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The Commercial Exception: A Necessary Limitation to the Noerr-Pennington Doctrine

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**INTRODUCTION**

The objective of antitrust law is to protect competition.¹ The Sherman Act,² antitrust law's primary vehicle, contains broad language³ which could be read to proscribe any and all anticompetitive activity. The United States Supreme Court, however, rejects this construction. The Court's *Noerr-Pennington*⁴ doctrine immunizes⁵ from antitrust liability acts of petitioning

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1. In NCAA v. Board of Regents, 468 U.S. 85 (1984), the Court stated: The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as a rule of trade. It rests on the premise that unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. *Id.* at 104 n.27 (citing Northern Pacific R.R. v. United States, 365 U.S. 1, 4-5 (1958)). See also, e.g., *Standard Oil v. FTC*, 340 U.S. 231, 249 (1951); *infra* notes 63-64 and accompanying text.


3. Sections 1 and 2 of the Sherman Act provide:
   1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
   2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

*Id.* §§ 1, 2.


5. The term "immunizes" refers to conduct the Supreme Court never intended to proscribe by the antitrust laws. This is distinguished from the term "exemption," which refers to conduct that would otherwise come within the scope of the antitrust laws, but which the Supreme Court deems exempt. Oppenheim, *Antitrust Immunity for Joint Efforts to Influence Adjudication Before Administrative Agencies and Courts—From Noerr-Pennington to Trucking Unlimited*, 29 WASH. & LEE L. REV. 209, 209 n.2 (1972).
the government even if the petitioning results in the restraint of trade. The basis for this immunity is that petitioning the government constitutes political activity, which was never intended to be regulated by the Sherman Act. The Noerr-Pennington doctrine establishes that the goals of antitrust law are subservient to a representative democracy's need for private input. The exact boundaries of this doctrine, however, have yet to be determined.

Some lower federal courts have articulated a "commercial exception" to the Noerr-Pennington doctrine, holding that efforts to influence government officials are not immunized from antitrust liability when the government is acting in a purely commercial capacity. Other federal courts have rejected the validity of the commercial exception. This split between the federal circuits has resulted in inconsistent adjudication.

This Note argues in favor of the commercial exception to the Noerr-Pennington doctrine. Section I examines the background to the Noerr-Pennington doctrine. Particular attention is devoted to the reasoning behind the Supreme Court cases on which the doctrine is based: Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.; United Mine Workers v. Pennington; and California Motor Transport v. Trucking Unlimited. Section II discusses the commercial exception to the Noerr-Pennington doctrine. This section articulates the theoretical and legal justifications for the

7. See infra notes 24-35 and accompanying text.
8. See infra notes 24-31 and accompanying text.
9. See infra notes 63-80 and accompanying text.
10. See infra note 11 and accompanying text.


Courts in the Fourth and Eighth Circuits have not discussed the commercial exception. The Tenth Circuit's position is ambiguous. See Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696 (D. Colo. 1975).

commercial exception. Finally, Section III explains how the commercial exception should be applied to promote both the objectives of antitrust law and the *Noerr-Pennington* doctrine.

I. BACKGROUND TO THE *Noerr-Pennington* DOCTRINE

A. The Noerr Case

The Supreme Court first immunized political activity from antitrust liability in *Eastern Railroad Presidents Conference v. Noerr Motor Transport*. The litigation in *Noerr* grew out of an "economic life or death" struggle between railroads and the trucking industry for the lucrative long-distance hauling of heavy freight business. Forty-one Pennsylvanian truck operators and their trade association brought the complaint against twenty-four Eastern railroads, their trade association, and a public relations firm retained by the railroads. The truckers charged that the railroads had conspired to restrain trade and monopolize the long-distance freight business in violation of sections 1 and 2 of the Sherman Act. Specifically, the complaint alleged that the railroads had engaged the public relations firm to conduct a publicity campaign designed to influence the Governor and state legislature to enact and enforce legislation unfavorable to the trucking business. The complaint described the campaign as "vicious, corrupt, and fraudulent" because the railroad's sole motivation was to harm the truckers and eventually eliminate them as competitors. In addition, the campaign disguised the views as being expressed by disinterested private persons and civic groups, when in fact they were disseminated by the public relations firm and paid for by the railroads.

The railroads' objectives were highly offensive in terms of antitrust policy. They intended to monopolize the long-distance freight business through conduct other than providing superior service to consumers. Monopoly is socially undesirable because a monopolist maximizes profits by reducing the supply of his product and increasing the price. This results in a reduction in the amount of gain from trade available to the community as a whole. Accordingly, if the railroads were successful in their attempt to monopolize

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17. *Id.* at 129.
20. *Id.*
the freight industry, the cost of shipping freight would have increased and the amount of shipping would have decreased. It is this situation that the Sherman Act intends to proscribe. On the other hand, the means the railroads' chose to monopolize the freight industry were acceptable; they utilized the political process. The railroads successfully lobbied the Governor of Pennsylvania to veto a law which would have allowed the truckers to carry heavier loads, thereby making their business more profitable. In a representative democracy, it is appropriate for private groups to attempt to enlist the aid of the government in furtherance of their personal interests.

Faced with these competing policies, the Supreme Court held that the railroads' conduct was immunized from antitrust liability. It concluded that "mere attempts to influence the passage and enforcement of laws" do not fall within the scope of the Sherman Act. In reaching this conclusion, the Court relied on three considerations. First, the Court noted that there is an "essential dissimilarity" between agreements to seek legislation and agreements traditionally condemned by the Sherman Act, such as price fixing and group boycotts. Second, the Court emphasized that in a representative democracy, private parties must be able to make their desires known to their representatives. Applying the Sherman Act to this conduct would impute to the Act a purpose to regulate political activity, not business activity; this purpose was never intended by Congress. Third, the Court stated that finding the railroads' conduct illegal would "raise important constitutional questions" because the right to petition is protected by the first amendment.

Given the competing interests, the Court's position in Noerr is well taken. Immunizing joint efforts to influence government officials vested with the

23. Id.
25. Id. at 135.
26. Id. at 136.
27. Id.
28. Id. at 137.
29. Id. at 138.
30. The first amendment states:
   Congress shall make no law respecting the establishment of religion, or prohibiting
   the free exercise thereof; or abridging the freedom of speech, or of the press; or
   the right of the people peaceably to assemble, and to petition the government for
   a redress of grievances.
   U.S. Const. amend. I.
   The Court diminished the significance of the first amendment as a factor in its decision by
   explaining in a footnote that under its view of the proper construction of the Sherman Act,
   it was not necessary to consider the constitutional questions. Noerr, 365 U.S. at 132 n.6.
   Subsequent decisions applying the Noerr-Pennington doctrine, however, have rested squarely
   on the first amendment right to petition. See, e.g., California Motor Transp. v. Trucking
power to make public policy decisions does impede the goals of antitrust law. But antitrust objectives are subordinate to a representative democracy's need for private input. The "essential dissimilarity" the Court spoke of between successful lobbying efforts and conduct traditionally condemned by the Sherman Act is the element of causation. Under our system of government, elected officials have the authority to determine the amount of competition that is desirable. In making this determination, government officials are influenced by a myriad of sources, not the least being those directly interested in the legislation. If a producer is fortunate enough to induce the government into granting him a monopoly, then the government action is the cause of the monopoly, not the producer's lobbying efforts. An injured competitor's remedy lies in the political process, not the antitrust laws.

Similarly, the Court properly distinguished between political activity and business activity for the purpose of applying the Sherman Act. In holding that political activity was immunized from antitrust liability, the Court defined political activity in terms of its function rather than the intent of the petitioner. Both political and business activity typically are motivated by self-interest. The political process is grounded on the assumption that self-interest will compel private parties to inform their representatives of their desires. It follows that the right to lobby cannot be conditioned on the petitioner's intent to benefit himself. Such a policy would bereave government of a lode of information. The distinguishing characteristic of political activity, then, is not the intent of the petitioner, but that it results in the free flow of information between the public and private sectors. Sound

   One commentator finds the Court's "essential dissimilarity" argument unpersuasive. Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine, 45 U. Cin. L. Rev. 80, 83 (1977). He asserts that the Court's suggestion "that atypical, untraditional anticompetitive agreements are not violative of the antitrust laws is contrary to prevailing precedent." Id. See, e.g., American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946) (it is not the form of combination or the particular means used but the result which is condemned by the antitrust laws); United States v. American Tobacco Co., 221 U.S. 106, 181 (1911) (Sherman Act encompasses all acts within the spirit or purpose "without regard to the garb in which such acts are clothed").
   Fischel's error is that he defines "essential dissimilarity" in terms of the conduct's appearance ("atypical, unusual"), rather than its procedural relationship to the resulting restraint of trade (lack of causation).

32. See supra notes 24-28 and accompanying text.

33. Noerr, 365 U.S. at 139 ("A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would deprive the government of a valuable source of information . . . .")

34. The Court states:
   The right of people to inform their representatives in government of their desires with respect to the passage and enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.

Id.
public policy requires informed policymakers. Political activity is protected because it serves a necessary function in a democratic society.

Following its broad pronouncement of antitrust immunity for political activity, the Court articulated an exception to this immunity. It observed that there may be situations in which efforts to secure government action are a "mere sham" for what are actually direct efforts to harm a competitor. These bad faith activities are not immunized from the Sherman Act.

Although the "sham" exception may appear inconsistent with the Court's earlier statements concerning the irrelevancy of the petitioner's intent, the two positions are reconcilable. The intent to achieve personal gain or anticompetitive ends is irrelevant, provided the petitioner actually intends to influence the passage and enforcement of laws. If the petitioner does not intend to influence government action, but merely seeks to directly disadvantage a competitor, then the "sham" exception applies. Accordingly, the petitioner's conduct is not immunized from antitrust liability. Because the petitioner seeks to harm a competitor directly, and not through government action, it is the petitioner's conduct that caused the injury and not the government action. There is no "essential dissimilarity" between these efforts and efforts normally condemned by the Sherman Act. Likewise, if the petitioner does not have a good faith intent to influence the passage and enforcement of laws, then the petitioner's conduct does not serve the purpose of providing valuable information to public policymakers. In sum, if the conduct is a "sham," the reasons for immunizing political activity from antitrust liability are absent. More importantly, the "sham" exception illustrates that there is no blanket immunity for acts of petitioning the government. Immunity is based on the function of the petitioning, not on the participants.

B. Noerr Extended to Include "Broader Schemes"

United Mine Workers v. Pennington expands the Supreme Court's holding in Noerr to include "broader schemes." In Pennington several small coal operators alleged that the United Mine Workers (UMW) and several

35. Id. at 144.
36. Id.
37. Id. For an example of an application of the "sham" exception, see infra notes 52-60 and accompanying text.
38. See supra note 34 and accompanying text.
39. See Winterland Concessions Co. v. Trela, 735 F.2d 257, 263-64 (7th Cir. 1984) ("[T]he prerequisite motive for the sham exception is the intent to harm one's competitors not by the result of the litigation but by the simple fact of the institution of the litigation." (quoting Gainsville v. Florida Power & Light Co., 488 F. Supp. 1258, 1265-66 (S.D. Fla. 1980))); Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 (7th Cir. 1982) ("The line [between protected and unprotected petitioning] is crossed when [defendant's] purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself—regardless of outcome—of litigating."); cert. denied, 461 U.S. 958 (1983).
41. See infra notes 44-46 and accompanying text.
large coal operators conspired to eliminate the small coal operators as competitors, thereby monopolizing the coal industry in violation of the Sherman Act. The complaint charged that the UMW and large operators jointly lobbied the Secretary of Labor to establish, pursuant to authority granted to him under the Walsh-Healey Act,\(^4\) abnormally high minimum wage rates for the employees of contractors selling coal to the Tennessee Valley Authority (TVA). This, in turn, made it difficult for the small operators to compete in the TVA market. The complaint also charged that the UMW and the large operators persuaded the TVA to curtail its spot-market purchases, which in large part were exempt from the Walsh-Healey minimum wage requirements. This effectively eliminated the TVA as a buyer of the small operator’s coal.

The Court found that the trial court had erred in instructing the jury that efforts to influence the Secretary were illegal if part of a broader conspiracy to eliminate the small operators as competitors.\(^4\) The Court phrased this narrow holding in extremely broad language. It stated that “[j]oint 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.”\(^4\)

The decision in Noerr was based on “evidence consisting entirely of activities seeking to influence public officials.”\(^4\) Pennington’s grant of immunity to conduct that is part of a “broader scheme” represents a considerable extension of Noerr.\(^4\)

Although the Court neglects to articulate its basis for shielding attempts to influence the Secretary of Labor from antitrust liability, Pennington appears to be a straightforward application of its reasoning in Noerr. The Secretary of Labor, in setting the Walsh-Healey minimum wage, was acting in the capacity of a labor policymaker which involves political, rather than purely economic, considerations.\(^4\)

Whether the TVA’s purchasing decisions were made in a political or economic framework is less clear. On the one hand, the TVA was established for the purpose of encouraging agricultural and industrial development.\(^4\)

Thus, it may have made its purchasing decisions in support of the Secretary

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43. Pennington, 381 U.S. at 670.
44. Id.
45. Id. (emphasis added).
    One commentator asserts that Pennington extends Noerr to include attempts to influence the executive branch, rather than only the legislative branch. See Fischel, supra note 31, at 85. The holding in Noerr, however, already encompassed both the legislative and executive branches. See Noerr, 365 U.S. at 136.
of Labor's minimum wage policy. If this is the case then Pennington is consistent with Noerr because Pennington involved a policy decision. On the other hand, the TVA's purchasing decisions may have been made on purely economic grounds. Indeed, the TVA is statutorily required to act on an economic basis. If the TVA's decisions were entirely economic then Pennington could be interpreted as expanding antitrust immunity to attempts to influence purely commercial government actions. The Court, however, is silent on whether it considered the TVA's actions to be political or economic in nature. This ambiguity has contributed to confusion in the lower courts concerning the validity of the commercial exception to the Noerr-Pennington doctrine.

C. Noerr-Pennington Extended to Adjudicatory Bodies

In California Motor Transport v. Trucking Unlimited, the Supreme Court extended the Noerr-Pennington doctrine to include joint efforts to influence administrative agencies and courts. The litigation in California Motor Transport was instituted by fourteen California highway carriers against nineteen competitors, who allegedly conspired to monopolize and restrain trade in violation of the antitrust laws. The complaint asserted that the defendants engaged in a systematic program to oppose before state and federal courts virtually all of the plaintiffs' applications to the government for additional motor carrier operating rights. Such government-granted operating rights were required by law for a carrier to conduct business. The complaint alleged that the defendants' purpose for opposing the plaintiffs' applications for operating rights was to eliminate them as competitors.

The district court, reasoning that the defendants' conduct was protected by Noerr-Pennington, dismissed the complaint for failure to state a claim. The Court of Appeals reversed on alternative grounds: It held either that Noerr-Pennington applies only to joint efforts to influence the passage and enforcement of laws, and not to proceedings before agencies and courts; or,

49. Id. § 831 h(b) (1982 & Supp. III 1985).
50. See Costilo, supra note 46.
51. See George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 32 n.7 (1st Cir. 1970) (arguing that the UMW's overtures before the TVA were "a reasonable addendum to the main proceedings before the Secretary" and thus political), cert. denied, 400 U.S. 850 (1970); contra Bustop Shelters v. Convenience and Safety Corp., 521 F. Supp. 989, 996 n.9 (S.D.N.Y. 1981) (asserting that the commercial exception is "inconsistent with Pennington, which involved government purchases of coal—certainly a commercial activity").
53. Id. at 509.
if *Noerr-Pennington* does apply, that defendants’ conduct fell within the “sham” exception articulated in *Noerr*.56

The Supreme Court rejected the Court of Appeals’ first ground, stating “certainly the right of 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.”57 The Court relied exclusively on the first amendment right to petition as its basis for extending antitrust immunity to administrative agencies and courts, rather than resting on its construction of the Sherman Act as it did in *Noerr*.58

But the Court emphasized that the right to petition is not without limits; it does not necessarily give defendants antitrust immunity.59 Indeed, in the instant case, defendants’ alleged actions constituted an abuse of the right to petition. The Court concluded that the “sham” exception applied, affirming the Court of Appeals’ second ground. Defendants’ actions served to “harass and deter [plaintiffs] in their use of administrative and judicial proceedings so as to deny them ‘free and unlimited access’ to those tribunals.” Because their conduct was a “sham,” defendants were not immunized from antitrust liability.

The Court went on to acknowledge the distinction between the legislative and executive branches on the one hand, and courts and agencies on the other.60 It illustrated this distinction by explaining that practices which may be condoned in a political context, such as misrepresentations or unethical conduct,61 have no place in the adjudicative process and will not be immunized from antitrust liability if used for anticompetitive purposes.62 The basis for differentiating between these branches lies in the framework within which each operates. Adjudication occurs within the strictures of existing laws, statutes, precedent, and the facts of the instant case. The system works properly only to the extent that this information is presented accurately before a tribunal. The political process, however, operates within less constricted bounds. Its purpose is to address all matters of public concern. Political policymakers rely on a variety of sources of information in discharging their duty. The Court’s extension of the *Noerr-Pennington* doctrine

56. See *supra* notes 35-40 and accompanying text; Oppenheim, *supra* note 5, at 215.
58. See *supra* notes 24-31 and accompanying text.
59. The Court stated that:
Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.
*California Motor Transp.*, 404 U.S. at 513.
60. *Id.* at 512-13.
61. See *Noerr*, 365 U.S. at 145 (defendant’s political activity was protected, even though it was “fraudulent,” “deceiving,” and “malicious”).
to adjudicatory bodies, therefore, did not diminish the Court's concern that officials vested with broad policymaking discretion are informed.

*Noerr, Pennington,* and *California Motor Transport* constitute the Supreme Court's discussion of antitrust immunity for attempts to influence governmental officials. Lower federal courts have looked to these three cases for guidance in defining the scope of the *Noerr-Pennington* doctrine. The lack of clarity in Supreme Court case law has lead to the current split between the federal circuits concerning the validity of the commercial exception to the *Noerr-Pennington* doctrine.

II. THE COMMERCIAL EXCEPTION

A. Theoretical Basis for the Commercial Exception

The economic objective of antitrust law is to maximize consumer welfare by protecting competition and preventing monopoly.\(^63\) Competition allows scarce resources to be allocated most efficiently and encourages the development of new techniques to better use those resources. Competition may also promote non-economic goals that are commonly valued. It distributes wealth, limits the power and size of any one business, creates opportunities for entrepreneurs, and allows one's success or failure to be determined by the impersonal forces of the market, rather than the prejudices and predilections of private groups which may control the essential support systems.\(^64\)

Clearly the law may have goals other than promoting economic efficiency. For example, it may attempt to alleviate poverty or racial inequalities. The Supreme Court first recognized that antitrust laws are not intended to prohibit the government from implementing policies which may have anticompetitive ends in *Parker v. Brown.*\(^65\) Accordingly, antitrust immunity for valid government action is known as the *Parker v. Brown* doctrine.

In *Parker,* the California legislature established an agricultural marketing, or "prorate" system designed to avoid ruinous competition within the state's raisin industry. A commission appointed by the Governor and confirmed by the State Senate administered the system. The commission was empowered to control the marketing of each raisin grower's crop, thereby controlling the supply and price levels in the industry. The Supreme Court assumed that this program would have violated the Sherman Act if it had been the product

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\(^63\) See, e.g., Standard Oil Co. v. FTC, 340 U.S. 231, 249 (1951) ("Congress was dealing with competition, which it sought to protect and monopoly, which it sought to prevent."); R. BORK, THE ANTITRUST PARADOX 51 (1978) ("The only legitimate goal of American antitrust law is the maximization of consumer welfare . . . ."); *supra* note 1.

\(^64\) P. AREEDA & D. TURNER, *supra* note 31, ¶ 103.

\(^65\) 317 U.S. 341 (1943).
of private agreement, but refused to apply the antitrust laws to the facts of the case before it. The Court concluded that:

nothing 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 state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly, but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.66

The Court in Parker held that valid government actions are immunized from antitrust liability.67

Noerr-Pennington follows naturally from Parker v. Brown; because Parker permits the government to engage in anticompetitive policies, antitrust law must not prohibit private parties from informing the government of their anticompetitive desires.68 The objective of Noerr-Pennington is to insure that the political process functions properly.

The government often participates in the economy in a commercial or proprietary capacity. Indeed, the government is the single largest consumer in the United States; government purchases constitute twenty percent of the gross national product.69 The government may make purchases in support of policy decisions,70 or it may act on purely economic grounds.71 When the government makes commercial decisions based solely on economic considerations, its role in the market is identical to that of private consumers. It

66. Id. at 350-52.

67. To receive antitrust immunity for state actions under the Parker doctrine, the Supreme Court requires (1) that there exist a clearly articulated and affirmatively expressed State policy to displace competition, and (2) that the State itself, not a private party, actively supervise any anticompetitive action exercised at the State's insistence. See, e.g., Hoover v. Ronwin, 466 U.S. 558, 570 (1984); Community Communications v. City of Boulder, 455 U.S. 40, 54-55 (1982); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

When there is a clearly articulated state policy to displace competition through regulation, however, such regulatory bodies need not act under strict state supervision. See Southern Motor Carriers Rate Conference, Inc., v. United States, 471 U.S. 48, 61 (1985); Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 (1985).

68. It is important to note the differences between Parker v. Brown and Noerr-Pennington. When the government chooses to displace competition without being petitioned to do so by private parties, Parker applies but Noerr-Pennington does not. When private parties petition the government to displace competition, but the government refuses to take such action, Noerr-Pennington applies but Parker does not.


70. See City of Atlanta v. Ashland-Warren, Inc., 1982-1 Trade Cas. (CCH) ¶ 64,527 (W.D. Ga. 1981) (city accepted bids for paving contracts only from contractors who could satisfy affirmative action guidelines).

is bidding for scarce resources along with all other participants in the market. The forces of competition efficiently allocate resources regardless of the identity of the actors; the invisible hand is no respecter of persons. As long as competition is unrestrained, consumer welfare will be maximized. In this instance, the government has not chosen to displace competition to pursue other policies, as it did in *Parker*. Instead, it has chosen to act on a purely economic basis. The regulation of economic relationships is the dominion of antitrust law. Private parties who trade with the government when the government is acting in a purely commercial capacity should not be immunized from antitrust liability. There should be a commercial exception to the *Noerr-Pennington* doctrine.

Without a commercial exception, society sacrifices consumer welfare while gaining nothing in return. The benefit society enjoys from the *Noerr-Pennington* doctrine is clear: The democratic process functions properly because people are free to make their desires known to their representatives. In so petitioning, private parties communicate the information needed by the government to make informed policy decisions. When the government acts as a consumer, the choice concerning which specific item to purchase is no longer a policy decision. The government official who makes the actual purchasing decision only has the authority to compare products, not restrain trade. This does not imply that the government official may only consider price when choosing a product. When making a decision based on purely economic grounds, the official, like any rational consumer, should take into account numerous factors, such as quality, promptness of delivery, and availability of future service. Private sellers are encouraged to inform the official about any of these factors. This conduct constitutes proper salesmanship, or what antitrust law terms "rivalry on the merits." But if the private sellers' sales techniques include efforts to persuade the government to accept a price-fixing scheme, a boycott of a competitor's product, or any other illegal arrangement, then the benefits of competition are lost. Worse yet, the political process goals of *Noerr-Pennington* are not furthered because this was not intended to be a policy decision requiring private input.

The seminal case advocating the commercial exception illustrates this point well. In *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, the plaintiff, Whitten, and the defendant, Paddock, both manufactured equipment for pipeless swimming pools. The market for this equipment was largely composed of public and quasi-public agencies. These agencies were required by law to operate under public competitive bidding procedures. Whitten alleged that Paddock violated the antitrust laws by inducing private architects, who were hired by the agencies to supervise pool construction, to adopt specifications supplied by Paddock that were drawn so narrowly so

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72. Id.
as to exclude all competitors. Paddock's tactics ranged from high pressure
salesmanship to fraudulent statements to threats of litigation.\(^7\)

The district court summarily dismissed Whitten's complaint, holding, \textit{inter alia}, that Paddock's actions were immunized from antitrust liability by Noerr-Pennington.\(^7\) The First Circuit Court of Appeals, in a thoughtful opinion by Judge Coffin, vacated the district court's findings.\(^7\)

Judge Coffin reasoned that the purpose of Noerr-Pennington is to insure uninhibited access to public policymakers. Because the architect in Whitten was not vested with "significant policymaking discretion,"\(^7\) Paddock's attempts to influence him were not the kind of political activity that Noerr-Pennington protects.\(^7\) Judge Coffin concluded that the legality of Paddock's selling practices should be judged without regard to the identity of the customer when the government is acting under competitive bidding statutes.\(^7\)

The government agency\(^7\) in Whitten was acting as a consumer shopping for swimming pools. The legislature, by mandating competitive bidding, made the policy decision that pools were to be purchased on a purely economic basis. Paddock's attempts to influence the government's architect contributed nothing to the needs of a representative government in a democratic society. But by eliminating competition, its conduct may have increased the price the public was forced to pay for pools. Resources were misallocated and consumer welfare decreased.\(^8\) Judge Coffin recognized that immunizing Paddock's conduct would frustrate antitrust policy without furthering the objectives of Noerr-Pennington. Indeed, if Paddock had been dealing with private pool builders rather than the government, he would not have enjoyed antitrust immunity. Since the government under these conditions is no different than a private buyer, it makes little sense to change the rules.

In sum, antitrust law governs purely economic relationships. Its goal is to maximize consumer welfare by protecting competition. The government,

\footnotesize{73. \textit{Id.} at 27.\hfill 74. The district court reasoned that \textit{Noerr-Pennington} protected Paddock's conduct because it was directed toward a quasi-governmental official. \textit{Id.}\hfill 75. \textit{Id.} at 36.\hfill 76. \textit{Id.} at 33.\hfill 77. \textit{Id.}\hfill 78. It is important to note that applying the commercial exception does not mandate a finding that the defendant is liable for an antitrust violation. The commercial exception merely negates the immunity granted by \textit{Noerr-Pennington}. For example, Judge Coffin held that Paddock's actions were not immunized from antitrust liability. He remanded the case for a determination of whether Paddock actually committed a violation of the Sherman Act. \textit{Id.}\hfill 79. For purposes of the \textit{Noerr-Pennington} doctrine, the private architect hired by the government agency is considered an agent of the government. See \textit{Whitten,} 424 F.2d at 28.\hfill 80. See supra notes 63-64 and accompanying text.}
however, has the authority to engage in anticompetitive activities. Accordingly, the Noerr-Pennington doctrine immunizes from antitrust liability joint efforts to influence the government to pursue policies that may be inconsistent with the goals of antitrust law. The commercial exception to the Noerr-Pennington doctrine is based on the recognition that the government, in addition to being a policymaker, is the nation's largest consumer. When acting in a purely commercial capacity, the government's posture in the market is identical to that of a private consumer; its decisions are economic, not political. Immunizing private parties who deal with the government in this context will result in the misallocation of resources without improving the political process. A theoretical analysis, therefore, supports a commercial exception to the Noerr-Pennington doctrine.

B. Legal Basis for the Commercial Exception

Supreme Court precedent supports the commercial exception to the Noerr-Pennington doctrine. The holdings in Noerr, Pennington, and California Motor Transport were phrased in terms of broad verbal formulae. Lower courts have tended to give undue attention to this broad language while ignoring the reasoning or factual basis behind these holdings. As a result, courts have granted blanket immunity for odious anticompetitive conduct merely because it was directed toward the government. Clearly, the Noerr-Pennington doctrine does not establish blanket antitrust immunity for attempts to influence the government. The "sham" exception, which was originally articulated in Noerr and explicated in California Motor Transport, demonstrates this point. In California Motor Transport, defendants' petitioning was directed toward the adjudicatory process. Defendants, however, had no intention of using this process for the purpose for which it was created—the just resolution of controversies. On the contrary, their purpose was, as the Court stated, "to usurp that decision making process."
Defendants' conduct, therefore, was a "sham," and not immunized from antitrust liability. The reasoning behind the "sham" exception is that efforts to petition the government are not immunized when proper functioning of the governmental process is not necessary for the petitioner to achieve his goal. This reasoning applies equally to the commercial exception. When the government acts in a commercial capacity, its goal is to maximize efficiency. The proper functioning of the political process is not necessary for it to achieve this goal. Accordingly, there is no reason to immunize efforts to influence the government when it is acting as a consumer.

Moreover, blanket immunity for activity involving the government would be inconsistent with the government's right to damages resulting from antitrust violations. Section 4A of the Clayton Act allows the government to recover when it has been injured by an anticompetitive practice. The reasoning behind this statute is that immunizing private parties merely because the government is the victim of an improper act has no theoretical justification. For example, if several manufacturers of electrical generators conspire as to the price each will bid for various government contracts to purchase generators, the anticompetitive effect is no different than if this illegal conduct was directed toward a private buyer. In both cases, resources are misallocated and consumer welfare is decreased. The Supreme Court recognized this fact in Georgia v. Evans. The Court stated that "[n]othing in the [Clayton] Act, its history, or its policy, could justify" immunizing a wrongdoer solely because his victim is the government. The commercial exception is based on this same reasoning. The damage caused by anticompetitive activity is the same whether the victim is the government or a private party. When the political process is not implicated, tolerance of anticompetitive conduct is unwarranted.

Furthermore, there is not an "essential dissimilarity" between joint efforts to influence the government acting in a commercial capacity and efforts to influence private parties. As stated previously, petitioning government policymakers is essentially dissimilar from conduct traditionally condemned by the Sherman Act because policymakers have the discretion to override antitrust objectives to promote other ends. Any resulting monopoly is caused

86. Section 4A of the Clayton Act states:
Whenever the United States is hereafter injured in its business or property by reason of any thing forbidden in the antitrust laws it may sue therefore in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of the suit.
87. See P. Areeda & D. Turner, supra note 31, ¶ 206c.
88. 316 U.S. 159 (1942).
89. Id. at 162.
90. See Whitten, 424 F.2d at 31.
91. See supra notes 26, 31 and accompanying text.
by the government legitimately exercising its authority to displace competition. When acting in a purely commercial capacity, the government has made the decision not to exercise its authority to displace competition. The government, therefore, is not the cause of any resulting monopoly. Antitrust immunity for private parties when the government acts in a purely commercial capacity cannot be grounded on the "essential dissimilarity" between lobbying activity and activity traditionally condemned by the antitrust laws.

Likewise, the first amendment right to petition does not invalidate the commercial exception. California Motor Transport's extension of antitrust immunity to adjudicatory agencies and courts rested squarely on the right to petition. The Court did not discuss the "essential dissimilarity," or political process arguments, which formed the basis for its holding in Noerr. In light of this omission, some lower federal courts have asserted that California Motor Transport implicitly overrules the commercial exception. These courts reason that the commercial exception, as articulated in Whitten, is grounded on Noerr's emphasis on immunity for efforts to influence government officials vested with broad policymaking discretion. Because adjudicatory agencies and courts do not possess broad policymaking discretion, antitrust immunity cannot be restricted to efforts to influence policymakers. Such courts argue that the first amendment right to petition is absolute. Moreover, these courts, based on the notion that the right to petition is absolute, have not engaged in traditional first amendment freedom of expression analysis. By baldly asserting that the right to petition immunizes the conduct, they accord this right greater protection than that accorded other first amendment freedoms.

This reading of California Motor Transport lacks merit. The Court in California Motor Transport stressed that the right to petition is not without limits. Indeed, the Court held that the defendants were not immunized,

92. See supra notes 57-58 and accompanying text.
93. See In re Airport Car Rental Litig., 693 F.2d 84, 87 (9th Cir. 1982) ("It is possible that California Motor Transport implicitly overruled . . . Whitten."); Bustop Shelters v. Convenience and Safety Corp., 521 F. Supp. 989, 996 (S.D.N.Y. 1981) ("[Whitten] has been disapproved in this circuit, as implicitly overruled or weakened by California Motor Transport."); Reamco, Inc. v. Allegheny Airlines, 496 F. Supp. 546, 556 n.6 (S.D.N.Y. 1980). In Reamco, the district court stated:

Reamco's argument, based on Whitten, that the Noerr-Pennington doctrine insulates only those acts aimed at influencing governmental action on broad policy questions involving the passage or enforcement of legislation, and not actions related to narrow issues between specific parties, must be rejected in light of California Motor Transport's contrary conclusion.

Id.
94. Whitten, 424 F.2d at 25.
despite their right to petition, because they were using that right to violate valid antitrust statutes. Their petitioning efforts were a "sham" because they did not legitimately intend to invoke the processes of the adjudicative agencies and courts. The Court's concern in California Motor Transport was the same as that in Noerr; both cases protect legitimate efforts to influence the governmental process. The right to petition, therefore, does not automatically immunize efforts to influence any governmental official.

Furthermore, the right to petition does not warrant greater constitutional protection than other freedoms of expression. The Supreme Court, in McDonald v. Smith, firmly established that the right to petition should be treated no differently than other first amendment rights. Under tra-
ditional freedom of expression analysis, first amendment conduct receives considerable, but not absolute, protection.\textsuperscript{105} 

Commercial speech is accorded less constitutional protection than other forms of expression.\textsuperscript{106} The Supreme Court defines commercial speech as speech which proposes a commercial transaction.\textsuperscript{107} Moreover, speech may
be classified as commercial even though it contains "discussions of important public issues." 

Speech falling within the commercial exception is clearly commercial. The commercial exception applies to communication directed at public officials vested only with the authority to administer commercial transactions. Private parties have occasion to interact with officials possessing this limited authority solely to offer or advertise the availability of goods or services. Even if the interaction involves some noncommercial discussion, the speech would still be classified as commercial. Taken as a whole, the speech merely furthers a transaction.

The constitutional requirements for regulating commercial speech are articulated in Central Hudson Gas v. Public Service Commission. In this case, the Court developed a four-part analysis:

At the outset, we must first determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

prohibiting the unsolicited mailing of contraceptive advertisements. The mailings consisted of flyers specifically naming the product, and informational pamphlets discussing human sexuality and venereal disease. The Court concluded that the flyers fell "within the core notion of commercial speech." Id. at 66. In discussing the informational pamphlets, the Court reasoned:

The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech.

The combination of all these characteristics, however, provides strong support for the conclusion that the informational pamphlets are properly characterized as commercial speech.

Id. at 66-67 (citations and footnotes omitted).

108. Id. at 67-68.

109. While it is hypothetically possible, for example, for a private party to express to a government purchasing agent his desire for the government to abandon mandatory competitive bidding procedures, such conduct by private parties is unlikely. The utility of engaging in political activity before an official possessing no authority to act on any proposal is outweighed by the minimal time and effort this activity entails. Rational beings rarely undertake doubtlessly fruitless behavior.

But even if this expression does occur, the speech is still commercial. McDonald stressed that the existence of political content in otherwise commercial speech does not alter the status of such speech. See supra notes 106-08 and accompanying text.


111. See supra notes 107-09 and accompanying text.


113. Id. at 566.
As for the first element—that the expression must concern lawful activity or not be misleading—one can argue that speech regulated by the commercial exception fails this test. The commercial exception annuls immunity from antitrust laws when private parties interact with the government in a purely commercial capacity. The commercial exception only regulates speech that otherwise would be illegal under the antitrust laws if directed toward a private party. This regulated speech, then, does not concern lawful activity. Under this reasoning, the Central Hudson test is not met and the speech receives no constitutional protection.

Even if this argument is not dispositive, the speech is not automatically protected. For the speech to be protected, the commercial exception must fail one of the remaining elements. There can be little doubt that the commercial exception meets the second prong—that the asserted governmental interest is substantial. The government’s interest is the protection of competition. The Supreme Court has repeatedly recognized the importance of this interest,\textsuperscript{114} and has held it to be substantial enough to justify regulation that affects first amendment freedoms.\textsuperscript{115}

Likewise, the commercial exception directly advances the governmental interest asserted. Congress has deemed the antitrust laws to be effective in preserving economic freedom.\textsuperscript{116} By requiring compliance with the antitrust laws, the commercial exception furthers the objectives of enhancing consumer welfare through unfettered competition.

Finally, the commercial exception is narrowly tailored; it applies in limited circumstances. By definition, the commercial exception applies to conduct proscribed by the antitrust laws. All other conduct is outside the purview of this doctrine. It is impossible for the commercial exception to proscribe any expression that does not restrain trade. Moreover, the commercial ex-

\textsuperscript{114} See United States v. Topco Assoc., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933) ("As a charter of freedom [the Sherman Act is] comparable to that found to be desirable in constitutional provisions.").

\textsuperscript{115} See Claiborne Hardware, 458 U.S. at 912 ("This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association."); National Soc'y of Professional Eng'rs v. United States, 435 U.S 679, 697 (1978). In National Society, the Court stated:

While the resulting order may curtail the exercise of [first amendment] liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the [antitrust] violation . . . . The First Amendment does not "make it . . . impossible ever to enforce laws against agreements in restraint of trade . . . ."


\textsuperscript{116} See supra note 1.
ception will not chill otherwise protected speech. The Supreme Court has recognized that commercial speech is particularly resilient and thus is unlikely to be chilled.\textsuperscript{117} The commercial exception, therefore, satisfies the four requirements of the \textit{Central Hudson} test.

In addition, the commercial exception minimally abridges private parties' right to petition.\textsuperscript{118} The commercial exception prohibits parties from petitioning certain government officials—those possessing the authority to make only economic decisions—in a manner that violates the antitrust laws. Private parties are free to petition officials vested with policymaking discretion in any manner, irrespective of whether it violates the antitrust laws. This petitioning is protected by the \textit{Noerr-Pennington} doctrine. These parties, then, are abridged from expressing their desires to officials who have no authority to act on them, but uninhibited from expressing them to those who do. Under traditional first amendment freedom of expression analysis, the commercial exception does not violate private parties' right to petition.

The commercial exception is consistent with the Court's reasoning in \textit{Noerr, Pennington, and California Motor Transport}. The \textit{Noerr-Pennington} doctrine does not create blanket immunity for efforts to influence the government. Rather, it protects efforts to influence decisions that are made within the framework of the political process. When the government acts in a purely commercial capacity, the government's interest in protecting competition justifies the minor abridgment of the right to petition. Purely economic decisions should be regulated by antitrust law.

\section*{III. Application of the Commercial Exception}

The commercial exception is based on the premise that there is a fundamental distinction between the political realm and the economic realm. Accordingly, political decisions should be made within the parameters of the \textit{Noerr-Pennington} doctrine, and economic decisions should be governed by antitrust law. The most troublesome aspect of the commercial exception is determining when the government is acting in a political or commercial capacity. This problem is further complicated when the government acts in a commercial capacity while simultaneously engaging in a policy decision.\textsuperscript{119}

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\textsuperscript{117} Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel, 425 U.S. 748, 772 n.24 (1976) ("[C]ommercial speech may be more durable than other kinds. Since advertising is the \textit{sine qua non} of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.").
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\textsuperscript{118} Although not stated as part of the \textit{Central Hudson} test, traditional freedom of expression jurisprudence permits greater regulation of lower valued speech—such as commercial speech—when there is less than total abridgment of such speech. See, \textit{e.g.},\footnote{See supra note 70.}
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\textsuperscript{119} See supra note 70.
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Some lower courts have expressed approval for the concept of the commercial exception, but assert that it is impossible to administer. Such a concern is ill-founded. The Supreme Court's reasoning in Noerr, Pennington, and California Motor Transport provides guidelines for administering the commercial exception.

As a preliminary matter, it is important to note that the scope of the commercial exception is quite narrow. There are numerous methods of injuring competition via influencing government processes which do not implicate the commercial exception. Any legitimate attempts to influence legislation, adjudicatory bodies, or the enforcement or execution of laws are excluded from the gamut of the commercial exception. The commercial exception applies only when the government participates directly in the economy, typically buying, selling or leasing goods.

To determine whether the commercial exception is applicable, courts should consider if its application would defeat the objectives of Noerr-Pennington. As stated previously, the goal of Noerr-Pennington is to insure that the political process functions properly; because government has the authority to determine the appropriate amount of competition, private parties must be unconstrained to advocate their self-interest. Whenever the government makes a policy decision to interact in the economy and displace competition, private petitioning is necessary and should be protected. Contrarily, when the government expresses its intent to act on a purely economic basis, the political process is no longer relevant, and those who petition the government


We reject any notion that there should be a commercial exception to Noerr-Pennington, because although such a distinction may be intuitively appealing, it proves difficult, if not impossible, of application in a case such as ours where the government engages in a policy decision and at the same time acts as a participant in the marketplace.

Id. at 1505.


122. Federal Prescription Serv. v. American Pharmaceutical Ass'n, 663 F.2d 253, 263-64 (D.C. Cir.) ("Noerr is fully applicable, for the boards of pharmacy are charged with regulatory decisions rather than commercial decisions."), cert. denied, 455 U.S. 928 (1981).

123. See supra note 121.

124. The exponential growth of governmental regulation provides fertile ground for abuse of administrative and judicial processes in order to injure competition. Would-be competitors' access to the market is controlled by licensing authorities, zoning commissions, health departments, building inspectors and a host of other bodies. Attempts to influence these bodies are governed by the "sham" exception, not the commercial exception. See supra notes 39, 52-60 and accompanying text. See also R. Bork, supra note 63, at 347-64.

125. Noerr-Pennington also insures that the adjudicatory process functions properly. Yet because the adjudicatory process does not implicate the commercial exception, it is irrelevant to this discussion.
should be subject to antitrust law. The critical factor is the intent of government in participating in the market.

Requiring a court to determine the government's intent when it enters the market does not make the commercial exception unadministrable. The *Parker v. Brown* doctrine requires this very finding in granting antitrust immunity for valid government actions. *Parker* demonstrates that the Supreme Court regards such an inquiry to be workable. Under the *Parker* doctrine, there are two requirements for antitrust immunity for a government action: First, the anticompetitive activity must be clearly articulated and affirmatively expressed as state policy; second, the activity must be actively supervised by the state itself. These elements place a significant burden on the party seeking immunity.

Antitrust immunity for petitioning based on *Noerr-Pennington* should not require such a substantial burden. The first amendment right to petition militates against placing the burden on the petitioner to prove government intent to displace competition. A more reasoned approach is to require the petitioner to establish that his conduct was directed toward the government. Such a showing would establish a prima facie case for antitrust immunity. The burden of proof would then shift to the challenger to rebut the petitioner's presumption in favor of immunity. This burden could be met by demonstrating that the government intended to participate in the market on a purely economic basis. Evidence indicating the government's intent would consist of mandated bidding procedures, legislative history, or other factors which reflect the government's desire to maximize efficiency.

This approach, in essence, places the burden on the challenger to show that the petitioner's conduct is not protected by *Noerr-Pennington*. This placement of the burden is necessary to avoid whatever slight chilling effect the commercial exception may have on private parties' willingness to exercise their right to petition. In contrast to the *Parker* doctrine, the petitioner's burden is light. Under *Parker*, the petitioner has the burden of showing that the government clearly intended to displace competition. If the government's position was ambiguous or neutral, the petitioner is denied immunity. Under the approach suggested by this Note, the challenger has the burden of showing the government did *not* intend to displace competition. If its position is ambiguous or neutral, the petitioner is still immunized. If the challenger is able to satisfy this burden, the petitioner should have received ample

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126. 317 U.S. 341 (1943).
128. The commercial exception is implicated primarily when the government acts under competitive bidding statutes. This comprises a significant number of all transactions that occur in the economy. *See supra* note 69 and accompanying text.

The federal government is required to use competitive bidding procedures for substantially all transactions in which it engages. 41 U.S.C. § 5 (1982).
warning that his conduct would be subject to the antitrust laws, thereby eliminating any chilling effect. This approach strikes the proper balance between the objectives of *Noerr-Pennington* and antitrust law.

**CONCLUSION**

The commercial exception to the *Noerr-Pennington* doctrine should become a settled principle of antitrust law. It places a reasoned limitation on antitrust immunity for attempts to influence the government. By recognizing that the government, besides being a public policymaker, is an immense force in the market, the commercial exception harmonizes the objectives of both *Noerr-Pennington* and antitrust law. *Noerr-Pennington* protects the political process. This process, however, is not implicated when the government acts on purely economic grounds. Those who deal with the government in this context should be subject to the scrutiny of antitrust law. This insures that the benefits of competition are realized while preserving the integrity of the political process. Simply stated, when the government acts like a consumer, it should be treated like one.

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