Municipal and Private Petitioner Immunity from Antitrust Liability: A Declaration of Independence to Preserve the *Parker* and *Noerr-Pennington* Doctrines

Keith E. Moxon

*University of Nebraska College of Law, kem@vnf.com*

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I. INTRODUCTION  

An increased involvement by local government in a wide range of social services and economic activities has generated a flurry of antitrust challenges to municipal regulation and licensing. Operations such as airports, trash collection, sewer services, and sports facilities, have been subject to such challenges. The increased role of state and local government has been due in part to an infusion of federal assistance that increased the federal government's total expenditures from $2.1 billion in 1902 to $30.6 billion in 1960 and to $71.3 billion in 1980. This represents an increase in annual per capita expenditures by state and local governments from $27 per person in 1902 to $315 in 1980. Zimmerman, Reducing the Growth and Size of the Public Sector: Is New Federalism Part of the Answer?, 7 STUDIES IN TAXATION, PUBLIC FINANCE, AND RELATED SUBJECTS—A COMPREHENDIUM 163, 165 (1983). A considerable part of this increased role of state and local government has been due to an infusion of federal assistance that increased the average of 15 percent each year from 1958 to 1978. In 1978, the federal government provided a total of $78 billion to states and cities—17 percent of the federal government's total expenditures. Sbragia, The 1970's: A Decade of Change in Local Government Finance, in THE MUNICIPAL MONEY CHASE—THE POLITICS OF LOCAL GOVERNMENT FINANCE 10 (A. Sbragia ed. 1983).  

1. See, e.g., Hill Aircraft & Leasing Corp. v. Fulton County, 561 F. Supp. 667 (N.D.  
transit systems, cable television, electrical utilities, and zoning have all been challenged under antitrust laws.

To the extent that a municipality's conduct, albeit anticompetitive, can be characterized as "state action" it may be immune from liability under the Sherman Act. The rationale underlying this immunity is that federal antitrust laws do not prohibit the imposition of anticompetitive restraints by a state acting as sovereign. This same notion of federalism applies to cities that are cloaked with state authority. Yet in any given case it is often unclear whether a city will succeed on its claim of antitrust immunity under the state action doctrine. Moreover, state action immunity may be stripped away by the application of various exceptions that expose cities and their officials to antitrust liability.

The regulatory and legislative role of cities is inherently policy-oriented and frequently requires anticompetitive conduct in order to

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3. See, e.g., Heille v. City of St. Paul, 671 F.2d 1134 (8th Cir. 1982).
7. See, e.g., Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555 (5th Cir. 1984).
9. See, e.g., Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982), cert. denied, 461 U.S. 945 (1983); Mason City Center Assocs. v. City of Mason City, 468 F. Supp. 737 (N.D. Iowa 1979).
10. See infra Section II.
11. 15 U.S.C. §§ 1 & 2 (1982). The two principal provisions of the Sherman Act make unlawful "[e]very 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," id. at § 1, and the actions of "[e]very 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 . . . ." Id. at § 2.
13. See infra notes 40-43 and accompanying text.
14. See infra notes 61-91 and accompanying text.
15. For purposes of this Article, a number of categories have been developed to describe the various reasons used by courts to deny Parker immunity for particular anticompetitive governmental activities. The general exception to Parker immunity is for conduct that lies outside of the state authorization. More specific rationales for denying Parker immunity include the "improper self-interest" exception, the "least restrictive means" exception, and the "co-conspirator" exception. See infra notes 92-118 and accompanying text.
achieve lawful municipal objectives. For example, in the regulation of hospital facilities, the creation of an ambulance service system, or similar functions, the municipality, when acting under "state action" authority, may lawfully authorize or compel anticompetitive conduct without antitrust liability.

This Article will review the historical development of the state action doctrine and will analyze the current standard for determining whether a municipality can claim state action immunity from liability under the Sherman Act. An important issue regarding municipal liability under the antitrust laws has been whether the treble damages provision of the Clayton Act applies to cities. Legislation recently enacted by Congress, which became effective October 24, 1984, grants cities immunity from any monetary liability, including awards of attorney's fees or actual damages.

The Article will also analyze the related concept of immunity for persons who petition for, or otherwise attempt to influence the government to engage in anticompetitive conduct. This petitioning immunity is generally referred to as the "Noerr-Pennington" doctrine, and is predicated on both the desirability of public participation in the policy-making process and on the corresponding first amendment right to petition government, even at the risk of damage to

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18. See supra notes 2-9 and accompanying text.

   Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee ....


21. United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965) (successful joint efforts by union and large coal companies to influence the Secretary of Labor to establish minimum wages at higher levels harmful to small coal companies were exempt—affirming Noerr determination that anticompetitive purpose or intent does not bring such conduct within the purview of antitrust laws); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (conspiracy among railroads to cause passage of state anti-trucking legislation and to obtain a gubernatorial veto of a bill favorable to the trucking industry was exempt from the antitrust laws despite railroads' anticompetitive purpose).
Like state action immunity, Noerr-Pennington immunity is not absolute but is subject to exceptions which, if applicable, result in exposure to antitrust liability. These exceptions have been the source of considerable confusion and inconsistency among lower courts attempting to apply the Noerr-Pennington doctrine. This Article will identify the problems lower courts have experienced in determining whether the antitrust laws should apply to attempts by private parties to induce anticompetitive conduct by local governments.

The major focus of this Article is on the functional relationship between the state action doctrine and the Noerr-Pennington doctrine. Of particular importance is whether the absence of state action immunity for a municipality's anticompetitive conduct will automatically foreclose Noerr-Pennington immunity for the petitioning party. In other words, to what extent is Noerr-Pennington immunity linked to or conditioned upon the availability of state action immunity for the local government?

This Article will explore the divergent views among the lower courts on this issue and will attempt to isolate the fundamental policy forces that support the preservation and proper application of each doctrine. The Local Government Antitrust Act of 1984 may create new pressures to restrict the availability of Noerr-Pennington immunity for those who successfully petition for anticompetitive government conduct. This Article will recommend an approach to the state action and Noerr-Pennington doctrines that recognizes necessary exceptions, but encourages the broad immunity necessary for effective and efficient local government.

Section II traces the development of the state action doctrine. Section III summarizes the much shorter history of the Noerr-Pennington doctrine. Section IV discusses the relationship between the two doctrines and the conflicting results in lower courts for successful petitioners where the municipality's conduct is judged not to be immune from the antitrust laws. The final sections of Section IV consider the impact of the Local Government Antitrust Act of 1984 on the availability of private party petitioning immunity and recommend an approach to the proper application of both immunity doctrines.

22. See infra notes 124-26 and accompanying text.

23. For purposes of this Article, the exceptions to Noerr-Pennington immunity have been grouped into four categories of conduct: 1) illegal petitioning conduct ("abuse of process" exception); 2) participation by a public official in the petitioning conspiracy ("co-conspirator" exception); 3) government conduct that is proprietary/non-political in nature ("commercial" exception); and 4) petitioning solely for the harm caused to competition ("sham" exception).
II. THE DEVELOPMENT AND RESTRICTION OF STATE ACTION IMMUNITY FOR CITIES: THE PARKER DOCTRINE

A. Parker v. Brown: In the Beginning

Parker v. Brown,24 was the first United States Supreme Court case to enunciate state action immunity from the federal antitrust laws.25 In Parker, the Court held that California’s anticompetitive agricultural marketing program was immune from scrutiny under the Sherman Act. The state law at issue was not pre-empted by federal antitrust laws. The Court relied on federalism grounds to justify immunity for the program, emphasizing that it had been adopted by the state legislature and enforced by the state acting as sovereign.26 Under the Court’s interpretation, the purpose of the Sherman Act was to control private anticompetitive conduct, not government regulatory conduct.27 The Court reasoned that:

[N]othing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature . . . . The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.28

The notion of state action immunity, as stated in Parker, gave rise to a general assumption that all local governmental entities, including

24. 317 U.S. 341 (1943). In Parker, the California legislature had enacted a state raisin marketing program that was designed to limit production and maintain prices in order to avoid ruinous competition in the California raisin industry. The state permitted a committee of private growers to stabilize raisin prices by manipulating the market. Id. at 346.

25. The first suggestion of a state action defense to antitrust liability appeared in Olsen v. Smith, 195 U.S. 332 (1904), just fourteen years after the Sherman Act was adopted. In Olsen, the Court held that a Texas law authorizing a monopoly for steamboat pilotage did not violate federal antitrust law. The Court’s language suggested the need for a distinction between private conduct in violation of the Sherman Act and otherwise similar state regulatory action. Id. at 344-45. The Court observed: “[It] must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law.” Id. at 345. The Court concluded that denying immunity to the monopoly granted by the state would undercut the authority of the state to regulate pilotage services. Id.

26. The Parker Court observed: “In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.” Parker v. Brown, 317 U.S. 341, 351 (1943).

27. Id. at 350-52. However, the Court emphasized that a state could not immunize private parties from the Sherman Act merely by declaring their conduct lawful. Id. at 351. Thus, the Parker Court would have found a state-authorized private combination in restraint of trade to be subject to the Sherman Act, unless directly connected to a legitimate state regulatory objective.

28. Id. at 350-51.
state agencies and local political subdivisions of a state, were exempt from federal antitrust laws. However, subsequent cases have restricted the state action doctrine. The Supreme Court has indicated that municipalities are not equivalent to states for purposes of state action, and that even a state's involvement with anticompetitive conduct will not trigger Parker immunity in all cases.


Thirty-two years after Parker, the Supreme Court handed down its next decision on state action immunity. In Goldfarb v. Virginia State Bar, the Court rejected a claim that the bar association's minimum fee schedules were immune from antitrust scrutiny. The Court emphasized that, in order to qualify for state action immunity, the anticompetitive conduct must be required or compelled by direction of the state acting as sovereign. The Goldfarb Court concluded that state supreme court had merely tolerated but had not mandated the challenged fee schedules in establishing ethical standards. Thus, after Goldfarb, not every act of a state agency would automatically qualify for Parker immunity.

C. Cantor v. Detroit Edison Co.: Compulsion Plus Affirmative/Active State Policy

One year after Goldfarb, the Court issued a plurality opinion in Cantor v. Detroit Edison Co. The Court held that there was no state action immunity conferred upon the defendant electric utility when the state agency passively accepted the utility's tariff that authorized the anticompetitive practice. The Court concluded that the tariff references did not constitute an articulated state policy against competition, but amounted to mere state toleration of the tariff proposal.

31. 421 U.S. 773 (1975). Goldfarb involved a county bar association's minimum fee schedule that was enforced by the state bar association, a quasi-state agency. The Virginia legislature had empowered its supreme court to regulate the practice of law. Id. at 789. However, that court did not monitor fee schedules. Such fee schedules were supervised by the practicing bar. Id. at 790-91.
32. Id. at 790-93. The Court stated: "It is not enough that . . . anti-competitive activity is 'prompted' by state action; rather, anti-competitive activities must be compelled by direction of the State acting as a sovereign." Id. at 791.
33. 428 U.S. 579 (1976). Detroit Edison's practice of distributing "free" light bulbs to residential consumers and recovering the cost of such program through higher rates was challenged as an unlawful tying arrangement. Detroit Edison argued that its actions were "compelled" under the utility's accepted tariffs and that the state action doctrine shielded it from liability under antitrust laws.
34. Id. at 594 & n.31. The facts of Cantor revealed that no state statute regulated the light bulb business, no statute or agency rule required the light bulb exchange program, and neither the legislature nor the state regulatory agency had ever
The *Cantor* Court's position was that *Parker* state action immunity would not be available where the state's policy regarding the challenged activity was neutral.


The next major decision involving the *Parker* doctrine concerned a challenge to restrictions on attorney advertising imposed by the Arizona Supreme Court. In *Bates v. State Bar of Arizona*, the Court held that the antitrust laws were not applicable. Unlike the situation in *Goldfarb*, the Arizona Supreme Court was "the ultimate body wielding the State's power over the practice of law . . . and, thus, the restraint [was] 'compelled by direction of the State acting as sovereign.'" The Court found that the restraints in *Bates* were clearly articulated and affirmatively expressed by the sovereign as state policy, and were actively supervised by the state.

E. *City of Lafayette v. Louisiana Power & Light Co.*: Erosion of the *Parker* Doctrine for Cities

The United States Supreme Court first addressed the applicability of the *Parker* state action immunity to municipalities in *City of Lafayette v. Louisiana Power & Light Co.* The Court concluded that cities are "persons" subject to liability under the antitrust laws and are not automatically exempt by virtue of their status as agents or instrumentalities of the state. The plurality in *Lafayette* reasoned that under this nation's dual federal-state system of sovereignty, municipalities are not sovereigns and that broad antitrust immunity for cities would threaten the national economic system of competition.

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36. *Id.* at 360 (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975)).
37. *Id.* at 362. These two elements were subsequently articulated as two separate standards for antitrust immunity under *Parker*. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). For a discussion of the *Midcal* decision, see *infra* notes 44-47 and accompanying text.
38. 435 U.S. 389 (1978). Two electric utility companies owned and operated by the city brought an antitrust action against a competing private competitor who, in turn, asserted counterclaims alleging antitrust violations by the city.
39. The plurality in *Lafayette* specifically stated:

Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. *Parker*'s limitation of the exemption to "official action directed by a state," is consistent with the fact that the State's subdivisions generally have not been treated as equivalents of the States themselves. In light of the serious economic
The Lafayette opinion recognized that the state as sovereign could authorize anticompetitive conduct by a city and thereby immunize the city from antitrust liability. Under the plurality's standard, state action immunity would apply to a city's anticompetitive conduct only if it was "pursuant to state policy to displace competition with regulation or monopoly public service." 40 This standard recognized that states frequently may prefer to delegate responsibility to cities to implement state policies. A "state policy" relied upon by a city seeking Parker immunity would have to be "clearly articulated and affirmatively expressed." 41 However, the city's specific conduct need not be the subject of express, detailed state authorization. According to the plurality in Lafayette, the state legislature need only implicitly authorize the anticompetitive conduct by "'contemplat[ing] the kind of action complained of.'" 42 Chief Justice Burger, in his concurring opinion, sought to limit the Parker exemption to cities engaged in "traditional governmental functions" 43 as opposed to proprietary activities.

F. New Motor Vehicle Board v. Orrin W. Fox Co. and California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.: The Parker Standard Refined and Adopted

The Lafayette test for state action immunity was adopted by a majority of the Court later that same year in New Motor Vehicle Board v. Orrin W. Fox Co. 44 The Court in Fox found that immunity under Parker was appropriate for two reasons. First, the anticompetitive state program was clearly articulated and affirmatively expressed in a regulatory scheme to displace unfettered business decisionmaking regarding the location of automobile dealerships. Second, the state board actively supervised the program by making independent decisions based on objective criteria contained in the statute. 45

40. Id. at 413.
41. Id. at 410 (emphasis added).
42. Id. at 415 (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 389, 434 (1976)).
43. Id. at 424 (Burger, C.J., concurring). Thus, although a majority of the Court agreed in the judgment, the Chief Justice focused on the nature of the challenged activity rather than the identity of the parties to the suit.
44. 439 U.S. 96 (1978). Fox involved a program established by state statute under which existing automobile dealers in a geographic area could protest if the manufacturer sought to open a new dealership in that area. The statute required state board approval of a new dealership if an existing dealer raised an objection.
45. Id. at 109-10 & n.14. The "active state supervision" criterion was described in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978), as underlying the Court's decision in Bates v. State Bar of Ariz., 433 U.S. 350 (1977). This
Two years later, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, the Court refined and further narrowed the *Parker* standard developed in *Bates* and *Fox*. After *Midcal*, the challenged restraint/conduct itself, not just the state anticompetitive policy, must be "clearly articulated and affirmatively expressed."  

**G. Community Communications Co. v. City of Boulder: More Erosion of Parker Immunity for Cities**

The Supreme Court delivered its next opinion on state action immunity in 1982. In *Community Communications Co. v. City of Boulder,* the Court held that an ordinance enacted under a city's home rule power does not satisfy the "clear articulation and affirmative expression" requirement. The court stated:

> [P]lainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive. A State that allows municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality.

The Court also rejected an argument that the city's ordinance was "an 'act of government' performed by the City acting as the state" in local

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46. 445 U.S. 97 (1980). *Midcal* involved a California resale price maintenance system for wine. The program in *Midcal* was denied state action immunity because it failed to satisfy the "active state supervision" criterion. In *Midcal* the state alcoholic beverage control board merely enforced privately made price decisions. The state failed to establish prices, review the reasonableness of privately set prices, or monitor market conditions. *Id.* at 105-06. The first criterion (clear authorization) was satisfied because the state legislature's anticompetitive policy was clear in its purpose to permit the challenged restraint. *Id.* at 105.

47. *Id.* (quoting New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978)).

48. 455 U.S. 40 (1982). In *Boulder*, a cable television operator sued the city, alleging that a three month moratorium on the expansion of his business (during which time the city planned to invite new businesses to enter the cable market) was a violation of the antitrust laws. The city argued that the requirement of "clear articulation and affirmative expression" was satisfied by the Colorado Home Rule Amendment's "guarantee of local autonomy," through which the state had "contemplated" the anticompetitive regulatory program enacted by the City of Boulder. *Id.* at 54-55. The Court rejected this argument: "Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." *Id.* at 58.

49. *Id.* at 55 (emphasis in original).
matters which meets the ‘state action’ criterion of Parker.”

The Court reiterated a position first taken in Lafayette, that the “dual system of government” results in a principle of federalism “which has no place for sovereign cities.”

H. **Town of Hallie v. City of Eau Claire and Southern Motor Carriers**

**Rate Conference, Inc. v. United States: 1985 Cases Clarify Parker Immunity**

After Boulder, it was clear that actions and policies undertaken by cities on their own without state authorization would not be protected under Parker state action immunity, even when the cities had been conferred broad home rule authority by the state. Boulder did, however, leave several state action immunity issues unresolved regarding anticompetitive municipal activities.

First, the Supreme Court did not decide in Boulder whether the second element of the Midcal two-prong test for state action immunity, “active state supervision,” must be shown for a city to be protected under the state action doctrine. In Boulder, the Court suggested that the “active state supervision” standard might not apply to municipal conduct. Justice Rehnquist suggested that application of the “active state supervision” prong would distort the state/municipal relationship regarding enforcement of municipal ordinances. At least one commentator surmised that Boulder signaled the Court’s in-

50. *Id.* at 53 (emphasis in original).
52. *Id.*
53. California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (“The policy must be ‘actively supervised’ by the State itself.”). In Midcal, the state action exemption was claimed by a private party.
54. After Midcal, many commentators argued that the active state supervision test applied only to private anticompetitive conduct and not municipal activities. See, e.g., Areeda, Antitrust Immunity for “State Action” After Lafayette, 95 HARV. L. REV. 435, 445 n.50 (1981); Rogers, Municipal Antitrust Liability in a Federalist System, 1980 ARIZ. ST. L.J. 305, 341.
55. The Boulder Court observed: “Because we conclude in the present case that Boulder’s moratorium ordinance does not satisfy the ‘clear articulation and affirmative expression’ criterion, we do not reach the question whether that ordinance must or could satisfy the ‘active state supervision’ test focused upon in Midcal.” Community Communications Co. v. City of Boulder, 455 U.S. 40, 51 n.14 (1982) (emphasis added).
56. Justice Rehnquist expressed concern about the restricted ability of municipalities to regulate their local economies “without the imprimatur of a clearly expressed state policy to displace competition.” *Id.* at 70-T1 (Rehnquist, J., dissenting). Regarding the second prong of the Midcal test, Justice Rehnquist observed: “The Court understandably avoids determining whether local ordinances must satisfy the ‘active state supervision’ prong of the Midcal test. It would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself.” *Id.* at T1 n.6 (Rehnquist, J., dissenting).
tention to require active state supervision as a condition of exempting municipal conduct from the antitrust laws. But several circuits addressing this issue since Boulder have consistently agreed with Justice Rehnquist, holding that the active state supervision requirement does not apply to municipalities. This area of uncertainty was resolved by the Supreme Court in a case heard during its last term.

In *Town of Hallie v. City of Eau Claire*, the plaintiff towns challenged the city's ability to use its monopoly position in sewage treatment to force the towns to submit to annexation. The Court refused to apply the second prong of the *Midcal* test ("active state supervision") to municipal conduct, holding that such supervision "is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party."

The Court in *Town of Hallie* reiterated the need for a municipality to satisfy the first prong of the *Midcal* test, conduct pursuant to clearly articulated and affirmatively expressed state policy. The Court at-

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57. McMahon, Recent Significant Developments in "State Action" and Noerr-Pennington Exemptions: From Boulder to the "Sham" Exception, 14 U. Tol. L. Rev. 531, 544 (1983) ("Boulder would seem to portend, then, that the Supreme Court will require 'active supervision' by the state before anticompetitive municipal conduct may qualify for immunity.").

58. See, e.g., Golden State Transit Corp. v. City of Los Angeles, 726 F.2d 1430 (9th Cir. 1984) (active state supervision is not necessary where the challenged activity is within a traditional function of a municipality); Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1065, 1014 (8th Cir. 1983) ("Because municipal officials generally are politically accountable to the citizens they represent for the decisions regarding the challenged restraint, state supervision is not as necessary to prevent abuse as in the private context."); *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 384 (7th Cir. 1983) (imposing the active state supervision requirement on municipalities "would erode the concept of local autonomy and home rule authority").

59. *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713 (1985), aff'd, 700 F.2d 376 (7th Cir. 1983). Four unincorporated townships filed suit against the City of Eau Claire, alleging that the City had violated § 1 of the Sherman Act by monopolizing the provision of sewage treatment and by tying such services to the provision of sewage collection and transportation services. *Id.* at 1715. The City had refused to supply sewage treatment services to the townships. The City did provide such services to individual landowners in areas where a majority of the property owners had voted to approve annexation by the City and to use the City's sewage collection and transportation services. *Id.* at 1715-16.

The district court dismissed the townships' complaint, finding that the City's conduct fell within the scope of *Parker* state action immunity. *Id.* at 1716. The Seventh Circuit affirmed.

60. *Id.* at 1717.

61. *Id.* at 1721. The Court reasoned that the active state supervision requirement "serves essentially an evidentiary function" to ensure that the challenged conduct conforms to the state policy. *Id.* at 1720. The Court noted: "Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests . . . . Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement." *Id.* at 1720-21 (emphasis in original).
tempted to define "how clearly a state policy must be articulated for a municipality to be able to establish that its anticompetitive activity constitutes state action." The Court concluded that state statutory provisions need not expressly mention anticompetitive conduct, so long as the challenged conduct is "a foreseeable result" of the "broad authority to regulate" conferred by the state. The Court expressly rejected the plaintiffs' contention that the state statutory policy must "catalog all of the anticipated effects" of the authorized conduct.

Finally, the Court in Town of Hallie refused to require a municipality to show that the state "compelled" the anticompetitive conduct to satisfy the "clear articulation" requirement of state action immunity. The Court noted that while explicit compulsion language "may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to clearly articulated state policy."

On the same day as the decision in Town of Hallie, the Court decided another Parker immunity case. In Southern Motor Carriers Rate Conference, Inc. v. United States, the Court held that private common carrier rate bureaus, engaged in collective ratemaking authorized but not compelled by state law, are entitled to state action immunity. Common carriers in the four affected states are permit-

62. Id. at 1717.
63. The Court distinguished the Home Rule Amendment reviewed in Boulder. See supra notes 48-52 and accompanying text. The Colorado Amendment lacked specific reference to cable television. Here the Wisconsin statutes specifically authorized municipalities to provide sewer services and authorized the conduct with foreseeable anticompetitive effects. Town of Hallie v. City of Eau Clair, 105 S. Ct. 1713, 1719 (1985).
64. The Court cited Justice Stewart's dissent in City of Lafayette for the conclusion that requiring such explicit authorization would produce "detrimental side effects upon municipalities' local autonomy and authority to govern themselves." Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713, 1719 (1985) (citing City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 434-35 (1978)).
65. Compulsion language in Cantor and Goldfarb was found to be inapplicable because those cases involved private parties claiming state action immunity. Id. at 1719-20.
66. Id. at 1720.
68. The United States sued Southern Motor Carriers Rate Conference and North Carolina Motor Carriers Association, charging violations of § 1 of the Sherman Act. The charges were based on alleged conspiracies with their members to fix intrastate transportation rates for general commodities. The rate bureaus submitted, on behalf of their members, joint rate proposals to the respective Public Service Commissions, (PSC's) in North Carolina, Georgia, Tennessee, and Mississippi. The PSC in each state is authorized to exercise ultimate control over all intrastate common carrier rates.

ted by state law to agree on rate proposals prior to joint submission to the state Public Service Commission (PSC) for approval.69 However, collective ratemaking is not compelled by the state statutes. Individual members of the bureau are not bound by a jointly proposed rate submission; any individual common carrier member is allowed to submit a separate rate proposal.70

The Court in Southern Motor Carriers held expressly that Parker state action immunity is available to private parties in circumstances that satisfy the two-part Midcal test.71 The Court rejected the Fifth Circuit's holding that compulsion is a threshold requirement for finding that the private conduct is attributable to a clearly articulated state policy.72 The Court admitted that "Goldfarb did employ language of compulsion,"73 but concluded that the presence of compulsion was not a dispositive issue in that case.74 The Southern Motor Carriers gloss on the Parker/Midcal test is that "regulated private parties" may be immunized by state policies that "permit, but do not compel, anticompetitive conduct."75 Once the state has "clearly articulate[d] its intent to adopt a permissive policy, the first prong of the Midcal test is satisfied."76

This loose application of state action immunity, albeit apparently limited to regulated private parties, is particularly interesting on the facts in Southern Motor Carriers. Three of the states involved (Georgia, North Carolina, and Tennessee) have statutes that expressly au-

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70. Id.
71. Id. at 1727. In Midcal, the "clearly articulated and affirmatively expressed" and the "active state supervision" prongs were applied to a situation involving state regulation of private parties. See supra notes 46-47 and accompanying text. In Southern Motor Carriers, Parker immunity was sought to shield private conduct from federal antitrust laws.
73. Id. at 1729. See also Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 (1975) ("The threshold inquiry . . . is whether the activity is required by the State acting as sovereign.")
74. Southern Motor Carriers Rate Conference, Inc. v. United States, 105 S. Ct. 1721, 1729 (1985). The Court concluded its clarification of Goldfarb by observing: "Although we recognize that the language in Goldfarb is not without ambiguity, we do not read that opinion as making compulsion a prerequisite to a finding of state action immunity." Id.
75. Id. at 1728 (emphasis in original).
76. Id.
authorize the collective ratemaking. However, the Mississippi statutes do not expressly authorize such ratemaking. Mississippi law merely delegates to the state PSC the authority to regulate common carriers. The Court found that the Mississippi PSC in turn "exercised its discretion by actively encouraging collective ratemaking among common carriers." Despite the lack of any clear legislative pronouncement, the Court concluded that such circumstances constituted a clear intent to establish an anticompetitive regulatory program and that "failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws." Thus, it appears that mere existence of a state regulatory program, where an agency has authority to approve particular anticompetitive conduct, might support a claim of Parker immunity for the regulated private parties, even without a clear legislative policy authorizing such conduct. This broad application of Parker immunity is likely to be the subject of future litigation as regulated private parties test the scope of immunity announced in Southern Motor Carriers.

I. Application of Parker State Action Immunity in the Lower Courts

1. The Search for State Authorization

There is a wide divergence among courts in determining whether a state statute is sufficient to confer antitrust immunity upon a municipality engaged in anticompetitive conduct. On the one hand, courts have readily accepted the Lafayette and Boulder language that a city need not point to a "specific, detailed legislative authorization." In certain cases, these courts have concluded that fairly general state authorization may be sufficient to confer Parker immunity. On the
other hand, courts have sometimes taken a much more restrictive view of *Parker* and have refused to find state action immunity for a city’s actions despite the existence of an authorizing state statute.\(^{83}\) Generally, courts reject immunity in such cases by finding that the specific municipal conduct was not within the contemplation of the legislative grant of authority.

Two cases illustrate the extent of court discretion involved in determining whether general state authorizing legislation provides a sufficient basis for invoking state action immunity. In *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*,\(^ {84}\) the Eighth Circuit concluded that a state statute contemplated restrictions on competition in the disposal of solid waste and that the local agency’s conduct was protected under the state action doctrine. The court reasoned:

> Admittedly, one must engage in some speculation to determine whether the State of Iowa genuinely intended to displace competition in the disposal of solid waste. We agree with the district court, however, that *notwithstanding the statutes’ silence on the specific matter of monopolization, it is possible to infer the existence of an affirmative state policy permitting anticompetitive practices in the operation of municipal land fills.*\(^ {85}\)

In contrast, the Ninth Circuit, in *Parks v. Watson*,\(^ {86}\) refused to interpret a similar state statute broadly to immunize a city’s anticompe-

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\(^{83}\) See, e.g., Feminist Women’s Health Center, Inc. v. Mohammed, 586 F.2d 530 (5th Cir. 1978) (Florida statutes authorizing state board to take disciplinary actions against physicians did not authorize the board to engage in improper practices), *cert. denied*, 444 U.S. 924 (1979); Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (7th Cir. 1977) (no immunity under *Parker* where local park district improperly attempted to coerce its concessionaires into raising prices and paying a percentage fee on sales), *vacated and remanded*, 435 U.S. 992, *reinstated*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979).

\(^{84}\) 715 F.2d 419 (8th Cir. 1983).

\(^{85}\) Id. at 426 (emphasis added).

\(^{86}\) 716 F.2d 646 (9th Cir. 1983).
titive conduct. The *Parks* court viewed the statute's silence regarding particular restraints as grounds for denying state action immunity. According to the Ninth Circuit:

> The City argues that it is apparent from an analysis of [the Oregon statute], in which the state authorizes public ownership of geothermal resources, that the Oregon Legislature “envisioned each separate [geothermal heating] district as constituting a ‘little monopoly.’” From our reading of the statute, it is questionable whether the legislature intended to create such monopolistic control by the City. *Nowhere in the statute is there any express authorization to exclude private competition in the geothermal market.*

These cases demonstrate the difficulty of predicting whether state authorization will be inferred to immunize anticompetitive municipal conduct. Perhaps Professor Areeda has best described this determination process as one focused primarily on the *reasonableness* of the challenged conduct under the circumstances. Areeda concludes that the courts will demand a more explicit legislative expression of authority where the challenged conduct is impracticable, inefficient, inconvenient, and unnecessary. Because a strict standard would unduly interfere with many local government activities, Areeda proposes that “the best approach is to infer authority generously for ‘ordinary,’ ‘conventional,’ and ‘reasonable’ activity.” As if to apologize for the uncertainty of such guidance, Areeda notes: “This is a perfectly familiar approach to statutory interpretation: assume that the legislature intends the ‘reasonable,’ but require more specific language or legislative history to justify the ‘exceptional.’”

2. Grounds for Defeating *Parker* Immunity Claims

In addition to the previously described general basis for rejecting *Parker* immunity—where the city's conduct is judged to exceed state authorization (perhaps labeled under the general heading of “ultra vires”)—it is possible to define at least four other specific categories of grounds used by courts to defeat claims of state action immunity.

a. Improper Self-Interest

In certain cases, courts have denied *Parker* immunity where the challenged conduct would result in an unintended and unfair advantage to the municipality or its officers. Perhaps the best example is

87. *Id.* at 663 (emphasis added).
88. Areeda, *supra* note 54, at 447. Professor Areeda notes that *Parker* immunity may be inferred despite the lack of express statutory authority where the challenged conduct is economically motivated and/or consistent with a regulatory scheme. *Id.* at 446-47. See, e.g., *Jordan v. Mills*, 473 F. Supp. 13 (E.D. Mich. 1979).
91. *Id.* at 447.
Stauffer v. Town of Grand Lake, in which the court held: "The Colorado legislature did not foresee, contemplate or intend that zoning officials would use their legislative authorization to promote their own interests and economic benefit. Therefore, the defendants have failed to establish their claim to Parker immunity."

b. Least Restrictive Means

Another group of cases stands for the proposition that courts will reject Parker immunity, despite the existence of statutory authorization, where the authorized objective could have been achieved by means less restrictive than the challenged anticompetitive conduct. Cases such as these fit into a "least restrictive means" category for denying Parker immunity.

c. Commercial/Proprietary Conduct

Although no cases appear to have expressly denied Parker immunity on such a basis, at least two courts have suggested that a municipality may not be entitled to Parker state action immunity when it is engaging in commercial or proprietary conduct rather than functioning in a regulatory or policy role. Such a distinction can be traced to the concurring opinion of Chief Justice Burger in Lafayette, but con-
sidering the Supreme Court's subsequent opinions in Fox,\footnote{New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978).} Midcal,\footnote{California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).} and Boulder,\footnote{Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982).} such a distinction is irrelevant in determining the existence of state action immunity.\footnote{In all three cases cited above, the challenged conduct was regulatory in nature rather than proprietary. Since immunity was found not to exist in Midcal and Boulder, it is clear that the regulatory nature of the conduct is not solely determinative of the existence of state action immunity. In fact, the determination of state action immunity turns on the extent of state authorization, regardless of whether the challenged conduct is subjectively characterized as commercial or governmental. For a criticism of the "proprietary-governmental" perspective in state action analysis, see City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 432-34 (1978) (Stewart, J., dissenting).}

\subsection{Conspiracy with Private Parties}

The most important and perhaps the most frequently applied basis for denying state action immunity arises when a conspiracy is alleged between a local government and private parties. This "exception" to state action immunity arguably stems from language in Parker in which the Court noted there was "no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade."\footnote{Parker v. Brown, 317 U.S. 341, 351-52 (1943).} Where the evidence supports a finding of an improper "conspiracy" with private parties, the local government entity will lose its state action immunity.

Lower courts have had difficulty determining what constitutes an illegal "conspiracy" that will strip away state action immunity. Where the local government decisionmaking is truly unilateral in nature, not made in concert with any other entity, a city should be able to avoid liability under section 1 of the Sherman Act.\footnote{Generally, in order to violate § 1 of the Sherman Act there must be joint action in the form of a "contract, combination . . . or conspiracy." 15 U.S.C. § 1 (1982).} For example, in Greyhound Rent-a-Car, Inc. v. City of Pensacola,\footnote{676 F.2d 1380 (11th Cir. 1982).} the court refused to find a conspiracy where the city had no prior contact or discussion with any of the bidders regarding the use of a particular specification. Similarly, in Mason City Center Associates v. City of Mason City,\footnote{671 F.2d 1146 (8th Cir. 1982).}
the plaintiffs claimed that their rezoning application was denied as a result of a conspiracy between the city and two private developers hired to carry out the downtown redevelopment plan. Although the Eighth Circuit in *Mason City* did not expressly base its decision on the *Parker* immunity doctrine, the court did uphold the use of testimony from city council members who testified that they were not motivated by the agreement. The court affirmed the jury verdict for the city based on the admitted testimony, in effect finding that the agreement/conspiracy did not exist as a cause of plaintiff's injury. This result was identical to finding *Parker* immunity in the absence of a conspiracy between the city and the developers.

However, when sufficient evidence is presented regarding an unlawful conspiracy between a city and private parties, the courts have been quite willing to deny state action immunity to the city. In *Whitworth v. Perkins*, for example, the Fifth Circuit reversed the district court's summary judgment for the municipal defendants and concluded that allegations of illegal conspiracy in the enactment of a zoning ordinance barred any automatic *Parker* immunity. *Whitworth* is important for establishing a separate method of analysis based on the “participant” dictum in *Parker*. In *Whitworth*, the court relied on an allegation that the public enactment was intended to further private financial objectives rather than the public good. The court concluded that such allegations preclude an automatic application of state action immunity. Under the *Whitworth* approach, the focus is on finding a “bona fide governmental decision” on which to base *Parker* immunity.

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105. *Id.* at 1149. In effect, *Mason City* suggests that a city will be allowed to claim a defense of “proper public purpose” as a secondary strategy when a claim of state action immunity has been rejected.

106. “Conspiracy” connotes an evil or forbidden combination that is absent when local officials agree among themselves regarding their chosen course of conduct or when one or more of the officials adopts the position of a petitioner. See P. Areeda, *Antitrust Law* ¶ 203.3 (Supp. 1982).


108. The court stated: “The mere presence of the zoning ordinance does not necessarily insulate the defendants from antitrust liability where, as here, the plaintiff asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade.” *Whitworth v. Perkins*, 559 F.2d 376, 379 (5th Cir. 1977).

109. *See supra* note 101 and accompanying text.


111. Arguably this standard could be met easily in most cases, since the court need only determine that the city has at least one justification for its conduct that is not purely private in character. *See Melton, supra* note 96, at 358 n.183 & 359 n.185 (“agreements with private entities should not automatically lead to rejec-
Similarly, in Westborough Mall v. City of Cape Girardeau,\textsuperscript{112} the Eighth Circuit reversed the district court’s grant of summary judgment for municipal defendants. The court concluded that “a conspiracy to thwart normal zoning procedures and to directly injure the plaintiffs by illegally depriving them of their property is not in furtherance of any clearly articulated state policy.”\textsuperscript{113}

These cases illustrate the threat to a city posed by conclusory pleadings of an illegal conspiracy. This problem is aggravated by the failure to define “conspiracy” clearly.\textsuperscript{114} Professor Areeda has suggested that “vague and unsupported conspiracy allegations” should be given very little consideration by the court for three reasons: (1) the temptation of a private party to claim an illegal conspiracy whenever the city’s decision is disappointing; (2) the slight probability that bad faith or corruption by the city could be proved; and (3) the potential chilling effect of antitrust actions on the operations of local government.\textsuperscript{115}

However, a court may properly reject a city’s claim of absolute Parker immunity where the allegation contains reasonably specific evidence substantiating an illegal conspiracy, such as an official’s decision made solely out of personal bias in favor of a particular private party,\textsuperscript{116} or an official’s action to benefit only personal financial interests of the participants.\textsuperscript{117}

In summary, Parker immunity may be lost due to the city’s participation in an illegal conspiracy. However, a plaintiff who fails to claim

\begin{itemize}
  \item \textsuperscript{112} 693 F.2d 733 (8th Cir. 1982).
  \item \textsuperscript{113} Id. at 746.
  \item \textsuperscript{114} Permitting a plaintiff to avoid an early dismissal merely by raising a facial claim of “illegal conspiracy” would allow plaintiffs with meritless cases to hold cities hostage to antitrust claims for extended time periods. Cities may be forced to capitulate to such meritless claims and settle the claims before trial to avoid defense litigation costs and the uncertainties of a jury trial.
  \item \textsuperscript{115} Areeda, supra note 54, at 453. A related issue discussed by Areeda is the review by an antitrust court of “ordinary” errors or abuses in the administration of powers conferred upon the city by the state. Areeda argues that such errors should not support an antitrust challenge because state tribunals can control any administrative abuses by the city. Id. at 453. Areeda states: “The key factor in Parker and for all the Lafayette Justices was the existence of a state policy that intentionally displaces antitrust law. Erroneous application of that policy by local officials does not negate the underlying state authorization.” Id. at 450 (emphasis in original). See Scott v. City of Sioux City, 1984-1 Trade Cas. (CCH) ¶ 66,050 (8th Cir. 1984) (failure to follow procedures was not of sufficient magnitude to necessitate abrogating the city’s antitrust immunity).
  \item \textsuperscript{116} See, e.g., Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977); Guthrie v. Genesee County, 494 F. Supp. 950 (W.D.N.Y. 1980).
  \item \textsuperscript{117} See, e.g., Stauffer v. Town of Grand Lake, 1981-1 Trade Cas. (CCH) ¶ 64,029 (D. Colo. 1980).
\end{itemize}
that the city's decision lacked any bona fide governmental purpose should expect an early dismissal of the complaint based on the city's Parker immunity. As summarized by the attorney who represented the twenty-three amici states on the brief and in oral argument in Boulder:

The courts simply are not likely to find the requisite joint action other than in instances when there are "under-the-table" deals between a local government and another entity to disadvantage a third-party. It is only when anticompetitive actions are undertaken as the result of a true conspiracy involving a city and one or more other entities to disadvantage a competitor that the antitrust laws will be, and preferably should be, found to apply.\textsuperscript{118}

III. IMMUNITY FOR PRIVATE ATTEMPTS TO INFLUENCE GOVERNMENT DECISIONS: THE NOERR-PENNINGTON DOCTRINE

Whereas the Parker "state action" doctrine protects municipal actions authorized by the state legislature, the Noerr-Pennington "political action" doctrine protects private efforts to influence government officials in creating or implementing legislation that has anticompetitive effects.\textsuperscript{119} Both doctrines insulate anticompetitive actors from liability under the antitrust laws. Municipalities are protected under Parker and petitioning private parties are protected under Noerr-Pennington. However, the policy roots of each doctrine are distinct, as are the contexts in which the two doctrines are applied. A proper understanding of the Noerr-Pennington doctrine and its use by the courts must rest on a careful interpretation of the historical development of that doctrine.

A. Development of the Political Action Immunity Doctrine

\textit{Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.},\textsuperscript{120} was the first Supreme Court case to establish that attempts to influence the government were exempt from the Sherman Act, even when the result sought had anticompetitive effects.\textsuperscript{121} In Noerr, mem-

\textsuperscript{118} McMahon, supra note 57, at 549-50. See, e.g., Scott v. City of Sioux City, 1984-1 Trade Cas. (CCH) ¶ 66,050 (8th Cir. 1984) (city immunized under Parker where no allegations of bribery or other illegal acts and where (unlike Westborough Mall) legislative authorization existed for the challenged conduct).


\textsuperscript{120} 365 U.S. 127 (1961).

\textsuperscript{121} The Noerr Court used the Parker state action exemption as its "starting point," stating:

It has been recognized . . . that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of "individuals or combinations of individuals or corporations." Accordingly, it has been held that where a restraint upon trade or mo-
bers of a railroad conference were charged by truck operators with conspiracy to restrain trade and monopolize long distance freight business in Pennsylvania. The railroads had sponsored a vigorous publicity campaign designed to procure legislation and enforcement destructive of their competitors' trucking business. Despite the obvious anticompetitive intent and effects of the railroads' conduct, the Court held that the petitioning conduct did not subject the railroads to liability under the Sherman Act.

Two primary policy considerations were advanced in *Noerr* to support the finding of immunity for petitioning conduct. First, relying on *Parker's* protection of valid (albeit anticompetitive) government action, the Court inferred that petitioning immunity was necessary and consistent with Congress' intent to protect political activity such as petitioning the legislature or the executive to take the requested (sometimes anticompetitive) action. The Court declared that petitioning immunity is premised on the constitutional right to petition and that a legislative intent to abrogate such a right would not be imputed to Congress. Second, the Court observed that restricting "the ability of the people to make their wishes known to their representa-
tives" would "substantially impair" the power of the legislative and executive branches to take the very anticompetitive actions allowed by *Parker*.

The Court in *Noerr* concluded that neither the defendants' anticompetitive intent nor the unethical nature of the lobbying is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out.

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122. Id. at 128-31. The railroads employed a public relations firm that used various front organizations to give the appearance of opposition to the trucking industry through seemingly independent and spontaneous organizations.

123. The *Noerr* Court stated: "[T]he Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of government action with respect to the passage and enforcement of laws." Id. at 138.

124. The Court noted that such political petitioning conduct was marked by an "essential dissimilarity" to conduct traditionally condemned by the Sherman Act: "such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements." Id. at 136. The Court stressed that: "The proscriptions of the [Sherman] Act ... are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities ... ." Id. at 141.

125. Id. at 138. Nonetheless, the *Noerr* Court expressly declined to rest its decision on the first amendment, basing it instead on construction of the Sherman Act. Id. at 132 n.6.

126. Id. at 137.

127. The Court noted that even where the petitioner's "sole purpose in seeking to
barred the immunity protection required by these two policies. Even a showing of injury in fact to the plaintiffs' competitive position did not warrant application of the antitrust laws to legitimate petitioning. 129

The Noerr Court noted in dictum, however, that there may be an exception to this petitioning immunity: "There 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 and the application of the Sherman Act would be justified." 130

The holding and reasoning of Noerr were reaffirmed four years later in United Mine Workers of America v. Pennington, 131 a case involving joint efforts by large coal mine operators and a mine workers union to persuade the Secretary of Labor to set minimum wages for employees in the coal industry. The Court held that, despite evidence of harm to smaller coal companies resulting from the executive branch decision, the successful petitioning was absolutely immune from liability under the Sherman Act and the petitioners' anticompetitive purpose was legally irrelevant. 132

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128. The Court found that the "deception" and "distortion" involved in the third-party lobbying technique, although "falling far short of the ethical standards generally approved in this country," Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 140 (1961), did not constitute a violation of the Sherman Act: "Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity." Id. (emphasis added).

129. The Court stated specifically:

It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. . . . To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns. We have already discussed the reasons which have led us to the conclusion that this has not been done by anything in the Sherman Act.

Id. at 143-44.

130. Id. at 144. The Court pointed out that in the Noerr case there was no dispute that the railroads had been engaged in "a genuine effort to influence legislation and law enforcement practices." Id.


132. The Pennington Court noted specifically: "Nothing could be clearer from the Court's opinion [in Noerr] than that anticompetitive purpose did not illegalize the conduct there involved. . . . Noerr shields from the Sherman Act a concerted
Perhaps the most important aspect of the decision in Pennington was the Court's willingness to extend immunity to petitioning activities even though the petitioning was part of a larger scheme intended to reduce competition. The Court stated: "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.”

The third and most recent major Supreme Court decision involving petitioning immunity, California Motor Transport Co. v. Trucking Unlimited, extended the Noerr-Pennington principle to state and federal agencies and the courts. The Court also shifted the underpinnings of the doctrine away from Noerr's statutory construction to reliance on constitutional values within the first amendment. However, the Court found that the conduct alleged fit within the "sham" exception and was, therefore, subject to scrutiny under the Sherman Act. Thus, the Court cut back its earlier position in Pennington, that purpose and intent were irrelevant to a finding of immunity.

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133. The joint effort of large coal companies and the UMW to injure competing small coal producers allegedly proceeded along several fronts. The small producers claimed that: (1) the defendants had urged the TVA to halt coal purchases on the "spot" market (harmful to small producer who lacked financial resources to compete effectively in the "term" market); (2) the defendants had initiated price-cutting campaigns against small producers; and (3) the large coal companies had refused to buy, sell, or market non-union coal. Id. at 660-61.

134. Id. at 670.

135. 404 U.S. 508 (1972). Plaintiff highway carriers alleged concerted action by other trucking companies to institute actions in state and federal proceedings to resist and defeat applications by plaintiffs to acquire, transfer, or register operating rights. Id. at 509.

136. Id. at 510-11.

137. Indeed, the California Motor Transport Court made no reference to Parker, instead expounding on the scope of the constitutional right to petition:

"Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition. . . . We conclude that it would be destructive of 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-a-vis their competitors. . . . That right [of access], as indicated, is part of the right of petition protected by the First Amendment."

Id. at 510-11, 513.

138. The Court stated that proceedings instituted "with or without probable cause, and regardless of the merits of the cases" may be evidence of a "purpose to deprive the competitors of meaningful access to the agencies and courts" and would thus fall within the sham exception to Noerr. Id. at 512.

At least in an adjudicatory context, petitioners who do not merely seek to influence public officials, but who seek "to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decision-making process" will not be protected under Noerr immunity.\footnote{140} The Court in California Motor Transport also emphasized that the nature of the governmental body being petitioned is relevant to the availability of Noerr immunity. Certain types of unethical conduct, such as misrepresentation, which are permitted in the political/legislative context, "are not immunized when used in the adjudicatory process."\footnote{141}

Determining whether particular petitioning conduct falls outside the protection of the Noerr political protection doctrine has been the source of considerable difficulty for lower courts. The application of the Noerr-Pennington doctrine and its exceptions are examined in the following section.

B. Exceptions to the Application of the Noerr-Pennington Immunity Doctrine

Although the right of private parties to petition the government for anticompetitive results has been stated in broad terms, the Noerr-Pennington doctrine has been limited in application by the courts in several respects.\footnote{142} The purpose of this subsection is to describe briefly the grounds upon which courts may find particular petitioning conduct to be outside the protection of the Noerr-Pennington doctrine and therefore subject to scrutiny under the antitrust laws. For purposes of this Article, the "exceptions" to Noerr-Pennington immunity have been grouped into four categories: (1) the "abuse of process" exception; (2) the "co-conspiracy" exception; (3) the "commercial" exception; and (4) the "sham" exception.\footnote{143}

\footnote{141} Id. at 513. The Court identified certain conduct that would result in sanctions (perjury of witness) or would constitute antitrust violations in an adjudicatory setting (use of a fraudulently obtained patent to exclude a competitor, conspiracy with a license authority to eliminate competitor, bribery of a public purchasing agent). Id. at 512.
\footnote{142} A number of commentators have discussed the application and scope of the Noerr-Pennington doctrine. See, e.g., Crawford & Tschoepe, The Erosion of the Noerr-Pennington Immunity, 13 ST. MARY'S L.J. 291 (1981); Fischel, supra note 119; Higginbotham, The Noerr-Pennington Problem: A View From the Bench, 46 ANTITRUST L.J. 730 (1977); McMahon, supra note 57; Note, Application of the Sherman Act to Attempts to Influence Government Action, 81 HARV. L. REV. 847 (1968).
\footnote{143} The classification of particular petitioning conduct as an exception to Noerr-Pennington immunity is subject to wide variation among Courts and commentators, both in terms of which exceptions to recognize and how to define the scope of recognized exceptions.
1. The "Abuse of Process" Exception

Some courts have held that unlawful activity by defendants seeking official action from a governmental body results in a loss of Noerr-Pennington immunity. For example, in Westborough Mall, Inc. v. City of Cape Girardeau, the Eighth Circuit held that the defendant private shopping center developers were not protected by Noerr-Pennington immunity because the allegations in the complaint raised a reasonable inference of unlawful conduct. The court found that any legitimate lobbying efforts "may have been accompanied by illegal or fraudulent actions," so that it was improper to grant the defendants absolute immunity at the summary judgment stage. More specifically, private parties who furnish false information to administrative agencies for use in a decisionmaking process will frequently be subjected to antitrust liability without the protection of Noerr-Pennington immunity.

Other courts have refused to bar the application of Noerr-Pennington immunity despite similar unethical or unlawful conduct. Because such decisions cannot always be factually distinguished from those "abuse of process" cases denying Noerr-Pennington immunity, it is reasonable to conclude that courts are free to exercise considerable

144. 693 F.2d 733 (8th Cir. 1982) (reversing district court's grant of summary judgment for municipal and private defendants).
145. Id. (emphasis added). See also Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150, 440 F.2d 1096, 1099 (9th Cir.) (Noerr-Pennington doctrine not "intended to protect those who employ illegal means to influence their representatives in government"), cert. denied, 404 U.S. 826 (1971).
146. Id. (emphasis added).
discretion in determining whether a petitioner's conduct will be subject to antitrust scrutiny, particularly in a legislative context.

2. The "Co-conspiracy" Exception

The Supreme Court has alluded to the existence of a "co-conspiracy" exception to the Noerr-Pennington doctrine on at least two occasions.\(^{149}\) The Court has, however, never held explicitly that where government officials have a substantial personal interest in the decision being sought, and/or where they play an active role in the private defendants' petitioning conduct, such involvement by government officials will bar Noerr-Pennington immunity.

The lower courts are split as to whether an allegation of a government official's participation in a "conspiracy" is a basis for denying petitioners the protection of Noerr-Pennington immunity.\(^{150}\) Cases from the Seventh and Third Circuits illustrate the divergent views of the courts regarding this exception.

In Metro Cable Co. v. CATV of Rockford, Inc.,\(^ {151}\) the plaintiff raised an antitrust challenge to the denial of its application for a cable television franchise, alleging a conspiracy among the mayor, an alderman, and the successful applicant.\(^{152}\) Emphasizing the political/legislative context, the Seventh Circuit held that the petitioning conduct was protected under the Noerr-Pennington doctrine,\(^ {153}\) despite allegations

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\(^{149}\) In United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965), the Court observed that the government decision that the defendants had allegedly conspired to procure "was the act of a public official who is not claimed to be a co-conspirator." Id. at 671 (emphasis added). Later, in California Motor Transp. Co. v. Trucking Unlimited, 494 U.S. 508 (1972), the Court, in identifying specific unethical conduct that might result in antitrust violations, noted that a "[c]onspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression." Id. at 513.

This issue dates back to Parker v. Brown, 317 U.S. 341 (1943), where, in the context of state action immunity, the Court observed that the case contained "no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." Id. at 351-52.

\(^{150}\) The problem of defining what constitutes a conspiratorial involvement by the government official is a threshold determination of no small difficulty. See supra notes 101-18 and accompanying text (conspiracy exception in Parker context). It should be noted that Noerr-Pennington applies only in the context of bona fide petitioning for government action and does not immunize conduct which does not involve petitioning. See, e.g., Cincinnati Riverfront Coliseum, Inc. v. City of Cincinnati, 556 F. Supp. 664, 669 (S.D. Ohio 1983) (Noerr-Pennington not applicable where no concerted effort to influence public officials but, rather, a contractual agreement between two parties, one of whom is a municipality).

\(^{151}\) 516 F.2d 220 (7th Cir. 1975).

\(^{152}\) The complaint alleged that the public officials were persuaded by private parties to support the CATV application and to oppose the plaintiff's application and that these officials were given campaign contributions in exchange for such undertakings. Id. at 230.

\(^{153}\) Id. at 230-31.
of misrepresentations and campaign contributions. The court observed that if an agreement to induce legislative action were deemed a "conspiracy," this would "in practice abrogate the Noerr doctrine." The court reasoned that every successful effort to influence legislative action would result in government officials becoming "co-conspirators." The Metro Cable court viewed the government officials' conduct as clearly within the state action parameters of Parker: granting a franchise to defendant and refusing a franchise to plaintiff as authorized by state law. Moreover, the court implied that the government officials in Metro Cable were not active participants in a conspiracy.

Other courts have concluded also that government officials' mere economic or political interest in the outcome of decision-making is not sufficient to bar Noerr-Pennington immunity for the petitioner. These courts have applied a similar "active participation versus mere interest" standard, but have held that economic or personal interest in the decision by government officials constitutes active involvement in the conspiracy, and that the petitioning immunity of Noerr-Pennington is not available in such cases. The Third Circuit adopted this position in Duke & Co. v. Foerster, a case in which the plaintiff alleged that he had been barred from selling malt beverages in municipal facilities because of a conspiracy involving competitors and local government officials. The Third Circuit reversed the district court's dismissal of the complaint, holding that Parker immunity was not

154. Id. at 230.
155. Id.
156. Id. at 228-29.
157. The court rejected the claim that government officials responding to a successful petitioning effort (even where supplemented by campaign contributions and misrepresentations) would constitute a conspiracy and bar the application of Noerr-Pennington immunity. The absence of active participation was emphasized to the point of redundancy:

[We] can find no rational basis . . . for holding that such participation by a member of the legislative body as is here alleged should cause the Sherman Act to apply to an effort to induce governmental action that is otherwise protected by Noerr. Nothing in the Noerr opinion or any other case of which we are aware suggests any reason for believing that Congress, not having intended the Sherman Act to apply to combined efforts to induce legislative action, did intend the Act to apply if a member of the legislative body agreed to support those efforts.

Id. at 230.
159. 521 F.2d 1277 (3rd Cir. 1975).
160. The district court had granted a motion to dismiss the complaint as to the governmental defendants on the basis of Parker. Id. at 1279.
available to protect the government officials' conduct.\textsuperscript{161} The Court went on to state that \textit{Noerr-Pennington} would not protect the private petitioners because "the complaint goes beyond mere allegations of official persuasion by anticompetitive lobbying and claims official participation with private individuals in a scheme to restrain trade . . . ."\textsuperscript{162} Ironically, the record in Duke actually shows less active involvement by the governmental officials than in Metro Cable.\textsuperscript{163}

A broad application of the co-conspirator exception permits a plaintiff challenging the defendant's petitioning conduct to avoid early dismissal. Courts following Duke will conclude that allegations of a conspiracy involving public officials will preclude an automatic grant of \textit{Noerr-Pennington} immunity as a matter of law.\textsuperscript{164} Obviously, the risk of being denied \textit{Noerr-Pennington} immunity can chill the right to petition for government action.\textsuperscript{165}

A number of courts have refused to recognize a co-conspirator ex-

\textsuperscript{161} The court's conclusion on the \textit{Parker} immunity issue is questionable and highlights the broad discretion available to courts in deciding whether particular governmental conduct exceeds statutory authority. In Duke, the court held that the city's statutory power to select products to be sold through concessions in their facilities did not mandate or permit discrimination against certain suppliers. \textit{Id.} at 1281. This conclusion is an example of the most restrictive application of the \textit{Parker} "authorization" requirement. It is difficult to construe such a power to select certain products as not conferring the correlative right to deal with particular suppliers.

\textsuperscript{162} \textit{Id.} at 1282.

\textsuperscript{163} Indeed, the Duke Court seemed confused in its treatment of the \textit{Parker} and \textit{Noerr-Pennington} doctrines. The court, in dicta, noted that \textit{Noerr-Pennington} immunity could apply to the governmental entity "which 'listens to anticompetitive pleas,'" \textit{id.}, a proposition of non-petitioning immunity without support in case law or commentary. The court cited \textit{Parker} and \textit{Goldfarb} as origins of its reasoning on the application of \textit{Noerr-Pennington} immunity, despite the fact that such cases involved \textit{state action} immunity. Even the court's interpretation of this \textit{Parker} line of cases was muddled. The court concluded that actions of a local unit of government must be "compelled by the state," a conclusion clearly at odds with case law. \textit{Id.} (emphasis added). See supra notes 40-42 and accompanying text. Finally, the court cited Harmon v. Valley Nat'l Bank, 379 F.2d 584 (9th Cir. 1964), for its conclusion regarding official participation in a conspiracy, despite the fact that the Ninth Circuit had earlier indicated that Harmon was no longer good law. \textit{See} Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341, 342-43 (9th Cir. 1969).

\textsuperscript{164} \textit{See} Mason City Center Assocs. v. City of Mason City, 468 F. Supp. 737, 745 (N.D. Iowa 1979), aff'd in relevant part, 671 F.2d 1146 (8th Cir. 1982).

\textsuperscript{165} At least one commentator has stongly criticized the co-conspirator exception because of this chilling effect:

Acceptance of the co-conspirator theory would mean that although competitors have a constitutional right to petition the government, the right could be lost if the petitioning is successful, because the government officials might be labeled co-conspirators, and \textit{Noerr} protection lost . . . . [I]n most cases the co-conspirator exception is unworkable and should not be recognized.

Fischel, supra note 119, at 115.
ception, either by rejecting this exception outright,\textsuperscript{166} or by finding alternative grounds for denying \textit{Noerr-Pennington} immunity.\textsuperscript{167} The better view appears to be that followed by \textit{Metro Cable} and its progeny, which protects a broad right to petition and refuses to find a "conspiracy" where there is a mere coincidence of views between government officials and private petitioners. Such protection can be properly extended to actions in which the government officials have an interest. As the Ninth Circuit has said:

\begin{quote}
Local government units such as city councils and county boards are seldom completely free from personal interest and outside influences, but the Sherman Act was not intended to regulate this type of activity . . . . As long as the official's action is itself lawful, the action is without the scope of the federal antitrust laws, even if the motive for the action is a personal one.\textsuperscript{168}
\end{quote}

A final conceptual note regarding the co-conspirator exception is helpful in understanding the confusion that is sometimes evident in the cases discussing and applying this exception. Some courts have considered the co-conspirator exception to be a subcategory of the "sham" exception. Thus there is a risk of misapplying "sham" elements, such as purpose or intent, to the conduct of a public official who is alleged to be a participant in a "conspiracy."\textsuperscript{169} Obviously, such nonstandard classifications tend to further obfuscate an already hazy conceptual scheme of exceptions to \textit{Noerr-Pennington}.

\section*{3. \textit{The "Commercial" Exception}}

A number of lower federal courts and commentators have recognized yet another basis for denying immunity under \textit{Noerr-Pennington} for certain petitioning conduct. The commercial exception rests on the notion that the right to petition is properly immune from antitrust scrutiny only where the government action sought is truly political in nature. By contrast, when the government is functioning in a proprietary manner, the right of a private party to enter the "political" arena to advance his self-interest is substantially diminished, and the petitioning conduct is therefore subject to the antitrust laws.\textsuperscript{170} One commentator has summarized the rationale for this dis-

\textsuperscript{166} See, e.g., Alphin Aircraft, Inc. v. Henson, 1984-2 Trade Cas. (CCH) \textsuperscript{66,161} (D. Md. 1984).

\textsuperscript{167} See, e.g., Westborough Mall v. City of Cape Girardeau, 693 F.2d 733, 746 (8th Cir. 1982) (declining to base decision on co-conspirator doctrine but denying immunity because of alleged illegality and fraud in lobbying).

\textsuperscript{168} Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341, 342 (9th Cir. 1969).


\textsuperscript{170} A comprehensive discussion of the commercial exception to the \textit{Noerr-Pennington} immunity framework is provided by G.A. Slaughter, Antitrust Liability for Government Petitioning: The "Commercial" Exception, 91 Mich. L. Rev. 1261 (1993).
tinction as follows:

The purposes of government expenditures are properly influenced by political pressures, but, once the purposes are defined politically, a government is best able to accomplish those purposes by behaving in accordance with strictly economic criteria. Thus, where concerted effort is employed to influence the executive in its role as a purchaser in the economy, the considerations suggesting antitrust immunity for action in an exclusively political context are inapposite. Similarly, a legislative body may occasionally participate directly in the economy as a consumer on behalf of the government, as when a city council approves a contract. To this extent, attempts to influence its conduct should also be subject to the proscriptions of the Sherman Act.171

The roots of the commercial exception can be traced to Continental Ore Co. v. Union Carbide & Carbon Corp.,172 in which the antitrust laws were held applicable to a conspiracy involving "private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws."173 The first case to hold that the Noerr-Pennington doctrine will not protect private petitioners when the government is functioning in a commercial/proprietary capacity was George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.174 In Whitten, the plaintiff alleged that the defendant, Paddock, had persuaded the city to adopt exclusive bid specifications that only the defendant could satisfy. The court rejected Paddock's contention that its conduct was protected by petitioning immunity.175 The court reasoned that the local government did not require political input where the policy issues regarding swimming pool construction had already been determined.176

The difficulty of defining commercial versus governmental/politi-


ical activity has resulted in inconsistent results in the lower federal courts. For example, some courts have applied the commercial exception where the governmental activity was apparently noncommercial. Another significant problem arises because of the difficulty in defining the scope of commercial activity. Application of the commercial exception may impinge on first amendment rights to free speech where antitrust liability is extended to political conduct. The commercial exception has been applied where the government functions as purchaser and seller. However, a compelling argument can be made for applying the commercial exception less rigorously when the government functions as a seller.

Inconsistency results among courts applying the commercial exception because of its inherently vague scope. In addition, the fact
that other courts simply do not apply the commercial exception leads to contrary results on substantially similar facts.\footnote{182} An apparent majority of courts do not apply the commercial exception. Instead, these courts grant broad petitioning immunity in a wide range of government activity contexts. This is probably the proper view given the uncertain and chilling effects of barring petitioning immunity through the application of the commercial exception. The Ninth Circuit, for example, has strongly rejected the commercial exception to \textit{Noerr-Pennington}. It recognized the objectives of petitioning immunity as the preservation of first amendment rights and the free flow of communication to government decision-making, even in a commercial context.\footnote{183} Although one can theoretically posit a bar to petitioning immunity "[w]here the government is making \textit{purely economic} decisions as a consumer in the economy,"\footnote{184} in practice it is virtually impossible to determine whether particular governmental conduct of a commercial nature is devoid of any policy ramifications.

4. The "Sham" Exception

The final category of exceptions to \textit{Noerr-Pennington} immunity, the "sham" exception, is perhaps the category most lacking clear definition of scope and contours.\footnote{185} The sham exception was first stated in


183. In re Airport Car Rental Antitrust Litigation, 693 F.2d 84, 88 (9th Cir. 1982), cert. denied, 462 U.S. 1133 (1983). The Ninth Circuit also noted that a distinction between \textit{implementing} and \textit{formulating} policy cannot properly be invoked to deny petitioning immunity. This was undoubtedly a reference to the Fifth Circuit's decision in Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1286-98 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972), a decision that can be criticized for not recognizing the discretionary and policymaking nature of much governmental enforcement-implementation conduct.

184. See Fischel, supra note 119, at 117 (emphasis added).

185. Indeed, the sham exception has sometimes been interpreted to include the co-conspirator exception. See supra note 169 and accompanying text. One pair of commentators demonstrated their uncertainty about the contours of the sham exception by stating two distinctly different definitions of the sham exception within the same article. The authors first emphasized the unique nature of the sham exception and distinguished "other limitations" (equivalent to what has been referred to in this Article as the "abuse of process" exception):

The key distinction between the sham exception and these other limitations is the difference between improper ends and improper means. If
dictum in \textit{Noerr} and later applied in \textit{California Motor Transport}.\textsuperscript{186} It has generally been applied by the lower courts to deny petitioning immunity where the attempts to induce governmental administrative or judicial action are not actually undertaken for the purpose of influencing such tribunals, but instead are intended to harass, deter, and bar competitors from free and meaningful access to the tribunals.\textsuperscript{187} Determining the genuineness of the petitioning activity involves significant factual questions.\textsuperscript{188} Despite the language in \textit{Noerr} that intent is irrelevant to the determination of petitioning immunity,\textsuperscript{189} \textit{California Motor Transport}\textsuperscript{190} and subsequent lower court opinions have made clear that the defendant's intent is the principal criterion in judging whether a defendant's conduct constitutes a sham.\textsuperscript{191} Where the defendant's good faith in

\footnotesize{the defendant's goal in seeking governmental action is not the action at all, but rather to injure its competitor or to obtain a competitive advantage, then the defendant's petitioning may properly be characterized as a sham. On the other hand, even if the defendant truly wants the governmental action sought, certain means of attempting to obtain that relief are so improper that they are beyond the realm of political activity for antitrust purposes.}


Five pages later, the authors articulated a “sham” definition that not only ignored the previous distinction but contradicted it, stating a definition broad enough to include both the “sham” and the “abuse of process” exception: “The sham exception can apply either when the defendant has no real desire to prevail in the proceedings, but is using them to injure competitors, or when the defendant has engaged in certain prohibited conduct.” \textit{Id.} at 571.

\textsuperscript{186} See supra notes 135-41 and accompanying text.

\textsuperscript{187} California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511-12 (1972). Given that this exception was first recognized in \textit{Noerr} in the context of petitioning legislative and executive bodies, the exception is likely to apply in such situations as well. See Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076, 1081 n.4 (9th Cir. 1976) (sham exception applies to “activities external to or abusive of the legislative, administrative or judicial process” (emphasis added)).

In practice, however, legislative/political petitioning is granted much broader immunity with much less, if any, regard for the petitioning methods used or the petitioner's intent. Thus, the sham exception is unlikely to be invoked successfully in a legislative/political subject.

\textsuperscript{188} Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, 690 F.2d 1240, 1253 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983).

\textsuperscript{189} See supra note 127 and accompanying text.

\textsuperscript{190} See supra note 139 and accompanying text.

\textsuperscript{191} See, e.g., Hospital Bldg. Co. v. Trustees of Rex Hosp., 691 F.2d 678, 687 (4th Cir. 1982) ("misrepresentations, to fall within the sham exception . . ., must be made with the requisite intent"), cert. denied, 462 U.S. 1129 (1983); Mark Aero, Inc. v. Trans World Airlines, Inc., 580 F.2d 288, 297 (8th Cir. 1978) ("[t]he fundamental question presented in each case involving the 'sham' exception . . . is the question of intent").
seeking governmental action is a "significant motivating factor" underlying the action, the sham exception will usually be avoided.\textsuperscript{192} Conversely, where the "petitioning" conduct alleged shows an absence of good faith, this may be sufficient to trigger application of the sham exception, subjecting the petitioner's conduct to antitrust scrutiny.\textsuperscript{193}

The federal courts appear to be expanding the application of the sham exception. While a detailed analysis of the evolution and application of the sham exception is beyond the scope of this Article, several recent developments illustrate the extent to which the sham exception can be liberally used by courts to deny \textit{Noerr-Pennington} immunity.

First, despite the reference in \textit{California Motor Transport} to "a pattern of baseless, repetitive claims,"\textsuperscript{194} a number of courts recently have concluded that a single action can satisfy the sham exception.\textsuperscript{195} Second, it may not be necessary to actually institute a proceeding to constitute a sham. In \textit{Alexander v. National Farmers Organization},\textsuperscript{196} the Eighth Circuit ruled that threats of litigation, designed to deter customers of the competitor, fell within the sham exception. The court reasoned that the threats were not intended to influence government action but were directed at and intended to influence the parties threatened.\textsuperscript{197} Finally, although the groundless or unsuccessful nature of an attempt to obtain governmental action can be evidence of bad faith or sham conduct,\textsuperscript{198} recent decisions indicate that the sham exception may be appropriate to deny petitioning immunity, even where the action was successful.\textsuperscript{199} The most important determination, overriding even the ultimate outcome of the alleged sham pro-

\textsuperscript{192} Aydin Corp. v. Loral Corp., 718 F.2d 897, 903 (9th Cir. 1983).
\textsuperscript{195} See, e.g., Aydin Corp. v. Loral Corp., 718 F.2d 897, 903 (9th Cir. 1983); MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1154-55 (7th Cir.), cert. denied, 444 U.S. 891 (1983). One commentator has suggested that this trend has stemmed from the Supreme Court's 1977 decision in \textit{Vendo Co. v. Lektro-Vend Corp.}, 433 U.S. 623 (1977), in which the plurality and dissenting opinions suggest that at least six members of the Court might hold that a single action constitutes a sham. See McMahon, supra note 57, at 554-55.
\textsuperscript{196} 687 F.2d 1173 (8th Cir. 1982), cert denied, 461 U.S. 937 (1983).
\textsuperscript{197} Id. at 1195. See also Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 460 F. Supp. 1359, 1386 (D. Hawaii 1978) (threatening competitor's customers with litigation is outside protection of \textit{Noerr-Pennington}).
\textsuperscript{198} See, e.g., Ernest W. Hahn, Inc. v. Coddington, 615 F.2d 830, 841 (9th Cir. 1980).
\textsuperscript{199} See, e.g., Sunergy Communities, Inc. v. Aristek Properties, Ltd., 535 F. Supp. 1327, 1331 (D. Colo. 1982) (success on the merits is only one factor to be considered in whether to apply the sham exception); Ross v. Bremer, 1982-2 Trade Cas. (CCH) ¶ 64,746 (W.D. Wash. 1982) (even though action successful, other factors must be considered, such as purpose of the action and whether misuse of regulatory process occurred).
ceeding, appears to be whether the action was initiated automatically, without regard to the merits of the action or the probability of success.\footnote{Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1254 (9th Cir. 1982). The Supreme Court in California Motor Transport seemed to place significant importance on the initiation of proceedings “with or without probable cause, and regardless of the merits of the case.” California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512 (1972). The Court reasoned that “the nature of the views pressed . . . may bear upon a purpose to deprive the competitor of meaningful access to the agencies and courts.” \textit{Id.}}

Much like the other exceptions, the sham exception is generally applied to permit antitrust scrutiny of actions that are characterized as undeserving of \textit{Noerr-Pennington} immunity. Inherent in this exception, like the others, is the potential for the courts to deny protection to legitimate petitions for government action. Of particular difficulty in applying the sham exception is a court’s evaluation of the propriety of the defendant’s intent—a subjective determination capable of widely varying outcomes on similar facts. To the extent that the sham exception is properly limited to “constitutionally valueless activity, such as deliberate misrepresentations, bribery, and the knowing assertion of a baseless legal claim,”\footnote{See Fischel, supra note 119, at 122.} broad protection of first amendment freedoms can be afforded and the public antitrust policy favoring competition can be preserved.

\section*{III. THE RELATIONSHIP BETWEEN THE \textit{PARKER} AND \textit{NOERR-PENNINGTON} DOCTRINES: COMMON ROOTS, SEPARATE BRANCHES}

\subsection*{A. Historical Context—Companion Doctrines}

It is not surprising that the courts have often presumed a natural and close relationship between the state action immunity doctrine based on \textit{Parker} and the petitioning immunity doctrine based on \textit{Noerr} and \textit{Pennington}. In fact, the \textit{Noerr} decision cited \textit{Parker} for its starting premise that “where a restraint upon trade or monopolization is the result of \textit{valid governmental action, as opposed to private action}, no violation of the [Sherman] Act can be made out.”\footnote{Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961) (emphasis added).} The Court in \textit{Noerr} then concluded that it was “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 monopoly.”\footnote{\textit{Id.}} Finally, the mutually supportive nature of the relationship between state action immunity and petitioning immu-
nity was described by the Court in Noerr: "[S]uch a holding [barring petitioning immunity] would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade."\(^\text{204}\) In other words, the Court reasoned that petitioning immunity is necessary to preserve the very power protected by Parker: the power of government entities to take anticompetitive actions. Without petitioning immunity, government would be denied the benefits derived from public input, such as comprehensive information from informed sources, vigorous lobbying from interested parties, and open decision-making processes.

Nonetheless, the decision in California Motor Transport\(^\text{205}\) made it clear that the Court had developed a new view of petitioning immunity. The Noerr doctrine now had clear constitutional underpinnings, not the statutory construction roots of Parker.\(^\text{206}\) Thus, there can be no question that the two doctrines have been defined by the Court as having separate, but related, legal bases.\(^\text{207}\)

Despite differences in the purpose and origin of the two doctrines, courts have sometimes blurred the distinctions between them and have reached divergent conclusions regarding their relationship. For example, in E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority,\(^\text{208}\) the First Circuit cited both the Noerr and Pennington decisions as cases that followed the state action principle of Parker.\(^\text{209}\) The court first found that the actions of the Authority, a governmental body, were immune under Parker. The court then rejected the antitrust claims against the private defendants, reasoning that because

\(^{204}\) Id. at 137.

\(^{205}\) See supra notes 135-41 and accompanying text.

\(^{206}\) See supra notes 24-30 and accompanying text. In fact, the Court in California Motor Transport made no explicit reference to Parker except in a concurring opinion by Justice Stewart, who noted that the decision to grant immunity to the railroads in Noerr "was a corollary of our decisions in [Rock Royal Co-op and Parker], holding that when a monopoly or restraint of trade is the result of valid governmental action, there cannot be an antitrust violation." California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 516 n.3 (1972) (Stewart, J., concurring).

\(^{207}\) The lower federal courts have frequently acknowledged the distinct origins of the Parker and Noerr-Pennington immunities. See, e.g., In re Airport Car Rental Antitrust Litig., 693 F.2d 84, 87 (9th Cir. 1982); Feminist Women’s Health Center, Inc. v. Mohammad, 586 F.2d 530, 542 (5th Cir. 1978). Commentators have also consistently recognized the separate roots of these two doctrines. See, e.g., McMahon, supra note 57, at 532; Comment, supra note 170, at 752.

\(^{208}\) 362 F.2d 52 (1st Cir.), cert. denied, 385 U.S. 947 (1966). In Wiggins, the Authority signed an exclusive contract with another defendant for fixed base operations at the airport managed by the Authority. The plaintiff, Wiggins, sued under the antitrust laws.

\(^{209}\) The Wiggins court’s view of Parker and Noerr-Pennington as a single line of authority is understandable when one considers that the constitutional roots of Noerr-Pennington were not clearly defined until California Motor Transport, six years after the decision in Wiggins.
the government’s conduct was immune, it would be unreasonable to hold that the private defendants (who had acted with the government) were liable under the antitrust laws. In effect, the Wiggins court protected the private defendant by a broad reading of Parker rather than under a separate petitioning immunity.

The Tenth Circuit displayed a similar blurred view of Parker and Noerr-Pennington in Semke v. Enid Automobile Dealers Association. The court ruled that the trial court had been correct in holding that the petitioners acted validly and under the protection of not only Noerr-Pennington—California Motor Transport but also Parker. The Semke court’s view of these cases as a single line of authority was illustrated by its reference to the “exemption expounded in the Parker-Noerr line of cases.”

In Metro Cable Co. v. CATV of Rockford Inc, the Seventh Circuit stated explicitly the logical result of viewing Parker and Noerr-Pennington as closely related and interdependent doctrines: “Since the governmental actions of the city council and its committees were not themselves subject to the Sherman Act, the same was true under Noerr of concerted efforts to induce those governmental actions, even though those efforts had the anticompetitive purpose and effect alleged by plaintiff . . . .” This case suggests strongly that petitioning immunity for the private parties follows rather automatically upon a finding of state action immunity for the governmental body.

A recent district court opinion stated this relationship as follows: “It will be seen that Noerr-Pennington immunity presupposes Parker v. Brown immunity: if the governmental or agency action is valid as under state authority (despite anticompetitive effects), then seeking to influence the action and a successful outcome are also exempt.” This position is even stronger than that expressed in Metro Cable be-

210. Id. at 56.
211. 456 F.2d 1361 (10th Cir. 1972). In Semke, new car dealers persuaded state officials to enjoin the plaintiff, a dealer of used cars, from selling new cars in violation of the state law requiring state licensing of all new car dealers.
212. Id. at 1365.
213. Id. at 1367.
214. 516 F.2d 220 (7th Cir. 1975), affg 375 F. Supp. 350 (N.D. Ill. 1974). In Metro Cable, the unsuccessful applicant for a cable television franchise sued the successful applicant and city officials. The district court granted defendants’ motion to dismiss.
215. Id. at 229. The court went on to recognize both the sham and the co-conspirator exceptions to Noerr-Pennington immunity, but held that neither exception applied in that case.
216. See also Trans World Assoc. v. City & County of Denver, 1974-2 Trade Cas. (CCH) ¶ 78,293 (D. Colo. 1974) (city’s immunity under Parker to negotiate airport car rental concessions and to contract with private defendants resulted in a similar immunity for such private defendants).
cause it asserts that *Parker* state action immunity is not only a sufficient but is necessary condition to the availability of a Noerr-Pennington petitioning immunity.

**B. Noerr-Pennington Conditioned on *Parker*: Parallel Restrictions on Immunity**

The close linkage between *Parker* state action and *Noerr-Pennington* petitioning immunities can be a real benefit to the private defendant where state action immunity has been found. Such a linkage can, however, be used to deny petitioning immunity for private parties when a court has applied the *Parker* doctrine restrictively to bar state action immunity for the government’s conduct.\(^{218}\)

Since the Supreme Court’s decision in *Lafayette* in 1978, the availability of state action immunity for cities has been much more restricted.\(^{219}\) However, even before the decision in *Lafayette* there was a suggestion that a narrower application of state action immunity for cities should result in a parallel curtailment of *Noerr-Pennington* immunity for the petitioning private parties.

In *Kurek v. Pleasure Driveway & Park District of Peoria*,\(^ {220} \) plaintiffs, existing concessionaires, alleged that the local park district had agreed with defendant GSM, a potential concessionaire, that GSM would submit economically unrealistic bids for concession rights at five municipal golf courses. Plaintiffs alleged that GSM’s phony bids were intended to extract a larger concession fee from the plaintiffs. Plaintiffs refused to pay the higher fee and were terminated. The park district granted concession rights to GSM but at a price substantially less than GSM’s original bid.\(^ {221} \)

The Seventh Circuit first determined that the park district was not automatically entitled to immunity under *Parker*.\(^ {222} \) The court also rejected GSM’s claim of *Noerr-Pennington* immunity for three reasons: (1) the private petitioner’s participation in a scheme that it knew would be used to coerce plaintiff into conduct violative of the antitrust laws;\(^ {223} \) (2) the limited applicability of the first amendment’s “right to

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\(^{218}\) See supra notes 38-43 and accompanying text.

\(^{219}\) See supra notes 48-52 and accompanying text.

\(^{220}\) 557 F.2d 580 (7th Cir. 1977), vacated and remanded, 435 U.S. 992 (1978), reinstated, 583 F.2d 378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979).

\(^{221}\) Id. at 585-86.

\(^{222}\) In reaching this conclusion, the court relied on the Fifth Circuit’s decision in *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431 (5th Cir. 1976), and also the Third Circuit’s decision in *Duke & Co. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975).

\(^{223}\) *Kurek v. Pleasure Driveway & Park Dist. of Peoria*, 557 F.2d 580, 593 (7th Cir. 1977).
petition" protection for a "contract proposal to a government unit;" and (3) as an alternative ground, the probable application of the "sham" exception to deny Noerr-Pennington immunity.

The rejection of Noerr-Pennington immunity on the facts of Kurek was probably correct since it could rest on any one of three exceptions to that doctrine. But Kurek is important for a different reason. The court in Kurek advanced the proposition that the absence of Parker immunity necessarily limits the applicability of Noerr-Pennington immunity:

Our determination that the Park District and its officials had no state mandate or authority to engage in the activities attacked here necessarily reduces the applicability of the reasoning of Noerr to the degree it is based on the need of governmental units for citizen input in making decisions that Parker holds to be outside the scope of the Sherman Act.

In other words, the court concluded that Noerr-Pennington immunity should be available only to petitions for governmental acts not subject to scrutiny under the antitrust laws, i.e., where the government is immune under Parker.

This position (conditioning Noerr-Pennington immunity on the availability of Parker immunity) was restated two years later in Pinehurst Airlines, Inc. v. Resort Air Services, Inc. The district court in Pinehurst Airlines denied state action immunity under Parker because the anticompetitive conduct lacked state authorization. The court then denied Noerr-Pennington immunity, apparently applying a form of commercial/proprietary exception.

Finally, in a footnote, the court observed that the Lafayette decision would curtail Noerr-
Pennington due to that doctrine's linkage to and dependence upon the Parker doctrine:

"[The decision in Lafayette . . . may have serious repercussions for the scope and weight of the Noerr-Pennington doctrine as well . . . . The implications of Lafayette add an entirely new dimension to municipal liability and indirectly to the liability of private persons or entities that seek to influence public action of a legislative or administrative nature."

The message emerging from these decisions was clear: state action immunity for the government is a prerequisite to petitioning immunity for the private parties; to the extent the former is restricted, the latter is similarly curtailed.

In re Airport Car Rental Antitrust Litigation, a case decided the same year as Pinehurst Airlines, continued the line of cases expressing this view—that Noerr-Pennington immunity should not be available to petitioning parties where the government's conduct is not immunized under Parker. In the initial district court opinion, the private defendants (Hertz, Avis, National, and an Avis licensee) sought summary judgment, claiming Noerr-Pennington immunity. The court rested its denial of petitioning immunity on the commercial exception and, after an extensive analysis of the first amendment protection of commercial speech, concluded:

Although [the Sherman Act) must yield to the First Amendment rights of speech and petition when the government is acting in a policymaking capacity, the Court concludes that when commercial speech is involved—when defendants are seeking to influence the purely commercial functions of government—the governmental interest in maintaining the integrity of the antitrust laws must take precedence.

Despite this apparently sufficient basis for denying Noerr-Pennington immunity, the court advanced another (perhaps the primary) rationale for its decision: "[T]his Court's decision to retain Noerr-Pennington's commercial/governmental distinction is prompted not only by its First Amendment analysis but also by its desire for consistent

231. Id. at n.24 (emphasis added).
232. 474 F. Supp. 1073 (N.D. Cal. 1979). In Airport Car Rental, the plaintiffs sued competitors, alleging a conspiracy to monopolize the airport car rental market involving several car rental companies and city airport authorities.
233. The Airport Car Rental litigation involved several actions commenced in various district courts alleging that Hertz, National, and Avis engaged in joint activities to influence airport authorities to exclude competing companies in violation of §§ 1 & 2 of the Sherman Act. Motions for summary judgment had been filed (in the former district court case discussed previously) while the litigation was assigned to the initial district court judge. This judge had ruled that the defendants were not immune under the Noerr-Pennington doctrine. Following reassignment of these cases to a different court, the defendants renewed their motions, albeit directed at a different plaintiff and with respect to different airports.
234. Id. at 1086. In the next paragraph, the court clarified the scope of this exception by noting that "when the government is acting in a purely commercial capacity, as, for example, a buyer or seller of goods, the antitrust laws should be applied . . . ." Id. (emphasis added).
application of the laws."235 The Airport Car Rental court plainly feared that the private parties who instigated anticompetitive commercial conduct by a city could otherwise escape liability while the city itself could be held liable.236 The proper solution, according to the court, would be to view the Parker and Noerr-Pennington doctrines as essentially co-extensive, i.e., Noerr-Pennington immunity should be applied only to private attempts to influence government action that is not itself subject to the antitrust laws.237 The court elaborated on this "practical interrelation" rationale for making the Noerr-Pennington immunity depend on the existence of a Parker immunity for the government:

...While it is true that Noerr-Pennington and Parker v. Brown are legal doctrines rooted in very separate principles—the right to petition versus sovereign immunity and federalism—the Court feels constrained to consider their practical interrelation in order to avoid potentially inequitable or anomalous results. And it certainly seems inequitable to hold a municipal official liable for actions he took at the urging of a private party while ruling that the private party is immune solely because it acted through the agency of that municipal official.238...

Thus, the rather conventional holding (commercial exception bars Noerr-Pennington immunity for private petitioners) was overshadowed by dicta describing a broad principle under which the availability of petitioning immunity is conditioned upon the presence of Parker immunity for the government's conduct.239

A subsequent district court opinion in the Airport Car Rental case240 soundly criticized the earlier decision. It rejected the notion that Noerr-Pennington immunity for private parties necessarily depends on the availability of state action immunity for the government:

...There is, moreover, no necessary or logical relationship between the imposition of liability on those who advocate anticompetitive activities and on those who participate in them . . . . [T]he Sherman Act prohibits participation in, not advocacy of, anticompetitive activities. Private parties attempting to influence public officials to engage in commercial activities which may later be found to violate the antitrust laws do not thereby become themselves liable. For liability to be imposed upon them, they must be participants in the

235. Id. at 1087-88 (emphasis added).
236. Id. at 1088.
237. The court specifically noted: "[I]t seems appropriate to restrict the Noerr-Pennington doctrine to attempts to influence government officials who are engaged in activity that would be protected from the reach of the antitrust laws." Id. at 1090.
238. Id. at 1089-90 (emphasis added).
239. Id. at 1091. Ironically, the court cited the Lafayette decision for the principle that Noerr-Pennington should, whenever possible, be applied in a manner consistent with Parker: "[T]he courts should be reluctant to extend immunity to private parties who have sought to influence government activity that would not be protected under the state action doctrine." Id.
scheme.241

The court in this second Airport Car Rental decision was persuaded to reject not only the commercial exception to Noerr-Pennington but also the proposition that petitioning immunity for private parties is conditioned upon state action immunity for the government. The primary basis for rejecting this latter proposition was the inevitability of “grave practical problems which would be encountered in its administration.”242 In effect, the court feared that uncertainty in predicting whether the government’s conduct would be immunized under Parker would result in an unacceptable chilling of the private petitioner’s first amendment right to attempt to influence the government.243

The second opinion in Airport Car Rental was affirmed by the Ninth Circuit in 1982.244 The Ninth Circuit expressly rejected the use of a commercial exception to deny Noerr-Pennington immunity,245 and refused to require symmetry in the application of the Noerr-Pennington and Parker doctrines.246 Since these decisions in the Airport Car Rental cases, the express conditioning of Noerr-Pennington immunity on Parker immunity appears to have been avoided entirely by the courts. However, the final sections of this Article will describe a means of applying these two doctrines in a way that would achieve the

241. Id. at 584. The court found that denying petitioning immunity in the absence of state action immunity is not compelled by the converse proposition (stated in Wiggins and Metro Cable) that the petitioning is immune when it seeks government action that is immune under Parker. The court observed: “The logic which dictates that joint attempts to influence exempt activities should be immune does not help answer the question whether liability should be imposed on joint action to influence [government] activities which may not be exempt.” Id. (emphasis added).

242. Id.

243. Id. at 585. The court noted that this uncertainty would be aggravated in a suit in which only the private parties were defendants. In such circumstances, the lawfulness of the absent government officials cannot be fully litigated, and the liability of the private parties may turn on the hypothetical liability of the absent government officials. The risk inherent in such proceedings is that liability may be founded on little more than speculation. Id.

244. In re Airport Car Rental Antitrust Litig., 693 F.2d 84 (9th Cir. 1982).

245. The court asserted a broad first amendment protection for petitioning conduct: “It is undisputed that the first amendment protects efforts to influence officials making essentially commercial decisions on behalf of a governmental entity.” Id. at 87.

246. The court emphasized the separate legal roots of each doctrine in concluding that petitioning immunity for private parties need not be conditioned on state action immunity for the government:

When private parties persuade state officials to effectuate some anticompetitive policy, an antitrust plaintiff might name both the private parties and the State as defendants and thus implicate both Noerr-Pennington and Parker. Because their liability is governed by “two separate doctrines,”... one defendant might be liable and the other exempt. . . . It would be inapt to require symmetry.

Id. (citations omitted).
same result, i.e., denying petitioning immunity to the private petitioners when the government's conduct is not protected under *Parker*.

C. The Relationship Between Petitioning Immunity and State Action Immunity: Detecting Subtle Linkage

To understand a court's application of the *Noerr-Pennington* and *Parker* doctrines it is necessary to recall the Supreme Court's observation in *Noerr* that "where a restraint upon trade . . . is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." The clear intent of the Court was to distinguish the conduct of a sovereign governmental entity from the conduct of private parties; only the former is protected under *Parker*. Most of the confusion among the lower courts in linking these two immunity doctrines can be traced to a misinterpretation of the phrase "valid governmental action," particularly the word "valid." Courts are simply wrong in concluding that governmental conduct not protected under *Parker* state action immunity automatically and necessarily becomes invalid in the sense of no longer being governmental in character.

*Community Communications Co. v. City of Boulder*, is a good illustration of this important distinction. Under Colorado's home rule authorization there was no question that the City of Boulder was authorized to engage in cable franchising. Therefore, the city was involved in valid governmental activity, despite the holding that such broad authorization was insufficient to establish state action immunity under *Parker*. Boulder did not hold that anticompetitive conduct unprotected by *Parker* becomes invalid in the sense of being nongovernmental. Instead, Boulder held that such conduct may create antitrust liability despite the fact that the conduct is governmental.

In *Affiliated Capital Corp. v. City of Houston*, the court engaged in an extensive examination of the *Noerr-Pennington* doctrine and the application of the co-conspirator exception to *Noerr-Pennington* immunity. The *Parker* doctrine was discussed briefly, only to show

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249. 519 F. Supp. 991 (S.D. Tex. 1981), rev'd, 700 F.2d 226 (5th Cir. 1983), vacated, 714 F.2d 25 (5th Cir. 1983), rev'd, 735 F.2d 1555 (5th Cir. 1984). In *Affiliated Capital*, an unsuccessful applicant for a cable television franchise sued the successful applicants, the City of Houston, and the Mayor of Houston, alleging a conspiracy to bar its entry into Houston's cable television market in violation of § 1 of the Sherman Act.
250. The district court granted judgment n.o.v. in favor of defendants, holding that the jury verdict in favor of the plaintiff could not be sustained because there was insufficient evidence that the alleged conspiracy was the cause of plaintiff's failure to receive a cable television franchise. *Id.* at 1012. Nonetheless, the court
the interdependence with Noerr-Pennington. A careful review of this
decision illustrates the unsettled, complex, and misunderstood nature
of the relationship between these two immunity doctrines.

The court in Affiliated Capital first considered the application of
Noerr-Pennington immunity and concluded that "the validity of the
public official co-conspirator exception is well supported in the case
law."\textsuperscript{251} The court then attempted to distinguish the holding in Metro
Cable\textsuperscript{252} by concluding that the mayor and certain public officials in
Affiliated Capital "not only were involved actively in the conspiracy
to exclude non-conspirators but also directed certain of the activities
of co-conspirators."\textsuperscript{253} In fact, the conduct of the public officials in
Affiliated Capital (primarily encouraging various cable television
franchise applicants to work out a division of territory), although
characterized by the court as "vigorous involvement in orchestrating
certain aspects of the conspiracy,"\textsuperscript{254} could just as fairly be described
as "mere acquiescence in private conspirators' plans or mere support
of private parties' efforts to induce favorable legislative results."\textsuperscript{255}

Courts have considerable latitude in judging whether particular
governmental conduct constitutes an "unlawful conspiracy."\textsuperscript{256} This
judgment is further complicated by the need to distinguish an unlaw-
ful conspiracy from a lawful response to a petitioner's request. Under
Parker/Lafayette, the distinction rests on whether an anticompetitive
agreement was contemplated under a state authorizing statute.\textsuperscript{257}

The court in Affiliated Capital next considered the applicability of
the Parker state action exemption to the facts of record. The court
held that Parker immunity was not available to the City of Houston or
the Mayor of Houston.\textsuperscript{258} The court's reasoning, however, reveals that

\begin{flushright}
vented an analysis of the Noerr-Pennington and Parker doctrines to dem-
strate that neither immunity doctrine was applicable to protect the defendants,
even if the plaintiff had prevailed on the causation issue. Although this analysis
is dictum with regard to the lower court opinion, the Fifth Circuit expressly ap-
proved the lower court's analysis of Parker, Noerr-Pennington, and the co-con-
spurator exception. Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555,
1566-67 (5th Cir. 1984).

The court concluded that application of the co-conspirator exception was justified
on the facts in the record and declined to analyze the application of the sham
exception to these facts. \textit{Id}.

\textsuperscript{252} Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975). \textit{See supra}
notes 154-58 and accompanying text (no conspiracy where government officials
merely agreed to support the efforts of the private conspirators).

\textsuperscript{253} Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991, 1014 (S.D. Tex. 1981)
(emphasis added).

\textsuperscript{254} \textit{Id.} at 1016 (emphasis added).

\textsuperscript{255} \textit{Id}.

\textsuperscript{256} \textit{See supra} notes 150-55 and accompanying text.

\textsuperscript{257} \textit{See supra} note 42 and accompanying text.

\textsuperscript{258} The court in \textit{Affiliated Capital} concluded that "the Mayor and the City itself . . .
its judgment regarding the liability of both public and private defendants rested on a blurred view of petitioning and state action immunities. In effect, the court concluded that the public officials' involvement in an illegal conspiracy barred both state action and petitioning immunities:

This Court interprets the decisions rendered pursuant to the authority of Noerr, Pennington and Parker as suggesting the following result. When a restraint of trade is the result of valid governmental action which was induced by the joint efforts of private parties, those joint efforts are shielded by Noerr-Pennington immunity. When, however, the governmental action is rendered invalid by the illegal, not merely unethical, conduct of the governmental entity acting as a co-conspirator, the joint efforts of the private parties are not automatically entitled to immunity.

This language appears to mean that there is but one co-conspirator exception that applies simultaneously to bar both Parker immunity for the governmental entity and Noerr-Pennington immunity for the private petitioners. To the extent such a view considers these two doctrines to be equivalent, it is erroneous and no better than the view that blindly conditions petitioning immunity for private parties on the presence of state action immunity for the governmental body.

Given the different sources and purposes of the two immunity doctrines, whether to apply a co-conspirator exception and what standards to use for such application are questions that should be answered separately for each doctrine. In Affiliated Capital, the district court concluded that the legislative action was rendered invalid.
by "the participation of the public officials in the illegal conspiracy." The Court correctly observed that the City's ultimate legislative power to act "was not rendered non-governmental by the [conspiratorial] actions of the defendants," but the court neglected to follow up on this important distinction between invalid and non-governmental as a starting point for a proper Parker analysis.

The denial of immunity to the private petitioners was asserted by the Affiliated Capital court in a similar conclusory fashion. The court's discussion regarding the application of a co-conspirator exception to Noerr-Pennington immunity is unconvincing. The focus of Noerr-Pennington immunity analysis should be on the governmental versus non-governmental nature of the anticompetitive action sought, and the application of an exception to this immunity should not be based on a conclusory declaration that the governmental action was "invalid" or "illegal."

The Fifth Circuit reversed the district court's judgment n.o.v. for the defendant, holding that sufficient evidence had been presented to establish that the alleged conspiracy caused the denial of a franchise to the plaintiff. However, the Fifth Circuit explicitly upheld the application of the co-conspirator exception to Noerr-Pennington immunity for the private parties. As a result, the original jury verdict awarding damages of $2.1 million was reinstated. Because the governmental defendants had been dismissed or were otherwise immune from liability, the effect of the Fifth Circuit's decision was to hold the private petitioning party solely liable for damages arising from the violation of the antitrust laws.

The Fifth Circuit's holding is of particular interest when compared with the district court's analysis of the immunity doctrines. These two cases, viewed together, demonstrate that there are two techniques

261. Affiliated Capital v. City of Houston, 519 F. Supp. 991, 1025 (S.D. Tex. 1981) (emphasis added). The determination of whether an agreement involving the city is "illegal" (i.e. a co-conspirator exception to Parker) requires a thorough analysis according to the standards developed in Parker and its progeny. The court in Affiliated Capital failed to recognize and apply such Parker standards; instead, the court proclaimed the illegality of the legislative action (the co-conspirator exception) as a conclusion without any supportive reasoning.

262. Id. However, the effect of the court's reasoning was to conclude that the City's legislative action, as tainted by the conspiracy, was rendered non-governmental.

263. Id.

264. See supra notes 251-55 and accompanying text.


266. Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1566 (5th Cir. 1984).

267. Id. at 1557. The City of Houston was not a party to the appeal, having been voluntarily dismissed by the plaintiff. Id. at 1557. The mayor was held to be entitled to qualified immunity and, therefore, absolved of liability. Id. at 1570. Because no issue remained regarding the liability of the governmental entity, the Fifth Circuit was able to avoid reviewing the district court's analytical morass regarding the interdependence of the Parker and Noerr-Pennington immunities.
equally effective in keeping a private petitioning party in the litigation and subject to antitrust liability: (1) condition the availability of Noerr-Pennington immunity on the availability of Parker immunity so that immunity for the private petitioner is barred upon a finding that the government’s conduct was “invalid”; or (2) liberally apply the co-conspirator or other exception to deny immunity for the private petitioning party. The potential for abuse in using these techniques is especially important in the wake of the Local Government Antitrust Act of 1984.268


Effective September 24, 1984, the recovery of monetary damages from any local government (or from its officials “acting in an official capacity”) is prohibited.269 In effect, at least with respect to monetary damages, municipalities are entitled to a Parker-type immunity from antitrust liability for anticompetitive actions.270 Although cities are absolutely immune from antitrust damage judgments, the Act does not immunize cities from actions for injunctive relief. Therefore, the traditional Parker state action immunity analysis will continue to apply to municipalities seeking to avoid injunctive suits under the antitrust laws.271

A probable effect of this “damage immunity” for cities will be to place an increased emphasis on recovery of damages from private party defendants. Whenever a private-governmental conspiracy is alleged to have caused financial loss, the plaintiff’s sole source of damage recovery will be the remaining private defendants. Therefore, a court that seeks to avoid a complete bar to plaintiff’s recovery may resort to techniques that will keep private parties in the litigation.

268. 1984 Act, supra note 20, at § 3(a).
269. Section 3(b) establishes a general bar against application of the Act to cases commenced before the effective date. However, the Act grants the courts discretion to apply subsection (a) of § 3 when “it would be inequitable not to apply this subsection to a pending case.” Id. at § 3(b). Proceedings that have reached a jury verdict, district court judgment, or a subsequent stage of litigation as of the effective date are presumed ineligible for the damage immunity. Id.
270. A detailed analysis of the Local Government Antitrust Act of 1984 is beyond the scope of this Article. The Act appears to grant unqualified protection from monetary damages being assessed against any city, without respect to the “official” or “valid” nature of the conduct. In other words, the Act not only removes the requirement imposed by the Supreme Court in Boulder that there be a specific and affirmative grant of authority from the state to the city but, further, removes any requirement that a city’s conduct be within any limits of state authorization. The monetary damages immunity for cities under the Act is broad and absolute.
271. While cities’ financial exposure to damages has been eliminated, the availability of injunctive relief results in financial burdens to cities required to defend actions that will undoubtedly be creatively pleaded as injunctive suits.
The effect may be a new wave of restrictions on the scope of Noerr-Pennington petitioning immunity.

A court may conclude (erroneously) that the availability of petitioning immunity for the private parties is dependent on Parker immunity for the city. Because of the considerable discretion available to courts in applying the Parker doctrine, in a wide variety of circumstances a court may be able to justify its conclusion that Parker immunity should not apply to the city's conduct. Consequently Noerr-Pennington immunity would be denied to the private parties, even in cases where petitioning immunity for the private parties should be available under a conventional Noerr-Pennington analysis.

Similar results (denying petitioning immunity) can be achieved by applying liberally the "sham," "co-conspirator," or other exceptions to Noerr-Pennington immunity. Especially now that recovery of monetary damages from a city is barred by federal statute, plaintiffs seeking damages for antitrust injuries will be motivated to allege that the private petitioners' conduct justifies application of an exception to deny Noerr-Pennington immunity. To preserve a plaintiff's damages remedy, courts may become increasingly sympathetic to using exceptions to bar immunity for private petitioners, in pleadings and throughout the course of litigation. As discussed in Section III, the application of exceptions to Noerr-Pennington immunity involves considerable latitude by the courts. Such exceptions are capable of being broadly applied to ensure that antitrust plaintiffs are not barred from monetary damage relief. The Fifth Circuit's decision in Affiliated Capital represents just such a liberal application of the co-conspirator exception. The local government defendants had been dismissed or were immunized from damage liability. The almost inescapable conclusion is that denying petitioning immunity to the private defendant was necessary to avoid a complete bar to the plaintiff's recovery of monetary damages.

272. See supra notes 81-91 and accompanying text.

273. A particularly ironic result of conditioning Noerr-Pennington immunity on the availability of Parker immunity is that petitioning immunity would be preserved primarily in those cases in which local government has the least amount of policy making discretion. Based on the Parker analysis developed through Lafayette and Boulder, a city whose conduct is rooted in broad policy authority risks losing its state action protection, whereas a city whose action has been directed, authorized, or at least contemplated by the state is most likely to be immunized under Parker. Thus, petitioning immunity would be most assured in those cases in which it is least needed—where the significant policy determinations have already been made.

274. See supra notes 142-201 and accompanying text.

275. Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555 (5th Cir. 1984). See supra notes 266-68 and accompanying text.

276. Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1557, 1570 (5th Cir. 1984).
Section 4(a) of the Local Government Antitrust Act of 1984 provides that no damages may be recovered "in any [antitrust] claim against a person based on any official action directed by a local government." Therefore, it might be argued that this Act protects private parties against narrow application of Noerr-Pennington immunity by protecting private parties whose actions are arguably "directed by local government." However, the legislative history of this statute makes it clear that courts will not be required to grant immunity to all private parties petitioning for or otherwise involved in anticompetitive governmental conduct. The Conference Report specifically states:

In referring in section 4 to the application of the antitrust laws to the conduct of non-governmental parties directed by a local government, the conferees borrowed the phrase "official action directed by" a local government from Parker v. Brown, 317 U.S. 341, 351 (1943); and the conferees intend that Parker and subsequent cases interpreting it shall apply by analogy to the conduct of a local government in directing the actions of non-governmental parties, as if the local government were a state.278

Unfortunately, such a test lacks certainty due to the considerable discretion available to courts in applying the Parker doctrine. Thus, the test is capable of being applied restrictively to deny immunity to private parties.279 This analogous application of the Parker standard to private conduct contributes to the confusion which inevitably arises when the characteristics, purposes, and applications of Parker and Noerr-Pennington doctrines are blurred by failure to treat each separately.280

Even if courts are able to avoid the difficulties in applying a Parker analysis to the conduct of private parties, such a standard will not protect them where the court concludes that liability of the private party is necessary for the plaintiff to collect any damages. The formulation of the test in the Conference Report simply does not prevent courts from using the Parker line of cases to keep the private party in the litigation.281

279. For a discussion of the restrictive application of the Parker doctrine see notes 83 & 86-87 and accompanying text.
280. See supra notes 208-46 and accompanying text.
281. For example, a court need only conclude that the anticompetitive actions of the private party were not directly authorized by the city or were not even contem-
The Local Government Antitrust Act of 1984, while relieving cities of antitrust damage liability, contains only a shadow of similar protection for private parties. Plaintiffs and courts might be increasingly motivated to collect monetary damages from private party defendants. Neither the Noerr-Pennington immunity doctrine, if applied restrictively, nor the “Parker-by-analogy” immunity doctrine will provide private parties sufficient protection. Both approaches are capable of being manipulated to keep the private party in the litigation.

E. A Recommended Approach to the Application of the Noerr-Pennington and Parker Doctrines

Given the important role of municipalities in the regulation and delivery of goods and services, there is a need for a clearer articulation of standards that will apply to anticompetitive municipal conduct requested by private parties. While federal legislation has eliminated cities’ exposure to financial liability for damages, the Parker doctrine will continue to define the contours of state action immunity in suits for injunctive relief.\(^{282}\) Of greater importance is the need to define the scope of Noerr-Pennington immunity for private parties who seek to persuade the municipality to initiate the challenged anticompetitive conduct. The final section of this Article describes a recommended approach for the application of the Parker state action immunity doctrine and the Noerr-Pennington petitioning immunity doctrine. An understanding of the proper relationship between these two doctrines is both a premise for and a result of such an approach.

Under the Parker doctrine, the essential focus is on whether the local government’s conduct was authorized by the state. The specific conduct must at least have been “contemplated” by the state.\(^{283}\) This standard arises from the principles of federalism in which the sovereignty of cities is not recognized; only state and federal governments fit within this dual system of government.\(^{284}\)

In general, Parker immunity should be applied broadly and the requisite state authorization should be inferred generously to avoid undue interference on antitrust grounds with local government’s ex-

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\(^{282}\) See supra notes 81-87 and accompanying text. Additionally, there is no consistency among the courts with regard to the recognition or application of various exceptions to the Parker immunity doctrine. Thus, various exceptions can be used by courts to deny immunity to private parties under the “Parker-by-analogy” methodology announced in the Act.

\(^{283}\) See supra note 42 and accompanying text.

\(^{284}\) See supra note 39 and accompanying text.
tensive responsibilities in providing and regulating goods and services. A lack of such authorization should be found only where expressly provided for in "non-authorizing" state statutes or where the local government's conduct is clearly beyond any reasonable or conventional activity reasonably contemplated by the state legislature.

The use of the conspiracy exception to deny Parker immunity should be limited to instances where the government's conduct is shown to be devoid of any governmental purpose and motivated solely by private interests. Any other approach would require the impossible (that local government officials be free of any personal bias or interest in a decision), or the impractical (that local government officials' dominant interest in the decision be governmental rather than personal). This approach, favoring broad Parker immunity, will also serve to protect private parties under the "Parker-by-analogy" standard announced in section 4 of the Local Government Antitrust Act of 1984.

The Noerr-Pennington doctrine of immunity for private parties who petition for anticompetitive governmental conduct has roots in constitutional principles and involves the need to preserve the free flow of ideas from the people to their representatives. Particularly in a legislative context, the right of private petitioners to obtain access to local government must not be abridged lightly, and even unethical techniques used to influence public officials must be within Noerr-Pennington's broad protection. Only clearly unlawful conduct (such as bribery) should be grounds for denying legislative petitioning immunity under antitrust laws. In an adjudicative setting it is proper to apply a stricter standard in order to preserve the integrity of judicial and agency tribunals. For example, submitting false information to such tribunals may be grounds for denying Noerr-Pennington immunity.

The most important Noerr-Pennington issues involve the application of the three primary exceptions to this immunity doctrine: the "co-conspiracy" exception, the "commercial" exception, and the "sham" exception. Of these exceptions, the co-conspiracy exception tends to generate the most confusion in the relationship between the Parker and Noerr-Pennington doctrines. The co-conspiracy exception to Noerr-Pennington should be applied to legislative petitioning only in limited situations. Mere economic or political interest by government officials in the results of decisionmaking should not, without

285. See supra notes 149-69 and accompanying text.
286. See supra notes 170-84 and accompanying text.
287. See supra notes 185-201 and accompanying text.
288. Indeed, for courts which hold the view that petitioning immunity should be conditioned on the availability of state action immunity, the application of a co-conspiracy exception to Parker constitutes a simultaneous and automatic denial of Noerr-Pennington on the same grounds. See supra notes 257-60 and accompanying text.
more, constitute grounds for denying \textit{Noerr-Pennington} immunity. This broad protection of legislative petitioning is essential to avoid chilling the right to petition and to preserve communication of ideas within a representative democracy.

The use of a commercial/governmental distinction should be abandoned. Although theoretically plausible, the proper application of such an exception is virtually impossible. Defining a “commercial” activity in an age of broad local government involvement in a wide array of economic activities is a task certain to lead to inconsistent results in the courts. Further, the proprietary nature of particular governmental conduct does not necessarily mean that the conduct lacks policymaking characteristics. Indeed, it is the policy/political nature of the activity rather than any economic indicia that properly triggers \textit{Noerr-Pennington} immunity.

The “sham” exception, although generally applied only in administrative or judicial contexts, can be used to deny legislative petitioning immunity. However, this exception should be applied narrowly to protect all petitioning where the private party’s intent was to influence the governmental body. The recent willingness of courts to find that a single proceeding could constitute a “sham” is an unnecessary erosion of \textit{Noerr-Pennington} immunity and inevitably chills the willingness of private parties to petition the government.\footnote{Preservation of constitutional values suggests that a presumption in favor of finding proper petetioning intent should operate to bar the sham exception in all but entirely baseless proceedings.}

The \textit{Noerr-Pennington} immunity doctrine should broadly protect the petitioning conduct of private parties. Although such broad application of the doctrine will insulate private anticompetitive conduct from the reach of the antitrust laws, this approach is necessary if private input into the local government decisionmaking process is to be preserved.

Finally, the constitutional protection of \textit{Noerr-Pennington} should not be eroded by misguided attempts to condition \textit{Noerr-Pennington} immunity for the local government. The separate purposes and roots of these two doctrines mandate separate analysis under each doctrine. Likewise, the use of liberal pleading standards should not be permitted to deny private petitioning immunity based on weak allegations of conduct claimed to justify application of one of the exceptions to the \textit{Noerr-Pennington} doctrine.

V. CONCLUSION

The Local Government Antitrust Act of 1984 is likely to place increased pressure on the \textit{Noerr-Pennington} doctrine as plaintiffs and
courts look for defendants against whom damage judgments can be awarded. A watchful guard is needed to preserve the doctrine in such changed circumstances. Important constitutional interests such as the right to petition, the right of access to government proceedings, and the flow of communication to government representatives should not be blindly sacrificed merely to enhance a plaintiff's recovery under a scheme of antitrust statutes. Preservation of a maximally competitive economic order must be secondary to preserving basic constitutional values that underlie the nation's democracy.

Keith E. Moxon, '85