed to the media and public. Within ten days after the boycott, a number of key officials in the District’s criminal justice system publicly announced that the District’s criminal system was on “the brink of collapse.” \footnote{301} The mayor met with members of the lawyers’ strike committee and promised to support legislation increasing their rates. \footnote{302} The CJA lawyers accepted the mayor’s promise, ending the boycott. \footnote{303} The Federal Trade Commission (FTC) then filed a complaint against SCTLA and four of its officers alleging that the lawyers’ boycott constituted an illegal conspiracy to fix prices in violation of section five of the FTC Act, which prohibits certain “unfair methods of competition.” \footnote{304} While the attorneys had an obvious economic interest in their fees, they claimed that their boycott was in pursuit of an underlying political objective: to improve the quality of representation for their indigent clients. \footnote{305} The attorneys argued that higher attorney fees would allow them to provide their clients with better representation by allowing each lawyer to give more time to fewer cli-

\footnote{§ 3006A (1970)). \textit{Id.} The average CJL lawyer made approximately $20,000 per year before the boycott. \textit{Trial Lawyers}, 856 F.2d at 228. As early as 1975, bar organizations in the District began to express concern about the low fees paid to CJA lawyers. \textit{Id.}}

\footnote{298. \textit{Id.; see also id. at 785} (Brennan, J., dissenting in part).}

\footnote{299. \textit{Id.} at 771.}

\footnote{300. \textit{Id.} The aim of the boycott was to obtain a “$45 out-of-court and $55 in-court rate schedule.” \textit{Id.}}

\footnote{301. \textit{Id.} at 772.}

\footnote{302. \textit{Id.}}

\footnote{303. The very next day the District of Columbia Council unanimously passed a bill increasing CJA fees to $55 for court time and $45 for other time. \textit{Trial Lawyers}, 856 F.2d. at 231.}

\footnote{304. 15 U.S.C. § 45 (1982). It is interesting to note that Commissioner Pertschuk dis- sented from the Commission’s decision to issue a complaint on the ground that it represented an “unwise use” of the Commission’s scarce resources and because he was of the opinion that a violation of the Act had not been alleged. 110 S. Ct. at 773 n.7; see also \textit{Superior Ct. Trial Lawyers Ass’n.}, 107 F.T.C. 562, 612-13 (1988).}

\footnote{305. 107 F.T.C. at 582.}
ents. They also asserted that higher fees would attract better qualified lawyers.

The Administrative Law Judge (ALJ) rejected the lawyers' arguments, but also denied the FTC's complaint, finding that there was "no point" in imposing antitrust liability in that "no harm was done." Even the victims of the boycott, officials of the District, acknowledged that the net effect of the boycott was beneficial.306 The FTC reversed, finding that the boycott's purpose and effect was to raise prices and was illegal per se.307 The FTC concluded that there was substantial anticompetitive harm caused by the boycott since the city was now required to pay an additional four million to five million dollars per year in CJA lawyer fees.308 As a remedy, the FTC entered a cease-and-desist order "to prohibit the respondents from initiating another boycott . . . whenever they become dissatisfied with the results or pace of the city's legislative process."309

On appeal, the D.C. Circuit agreed with the FTC that the attorneys' boycott constituted an illegal price fixing agreement. The court also agreed that neither Noerr nor the first amendment immunized such conduct from antitrust liability, even if the boycott was also part of an effort to influence valid governmental action. Judge Ginsburg reasoned for the majority that under the Supreme Court's Claiborne Hardware decision, motivation was the "crucial" factor for determining whether the boycott was protected "political" activity.310 While acknowledging that

306. 110 S. Ct. at 773.
307. Id. In finding that Noerr failed to immunize the boycott, the Commission concluded that Noerr only protects lobbying or publicity petitioning, not economic boycotts. In determining that the boycott was intended for economic, not political, objectives, the Commission found that the boycott was "made up of competitors and the objective was profit." 107 F.T.C. at 584 n.108. In the view of the FTC, a political boycott is one "motivated by political, social, religious or other noncompetitive purpose, and the members of the group lack[ed] a significant interest in the goal of the boycott." Id. Noerr was also found to be distinguishable on the ground that the anticompetitive effects of the boycott resulted directly from the action of the boycotters, and not, as in Noerr, from independent governmental action. According to the FTC, Noerr failed to cover the lawyers' boycott because "[t]he restraint was on the government, not by the government." Id. at 597. The fact that the government, and not consumers, was the target of the boycott, was deemed irrelevant. The FTC concluded that "[t]he mere fact that the government, as the only purchaser of [attorney] services, was the target does not protect their boycott from regulation." Id. at 599.
308. 110 S. Ct. at 773.
309. Id.; see also 107 F.T.C. at 602.
310. 856 F.2d at 245. There was Supreme Court precedent to support Judge Ginsburg's reading of Claiborne Hardware. For example, in Indian Head, Justice Brennan found Claiborne to establish the principle that politically motivated, as distinguished from purely profit motivated, boycotts are protected by the first amendment. Indian Head, 108 S. Ct. at 1941.

In finding that Claiborne Hardware failed to protect the petitioning of the private stan-
"[d]istinguishing between political and economic motives is a daunting task," the majority affirmed the FTC's finding of illegality because the lawyers' boycott was found to be "motivated primarily by economic self-interest." Since the boycott in Trial Lawyers was found to involve both "expressive" and "nonexpressive" elements, Judge Ginsburg held that the lawyers' conduct could be regulated only if a "sufficiently important governmental interest in regulating the nonspeech expression can justify incidental limitations on First Amendment freedoms," and then only to the extent needed to protect governmental interests. The FTC's finding of a per se violation thus was reversed and the case remanded for proof of market power.

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* dard-setting organization in Indian Head, Justice Brennan stated that the civil rights boycott in Claiborne "was not motivated out of a desire to lessen competition or to reap economic benefits . . . and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market." Id.

311. Trial Lawyers, 856 F.2d at 246.

312. Id. Judge Ginsburg, however, disagreed with the Commission's conclusion that the lawyers' concerted effort to raise the price of their services merited per se condemnation. Judge Ginsburg argued that the Supreme Court's decision in United States v. O'Brien, 391 U.S. 367 (1968), ruled against such a result. In O'Brien, the Court affirmed the conviction of a Viet Nam war protester who burned his draft card on the steps of the South Boston Court-house for the express purpose of advocating his antiwar views. The Court held that the governmental interest in regulating the "nonspeech elements" of conduct justified the incidental restrictions on first amendment expression. O'Brien, 391 U.S. at 376-77. Judge Ginsburg read O'Brien as establishing a general restraint upon the courts requiring them to apply the antitrust laws "prudently and with sensitivity" whenever expressive conduct was called into question. Trial Lawyers, 856 F.2d at 233-34.

313. Trial Lawyers, 856 F.2d at 248. Professors Areeda and Hovenkamp, however, argue that Judge Ginsburg's conclusion on this point may be seriously questioned. See P. AREEDA & H. HOVENKAMP, supra note 78, § 113.1, at 8. They argue that "complex inquiries into power in the actual case seemed unnecessary to vindicate First Amendment interests" since "boycotts of this character are so likely to be anticompetitive that complex inquiries into market power are not worth the cost." Id. at 8-9. On the other hand, Areeda and Hovenkamp also recognize that a per se application of the antitrust laws in speech-conduct cases might chill first amendment expression, thus suggesting the appropriateness of "a special rule allowing the defendants to prove their de minimis market power." Id. For a discussion of the relevance of market power to the petitioning of government cases, see infra notes 412-20 and accompanying text.

314. Trial Lawyers, 856 F.2d at 253. While Judge Ginsburg admitted that "power of some sort was surely exercised," he concluded that political power was not the same as economic power. Id. at 250-51. Judge Silberman, in a separate concurring opinion, rejected the majority's motivation test for determining whether the boycott was protected as "political" activity. He did so because he found that such an approach would be unworkable. Id. at 254.

Judge Silberman agreed with the majority that the case be remanded to the commission for proof of market power. Id. However, Judge Silberman rejected Judge Ginsburg's economic motivation test for determining the scope of first amendment protection for expressive boycotts on the ground that the test was unworkable. As an example of the mischief that
The Supreme Court ruled, six to three, that the trial lawyers' boycott constituted a conspiracy to fix prices that was illegal per se under section one of the Sherman Act. In an opinion by Justice Stevens, the Court reversed the appellate court holding that the per se rules of antitrust were inapplicable for evaluating the boycott, but affirmed the lower court's findings that the boycott fell outside the immunity afforded either by the Court's *Noerr* doctrine or by the first amendment. The notion that a first amendment defense should be recognized for boycotts having an "expressive component" was rejected on the ground that such an exception would create a "gaping hole in the fabric" of the antitrust laws.

In rejecting the trial lawyers' antitrust immunity claim, Justice Stevens distinguished *Noerr* on the ground that the scope of antitrust immunity afforded by *Noerr* was limited to petitioning campaigns directed toward obtaining governmental action, when the consequence of the effort is a restraint of trade resulting from legislation. Justice Stevens reasoned that *Noerr* was inapplicable because the restraint of trade in *Trial Lawyers* resulted from private, rather than governmental, action. In his view, the boycott was the *means* by which the trial lawyers intended to restrain trade since the economic consequence of their action would have lasted even if no legislation had been enacted. Finally, Justice Stevens emphasized that the trial lawyers' antitrust immunity arguments were "largely disposed of" by the Court's *Indian Head* decision, and specific...
cally by Justice Brennan's statement that Noerr does not extend to "every effort that is genuinely intended to influence governmental action."\(^{318}\)

Justice Stevens also rejected the claim that the boycott was protected by the first amendment as a form of political expression. Re-interpreting his own opinion in Claiborne Hardware, Justice Stevens concluded that the crucial element in Claiborne was that the civil rights boycotters "sought no special advantage for themselves . . . . [but instead] sought only the equal respect and equal treatment to which they were constitutionally entitled."\(^{319}\) While the lawyers' boycott may have been the result of "altruistic" motives, "it [was] undisputed that their immediate objective was to increase the price that they would be paid for their services."\(^{320}\) Claiborne Hardware thus was distinguished on the ground that first amendment protection for political boycotts was "not applicable to a boycott conducted by business competitors who 'stand to profit financially from a lessening of competition in the boycotted market.'"\(^{321}\)

Hence, while Justice Stevens began his analysis of Trial Lawyers with the cautious admonition that "[r]easonable lawyers may differ about the wisdom of this enforcement proceeding,"\(^{322}\) he found little difficulty in characterizing the lawyers' boycott as a "classic" restraint of trade subject to the antitrust rule of per se illegality. Since the boycott was based on an agreement among CJA lawyers designed to obtain higher prices for their services through their own concerted action, the boycott was characterized as a horizontal arrangement among competitors to fix prices. Although the trial lawyers' boycott had "expressive components," those components were found not to be unique since communication was seen to be the "hallmark of every effective boycott."\(^{323}\) Justice

\(^{318}\) Id. (citing Indian Head, 468 U.S. at 503).

\(^{319}\) Id.

\(^{320}\) Id.

\(^{321}\) Id.

\(^{322}\) Id. at 774.

\(^{323}\) Id. at 779. For these reasons, the majority rejected the suggestion of the D.C. Circuit that expressive boycotts were to be scrutinized with sensitivity to first amendment expression. As Justice Stevens explained:

"[W]e cannot accept the Court of Appeals' characterization of this boycott or the antitrust laws. Every concerted refusal to do business with a potential customer or supplier has an expressive component. At one level, the competitors must exchange their views about their objectives and the means of obtaining them. The most blatant, naked price-fixing agreement is a product of communication, but that is surely not a reason for viewing it with special solicitude . . . . That expressive component of the boycott conducted by these respondents is surely not unique. On the contrary, it is the hallmark of every effective boycott.

\(^{323}\) Id.
Stevens reasoned that the per se rule of antitrust applicable to price-fixing applied, rendering claims of social justification or excuse irrelevant to his analysis. 324

Justice Brennan, joined by Justice Marshall, dissenting in part, agreed that the lawyers' boycott was subject to Sherman Act regulation and was neither immunized by Noerr nor protected by the first amendment. Justice Brennan's disagreement with the majority centered on the narrow question concerning the appropriate antitrust standard to be applied for evaluating the legality of the Trial Lawyers' boycott. 325 Emphasizing the critical role that boycotts play in political speech, he rejected the approach of per se rules since they invariably disguise a presumption of illegality. He emphasized that the danger posed by per se rules is that the presumption of illegality ignores the possibility that boycotts might "operate on a political rather than economic level, especially when the Government is the target." 326

324. Justice Stevens accepted the respondents' claims that "the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants . . . [and] that without the boycott there would have been no increase in District CJA fees at least until the Congress amended the federal statute." Id. at 774. As he explained: "These assumptions do not control the case, for it is not our task to pass upon the social utility or political wisdom of price-fixing agreements." Id.

325. Justice Blackmun, in a separate dissent, agreed with the majority and Justice Brennan that the trial lawyers' boycott was neither immunized by Noerr nor absolutely protected by the first amendment. 110 S. Ct. at 791. Justice Blackmun disagreed that the trial lawyers' boycott should be judged under the per se rule of antitrust. Agreeing with Justice Brennan, Justice Blackmun concluded that the trial lawyers were "not merely participants in a competitive market for legal services" since they were officers of the court and were subject to being ordered by the courts to represent indigent clients under "pain of contempt." Id. at 792. In Justice Blackmun's view, the relevant factors determining the power of the boycott were thus "political, not economic." Id. On the other hand, Justice Blackmun disagreed with Justice Brennan's decision to remand for a finding of market power. According to Justice Blackmun, "[t]he Trial Lawyers' boycott . . . was a dramatic gesture not fortified by any real economic power" since the lawyers, as officers of the court, could not coerce the District to meet their demands. All that the lawyers could hope to do is force a political decision, i.e., "put the government in a position where it had to make a political choice between exercising its power to break the boycott, or agreeing to a rate increase." Id. at 791-92. For these reasons, Justice Blackmun concluded that he would affirm the D.C. Circuit's judgment insofar as the court precluded application of the per se rule to the trial lawyers' boycott, but reverse as to the remand to the FTC for a determination of market power. Id. at 792.

326. Id. at 785. Justice Brennan found that the per se rule of illegality was unwarranted in Trial Lawyers, given "the possibility that the boycott achieved its goal through a politically driven increase in demand for improved quality of representation, rather than by a cartel-like restriction in supply." Id. Judge Ginsburg in the D.C. Circuit also had recognized this possibility in concluding that "it [was] . . . possible that, lacking any market power, [the trial lawyers] procured a rate increase by changing public attitudes through the publicity attending the boycott"; or that "the publicity surrounding the boycott may have served . . . to dissipate any public opposition that a substantial raise for lawyers who represent indigent defendants had previously encountered." Trial Lawyers, 856 F.2d at 251. In Justice Brennan's view, the ma-
Although Justice Brennan was willing to find that the Trial Lawyers' boycott involved "expressive" conduct deserving first amendment protection, he agreed with the majority that "a group’s effort to use market power to coerce the government through economic means may subject the participants to antitrust liability." Indeed, though the justices disagreed about appropriate antitrust standards and their application to the facts of *Trial Lawyers*, all nine justices agreed that the concerted attempt by lawyers to secure higher wages from government by boycotting or withholding their services might subject them to antitrust liability. Apparently, the Court was convinced that the attempt to exercise power for profit-motivated objectives even when coupled with political objectives raised an antitrust concern that justified antitrust regulation of an expressive boycott.

*Trial Lawyers* thus establishes an important limitation on the first amendment defense for political boycotts seeking to influence governmental action: concerted activity among competitors to restrain trade by use of a boycott cannot be defended on the claim that such activity was intended to communicate a "political" message, even if the message may be relevant and necessary to governmental decisionmaking. *Trial Lawyers* must be seen as a retreat from the first amendment concern that the *Noerr* Court expressed for insulating political activity from the antitrust laws. On the other hand, *Trial Lawyers* is in keeping with the Court's *Indian Head* decision rejecting antitrust immunity claims for anticompetitive conduct before a private standard-setting organization. In both *Indian Head* and *Trial Lawyers*, petitioning outside the legislative context was subject to antitrust regulation even though political expression was involved, and despite the fact that such expression was genuinely intended to influence the governmental action.

327. Justice Brennan stated that he was "surprised" by Justice Stevens' majority decision finding that the expressive components of the boycott were not protected speech, since Justice Stevens in *Claiborne Hardware* had declared that "[t]he established elements of speech, assembly, association, and petition, ‘though not identical, are inseparable’ when combined in an expressive boycott." *Id.* at 789 (quoting *Claiborne Hardware*, 458 U.S. at 911).

328. *Id.* at 783.

329. The disagreement between the justices thus centered on the relevant antitrust standard to be applied—per se or rule of reason as well as the necessity of remanding for determinations of marker power. Justices Brennan and Marshall were of the opinion that the boycott should be remanded for such a determination; Justice Blackmun concluded that such a remand was unnecessary because the boycott lacked market power.
Since at least one purpose of the trial lawyer's boycott was to secure an economic advantage for the participants, the majority found that the boycott fell outside the first amendment defense recognized in *Claiborne Hardware* for politically motivated boycotts. The Court, however, failed to explain what role, if any, balancing played in its analysis of the first amendment defense. First amendment protection may be warranted even if an economic interest is involved, if the economic interest is of a de minimis nature or clearly outweighed by the importance of the political message. On the other hand, if balancing is permitted, there is the danger that it may lead to highly subjective regulation with a resulting chilling effect on protected forms of communication.\(^3\)

This is not to suggest that the first amendment distinction the majority drew between profit-driven and politically-driven boycotts was unsound in principle. Boycotts conducted by business competitors for profit-seeking objectives have never been thought to be protected by the first amendment, though such boycotts could be seen to involve elements of expression.\(^3\) The fact that conduct may be described as "speech" does not mean that the expression is protected for first amendment purposes.\(^3\) Moreover, profit-oriented forms of commercial expression have not warranted the same constitutional protection granted other forms of expression.\(^3\) Justice Stevens was thus right in stating that "[e]quality and freedom are preconditions of the free market, and not commodities to be haggled over within it."\(^3\)

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30. If one's right to engage in peaceful communicative activity can be known only after the fact, i.e., after one's motive has been scrutinized by the government, the exercise of the right will be profoundly discouraged.

31. See Schauer, *supra* note 168, at 563 ("The Defendant in a Sherman Act price-fixing case whose sole activity consists of transmitting to a competitor the prices her company is about to charge is treated the same way as any other antitrust defendant despite the fact that her activities were restricted to speech used for the purpose of communicating information.").

32. *Id.*

33. This is because profit-oriented forms of commercial expression fail to implicate human values and interests central to the type of liberty interests one normally identifies with first amendment values. See C. Baker, *supra* note 93, at 223 ("[E]nterprise speech rooted in the profit-oriented requirements of the market or in instrumental attempts to use property to exercise power over others fails in principle to exhibit individually chosen allegiance to personal values and, therefore, should be subject to regulation."). Moreover, the deliberative processes of government require that human self-determination, rather than the instrumental concerns of the market, be the generating force of communicative activity. "Permitting market-determined political speech is arguably corrupting, particularly to a sphere devoted to human self-determination, since this speech need not reflect anyone's substantive political views." *Id.* at 219.

34. *Trial Lawyers*, 110 S. Ct. at 777. Persuasive critiques argue that profit-oriented forms of expression differ fundamentally from other protected forms of expression found to be essential for securing individual liberties and political freedoms. A liberty-based theory of the first
While there may be principled reasons for denying profit-oriented forms of expression the benefit of a first amendment defense, those reasons do not apply to the trial lawyer's boycott because much more than the lawyers' interest in higher fees was at stake. When workers seek higher wages they also are seeking to gain control over what happens to them at the workplace; what is at stake are substantive and democratic values that transcend the desire for money. The trial lawyers boycott could be seen as an effort on the part of lawyers to assert their interest in participating in the process of decisionmaking affecting their workplace interests as well as their professional duties as lawyers. Those interests and duties were intimately connected to the interests of indigent clients who presumably stood to benefit from better paid legal counsel. The profit-motive perspective rooted in the logic of the marketplace fails to take into account the true nature of the lawyers' interests affected by the boycott. The flaw in Justice Stevens' analysis of the first amendment defense in Trial Lawyers is that the lawyers' interest in higher fees does not easily fit into the profit-motivated objectives that justify the regulation of commercial forms of expression.

Of course, if one conceptualizes the lawyers as mere market participants motivated by profit-making objectives, then their boycott would "fit" the Court's profit-motivated model and thus justify the denial of the lawyers' first amendment defense. Under a marketplace conception, the boycott would represent a classic restraint of trade—an instrumental attempt by a competitor group to use economic power to raise the market price of their services. Such a boycott would be "flatly inconsistent" with the purposes to be achieved by the antitrust laws. Since price-fixing was an objective of the trial lawyers' boycott, the presumption of antitrust illegality under the per se rule would seem warranted. Whatever political objectives were involved, they would seem incidental when compared to the forbidden nature of price-fixing conduct; and in any event, they

amendment argues that profit-oriented expression of producer groups deserves less first amendment protection because "[t]he enterprise's determination of which values to promote does not depend on either individual or collective visions about what humanity should be but is instead based on the technical requirements of profit maximization." C. BAKER, supra note 93, at 219. A republican theory of the first amendment argues that profit-oriented expression should be treated less hospitably since regulating this form of expression may be necessary to counteract the distortions caused by wealthy speech. See, e.g., Sunstein, supra note 15, at 1577 (discussing the republican approach to the campaign finance regulation); see also Meiklejohn, The First Amendment Is an Absolute, 1961 SUP. CT. REV. 245, 255 ("The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.'").

335. See C. BAKER, supra note 93, at 223.
would be irrelevant as a redeeming consideration under the per se rule of illegality.

There are, however, good reasons for questioning the majority's characterization of the trial lawyers' boycott. As Justice Brennan noted in his dissent, the FTC's findings regarding the effect of the boycott left open the possibility that the boycott achieved its goal, not through a cartel-like restriction of supply, but rather through public pressure brought to bear on a political process paralyzed by the fear that public opinion would fail to support the lawyers' objective—legislation for higher attorney fees. There may have been no less coercive methods of petitioning available to the trial lawyers for communicating their message.

The problem facing the trial lawyers was that they had engaged in a long history of attempting to influence governmental action through more direct petitioning efforts; but those efforts failed because the political environment was not conducive to such efforts. Direct lobbying and other more traditional forms of petitioning failed to influence government decisions because public officials (the Mayor, the City Council, and ultimately the federal government itself) were unsure how public opinion would react to an increase in attorney fees in the face of a fiscal crisis. Public opinion failed to react to the subject because the issue of attorney fees affected only the class of indigent clients. While public officials acknowledged the lawyers' position, the lack of a political consensus favored the status quo. The problem was that direct lobbying was doomed unless and until a political climate was created that would en-

336. Trial Lawyers, 110 S. Ct. at 785. If Noerr establishes the principle that "no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws," Noerr, 365 U.S. at 135, as Justice Stevens for the majority agreed it does, see Trial Lawyers, 110 S. Ct. at 776, then Noerr should have granted the Trial Lawyers' boycott the same degree of antitrust immunity afforded the petitioning activity of the railroads in Noerr. In both cases, a private group was seeking to influence governmental action by changing public attitudes through publicity attending petitioning activities.

337. Justice Brennan emphasized this fact in concluding that the trial lawyers' boycott "persuaded the consumer of the Trial Lawyers' services—the District government—to raise the price it paid by altering the political preferences of District officials." 110 S. Ct. at 785.

338. Justice Brennan recounted the largely ineffectual efforts of the trial lawyers to influence governmental action prior to calling for a boycott. Id. at 785-87. Judge Ginsburg noted that the Mayor was highly sympathetic to the Lawyers' cause, but that he "indicated that there was no money to fund an increase." Trial Lawyers, 836 F.2d at 230. Finally, Justice Brennan also noted that the governmental decision that the Trial Lawyers were seeking to influence was complicated because it called for political decisions that involved "the Mayor, City Council, and because of the unique status of the District of Columbia, the Federal Government as well." Trial Lawyers, 110 S. Ct. at 785.
able governmental officials to vote for an increase in CJA lawyer fees without fear of voter opposition.\textsuperscript{339}

The trial lawyers' boycott may have been the only effective means for promoting the interests of the class of indigent clients whose interests would be promoted by higher lawyer fees.\textsuperscript{340} Indeed, the class of economically disadvantaged clients lacked a representative group to advance their interest in having better paid and thus more effective legal representation. The lawyers' boycott may have been the only effective means for representing the interests of indigent clients before the D.C. legislature because an Olsonian collective action problem prevented direct representation of their interests. Since the class of indigent clients would be large, free rider problems would present an obstacle to their own effective joint representation. Individual members of the indigent class of clients would have little incentive to support joint action since participation would be costly when compared to the alternative of taking a free ride on the action of others. The trial lawyers, on the other hand, had an interest in representing their clients' interests before the District, but their effort was doomed in the absence of a grass roots political consensus. If this is true, then the trial lawyers' boycott should have been seen as legitimate political activity necessary to solve an Olsonian collective action problem.

There remains the possibility that the \textit{Trial Lawyers} decision may be explained by the emphasis the Court placed upon the unique status of the government in the underlying dispute. The result in \textit{Trial Lawyers} might be understood in light of the fear, expressed by Justice Stevens' majority opinion, that a contrary decision would leave government vulnerable to extortion by suppliers of the goods and services they need.\textsuperscript{341} In finding that the "overwhelming testimony demonstrated that [the boycott] almost produced a crisis in the administration of criminal justice in the District," Justice Stevens concluded that the boycott was "flatly inconsistent with the clear course of antitrust jurisprudence."\textsuperscript{342} The civil rights boycott protected in \textit{Claiborne Hardware} might be distinguished on the

\textsuperscript{339} As Justice Brennan noted in dissent: \"Taken together, these facts strongly suggest that the Trial Lawyers' campaign persuaded the city to increase the CJA compensation level by creating a favorable climate in which supportive District officials could vote for a raise without public opposition, even though the lawyers lacked the ability to exert economic pressure.\" \textit{Trial Lawyers}, 110 S. Ct. at 787.

\textsuperscript{340} \textit{Id.}

\textsuperscript{341} \textit{Id.} at 776. As Judge Ginsburg explained in \textit{Trial Lawyers}: \"Congress surely did not mean to leave governments so vulnerable to extortion by the suppliers of the goods and services they need.\" \textit{Trial Lawyers}, 856 F.2d. at 240.

\textsuperscript{342} \textit{Trial Lawyers}, 110 S. Ct. at 782.
ground that the boycott was brought against a private rather than a governmental entity.

Privately organized boycotts are obviously coercive events that raise unique dangers especially when they result in work stoppages of essential governmental services. The Supreme Court may have felt compelled to deny first amendment protection to the trial lawyers' boycott to protect the vulnerable position of the District, dependent as it was on the rendition of lawyer services, as well as societal interests adversely affected by the disruption of those services. In *Trial Lawyers*, however, the government had it within its power to terminate the boycott without acceding to the trial lawyers' demands. As Justice Brennan noted in dissent, "the government [had] options open to it that private parties do not . . . the boycott was aimed at a legislative body with the power to terminate it any time by requiring all members of the District Bar to represent defendants pro bono." Hence, even if one were convinced that the Supreme Court was justified in placing greater emphasis on the fact that the employer in *Trial Lawyers* was a governmental entity, there were alternatives available to the government for protecting its own interest as well as the public interest. It was not necessary to sacrifice the interests of the participants in the boycott, as well as their indigent clients, to protect governmental interests. In *Trial Lawyers*, individual liberties and political freedoms were never fully considered since the Court adopted a marketplace framework of analysis applicable to profit-oriented expression.

343. *Id.* at 790. Justice Blackmun, in his separate dissenting opinion, also emphasized that the District could have ordered members of SCTLA to represent indigent defendants pro bono. *Id.* at 791. For this reason, Justice Blackmun was of the opinion that the trial lawyers' boycott "was a dramatic gesture not fortified by any real economic power." *Id.*

344. See, e.g., *County Sanitation Dist. 2 v. Los Angeles County Employees Ass'n*, 38 Cal. 3d 564, 214 Cal. Rptr. 424, 699 P.2d 835 (1985) (public employee strikes held unlawful under state law only if the strike was found to pose an "imminent threat to public health or safety"). Hence, while the right to strike and picket has never been accorded absolute first amendment protection, see, e.g., *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Dorcy v. Kansas*, 272 U.S. 306 (1926); see also Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4 (1984), the withholding of personal services and the association of individuals for purposes of concerted activity for mutual aid and self-protection is surely an exercise of personal "liberty" warranting constitutional protection even if the participants stand to gain economically from such activity. *See A. COX, D. BOK & R. GORMAN, LABOR LAW: CASES AND MATERIALS* 578 (10th ed. 1986). While governmental interests may at times justify limitations on personal liberties, the constitutionality of governmental limitations should be sustained only after it has been determined that the exercise of individual liberty would pose an imminent threat to important governmental interests.

345. Indeed, if the trial lawyers' boycott is seen as a case involving an attempt of a labor group to secure better wages, then the majority's decision would take on a different dimension—one that rests upon a principle that can be seen to conflict with the "clear course" of
There are thus good reasons for questioning the application of antitrust sanctions to the trial lawyers' boycott. In denying the trial lawyers the most effective, and arguably the only means of influencing governmental action, the Supreme Court sacrificed the interests of lawyers and their indigent clients to the needs of government. An unfortunate consequence of the Court's decision is that the trial lawyers may now be forced to accept whatever wages the District may offer in the future, and the interests of indigent clients in having better paid lawyers will go unrepresented in the District. This possibility was ignored by the majority because the Court's analytical focus was narrowed by a theory of Noerr and the first amendment that accepts the logic of the marketplace as an unproblematic medium for ordering political and commercial activity.

IV. An Antitrust Approach for Limiting Business Predation in the Governmental Sphere

The notion that the courts should place greater antitrust limitations upon the right of corporate interest groups to petition government is neither radical nor unworkable. The idea can be seen to fit within a long tradition that has justified antitrust intervention in order to correct market failures. Markets fail for many reasons, but the reason most fre-

labor jurisprudence. The historic development of federal labor law and policy has been shaped by the recognition that labor combinations acting unilaterally to secure economic interests through strikes, boycotts, and other forms of concerted activity should be shielded from antitrust liability applicable to restraints of trade imposed by business combinations. See, e.g., United States v. Hutcheson, 312 U.S. 219 (1941). See generally Forbath, The Shaping of the American Labor Movement, 102 HARV. L. REV. 1109, 1159-79 (1989). In rejecting the common-law bias exhibited against labor boycotts, federal labor policy has firmly rejected the notion that concerted activities of workers should be analyzed under market-based concepts that treat labor as merely another commodity placed in market competition. See, e.g., 15 U.S.C. § 6 (1982) (Clayton Act) (providing "[t]hat the labor of a human being is not a commodity or article of commerce"). In Trial Lawyers, the Court may have unwittingly endorsed the development of doctrinal standards that are inherently biased against interests of workers in their attempt to secure better terms and conditions of employment, a trend that has come to characterize the modern development of labor and antitrust law. See Minda, supra note 139.

The Supreme Court might have avoided these problems by deciding Trial Lawyers as a matter of statutory construction, similar to the way the Eighth Circuit decided the NOW case, by holding that the drafters of the Sherman Act never intended the federal antitrust laws to be applied to boycotts of nonproducer groups seeking to secure better wages and working conditions. In other words, the Court might have found that a labor exception protects the trial lawyers' boycott from antitrust proscriptions.

346. In principle, such a result would seem to violate due process standards under the fifth and fourteenth amendments on the ground that it is arbitrary and capricious for government to sacrifice the employees' interest in a fair wage by depriving them of the joint product of their labor. Cf. A. Cox, D. Bok & R. Gorman, Labor Law: Cases and Materials 673 (9th ed., 1981).

347. See, e.g., D. Spulber, Regulation and Markets 3, 10-12 (1989). The notion of
A production externality such as pollution is the classic example given by economists for market failure. But externalities need not arise only in production; externalities can arise in politics as well. Public choice and antitrust capture theory, for example, provide persuasive reasons for understanding how rent-seeking behavior of special interest groups creates external effects in the representative process by silencing certain interests and causing distortions in governmental deliberation. Legislation that fails to take into account the total social costs and benefits affected would fail to reflect the public interest; the result would be the enactment of either too much or too little legislation, or simply the wrong legislation. Republican scholars, focusing on issues of substantive power and substantive powerlessness, argue that legal intervention is required in the political arena in order to solve market failure problems resulting from “maldistribution of private power that interferes with a well-functioning political marketplace.”

Antitrust regulation of concerted attempts to influence governmental action for anticompetitive objectives can thus be grounded in traditional antitrust concerns and objectives. Combinations of producers, seeking to accomplish predatory market objectives through subversion of government process, engage in a form of nonprice anticompetitive conduct that potentially presents the most serious form of market predation. Petitioning activity for such purposes represents an attempt to use government as an instrumentality for furthering a conspirators’ plan to restrict trade. In regulating such conduct under the antitrust laws, the courts would be policing anticompetitive conduct. The standards guiding such regulation would be competition policy, not the general ethical or moral standards of political conduct. Antitrust regulation of petitioning activity in the governmental sphere would transform the Sherman Act into a new ethical code for regulating political behavior as such.

market failure, as a justification for legal intervention, is not limited to antitrust. One can understand traditional justification for affirmative action, and legal interventions to ensure substantive equality, as being premised on the idea of market failure—the notion that “[l]egal intervention is required because of a maldistribution of private power that interferes with a well-functioning political marketplace.” Sunstein, supra note 131, at 619.

348. An externality has been defined as “a commodity bundle that is supplied by an economic agent to another economic agent in the absence of any related economic transaction between the two agents.” D. SPULBER, supra note 347, at 46. The existence of externalities troubles economists because externalities are viewed as a source of inefficiency in markets. See, e.g., D. DEWEY, MICROECONOMICS 221 (1975); Minda, The Lawyer-Economist at Chicago: Richard A. Posner and the Economic Analysis of Law, 39 OHIO ST. L.J. 439, 461-66 (1978).

349. See, e.g., Dewey, supra note 231, at 1523. Political externalities distort the legislative selection process, undermine the political legitimacy of government, and cause market and political distortions in the distribution of goods and services and legal entitlements.

350. Sunstein, supra note 131, at 619.
An effective antitrust immunity doctrine must respect certain legitimate forms of political activity of producers because corporate involvement in governmental policy is both essential and desirable for intelligent policy decisionmaking. On the other hand, federal competition policy must be capable of responding to predatory forms of producer expression designed to bring about illegitimate barriers to entry or other improper impediments to competition. A selective antitrust immunity doctrine is warranted to correct political externalities. Of course, critics might argue that the first amendment establishes a "legal barrier" to a more vigorous antitrust enforcement policy. It was, after all, the possibility of a first amendment question in *Noerr* that encouraged Justice Black to grant the railroads broad immunity from antitrust prosecution.

A. General First Amendment Considerations

While the right to petition government enjoys constitutional protection, the right is not absolute, especially when the exercise of petitioning interferes with the petitioning rights of others. One basis for concluding that the first amendment grants federal judges the power to regulate petitioning activity under the Sherman Antitrust Act is that such regulation may be necessary to curb exclusionary forms of petitioning that have the effect of deterring others from exercising their right to petition government. One might argue, for example, that the railroads' petitioning effort in *Noerr* was so extensive in its negative propaganda effect that it effectively excluded the truckers from the political market. The use of large petitioning expenditures by the railroads might have "drowned out" the opposing voices of the truckers by establishing a financial "barrier to entry" in the political arena. The first amendment, the argument goes, should not prevent the Supreme Court from invoking antitrust laws against the railroads' petitioning activity because antitrust

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351. See, e.g., id. at 605 ("A system that granted absolute protection to speech would be unduly mechanical, treading unjustifiably on important values and goals: consider laws forbidding threats, bribes, misleading commercial speech, and conspiracies."). The idea that the first amendment compels the *Noerr-Pennington* doctrine is supported by Justice Douglas' decision in *California Motor Transport*. See supra notes 84-87 and accompanying text. Justice Douglas' first amendment analysis in that case was not absolute, however, for he recognized the need for an exception to protect other individuals in the exercise of their right to petition. The sham litigation exception to *Noerr* was recognized in order to curb the deployment of "power, strategy, and resources [(of special interests)] to harass and deter respondents in their use of administrative and judicial proceedings so as to deny them 'free and unlimited access' to those tribunals." *California Motor Transp.*, 404 U.S. at 511 (quoting plaintiff's complaint); see also Handler & De Sevo, supra note 8, at 9.

352. Cf. M. TUSHNET, supra note 102, at 283.
remedies should be permitted to protect the petitioning rights of the truckers.

A variant of this argument was rejected by the Supreme Court in *Buckley v. Valeo.* There, the Court stated in dictum that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." In *Buckley,* the Court emphasized the importance of promoting a "public sphere" of unrestricted debate. There is contrary dictum in *First National Bank v. Bellotti,* however, suggesting that governmental regulation may be justified to protect the "public sphere" of government from expression designed to undermine governmental process. In *Bellotti,* Justice Powell's majority opinion acknowledged that "[p]reserving the integrity of the electoral process, preventing corruption, and 'sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." Hence, even though Justice Powell rejected a first amendment justification for governmental regulation of commercial expression in *Bellotti,* he acknowledged that an important exception might apply when commercial expression threatens the ability of government to choose the most prudent policies.

Because "corporations are wealthy and powerful and their views may drown out other points of view," a first amendment rationale exists to justify restricting corporate political expression if "corporate advocacy threatened imminently to undermine democratic process, thereby denigrating rather than serving First Amendment interests." The

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353. See infra notes 181-85 and accompanying text.
354. *Buckley,* 424 U.S. at 49.
355. 435 U.S. 765 (1978); see also infra notes 186-87 and accompanying text.
358. *Bellotti,* 435 U.S. at 789-90. Indeed, this very rationale was recently adopted by the Court in *Austin v. Michigan State Chamber of Commerce,* see note 187 supra, in upholding the constitutionality of state regulation restricting direct financial contributions of corporations in political campaigns. In recognizing the "corrosive and distorting effects" of corporate expenditures in political campaigns, the *Austin* Court has called into serious question the pluralistic premises of the marketplace of ideas logic that dominated the Court's thinking in cases like *Buckely* and *Bellotti.* In fact, justice Powell's dictum in *Bellotti* may be too stringent. As one commentator has noted, "[t]he state should only have the burden of showing that the audience interests that justify protecting [political] advocacy are weaker than those warranting its regulation." Note, supra note 357, at 941.

There are other first amendment decisions that the Court has rendered recognizing the need to protect public debate against the exclusionary effect of wealthy speech. In *NAACP v. Button,* 371 U.S. 415 (1963), for example, the Supreme Court invalidated a Virginia statute prohibiting the solicitation of legal business as applied to NAACP's practice of financing mi-
Supreme Court should recognize that the first amendment allows government regulation of political expression when the audience interest in the expression is weak, and the governmental interest in protecting against the silencing effect of unregulated economic power of the wealthy is strong. Such an approach is supported by highly regarded authority. Alexander Meiklejohn, for one, has advanced the position that the first amendment was designed to protect the deliberative process of government "so that the country may be better able to adopt the course of action that conforms to the wishes of the greatest number, whether or not it is wise or is founded in truth."359 Others have recognized that the free speech and press guarantees of the Constitution were designed to impede rather than advance rent-seeking behavior of special interest groups.360

A more responsive theory of first amendment values, one that seeks to protect individual liberty rather than marketplace interests, would place greater need for controlling commercial expression in the political arena.361 Dramatic differences in wealth and power can serve to shape minority civil rights litigants. State legislation prohibiting barratry was invalidated because the Court concluded that "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." Id. at 430. A similar principle could be found to justify granting first amendment protection to the civil rights boycott in *Claiiborne Hardware*. In *Claiiborne*, the civil rights boycott was essential for advancing equal respect and opportunity for an oppressed minority group. First amendment protection was necessary to allow a minority interest group to exercise political freedoms essential for substantive equality. *See also* Sunstein, supra note 131, at 620 (discussing how the reasoning in Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969), which required free reply time on discussions of public issues on broadcast time under the FCC's fairness doctrine, conflicts with the reasoning in *Buckley*). According to Professor Sunstein, "Red Lion is based on an understanding that government regulation intended to promote equality may further first amendment interests—indeed, may even be required by them." *Id.*. *See generally* Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107, 157-56 (1976) (developing a constitutional and normative theory for granting disadvantaged groups equal treatment).

359. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 93-95 (1948), quoted in Macey, supra note 3, at 249.

360. See Macey, supra note 3, at 247-49 (discussing the first amendment scholarship of Bruce Ackerman, the economic analysis of Buchanan and Tullock, as well as constitutional text). According to Professor Macey, "[t]he first amendment's free speech and press guarantees also support the hypothesis that the Constitution was designed to impede rather than advance rent-seeking." Id. at 249. Cass Sunstein argues that the Constitution was designed to impede the interest group dominance over the political process. Sunstein, *Naked Preferences*, supra note 15, at 1689. C. Edwin Baker argues that "[o]nly the enterprise speech rooted in the profit-oriented requirements of the market or in instrumental attempts to use property to exercise power over others fails in principle to exhibit individually chosen allegiance to personal values and, therefore, should be subject to regulation." C. BAKER, supra note 93, at 223.

361. Such a theory would seek support from recent arguments that have sought to justify governmental regulation of pornography. Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 HARV. WOMEN'S L.J. 1, 13-17 (1985). The idea of such work is based on claims asserting that "first amendment doctrine that refuses to examine issues of
the preferences that are selected in the market-like ordering process of government envisioned by pluralists. In Noerr, the railroads’ publicity campaign, conducted by a Madison Avenue publicity firm, was effective precisely because it shaped the preferences of political actors by transforming what they already knew about the trucking industry. The railroads sought to shape preferences through manipulation and misrepresentation of research data crucial to policy decisionmaking. The railroads’ petitioning created the preferences the railroads wanted by polluting the deliberative process of government with misinformation and deception. In doing so, the petitioning activity of the railroads had a potentially corrupting influence on the deliberative process of government, distorting the truth of relevant information, and thus subverting the ability of government to render policy decisions that reflect the public interest as opposed to the self-interests of the railroads.

In Noerr, the Supreme Court ignored these problems by adopting a highly questionable conception of political expression. The concept of political communication endorsed by the Supreme Court in Noerr was based on the pluralistic understanding of political speech as appealing to rational capacities: the perception that speech in the political arena serves a truth-discovery function through the rational assessment of ideas. The Court failed to consider that the means for expressing ideas might seek to influence opinion by making appeals to cognitive as well as noncognitive judgments. Cognitive judgments involve rational capacities that rely upon the discovery and understanding of facts and knowledge about the world. Cognitive judgments can be influenced by the force and persuasion of knowledge as well as through the dissemination of misleading and false information. Noncognitive judgments do not depend on rational capacities, but instead depend upon irrational emotion and subjective passion. Noncognitive expression seeks to influence by

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362. See Baker, supra note 195; see also C. Baker, supra note 93, at 203; V. Packard, The Hidden Persuaders (1957); M. Tushnet, supra note 102, at 291.

363. For a discussion of the distinction between cognitive and noncognitive speech in reference to pornographic forms of expression, see Sunstein, supra note 131, at 603. See also Finnis, "Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity, 116 U. Pa. L. Rev. 222, 227 (1960). Professor Sunstein argues that speech that has "purely noncognitive appeal [should be] entitled to less constitutional protection." Sunstein, supra note 131, at 603 (footnote omitted); see also Sunstein, The First Amendment and Cognition: A Response, 1989 Duke L.J. 433.

364. See, e.g., Sunstein, supra note 131, at 603 n.87 ("The term 'cognitive' as used here refers to whether the material is intended to or does in fact impart knowledge in any sense.").

365. Id. at 603 n.88. See generally Peller, supra note 207, at 1155-56 (describing irrational and rational forms of legal reasoning).
methods that are designed to shape and change attitudes independently of rational reason.\textsuperscript{366}

By refusing to consider the corrupting influence of the railroads' petitioning campaign through cognitive as well as noncognitive forms of communication, the Supreme Court endorsed a theory of the first amendment premised upon a misconceived understanding of what constitutes the nature of political expression. Political expression that seeks to influence either cognitive judgment through distortion of important facts, or noncognitive judgment through appeals to inflammatory or subliminal emotions, does not deserve the same level of first amendment protection granted to other forms of political speech. The reason is that these forms of "political" expression do not involve the communication of substantive knowledge needed for governmental deliberation. Instead, they generate harms that threaten the deliberative process itself by preventing the decisionmaker from reaching informed decisions.

If the Supreme Court in \textit{Noerr} had recognized that certain forms of political expression can harm democratic processes by undermining deliberative discourse, the Court might have concluded that the first amendment compelled a different result. First amendment values of representative government might have led the Court to conclude that the petitioning activity of the railroads was "low-value"\textsuperscript{367} speech that falls short of the full first amendment protection afforded political expression, especially when a group of commercial advocates intended to mislead and distort cognitive and noncognitive judgments of the intended audience through misrepresentation and misleading advertising techniques. The Court could have treated the railroads' political expression as a form of false and misleading petitioning, or simply "sham petitioning," and regulated it in the same way the FTC regulates misleading forms of product advertising.\textsuperscript{368}

\textsuperscript{366} See Sunstein, \textit{supra} note 131, at 606. Professor Sunstein argues that noncognitive expression such as subliminal advertising and hypnosis are entitled to less constitutional protection under the first amendment because such expression is not intended to communicate a "substantive message" necessary for deliberation. \textit{Id.}

\textsuperscript{367} First amendment scholars have recently argued for distinctions between "low-value" and "high-value" speech. Expression found to have "low-value" (\textit{e.g.}, pornography, fighting words, obscenity, etc.) is not accorded the same full first amendment protection accorded "high-value" speech. See Sunstein, \textit{Low Value Speech Revisited}, 82 \textit{Nw. L. Rev.} 555 (1989). While Professor Sunstein classifies political expression as "high-value" speech, see Sunstein, \textit{supra} note 131, at 604, he also acknowledges that speech can be classified as "low-value" when important governmental interests justify regulation. \textit{Id.} It is submitted that political expression found to be harmful to the deliberative processes of government should be treated as "low-value" speech because important governmental interests underlie the need for regulation.

\textsuperscript{368} For example, in a recent case brought against the R.J. Reynolds Company, the Federal Trade Commission claimed that the Company's use of "advertorials" in advertising that
Of course, much more than misleading advertising was involved in *Noerr*. The activities of the railroads were designed to disrupt the ability of state governments to render informed policy judgments. By controlling the flow of critical information in the legislative arena, the railroads were able to distort policy thinking on the relevant issues, rendering the process less likely to survey all the relevant alternatives. By controlling the flow of crucial information, the railroads were able to engineer and manipulate actual legislative choices. The substantive value choice rendered in the political arena was facilitated by the deployment of market power for the particular purpose of restraining trade.

Critics still might dispute the validity of these claims. For example, it may be empirically unclear whether in *Noerr* the truckers were really denied access or simply were not able to counteract the railroads' deceptive campaign with equal deception. In a pluralist system, drowning out is not likely since each contending interest group can appeal for financial support from the community to finance its petitioning effort. If truckers were financially unable to raise sufficient funds to counteract the petitioning expenditures of the railroads, then it is likely that their views did not have sufficient support in the community. Hence, critics might still contend the truckers' voices were drowned out not because of the corrupting effects of special interest influence, but rather because their views were not accepted in the marketplace of ideas. In the pluralist system, drowning out particular voices, even those of weaker groups, is expected because the market-like ordering principle of interest group struggle is assumed to filter out certain ideas that lack support. The fact that cer-

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distorted the results of a government-sponsored health test was an unfair method of competition. The case was settled before litigation was instituted. *See Selling or Advising? Dispute Settled on Tobacco Ads*, N.Y. Times, Oct. 21, 1989, at 50. The test, aptly named the “Mr. Fit” test, conducted by the National Institutes of Health attempted to determine whether a reduction of three risk factors—smoking, high blood pressure, and high cholesterol levels—could reduce the incidence of fatal heart disease. *Id.* The advertisements by Reynolds claimed that the Mr. Fit Test proved that the scientific link between smoking and heart disease was only an “opinion,” a “judgment” but not “scientific fact.” *Id.* Researchers, however, contended that the ads twisted their findings. The FTC claimed that Reynolds had misrepresented the study by omitting important findings of research. Reynolds argued that its advertisements were protected by the first amendment in that it purported to report on “scientific fact.” *Id.* The settlement offer was reported to provide “the Government and the health community with a powerful new tool against the abuse of scientific information by the tobacco industry.” *Id.* *See also* Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (state regulation on advertising found to be permissible under commercial speech standards, when product such as gambling casinos is found to be harmful). *But see* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (advertising ban on prescription drug prices violates first amendment commercial speech standards, because governmental interest in establishing regulation does not outweigh public's right of access to price information). *See generally* Schauer, *supra* note 168, at 566-67 (1989).
tain groups have more financial resources to advance their views is not a problem in the pluralist system because it is assumed that "each side of an issue can appeal for financial support." 369

Modern interest group theory would, however, support a contrary conclusion. Olson's collective action theory suggests that interest groups will fail to adequately represent every interest since free rider problems make large interest group organizations less likely to represent the interests of all affected parties. Arrow's impossibility theorem suggests that there may be technical obstacles in the operation of majoritarian rule, especially when several competing groups are advocating alternative policy proposals. Capture theory suggests that powerful interest groups are likely to dominate legislative and regulatory processes to appropriate economic benefits adverse to the public interest. Republican thought suggests that there may be a "true structural barrier" 370 that prevents all voices from being heard in a pluralist system of interest group politics.

Unfortunately, the Supreme Court has failed to offer any convincing framework for differentiating appropriate from illegitimate forms of political influence, especially when economic power is the vehicle for expression. 371 In Trial Lawyers, for example, the Court endorsed a highly problematic economic motivation test for determining if an expressive boycott was protected under the first amendment—a test that failed to take into account the lessons of modern interest group theory. 372 Since the boycotters had an economic interest at stake, the Court simply assumed that they lacked sufficient first amendment interest to be protected against governmental regulation. 373 It would have been better if the Court had avoided a motivation-based test and instead focused on whether political expression produced a harm that is both substantial and imminent. 374 A more principled first amendment analysis of political expression would have commenced with consideration of the inter-

369. M. Tushnet, supra note 102, at 284.
370. See id. at 285 (arguing that capital markets in a pluralist system are likely to malfunction: "The capital market is likely to malfunction here because people have to choose between spending money on political activity and spending it on personal consumption, and the relatively less well off face a more stringent budget constraint that reduces their ability to invest in a political activity.").
371. See, e.g., C. Baker, supra note 93, at 194-224.
372. See supra notes 336-40 and accompanying text.
373. See infra notes 319-21 and accompanying text. The distinction between political and economic expression is often unclear and may ultimately depend on the political perspective of the decisionmaker.
374. This is the standard the Supreme Court employed in determining the authority of the government to punish political speech in Brandenberg v. Ohio, 295 U.S. 44 (1969) (per curiam) (reversing conviction of Ku Klux Klan leader for advocating violence). See Sunstein, supra note 131, at 602.
ests and dangers served by such expression in terms of both facilitating or undermining the deliberative process of government. In cases involving petitioning before legislative bodies, the courts' focus should be on whether the petitioning activity of a special interest group creates an imminent harm to the deliberative process of government that is likely to undermine democratic processes. Evidence demonstrating that corruption and abuse in the manner in which expression was communicated should be highly relevant to such an inquiry.

Critics who claim that the first amendment unambiguously compels absolute antitrust immunity for political expression advance a conception of the first amendment overlooking the need of government to regulate political activity that threatens to undermine governmental processes. Such a view is controversial given the obvious one-sided emphasis it offers for protecting public discourse from regulation, and its corresponding neglect of a legitimate need for protecting governmental process from the corrupting effects of unregulated economic power.

B. General Antitrust Immunity Principles

A theory of antitrust immunity designed to protect legitimate political petitioning by producer interest groups is needed. The first step in devising such a theory must begin with the realization that governmental process can be just another marketplace in which firms enter to compete. In political markets, only those forms of competition that serve to raise serious antitrust dangers should be objectionable under antitrust laws.

375. In Trial Lawyers, the Court also should have recognized a doctrinal distinction between boycotts involving producer and non-producer groups. Since commercial expression seeking profit objectives falls within the category of "low-value" speech, see G. Stone, R. Seidman, C. Sunstein & M. Tushnet, Constitutional Law, 1158 (1986); Sunstein, supra note 131, at 302, there should be a presumption that producer boycotts are unprotected under the first amendment because it is unlikely that constitutionally permissible reasons support the expressive components of their boycotts. See supra notes 335-36 and accompanying text (discussion concerning profit-oriented speech in Trial Lawyers). Non-producer boycotts, those brought by consumer and labor groups, deserve greater protection, especially if collective action problems prevent the participants from seeking less coercive and more traditional methods for communicating their message to government.

376. See Fischel, supra note 7. It is more likely the case that it is the pluralistic perspective of those who defend Noerr on constitutional grounds, not the Constitution as such, that is the basis of their first amendment defense of Noerr. Pluralism, after all, is already heavily embedded in first amendment jurisprudence, as republican critics have revealed in their examinations of cases like Buckley v. Valeo. See C. Baker, supra note 93, at 225; see also Blum, The Divisible First Amendment: A Critical Functionalist Approach of Speech And Electoral Campaign Spending, 58 N.Y.U. L. Rev. 1273, 1357-78 (1983) (discussing the dichotomous structure of first amendment doctrine and Buckley v. Valeo). First amendment objections raised in opposition to any attempt to revise the Noerr-Pennington doctrine most likely turn back to assertions about the pluralist system and the wisdom of market ordering.
The most serious antitrust danger involving petitioning in the governmental sphere occurs when government is used to erect barriers to entry. A related danger involves the assertion of economic power to capture legislative and regulatory benefits. A third danger is that economic power may be deployed in the political arena to shape and control legislative preferences by distorting the information needed for intelligent policy decisionmaking.

(1) Identifying Antitrust Harms

Political solicitations and petitioning by producer groups or by a single firm should be subject to antitrust regulation only if it is established that such activity presents substantial anticompetitive harms that would not have occurred but for the challenged activity. Political activity designed to distort policy decisionmaking in favor of one producer group over another should also justify antitrust regulation.

This does not mean that every petitioning misrepresentation warrants denying antitrust immunity under the Noerr doctrine. To do so would bring about what Justice Black in Noerr feared most: an antitrust law that regulates ethical and moral conduct in the political arena. Misrepresentation occurring in the petitioning activities of producer groups should be grounds for the imposition of antitrust remedies only if it is established that the misrepresentations present the danger of trade restraints by rendering the political process vulnerable to capture by particular producer groups. This normally should depend on the nature and degree of abusive tactics utilized by the petitioners. The limitation of the antitrust laws should be applied to restrain petitioning activity only to guard against forms of corruption and "flagrant abuse." Hence, in the absence of improprieties or flagrant abuses, producer groups or a single firm should be allowed to petition government to enact legislation having an anticompetitive effect in the marketplace.

Thus, most political activities of special interest groups—solicitations, petitioning, boycotts—should continue to enjoy antitrust immunity. In the NOW case, the Eighth Circuit correctly decided that NOW's political boycott was immune from Sherman Act liability. The decision was justified because NOW's activities were legitimate political activities

377. A number of courts have recognized that a knowing submission of false information to a governmental body may give rise to antitrust liability. See Israel v. Baxter Laboratories, 466 F.2d 272, 279 (D.C. Cir. 1972) (drug manufacturer); Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1296-98 (5th Cir. 1971) (filing of false nomination forecasts with railroad commission), cert. denied, 404 U.S. 1047 (1972); see also P. AREEDA & H. HOVENKAMP, supra note 78, at 62.

378. Indian Head, 108 S. Ct. at 1945 (White, J., dissenting).
designed to influence governmental actions. \textsuperscript{379} NOW’s campaign consisted of direct solicitation by mailings, phone calls, and personal appearances. \textsuperscript{380} While the campaign had a substantial effect on convention revenues, there was no evidence establishing that it was NOW’s purpose or effect to distort the deliberative process of policy decisionmaking or otherwise misrepresent the nature of information crucial to policy determinations. Finally, the fact that NOW’s boycott was comprised primarily of citizen nonproducer groups was a factor that warranted the court’s conclusion that the boycott was of a political character.

The boycott involved in the \textit{Trial Lawyers} case is admittedly a more difficult case since the boycott was brought against a governmental entity and resulted in the termination of an important service performed by the government (legal representation of indigent defendants). The lawyers’ boycott, however, was a peaceful exercise of concerted activity utilized by citizens to express political grievances. The lawyers’ boycott was also necessary to represent the interests of indigent clients who lacked an effective representative group due to Olsonian collective action problems. Finally, the lawyers’ boycott did not involve abusive lobbying tactics designed to subvert the deliberative process of government, nor was there any attempt by the lawyers to capture governmental process for purely private economic advantage. These factors should have favored antitrust protection under the \textit{Noerr} immunity doctrine.

\textit{NOW} and \textit{Trial Lawyers} should be distinguished from \textit{Noerr}. In \textit{Noerr}, the railroads’ petitioning was not “competition on the merits,” because the railroads’ petitioning involved flagrant and highly abusive conduct that short-circuited the ability of the government to choose between the competing positions of political actors. Instead of focusing on whether private or public action is the cause of the restraint, an antitrust immunity analysis should seek to determine if competitor groups are engaging in solicitation and petitioning activity that poses substantial harm to the delicate function government performs in maintaining the process of competition. A narrowly drawn category for sham petitioning should be excepted from the \textit{Noerr-Pennington} doctrine.

\textsuperscript{379} The Eighth Circuit concluded that NOW’s boycott was immune from antitrust liability under the authority established by \textit{Noerr}. See Missouri v. NOW, 620 F.2d. 1301, 1311-16 (8th Cir. 1980). The dissent argued that \textit{Noerr} failed to establish an absolute immunity principle and that “a more comprehensive balancing of the important governmental interest” was required. \textit{Id.} at 1324 (Gibson, J., dissenting).

\textsuperscript{380} Missouri v. NOW, 467 F. Supp. 289, 293-94 (W.D. Mo. 1979).
(2) Judicial Recognition of a "Sham Petitioning" Exception

A selective antitrust approach to the government-petitioning cases should seek to justify the application of the antitrust laws only when necessary to restrain the exercise of economic power evidenced by improprieties in the petitioning process that are found to threaten federal competition policy. Such an approach can be developed from a "new" understanding of Noerr's "sham" exception. As previously noted, the sham exception has been largely ineffective in protecting against predatory conduct in the legislative arena, because the Supreme Court has used the term to cover only activity that is not "genuinely intended to influence governmental action." In common usage, however, the word "sham" means "something that is not what it purports to be; a spurious imitation; fraud." Petitions that distort and mislead legislative judgment ought to be "shams" because they are not what they purport to be; they are "spurious," and perhaps even "fraudulent." In the government-petitioning cases, the harm to be protected against involves a form of petitioning conduct that "corrupts" governmental process. While antitrust defendants should be allowed to use genuine efforts to influence governmental action, antitrust immunity under Noerr should be denied when lobbying and other forms of petitioning involve flagrant conduct seeking to perfect an anticompetitive conspiracy.

In ascertaining the actual scope of federal antitrust regulation under a sham petitioning exception to Noerr, the courts should develop criteria for identifying forms of abusive and improper behavior that can be used strategically by special interests in each sphere of government to achieve anticompetitive objectives. Antitrust regulation under the sham petitioning exception should not be misused for purposes of converting the antitrust laws into a general ethical code for policing political behavior. The party seeking to deny the imposition of antitrust immunity should have the threshold burden of establishing the sham petitioning exception.

An example of how the "sham" exception should be utilized is illustrated by the Ninth Circuit's decision in Session Tank Liners. In Sessions, the plaintiff alleged that the manufacturer of underground storage tanks had misrepresented crucial information before the private stan-

381. See supra note 205.
383. RANDOM HOUSE COLLEGE DICTIONARY 1208 (1975).
384. See, e.g., Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711, 721-22 (8th Cir. 1986) (upholding a jury instruction that denied Noerr immunity to lobbying efforts based on "threats, intimidation, coercion, or other unlawful acts"), cert. denied, 480 U.S. 910 (1987).
385. See supra notes 249-51 and accompanying text.
standard-setting organization that was highly relevant and material to the deliberative action taken by the private association in adopting the safety standard that blocked plaintiff's product from the market. Evidence also suggested that the defendant's membership on a crucial subcommittee of the private organization gave it the ability to capture the benefits of the association's standard-setting process. The fact that the private standard-setting association was vulnerable to producer capture, in addition to the deliberate misrepresentations made by the defendant, alerted the court to the possibility of petitioning abuse. The Ninth Circuit, however, emphasized that the sham exception would not apply to deny Noerr immunity to petitioning misrepresentations in the absence of evidence establishing a capture objective. 386

In Indian Head, there was similar conduct that should have alerted the courts to the possibility of opportunistic petitioning seeking regulatory capture objectives, though there were apparently no misrepresentations or distortions. 387 Subverting democratic process by purchasing votes should have been seen as paradigmatic capture behavior by a producer group bent on monopolizing competition. Hence, a threshold showing that sham petitioning was in furtherance of a conspiracy to restrain trade should be required as a condition precedent to denying the normal presumption in favor of antitrust immunity under Noerr. Forms of unethical conduct lacking an anticompetitive design would not be illegal under the Sherman Act since such conduct would fall outside the reach of the legislation.

Finally, while Justice Brennan's analysis (focusing on the source, nature, and context of the restraint) led him to a similar result in Indian Head, there are good reasons for favoring a sham exception approach. Justice Brennan's approach confuses antitrust immunity analysis with antitrust violations, collapsing the essential difference between these two different forms of antitrust inquiry. 388 The sham exception focuses the attention of the court on the factors most relevant for determining if antitrust immunity is warranted. The proper analysis for the applicability of the Noerr doctrine should focus on factors such as subversion and corruption of governmental process. 389 Antitrust considerations concerning the nature of the restraint become relevant only after the antitrust immu-

387. The Ninth Circuit recognized this possibility in its analysis of the Second Circuit's decision in Indian Head. See Sessions Tank Liners, 827 F.2d at 466 (citing Wiley, supra note 4).
388. See supra text accompanying notes 265-67.
389. See Session Tank Liners, 827 F.2d at 465.
nity issue has been resolved against the party claiming protection and the question is one of determining whether a substantive violation has in fact occurred.

C. Petitioning to Influence Legislative and Quasi-Legislative Action

Modern theories of interest group behavior suggest that producer groups may seek to influence government to obtain economic advantages that they would not normally receive by competing on the merits. The danger is that producer groups will utilize their petitioning effort to capture legislatively created benefits of regulation at the expense both of rivals and the public good. In designing an antitrust approach to deal with problems of producer capture and rent-seeking behavior in the legislative sphere, antitrust judges should seek to isolate the circumstances under which government-petitioning is a sham based on a strategic capture objective, irrespective of whether such activity seeks genuinely to influence governmental action. The courts should examine the nature of the conduct involved to determine whether the petitioning activity is in fact a sham designed to achieve an anticompetitive purpose.

(1) Factors Determining Sham Behavior Likely to Have a Predatory Market Design

a. Was the Petitioning Effort Based on Misrepresentations, Falsehoods, Distortions, or Unethical Propaganda Techniques?

Perhaps the most relevant factor in establishing a predatory petitioning purpose is whether the petitioning materials sought to distort the true nature of relevant policymaking by making intentional misrepresentations, lies, and half-truths with regard to matters that are material to governmental decisions. Petitioning based on the desire to mislead governmental decisions serves no legitimate representative function. The only objective of such activity is to mislead policymakers for collateral purposes. Moreover, it is unlikely that the process for policymaking will counteract the negative effect of such information, especially when complex matters are involved or when a select group has access to the materials relevant to these decisions. Lies and misrepresentations are difficult to counteract, especially when sophisticated means are used to camouflage the truth.

Consequently, the use of advertising propaganda techniques coupled with intentional misrepresentation of relevant facts should be viewed as relevant, but not conclusive, evidence to support the invocation of the antitrust laws when there is reason to believe that competition will be restrained. While not every misrepresentation should be grounds for de-
nying antitrust immunity, repeated instances of misrepresentations that pollute the deliberative process should be grounds for invoking antitrust remedies. In *Noerr*, the record was replete with examples of Madison Avenue propaganda tactics used in the railroads' publicity campaign to kill pro-trucking industry legislation. Propaganda films, third-party tactics, manufactured statistical studies, false endorsements, and other questionable tactics were used by the railroads to shape legislative preferences much in the same way that advertising shapes demand for products.\(^\text{390}\)

The view expressed by Justice Black, that the political process should be a "no-holds-barred fight" or an "anything goes" struggle for governmental favors, should be rejected. The political process should not be merely one of pressure group influence in which legislation is bought and sold like a commodity. A commitment to democratic ideals should require that the processes of government "ensure that political outcomes will be supported by reference to a consensus (or at least a broad agreement) among political equals."\(^\text{391}\)

The courts should ensure


Some economists have attributed these informational problems to certain forms of misleading product advertising that cause misinformation. F. Scherer, *supra* at 417-18.

First, consumers pay unnecessarily high prices for heavily advertised and otherwise differentiated products because they lack the technical knowledge to tell whether a particular [product is distinguishable from another]. Second, in such fields as home building and repair services, the consumer can be cheated or exploited because he cannot distinguish honest from dishonest workmanship . . . .

*Id.*


Conservative economists, however, adopt the view that "taste" is exogenous to the market—that advertising merely caters to pre-existing wants. See Mensch & Freeman, *supra*. What is the possibility that advertising may shape and create preferences? Advertising that distorts information crucial to consumer choice distorts allocative efficiency in the market. Petitioning that distorts crucial information for political choices causes a similar distortion in the allocation of policy decisionmaking. These arguments are supported by republican critiques about the role of interest groups in government. See Sunstein, *Beyond the Republican Revival, supra* note 15, at 1543-47. Hence, while it may be true that politics today is like the market, that does not mean that advertising in the market or in the political arena should be immune from federal regulation.

\(^{391}\) Sunstein, *Beyond the Republican Revival, supra* note 15, at 1550.
that powerful interest groups do not distort the deliberative processes of government through control over crucial information.

Antitrust regulation that seeks to limit the use of misinformation for predatory purposes would limit petitioning activity, not because of its content, but rather because of its secondary effects on the legislative process. In restricting misrepresentations and misleading propaganda in the political arena the courts would be furthering first amendment values by preserving the integrity of a process necessary for political discourse. This would not mean that the antitrust statutes would be transformed into a new code of political ethics; the purpose for invoking the antitrust laws in the government-petitioning cases would be limited to traditional antitrust objectives—the effectuation of federal competition policy. Ethical conduct in the political arena would be relevant, if at all, only to the extent that it bears on the type of antitrust issues that the Sherman Act was designed to handle.

b. Did the Producer Group Have a Unique, Anticompetitive Interest in the Subject Matter of Petitioning Activity?

A related factor is whether the producer group had a unique, anticompetitive interest in the subject matter of its petitioning effort. For example, if the National Association of Widget Manufacturers lobbies hard for a capital gains tax reduction, national health insurance, or a balanced budget amendment, such lobbying should not be troublesome under the antitrust laws. When producers conspire to lobby for legislation that would impose added burdens on a competitor by subverting the deliberative process of government, such lobbying should be viewed suspiciously under the antitrust laws.

If a producer group is seeking to influence legislative decisionmaking over matters that directly involve the group’s economic or financial interest, then there may be grounds to suspect that such petitioning is premised upon an illegitimate purpose. For example, in Noerr, the railroads were petitioning for antitruck legislation in various state legislatures. Although the subject matter of their petitioning effort did not directly involve considerations pertaining to the railroad industry, it did affect the financial and competitive interests of the railroads. The rail-

roads' purpose was to erect barriers to entry through legislation that excluded a potential competitor from their industry. While it is true that trucking legislation would have an effect on the railroads' interests by enabling a competitor to compete more effectively, the railroads' purpose was to render a rival less effective in the marketplace. Petitioning for legislation that would cripple a potential competitor industry should be strong evidence of an anticompetitive scheme to erect barriers to entry through governmental influence intended to cause antitrust injury. In other cases, there should be a required showing that the challenged petitioning activity affects either the economic or financial interest of producer groups seeking to influence governmental action.

c. Was the Petitioning Totally Negative in its Appeal? Was It Designed to Block Entry or Exit of a Rival from the Market Rather Than Affirmatively Advance a New Policy?

Recent empirical studies of interest group behavior suggest that organized interest groups are most likely to dominate the legislative process when the “objective is to kill a proposed measure than when the goal is to see one become policy.” Of course, the fact that a lobby group seeks the most effective strategy to influence legislative decisions should not by itself be a reason for establishing that petitioning is a sham. Nevertheless, courts should view negative petitioning suspiciously, especially when such activity seeks to impede the competition of a potential rival by blocking the rivals entry or exit from the market. This is because the effectiveness of negative political campaigns will pose the greatest dangers to market competition when they are aimed at influencing the government to cripple the competitive freedom of an actual or potential competitor. The fact that petitioning is designed to block legislation should also be a relevant factor in determining the presence of a capture motive. Of course, such a factor should not be deemed conclusive for establishing unlawful motive. Otherwise, even benign petitioning would be subject to antitrust liabilities.

This factor would have had a bearing on the Noerr litigation. In Noerr, the railroads' petitioning campaign was, at least in part, a campaign seeking to kill legislation that favored truckers. The truckers' petitioning effort, on the other hand, was almost entirely designed to support new legislation and policy. The district judge concluded that while both sides engaged in propaganda techniques, the truckers always used such techniques for the “affirmative purpose of seeking legislation,” whereas

the railroads sought "to destroy the good will" of a competitor by opposing pro-truck legislation at every turn. The district judge thus dismissed the antitrust claims against the truckers, while upholding the claims against the railroads.

The recent empirical evidence on interest group influence suggests that the district judge in *Noerr* may have had sound reasons for reaching the legal conclusions he did. It is more likely that the railroads' publicity campaign created a substantial and imminent threat to competition since it was almost exclusively negative in its appeal and effect. While the truckers may have had similar designs, it is unlikely that their efforts had a similar anticompetitive potential since there it was unlikely that barriers would have emerged in trucking had unfavorable trucking legislation occurred. Moreover, it was the truckers, not the railroads, that were excluded from the long-haul freight market. On the other hand, while it is true that blocking efforts are highly effective in preventing governmental action, it may be unclear whether such efforts in themselves were premised upon an anticompetitive purpose of design. At the very least, this factor would aid in judging the likelihood of harm caused by sham peti-

### d. Petitioning Expenditures

A factor that may be relevant but *not* conclusive in and of itself is the size of expenditures incurred in the petitioning effort. If a producer group is found to have expended considerable financial resources in its petitioning activities then the size of petitioning expenditures, along with other factors, may establish a predatory design to restrain trade. Heavy petitioning expenditures may create a barrier to entry that denies competitors a fair opportunity to engage in countervailing petitioning campaigns. If heavy petitioning expenditures serve to raise barriers to entry to political markets, adverse competitive consequences may result from governmental action influenced by wealthy competitors. For example, in *Noerr* the railroads' petitioning expenditures were substantial. The public relations firm that was retained to guide its petitioning efforts was paid 250,000 dollars per year plus expenses that included the salaries of employees of the firm. In *Indian Head*, Allied Tube spent over 100,000 dollars for the membership, registration, and attendance ex-

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395. In 1950 dollars, this was an extremely significant sum to spend for advancing the railroads' industry position on truck legislation.
penses of its representatives who packed the private standard-setting association meetings. At the very least, the size of petitioning expenditures, such as those involved in Noerr and Indian Head, should have alerted the courts that the petitioning effort was not simply directed at expressing opinions and disseminating information, but rather was seeking to reap anticompetitive benefits through the establishment of a barrier to a political market.

Petitioning expenditures should not, however, be sufficient in themselves for establishing the denial of antitrust immunity for petitioning government. Even substantial petitioning expenditures may be exceptional depending on the nature and complexity of the public policy issues at stake, as well as the location and number of policymakers involved. For example, the fact that state legislation was the subject of the petitioning effort in Noerr would suggest that sizable expenditures for petitioning were required, since a number of state legislatures were petitioned. Moreover, because the subject of the petitioning effort involved technical and scientific matters, the cost of petitioning was likely to be high. The relevance of petitioning expenditures should depend on the nature of the particular petitioning at issue as well as other relevant factors establishing that the petitioning was nothing more than a "sham."

(2) Successful Versus Unsuccessful Petitioning—Causation and Antitrust Injury

As a general principle, antitrust plaintiffs should be granted antitrust remedies only if they can establish that they suffered antitrust injuries caused by sham petitioning. The so-called Brunswick, or "antitrust injury," doctrine requires the antitrust plaintiff to establish an injury of the type that the antitrust laws were intended to condemn. In addition, the plaintiff must show that these injuries were proximately caused by the defendant's conduct. In cases in which sham petitioning is successful in its effort to influence governmental action restraining trade, an "antitrust injury" is easily established; but issues of causation may deny recovery.

In cases involving petitioning activity that is successful in bringing about governmental action, defendants will argue that the plaintiff's antitrust injuries were caused by valid governmental action, rather than the

396. Indian Head, 108 S. Ct. at 1934.
397. See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); see also P. Areeda & H. Hovenkamp, supra note 78, at 324-31 (discussing the "striking development" of the "antitrust injury" concept).
398. The antitrust plaintiff must show that the injury "flow[ed] from that which makes defendants' acts unlawful" under the antitrust laws. Brunswick, 429 U.S. at 489.
defendant's conduct. Antitrust defendants will argue that the act of government causing the injury was a supervening event breaking the chain of causation between the defendant's conduct and the plaintiff's antitrust injury.\textsuperscript{399} The causation argument, however, should not preclude recovery if the antitrust plaintiff can establish that defendant's petitioning accomplished a capture objective. If predatory forms of petitioning result in producer capture of the governmental process, then the petitioning activity should be treated as "legally proscribed" conduct, similar to bribery, justifying antitrust liability.\textsuperscript{400} If petitioning activity is successful in capturing the benefits of legislative action, then the petitioning, not the resulting governmental action, should be viewed as the proximate cause of plaintiff's antitrust injuries.

This raises additional questions concerning the status of governmental action initiated by forms of petitioning activity declared illegal under the federal antitrust laws. If petitioning successfully results in state regulation that restrains trade, then the relevant policy consideration is that of antitrust federalism, and the appropriate legal doctrine is antitrust preemption. In such cases, antitrust courts should apply Professor Wiley's four-part test, and preempt state regulation shown to be the product of producer capture. In applying Wiley's state action test, however, more consideration should be given to political values, independent of efficiency. In determining if state or local regulation is preempted under the antitrust laws, the courts should consider whether the democratic processes giving rise to economic regulation were undermined by producer capture. Lobbying activity found to be a sham then would be grounds for establishing producer capture under Wiley's capture criteria.

\textsuperscript{399} See P. AREEDA & H. HOVENKAMP, supra note 78, at 12.

\textsuperscript{400} Professors Areeda and Turner, for example, recognize that the grounds for immunizing political activity in antitrust suits do not cover "legally proscribed" conduct such as bribes. P. AREEDA & D. TURNER, supra note 63, at 47. Areeda and Turner suggest, however, that such a result "leaves many questions unanswered." \textit{Id.} For example, they posit the following unanswered questions:

- Should the category be limited to legislative proscription or broadened to include judge-made proscriptions? Should it be limited to criminal proscription or broadened to include any conduct to which the law attaches some sanction? Should it be limited to conduct proscribed with relative particularity or broadened to include proscriptions phrased in such general terms as "unreasonable" behavior?

\textit{Id.} Areeda and Turner ultimately avoid answering the questions they raise for they are of the view that causation in most cases should deny recovery. \textit{Id.} Antitrust liability for sham petitioning, however, does not have to lead to overly broad judicial standards of antitrust liability. Liability can be properly limited by an antitrust immunity standard that permits recovery only for "legally proscribed" forms of strategic behavior seeking to capture governmental processes for predatory purposes. Criminal proscription would not normally be appropriate unless the defendant's conduct involves extremely flagrant and pernicious conduct. Ambiguous judge-made standards should be avoided.
Whether state regulation furthers the values of economic efficiency should not be the exclusive factor for determining the propriety of federal preemption under Wiley's test. Economic efficiency should be relevant, but so should the democratic and equality values of a truly deliberative governmental process.

If federal regulation is involved, courts should seek to construe such legislation to avoid a construction that would give effect to the anticompetitive purposes of producer capture as a matter of statutory interpretation. In antitrust law there is a strong presumption against implied repealers or legislative exceptions to the antitrust laws. That presumption should be liberally invoked to avoid any potential conflict between federal regulatory measures and the antitrust laws. If federal legislation cannot be interpreted to avoid a result that favors the producer groups responsible for its enactment, then the courts should consider invalidating federal legislation. However, this route should be taken only if: (1) federal legislation has been shown to be the product of producer capture, and (2) if the legislation clearly conflicts with federal antitrust law and policy. An antitrust exemption should not be implied, given the Supreme Court's hostility to implied repealers of antitrust law.

If petitioning is unsuccessful or challenged before legislative action is taken, the issue then will be whether the antitrust plaintiff has in fact suffered an antitrust injury. In such cases, the antitrust plaintiff should be allowed to demonstrate antitrust injuries. Even unsuccessful petitioning can restrain trade of competitors by forcing them to incur additional costs of defending against false propaganda or otherwise responding to a negative lobbying effort. Antitrust injuries may thus arise even if the petitioning activity is unsuccessful. These cases should be analyzed as antitrust attempt cases. Antitrust liability should be imposed if the gravity of the harm and the extent to which dangerous probability of success presented by defendants' conduct establish an antitrust injury. Of course, in most cases, unsuccessful petitioning may be the best evidence that the defendants' conduct fell short of establishing the dangerous probability of success required to impose liability.

401. See Sunstein, supra note 125, at 486 (arguing that "[c]ourts should narrowly construe statutes that serve no plausible public purpose, and amount merely to interest-group transfers").

402. See, e.g., United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (cooperative railroad association).

403. See generally H. Hovenkamp, supra note 60, at 159-61 (introducing the offense of attempt).
D. Petitioning to Influence Executive and Administrative Action

As Pennington and California Motor Transport reveal, attempts to influence government can also occur before the executive branch of government as well as in the legislative setting. Because each of these branches is involved in policy decisionmaking there is reason to apply the factors applicable to legislative and quasi-legislative bodies to the executive as well.

In the executive context, the relevant inquiry should be whether the attempt to influence governmental decisionmaking involves the exercise of policy as distinguished from nondiscretionary forms of decisionmaking. If policy discretion is involved, the petitioning effort should be scrutinized under the factors applicable to petitioning in the legislative setting. Normally, petitioning activity should be presumed immune from antitrust prosecution unless it can be shown that the executive agent's exercise of policy decisionmaking had been captured or subverted by producer groups. Because executive and administrative officials must be granted a degree of discretionary authority in performing their adminis- terial duties and responsibilities, the courts should not impose antitrust liability except in those cases that involve egregious abuses such as bribery, collusion, and the like.

Thus, Pennington should have been a doubtful case for antitrust liability. Unlike Noerr, there was an absence of misrepresentations, falsehoods, and unethical behavior in the petitioning at issue. The fact that producers seek to influence an executive decision that might favor their particular commercial interests should not be conclusive proof in and of itself of an anticompetitive purpose or motive. The political influence brought to bear on the Secretary of Labor and officials of the TVA involved adminis- terial discretion of executive officers that was necessary to facilitate resolution of a collective bargaining impasse. Furthermore, it was far from clear whether the executive decisions involved in Pen- nington actually involved any policy discretion. If policy decisionmaking was not involved then there would be justifications for upholding the petitioning effort unless fraud, bribery, or collusion were shown.

Boycotts seeking to pressure governmental policy decisionmaking of governmental officials raise unique concerns, as the Court's Indian Head decision illustrates. Because boycotts are without doubt coercive, and since governmental officials may be vulnerable to such pressures, the courts should give great weight to the interest of government in determining if this form of activity should be immunized under Noerr-Pen-

404. See Fischel, supra note 7, at 85.
nington. If the boycott is brought by producer groups, then traditional antitrust principles applicable to commercial boycotts should apply. If the boycott is brought by a non-producer group, the focus should be on whether the participants in the boycott had less restrictive alternatives available for communicating their political message. If alternative avenues for petitioning were not available because of collective action problems, then the boycott should be protected by the antitrust immunity doctrine unless the interest of government in maintaining essential services is impaired, and the government lacks alternative measures to protect its interests.

Executive decisionmaking involving nondiscretionary functions should be subjected to antitrust scrutiny. In determining whether or not a nondiscretionary standard should be enforced, executive officers engage in an interpretative process not unlike that of judges to determine the applicability of legal standards. Similarly, in determining the application of legislative directives, as distinguished from nondiscretionary standards, executive officers perform administrative functions that normally do not call for input from special interest groups. Indeed, interest group influence at this level of executive decisionmaking is likely to bias the decisionmaker's judgement in favor of private interests. There is justification for treating nondiscretionary executive actions under an approach similar to the one recommended for the judicial and quasi-judicial sphere of government discussed below.

E. Petitioning to Influence Judicial and Quasi-Judicial Action

Regulating predation through governmental process makes sense in the legislative and quasi-legislative setting, but it makes little sense in the judicial and quasi-judicial setting—at least under the sham litigation theory developed since *California Motor Transport*. Sham litigation has become confused and unfocused because the Supreme Court has been unable to articulate a persuasive antitrust theory to justify its regulation, and it is submitted that none is possible.

The sham litigation exception, when applied to the judicial and administrative agency context, assumes that litigation might be used as an entry-deterring strategy by increasing a rival's costs through litigation. As previously discussed,\(^405\) however, such a theory might backfire. Moreover, there are other remedies and sanctions available for dealing with the bad faith and malicious prosecution problems. Private litigants can invoke common-law remedies, and judges can impose sanctions for

\(^{405}\) See *supra* note 227 and accompanying text.
harassing litigation. Moreover, in allowing judges to impose antitrust liability for bringing litigation, legitimate litigation is likely to be chilled, including antitrust litigation necessary to enforce important federal policy. In view of these realities, the courts would be wise to get out of the business of relying upon the antitrust laws to police bad faith litigation and instead refocus their efforts on dealing with the much more serious problem of truly flagrant and abusive behavior in this sphere of government.

Nevertheless, predation utilizing the judicial machinery of government should still be subject to antitrust attack. Decisions such as Walker Process should be followed in dealing with instances in which a predator seeks to enforce fraudulent legal claims, or valid claims based on information that was known to be false. Barriers to entry resulting from the use of fraud and misrepresentation perpetrated through the judicial machinery of government should be treated as any other attempt to restrain trade. Perjury and fraud in court as well as bad faith litigation and other forms of abuse of process, however, may best be addressed with nonantitrust sanctions. Such abuses must be distinguished from cases in which legally-proscribed conduct independent of litigation is the basis for an antitrust violation. Conspiracy with a judicial or administrative official to eliminate a competitor may result in the imposition of an antitrust sanction. Bribery of judicial officials is illegal and can be punished without additional antitrust remedies.

Administrative agencies performing regulatory functions may, however, present special circumstances that justify a more vigorous antitrust regulation policy. Public choice theorists have argued that regulatory agencies are vulnerable to capture by the very interests the agency was created to regulate. For example, a number of empirical economic studies have revealed that a major effect of Interstate Commerce Commission (ICC) regulation has been to increase the freight rates for the trucking industry. These studies, while not conclusive, imply that agency regulation in the trucking industry may have been captured by

\[406. \text{See supra notes 232-33 and accompanying text.}\]
\[408. \text{See Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706-07 (1962); Harman v. Valley Nat'l Bank, 339 F.2d 564 (9th Cir. 1964).}\]
\[409. \text{Wiley, supra note 4, at 724-26.}\]
\[410. \text{See, e.g., Sloss, Regulation of Motor Freight Transportation: A Quantitative Evaluation of Policy, 1 BELL J. ECON. & MGMT. SCI. 32 (1970); see also Moore, The Beneficiaries of Trucking Regulation, 21 J.L. & ECON. 327, 327 n.1 (1978) (noting several empirical studies on trucking regulation).}\]
\[411. \text{See Moore, supra note 410, at 327.}\]
industry interest. Ironically, the truckers, having lost the competitive struggle for legislative favors in the 1960s, may have achieved a measure of monopolistic power through ICC regulation. Governmental agencies performing regulatory, as distinguished from adjudicatory, functions should be the subject of higher antitrust scrutiny due to the greater likelihood of producer capture. Corporate interests seeking to influence regulatory actions of agencies through improper means should be treated like legislative lobbying and regulated under the sham petitioning exception.

F. Substantive Violations and Remedies

While issues of antitrust immunity must be distinguished from issues of substantive violations, antitrust analysis of substantive violations must also remain selective in its emphasis. For example, an antitrust immunity test that focuses more selectively on problems of regulatory capture should require a rule of reason analysis for determining antitrust violations. The meat cleaver approach of the per se rule of antitrust, biased as it is in favor of violation, is too insensitive for determining substantive violations in the government-petitioning cases. As Justice Brennan noted in his dissent in Trial Lawyers, the per se rule prevents judges from engaging in the type of particularized examination necessary to determine whether political expression merits protection under Noerr and the first amendment.412

While Justice Stevens applied the per se rule in Trial Lawyers, the case may have limited significance in that the majority (inaccurately) characterized the Trial Lawyers' boycott as a naked restraint of trade involving a price-fixing objective.413 In determining whether the anti-

412. Trial Lawyers, 110 S. Ct. at 732 (Brennan, J., dissenting in part).

413. Justice Stevens' invocation of the per se rule in Trial Lawyers can surely be criticized as inconsistent with what he has said about the per se rule in other antitrust cases. In National Collegiate Athletic Ass'n v. University of Okla., 468 U.S. 85, 104 n.26 (1984), for example, Justice Stevens stated in a footnote that "there is often no bright 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." Moreover, in the most recent United States Supreme Court decision dealing with a group boycott by a producer group, Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co., 472 U.S. 284 (1985), a unanimous Court concluded that a rule of reason analysis, not the per se rule, was the appropriate standard for determining whether a group boycott of producers violated the antitrust laws. As Justice Brennan noted in his dissent in Trial Lawyers, "[t]he [majority's] concern for the validity of the per se rule... is misplaced, in light of the fact that we have been willing to apply rule-of-reason analysis in a growing number of group-boycott cases." Trial Lawyers, 110 S. Ct. at 790. Furthermore, while the horizontal price-fixing agreements between competitors are condemned under the per se rule, see Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) ("[u]nder the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in inter-
trust laws have been violated in future government-petitioning cases, the courts should require that the plaintiff prove that the petitioning defendants' unimmunized petitioning constituted an exercise of market power or an attempt to obtain such power. The reason for requiring proof of market power is that antitrust regulation of political expression is warranted only if there is a basis for establishing that the petitioning conduct represents a substantial and real (not presumed) antitrust harm.

Proof of market power in the government-petitioning cases need not require the same degree of proof required in monopolization cases under section two of the Sherman Act. In cases in which a competitor group has attempted to exclude a rival from the market through governmental regulation, proof of exclusionary conduct may itself be proof of market power. In other cases, market structure data can provide a basis for determining market power. Market structure data is relevant because it may serve to establish information concerning the likelihood of the antitrust harm.

Because concentrated industries are more likely than unconcentrated ones to foster collusive behavior, judges should be critical of political solicitations by firms seeking protective economic legislation in highly concentrated market structures (for example, in industries in which there are ten or fewer firms). Industry concentration is especially

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414. For a discussion of the concept of market power in the law of monopolization, as well as economics, see Krattenmaker, Lande & Salop, Monopoly Power and Market Power in Antitrust Law, 76 Geo. L.J. 241 (1987).

415. Id. at 255.

416. See id. at 259-64.

417. For example, empirical surveys of price fixing conspiracies reveal that certain industry characteristics are more likely than others to facilitate collusive anticompetitive conduct. See, e.g., Hay & Kelly, An Empirical Survey of Price Fixing Conspiracies, 17 J.L. & Econ. 13 (1974); McElroy & Siegfried, The Economics of Price Fixing, 20 Surv. of Bus. 19 (1984). The structural characteristics that are most likely to encourage and foster collusive behavior and encourage predatory forms of conduct are concentrated market structures and restrictions on conditions of entry. These factors can help guide judges in their determination of the likelihood a governmentally induced restraint of trade will be successful in establishing or maintaining monopoly power.

418. See, Hay & Kelly, supra note 417, at 14.
relevant in cases in which the petitioning activity seeks legal restrictions on market entry. The fact that the railroads in Noerr sought to compete in the long-haul freight market should have alerted the courts to a serious antitrust danger.

Hence, while market structure should be a relevant factor for determining the propriety of antitrust immunity for petitioning activity, the relevant analysis required need not entail a full-blown rule of reason examination required for substantive violations under the rule of reason standard in monopolization cases. Requiring a complex market analysis in every case may not be worth the administrative cost involved. Since important petitioning rights are involved, burden of proof standards must be carefully tailored so that such rights are not unduly restrained.

A proper antitrust analysis should also require a remedial approach that makes distinctions between injunctive and damage remedies. Such an approach must allow for different remedies in private antitrust cases depending on whether government-petitioning has been successful in bringing about a government created restraint of trade. When the challenged petitioning has been successful in inducing governmental action, the remedies applicable to a successful preemption attack should apply if state regulation is involved. An injunction should issue declaring state law invalid and preventing its enforcement. A similar remedy could be fashioned in cases in which federal legislation has been captured by a producer group or single firm seeking to erect a barrier to entry, or otherwise to restrain trade in the industry. Public defendants should not face damage liability under the antitrust laws. Traditional antitrust remedies, including treble damages, should apply to private defendants.

Finally, problems of causation may bar recovery for substantive violations if a causal link between anticompetitive consequence and legis-
tive action is in fact impossible to establish. Antitrust plaintiffs should be allowed to prove the causation issue, however, and if proved they should recover accordingly. The courts should not presume as a general rule that causation denies recovery in every case.

Conclusion

The Noerr-Pennington doctrine is ripe for reconsideration because it is premised upon two highly questionable perspectives—a pluralistic perspective that assumes that interest group factions within a representative democracy promote social welfare; and a rather strained absolutist perspective of the first amendment that equates the right of interest groups to petition government with constitutionally-protected speech. These perspectives have resulted in a doctrinal “quagmire” because judges who adopt these perspectives in decisionmaking have mistakenly assumed that painful choices must be made in upholding either of two seemingly contradictory values—democratic values associated with the political freedom of citizens to petition government, and antitrust values protecting private actors from restraints of trade.

The perceived conflict between antitrust and politics masks a deeper theoretical problem embedded within Noerr-Pennington and first amendment jurisprudence. Both the first amendment defense as well as Noerr immunity have been grounded in a theory that presumes the validity of the distinction between politics and market, public and private. In finding that the Noerr immunity doctrine protects petitioning activity seeking to influence governmental action, but not private action, the Supreme Court has uncritically assumed that distinctions drawn between private versus public actions can mark the line separating antitrust and politics.

Similarly, in finding that the first amendment defense for political activity depends on whether an economic or political objective is at stake, the Court has adopted a doctrinal test that mirrors the very distinctions drawn for determining Noerr immunity. Political expression loses its claim to first amendment protection if it seeks to accomplish private economic interest; while political expression remains protected if it is found to be instrumental to the advancement of public or political objectives. The problem with such a view is that it fails to recognize that politics is a “sphere of power” of producer interests. Protecting regulatory lawmaking from certain corrupting forms of petitioning activity may be the only way to avoid the external effects of monopolistic market power.

Neither first amendment jurisprudence nor the principles of representative government will be able to define an autonomous sphere of political or public activity independent of market or private activity, and
at the same time respect the values of competition and free expression. Competition policy as well as freedom of speech can be restrained by private as well as public power. In attempting to maintain a political sphere of activity free from governmental regulation, the Supreme Court has unwittingly created antitrust and first amendment doctrines that grant private economic power an avenue for realizing monopolistic market objectives. While the Supreme Court has recognized the anticompetitive dangers of interest group petitions of government in *Indian Head* and *Trial Lawyers*, the Court has continued to adhere to distinctions that fail to appreciate that "our actual experiences of political, economic, and social life are too messy, too mixed, and too ambiguous to support any . . . categorical, wholesale answer."425

It is thus time to reconsider the background premises and assumptions that have supported policy justifications for allowing corporate interest to use governmental process for anticompetitive purposes. Modern interest groups suggest that federal competition policy cannot survive if antitrust enforcers allow corporate interest to dominate and capture governmental processes for purely private benefit. The true threat to the values of free expression and representative government lies not with antitrust regulation of petitioning, but rather with antitrust immunity, which has allowed the political process to be overwhelmed by the excessive influence of corporate greed and private access.

By immunizing government-petitioning cases under the *Noerr-Pennington* antitrust doctrine, the courts have allowed business interests to use political expression as a predatory strategy for capturing the benefits of regulation, thus threatening the political legitimacy of government. In refusing to intervene in the governmental sphere merely because activity is seen as political, or because otherwise valid governmental action has been engineered for private benefit, the courts have sharply limited the ability of the Sherman Act to protect the process of competition from a dangerous form of predation. If left unchecked, predation by business will not only undermine the foundations of the antitrust laws, but also adversely affect the integrity and the quality of political debate and deliberation occurring within government. The *Noerr-Pennington* doctrine, erected upon discredited notions of interest group pluralism, has thus established an antitrust immunity policy that is at odds with the very policies that the Warren Court sought to advance by its doctrine.

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