

# Making Sense of Antitrust Petitioning Immunity

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*Courts have struggled to produce a coherent doctrine governing when petitioners, such as lobbyists and litigants, are immune from antitrust liability. A variety of apparently conflicting exceptions and requirements permeate Supreme Court decisions in the field. In this Article, Professor Elhauge utilizes a functional process approach to identify factors the Court has implicitly considered in determining whether immunity applies. These factors turn critically on the incentive structure of the relevant decisionmaker: in particular, on whether the decisionmaker who imposed the restraint at issue had an objective financial interest in the restraint's anticompetitive consequences. Restraints produced by such a financially interested decisionmaking process, the Article argues, are and should be denied antitrust immunity unless the activity producing the restraint does not involve market behavior and is not separable from otherwise valid input into a governmental process of decisionmaking. These functional process considerations are shown to explain the outcome in every Supreme Court case adjudicating antitrust petitioning immunity issues. Adherence to a functional process approach, Professor Elhauge concludes, will facilitate resolution of many questions and anomalies regarding petitioning immunity doctrine and permit a more accurate understanding of the relationship between antitrust petitioning immunity and the related doctrine of state action immunity.*

For most of its history, the doctrine immunizing petitioning activity from antitrust liability has perversely coupled a sweeping general immunity with equally sweeping exceptions. This period was dominated by a trilogy of cases—*Noerr*,<sup>1</sup> *Pennington*,<sup>2</sup> and *California Motor*<sup>3</sup>—that embraced this seemingly simple principle: “Joint efforts to influence public officials do not violate the antitrust laws even though intended to

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1. *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961).
2. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).
3. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

eliminate competition.”<sup>4</sup> But this pristine principle was pockmarked with exceptions. Immunity did not apply when the efforts to influence public officials were a “sham,”<sup>5</sup> a concept stretched to include “forms of illegal and reprehensible practice,” even if they succeeded in influencing governmental action.<sup>6</sup> Nor did the immunity apply to petitioning that involved “commercial activity.”<sup>7</sup> And the Court’s dicta recognized a “conspiracy” exception, which denied immunity when a private actor conspired with the government to restrain trade.<sup>8</sup>

Perhaps embarrassed by its handiwork, the Court essentially ignored the issue for the sixteen years following *California Motor*, leaving the lower courts and litigants to struggle with the resulting doctrinal hodgepodge. The doctrine became increasingly unstable. The sham exception turned into a catchall to cover whatever forms of petitioning adjudicating courts deemed “improper.”<sup>9</sup> The commercial exception was sometimes applied and sometimes rejected in cases where either the petitioning or the desired governmental action was deemed to be “commercial,” a term that remained ill-defined.<sup>10</sup> Even more open-ended was the conspiracy exception, for a conspiracy of sorts could be alleged whenever petitioning was successful. And some lower courts recognized other vague exceptions for petitioning that influenced policy “implementation” rather than policy making,<sup>11</sup> and for when the activity was not “direct” petitioning but “preliminary” to it.<sup>12</sup>

The problem was more than a failure to set forth clear general rules for defining the scope of the immunity. The larger problem was that, as the exceptions were defined, adjudication consisted of pasting a conclusory label on the petitioning activity at issue. Implicit factors and policy judgments no doubt guided many courts in deciding whether a given activity was improper and a “sham,” and in deciding whether the

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4. *Pennington*, 381 U.S. at 670; see also *California Motor*, 404 U.S. at 510-11; *Noerr*, 365 U.S. at 136-38.

5. *Noerr*, 365 U.S. at 144.

6. *California Motor*, 404 U.S. at 511-13; see also *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965) (holding that antitrust liability could be imposed for a party’s actions in fraudulently obtaining and enforcing a patent).

7. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-08 (1962); see also *Noerr*, 365 U.S. at 137, 140-41 (distinguishing immune political activities from non-immune business activities).

8. *California Motor*, 404 U.S. at 513; *Pennington*, 381 U.S. at 671 & n.4.

9. See, e.g., Stephen Calkins, *Developments in Antitrust and the First Amendment: The Disaggregation of Noerr*, 57 ANTITRUST L.J. 327, 339 & n.63 (collecting sources).

10. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 206’, at 75-79 (Supp. 1991); Calkins, *supra* note 9, at 356-58; James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L.J. 65, 85-88 (1985); Lawrence A. Sullivan, *Developments in the Noerr Doctrine*, 56 ANTITRUST L.J. 361, 366-67 (1987).

11. See Earl W. Kintner & Joseph P. Bauer, *Antitrust Exemptions for Private Requests for Governmental Action: A Critical Analysis of the Noerr-Pennington Doctrine*, 17 U.C. DAVIS L. REV. 549, 563 n.56 (1984) (collecting cases).

12. *Id.* at 568-69 & nn.80-81 (collecting cases); see Calkins, *supra* note 9, at 345 n.92 (same).

commercial, conspiracy, and other exceptions applied. But these factors and policy judgments were not articulated. Consequently, the process of case-by-case adjudication did not redress the absence of general rules by producing precedents that could provide useful guidance. Instead, it produced doctrinal inconsistency,<sup>13</sup> prolonged uncertainty,<sup>14</sup> and ever-increasing litigation.<sup>15</sup>

Dissatisfied with this doctrinal muddle, the Supreme Court has in the last four years issued a new trilogy of cases—*Allied Tube*,<sup>16</sup> *Trial Lawyers*,<sup>17</sup> and *Omni*<sup>18</sup>—that casts aside the old trilogy's uneasy compromise between a broad immunity and its open-ended exceptions. This new trilogy drastically shrinks the sham and conspiracy exceptions. The sham exception, the Court has made clear, no longer includes improper petitioning activities if those activities are genuinely intended to influence the government.<sup>19</sup> And the conspiracy exception has been rejected, with the possible exception of cases where the government is acting as a market participant.<sup>20</sup>

At the same time, the new trilogy circumscribes the sweep of the affirmative immunity. It emphasizes that “the *Noerr* doctrine does not extend to ‘every concerted effort that is genuinely intended to influence governmental action.’”<sup>21</sup> As if to underscore the point, two of the new cases denied immunity to petitioning efforts that were not only genuinely intended to influence governmental action, but successful in doing so.<sup>22</sup> The scope of antitrust petitioning immunity now “depends . . . on the source, context, and nature of the anticompetitive restraint at issue.”<sup>23</sup>

The Court's new focus on the “source, context, and nature” of restraints has been roundly criticized for compounding instead of clarifying the doctrinal confusion.<sup>24</sup> And it cannot be denied that this new for-

13. See, e.g., Calkins, *supra* note 9, at 338-39; Sullivan, *supra* note 10, at 368.

14. See, e.g., Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 80-81 (1977); Kintner & Bauer, *supra* note 11, at 553.

15. To provide a rough sense of the magnitude and upward trend of litigation about antitrust petitioning immunity, I conducted a Westlaw search for federal opinions citing *Noerr*. This search uncovered a total of 718 cases decided between 1961-90. Only 75 of these opinions came down during 1961-70; 238 came down during 1971-80; and 405 came down during 1981-90.

16. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

17. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

18. *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344 (1991).

19. See *id.* at 1354-55; *Allied Tube*, 486 U.S. at 507 n.10.

20. *Omni*, 111 S. Ct. at 1351-53.

21. *Trial Lawyers*, 493 U.S. at 425 (quoting *Allied Tube*, 486 U.S. at 503).

22. See *id.* at 418 (denying immunity to petitioning efforts that succeeded in getting a city council to increase the prices paid to the defendants); *Allied Tube*, 486 U.S. at 502-03 (denying immunity to petitioning efforts that led to widespread adoption by state and local governments of an electrical code hurting defendants' competitors).

23. *Allied Tube*, 486 U.S. at 499; see also *Trial Lawyers*, 493 U.S. at 424-25 (denying immunity where the source of the challenged restraint was not public action).

24. See, e.g., *Allied Tube*, 486 U.S. at 513 (White, J., dissenting); AREEDA & HOVENKAMP,

mulation is not by itself terribly informative. Which sources, contexts, and natures provide immunity, and which do not? The new trilogy defines some of the relevant factors, but leaves others open.

What the new doctrinal framework does do, which the old doctrinal framework did not, is encourage courts to *articulate* the factors and policy judgments underlying their decisions. This might, in the long run, produce precedents that can provide greater doctrinal coherence. The new doctrinal framework also invites legal academics to see what factors and policy judgments we can identify in the cases to bring them into some predictable order.

The time has come, in short, to see whether we can make any more sense of antitrust petitioning immunity after the new trilogy than we could after the old one. I argue that we can under a functional process approach. Differences in the incentive structures underlying the decisionmaking processes that produce the restraints explain and justify why some restraints receive immunity and others do not. This argument builds on my prior article describing the process ideals underlying antitrust state action immunity.<sup>25</sup> I conclude that, as with state action immunity, petitioning immunity reflects the Court's implicit functional process views about how best to set the boundaries between the competitive and governmental processes.

A more precise statement of the conclusion would be this: under the Court's implicit process view, antitrust immunity does not apply—and the restraint at issue must be subjected to a competitive process regulated by antitrust ground rules—if the decisionmaker who imposed the restraint has an objective financial interest in the restraint's anticompetitive consequences, unless the activity producing the restraint neither involves market behavior nor is separable from otherwise valid input into the governmental process. Explaining the concrete meaning of this conclusion, and how it conforms to a coherent functional process position, will be the task of this Article.

Part I analyzes the Supreme Court's opinions and the doctrinal difficulties they produce in order to establish the need to formulate a policy foundation for the doctrine. Part II derives the basic functional process view that underlies the results in the cases, employs that view to resolve some doctrinal anomalies, and defends it against the interest group theory critique. Part III assesses the special issues posed by market restraints that coerce governmental action, and explains why the Court looks at objective incentives rather than subjective motives. Part IV then tackles the tricky issues posed by private action that both directly

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*supra* note 10, ¶ 206.2, at 89; Calkins, *supra* note 9, at 327, 337; Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905, 977-78 & n.264 (1990).

25. Einer R. Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667 (1991).

restrains trade and provides noncoercive input into the governmental process. Finally, Part V explores the limited circumstances in which petitioners can be liable for restraints imposed by governmental decisionmakers.

## I

### THE OPINIONS AND THEIR RESULTING DOCTRINAL DIFFICULTIES

#### A. *The Old Trilogy*

Antitrust petitioning immunity began with the famous case of *Eastern Railroad Presidents Conference v. Noerr Motor Freight*.<sup>26</sup> *Noerr* concerned a publicity campaign conducted by a group of railroads against truckers. The campaign had, and was intended to have, two main effects. First, it influenced government officials to enact or retain laws that made it hard for truckers to compete with the railroads.<sup>27</sup> Second, the campaign's adverse publicity directly impaired relations between truckers and their customers.<sup>28</sup>

Justice Black's opinion for the Court quickly concluded that the defendant railroads were immune from liability for the first effect,<sup>29</sup> which would seem to follow from antitrust's immunity for state action. The more interesting issue was whether the defendant should have immunity for the second direct effect. Without the aim to influence governmental action, a conspiracy to falsely disparage a competitor and hamper its customer relations would normally be subject to antitrust liability. But the Court decided that the defendants should be immune from liability for this effect because it was "incidental" to "political" activities genuinely intended to influence the government.<sup>30</sup>

Along the way, the *Noerr* Court made two things clear. First, it did not matter that the defendants were motivated by their financial interest in what law would prevail.<sup>31</sup> Second, it did not matter that the methods of political lobbying were unethical or deceptive.<sup>32</sup>

But the Court's opinion left other issues unresolved. Questions were raised by the Court's intimations that immunity might not apply if the activities used to influence the government involved not "political activity" but "business activity."<sup>33</sup> How precisely could one tell the differ-

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26. 365 U.S. 127 (1961).

27. *Id.* at 129-30.

28. *Id.* at 129, 133, 142.

29. *Id.* at 135-36.

30. *Id.* at 142-44.

31. *See id.* at 138-40.

32. *See id.* at 140-42.

33. *Id.* at 136-37, 140-41.

ence? Is there immunity for activity that is neither "political" nor "business" in nature? The opinion did not address those questions.

The case also raised questions about the scope of the immunity for direct effects incidental to genuine political petitioning. What does it take for these direct effects to be considered "incidental" to the petitioning? Is it enough that the effects flowed from efforts designed to influence the government? Or is the incidental test tantamount to a least restrictive alternative test, whereby the defendants are immune for direct injuries only if they have chosen the method of petitioning that imposes the least direct injury?

The Supreme Court next returned to the issue of antitrust petitioning immunity in *Continental Ore Co. v. Union Carbide & Carbon Corp.*<sup>34</sup> This case is usually left out of the *Noerr* trilogy,<sup>35</sup> no doubt because it contains only a short aside on the issue, but it nonetheless established an important precedent.

The defendant in *Continental Ore* was a producer of vanadium. The defendant's corporate subsidiary had been appointed an agent of the Canadian government and given "discretionary agency power to purchase and allocate to Canadian industries all vanadium products."<sup>36</sup> The defendant sought immunity under *Noerr* for its efforts to have its subsidiary use this governmental authority to exclude the defendant's competitors from selling vanadium on the Canadian market. The Supreme Court rejected this argument, concluding that the defendant's actions were "private commercial activity" outside the scope of *Noerr*.<sup>37</sup>

Unfortunately, this conclusion was unadorned with reasoning. Justice White's laconic opinion for the Court did not bother to explain what made the activities private commercial activity. The subsidiary influenced by the defendant was a governmental agent exercising governmental authority. And while the governmental authority did involve the purchase and resale of vanadium, this authority was essentially regulatory, designed to set a price ceiling during wartime and to allocate the metal in a non-market fashion in order to further strategic war aims. Why is this "commercial" rather than "political" or "regulatory"?

*United Mine Workers v. Pennington*,<sup>38</sup> the next case in the official trilogy, eliminated one possible answer to this question. *Pennington* involved, among other things, defendants' petitioning efforts to influence coal purchases by the Tennessee Valley Authority (TVA) to the detriment of the defendants' competitors. The Court concluded that such an

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34. 370 U.S. 690 (1962).

35. For sources including only *Noerr*, *Pennington*, and *California Motor* in the original trilogy, see, e.g., Milton Handler & Richard A. De Sevo, *The Noerr Doctrine and Its Sham Exception*, 6 CARDOZO L. REV. 1, 3-7 (1984); Hurwitz, *supra* note 10, at 78 & n.42.

36. *Continental Ore*, 370 U.S. at 703 n.11; see *id.* at 695, 702-04.

37. *Id.* at 707-08.

38. 381 U.S. 657 (1965).

effort to influence "public officials" was immune from antitrust liability.<sup>39</sup> Thus, whatever else suffices to constitute commercial activity within the commercial exception, efforts to influence the government's actions as a market participant do not.

The puzzling feature of *Pennington* is that it distinguished *Continental Ore* on the ground that there the influenced agent "was not a public official but the wholly owned subsidiary of an American corporation alleged to be a principal actor in the conspiracy."<sup>40</sup> But being a public official and being a subsidiary are not mutually exclusive. And the Court opinion, another Delphic effort by Justice White, does not explain how the Court squared its conclusion that *Continental Ore* did not involve a "public official" with the fact that the agent there exercised a governmental authority delegated to it by the Metals Controller of the Canadian government.<sup>41</sup>

In the end, then, *Pennington* provided no useful criteria for determining how to apply the commercial exception. Moreover, by stressing that the influenced public official in *Pennington* was not alleged to be a "co-conspirator,"<sup>42</sup> the opinion spawned what would become a troublesome and ill-defined conspiracy exception.

The next relevant case is, like *Continental Ore*, not considered part of the *Noerr* trilogy, no doubt because it does not even mention *Noerr*. Nonetheless, in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*<sup>43</sup> the Court established the important principle that obtaining administrative and judicial action through fraudulent petitioning could sometimes result in antitrust liability.

The defendant in *Walker Process* allegedly obtained a patent by denying knowledge of anyone else using the invention when in fact the defendant knew the plaintiff had been using it.<sup>44</sup> The plaintiff sued under the Sherman Act, alleging that the existence and enforcement of the patent had deprived the plaintiff of business it would have otherwise enjoyed.

The Court held that, if true, these allegations would establish a Sherman Act violation. An implicit holding was thus that *Noerr* immunity did not apply even though the defendant's actions, fraudulent though they may have been, were definitely intended to secure governmental action. Indeed, those actions succeeded in obtaining at least administrative action. But because the Court never directly addressed *Noerr*, the decision left unclear why *Noerr* immunity did not apply. Did

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39. *Id.* at 670.

40. *Id.* at 671 n.4.

41. *See Continental Ore*, 370 U.S. at 702 n.11.

42. *Pennington*, 381 U.S. at 671 & n.4.

43. 382 U.S. 172 (1965).

44. *Id.* at 174.

the use of fraud make the efforts to procure governmental action a "sham"? Was immunity denied because the petitioning activity did not seek "political" action but rather sought administrative and judicial adjudication of a factual issue?

These questions provide the backdrop for the final case in the *Noerr* trilogy: *California Motor Transport Co. v. Trucking Unlimited*.<sup>45</sup> In *California Motor*, the defendants allegedly conspired to institute legal proceedings to prevent their competitors from acquiring operating rights. The defendants' strategy was allegedly to harass their competitors by instituting these proceedings "'with or without probable cause, and regardless of the merits of the cases.'" <sup>46</sup> This did not mean that all, or even most, of the proceedings were baseless. On the contrary, the defendants had won twenty-one out of forty cases.<sup>47</sup> Rather, the crux of the complaint was that the defendants were instigating litigation automatically, without regard to whether the litigation had merit or not, in order to impose costs and delays on their competitors.

The *California Motor* Court first answered one of the questions raised in *Walker Process* by making clear that *Noerr* immunity applied not only to efforts to influence legislative and executive action, but also to efforts to influence administrative and judicial action.<sup>48</sup> *Noerr* immunity was, in other words, not an immunity limited to "political activities," but rather a general immunity for efforts to petition any of the branches of government.

But the *California Motor* Court coupled this broadening of the immunity with a broadening of the sham exception. Given that the defendants' success rate was over fifty percent, it could not be denied that the suits were genuine efforts to influence adjudicators.<sup>49</sup> And a sham exception truly limited to situations where no genuine effort was made to influence the government could not explain the decision in *Walker Process*. Justice Douglas' breezy opinion for the Court superficially reconciled this tension by asserting that the sham exception encompassed "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes."<sup>50</sup> As examples, the opinion cited lying to an adjudicator or patent officer, conspiring with a licensing authority, and bribing a purchasing agent.<sup>51</sup> More specifically, the Court

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45. 404 U.S. 508 (1972).

46. *Id.* at 512.

47. *Trucking Unlimited v. California Motor Transp. Co.*, 1967 Trade Cas. (CCH) ¶ 72,298, at 84,744 (N.D. Cal.), *rev'd on other grounds*, 432 F.2d 755 (9th Cir. 1970), *aff'd on other grounds*, 404 U.S. 508 (1972).

48. *See California Motor*, 404 U.S. at 510.

49. *Cf. Noerr*, 365 U.S. at 144 (holding the sham limitation inapplicable because the challenged "effort was not only genuine but also highly successful").

50. *California Motor*, 404 U.S. at 513.

51. *Id.* at 512-13.



concluded that the activity at issue—a pattern of making repetitive claims regardless of the merits in order to impose costs on the other litigant—constituted a sham.<sup>52</sup>

While one can sympathize with the Court's desire to deny antitrust immunity to such abusive practices, its use of the sham exception to accomplish the result was quite unfortunate. Having deprived the word "sham" of its natural meaning and of the meaning assigned to it by *Noerr*, it became nothing more than a catchall for whatever activities courts deemed improper.

To be sure, the Court made clear that political activities needed a wider berth of immunity, and that activities deemed a sham in the adjudicative process would not necessarily be deemed a sham in the political process.<sup>53</sup> But other than establishing that antitrust petitioning immunity varied with the context of the petitioning activity, this clarified very little. And it hardly provided the sort of clear guidance to which First Amendment activities are normally entitled because of concern that legal ambiguity will produce a chilling effect.

### B. *The Modern Trilogy*

Having left the lower courts to grapple unsuccessfully with this doctrinal morass for sixteen years, the Court returned to the issue four years ago in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*<sup>54</sup> In that case, steel producers packed the annual meeting of a private standard-setting association with employees and spouses in order to secure a majority vote for a version of the association's electrical code that excluded plastic conduit manufactured by competitors. The question was whether antitrust petitioning immunity should apply because the association's electrical code was routinely adopted into law by state and local governments.

The Court could have, as Justice White's dissent did, simply applied the general immunity with open-ended exceptions approach, and made a conclusory decision that the conduct either was (or was not) a "sham."<sup>55</sup> Instead, in an opinion by Justice Brennan, the Court abandoned that approach, explicitly rejecting the proposition that the sham exception covered genuine efforts to influence the government through "improper means" or "flagrant abuse."<sup>56</sup> As the Court noted, this loose use of the word "sham" rendered it no more than a contentless label, which obscured the factors underlying court decisions.<sup>57</sup> Indeed, a telling illus-

52. *See id.*; *see also* *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (stating that "repetitive lawsuits carrying the hallmark of insubstantial claims" fall within the sham exception).

53. *California Motor*, 404 U.S. at 512.

54. 486 U.S. 492 (1988).

55. *See id.* at 516 (White, J., dissenting).

56. 486 U.S. at 508 n.10.

57. *See id.* Claims of a "sham" had become so devoid of meaning that courts were holding

tration of the problem was ironically provided by White's dissent and the leading appellate proponent of this open-ended interpretation of the sham exception: each had reached directly contrary conclusions about the conduct in *Allied Tube*—one concluding it was a sham, and the other concluding it was not—without ever identifying the factors that led to their different conclusions.<sup>58</sup>

From now on, the *Allied Tube* Court stressed, the sham exception would *only* cover "activity that was not genuinely intended to influence governmental action."<sup>59</sup> Unfortunately, with the sham exception properly limited, the Court had no ready doctrinal tools for grappling with the case at hand.

The Court could not deny that the effort to influence government action was "genuine," as the association's code was widely adopted into legislation by state and local governments.<sup>60</sup> Nor could it claim the direct effects on the Code were not "incidental" to the petitioning efforts. Influencing the association's code was probably the "most effective means" of influencing legislation on the topic, and the effects of the "widespread" legislative adoption likely dwarfed the direct effects of the association code on the marketplace.<sup>61</sup>

At the same time, the case at hand involved firms exercising decisionmaking authority to formulate an association product standard that would in effect bind the association's members in an agreement to boycott a product of the firms' competitors. It was inconceivable that such a horizontal agreement about market behavior could be immunized from antitrust liability solely because the government might be persuaded by the example to adopt the same market restraint into law itself. If antitrust petitioning immunity applied to concerted market behavior that genuinely influenced the government, then a variety of bizarre results would follow: "[C]ompetitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized . . . ."<sup>62</sup>

The Court was thus faced with the difficult task of erecting a new doctrinal edifice to replace the shaky one it had razed. It attempted to do so by declaring that antitrust petitioning immunity depended on the

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that alleging a sham failed to provide a defendant with adequate notice of a plaintiff's claim. See AREEDA & HOVENKAMP, *supra* note 10, ¶ 203.4b, at 55-56 (collecting cases).

58. Compare *Sessions Tank Liners v. Joor Mfg.*, 827 F.2d 458, 465 (9th Cir. 1987) (sham), *vacated*, 487 U.S. 1213 (1988), with *Allied Tube*, 486 U.S. at 516 (White, J. dissenting) (not a sham).

59. *Allied Tube*, 486 U.S. at 508 n.10; see also *id.* at 500 n.4. This position was reaffirmed in *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344, 1354 (1991).

60. See *Allied Tube*, 486 U.S. at 502.

61. *Id.* at 502-03.

62. *Id.* at 503 (citations omitted).

"source, context, and nature" of the anticompetitive restraint sought to be remedied.<sup>63</sup>

The rule *Allied Tube* laid down was relatively straightforward when the source of the restraint was "valid governmental action."<sup>64</sup> In such a case, the immunity of those urging the governmental action is "absolute."<sup>65</sup> Thus, the defendants in *Allied Tube* had no liability for the market injuries resulting from the governmental adoption of the association's code.<sup>66</sup>

Complexities arose, however, where the direct source of the restraint was "private action," in the sense that the restraint would occur whether or not the government took action. Antitrust petitioning immunity applied to such private restraints only if the restraint was (1) "incidental" to a (2) "genuine" and (3) "valid" effort to influence the government.<sup>67</sup> In *Allied Tube*, as noted above, the "incidental" and "genuine" prongs of this three-part test were amply satisfied. The determinative question was whether the effort was "valid." Such determinations of validity, the Court stated, depend on the context and nature of the activity.<sup>68</sup>

In the case at hand, the Court concluded, the context and nature of defendants' conduct made it "commercial activity" that did not enjoy antitrust petitioning immunity.<sup>69</sup> It based this conclusion on two factors: (1) the conduct occurred in the context of a private standard-setting association where the normal rules of legality are provided by antitrust law itself; and (2) the nature of the conduct was exercising decisionmaking authority over market behavior, namely agreeing not to trade in plastic conduit.<sup>70</sup>

This was certainly an improvement on the loose *Continental Ore* commercial exception; at least some factors sufficient to lose immunity had been spelled out. But unfortunately, this approach did not answer the question that the dissent and others wanted answered: what *other* contexts and natures would also be denied immunity? Because the Court did not list the contexts and natures that did and did not merit immunity, its approach left the scope of petitioning immunity ill-defined. Worse, because the Court did not articulate *why* the nature and context of the conduct in *Allied Tube* meant it deserved no immunity, it provided no underlying policy to help guide the resolution of doctrinal ambiguities and gaps.

The next case in the new trilogy was *FTC v. Superior Court Trial*

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63. *Id.* at 499.

64. *Id.*

65. *Id.*

66. *Id.* at 498 & n.2, 500.

67. *Id.* at 499-500 & n.4.

68. *Id.* at 499-500.

69. *Id.* at 505-07 & n.10.

70. *Id.* at 506-07.

*Lawyers Ass'n.*<sup>71</sup> In this case, an association of trial lawyers had collectively agreed not to represent indigent criminal defendants until the District of Columbia increased the fees it paid the lawyers for such representation. In response the city agreed to pay the fees the boycotters requested.<sup>72</sup> The trial lawyers claimed antitrust petitioning immunity for their boycott on the ground that it was aimed at securing governmental action.

The Supreme Court denied immunity. Justice Stevens' opinion for the Court offered the following explanation:

[I]n the *Noerr* case the alleged restraint of trade was the intended *consequence* of public action; in this case the boycott was the *means* by which [the trial lawyers] sought to obtain favorable legislation. The restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted. In *Noerr*, the desired legislation would have created the restraint on the truckers' competition; in this case the emergency legislative response to the boycott put an end to the restraint.<sup>73</sup>

This would be more illuminating but for the fact that the Court's characterization of *Noerr* was inaccurate. As we saw in Section I.A, *Noerr* did not involve only restraints caused by public action. The publicity campaign had also restrained trade directly by impairing relations between truckers and their customers.<sup>74</sup> This restraint was a consequence of private action rather than public action in precisely the sense the *Trial Lawyers* Court meant: it would have had the same anticompetitive effects whether or not the government had acted.<sup>75</sup> Thus, the means/consequence distinction did not explain the different holdings in *Noerr* and *Trial Lawyers*.

The only other reasoning Justice Stevens offered for the Court's conclusion was *Allied Tube's* dicta that horizontal price-fixing, boycotts, or output restrictions could not be immunized even if genuinely intended to influence governmental action.<sup>76</sup> This provided no general delineation of the scope of antitrust petitioning immunity. But it did make two important contributions to the doctrine. First, it elevated this dicta to holding. Second, it established that collective decisionmaking over market behavior (the second *Allied Tube* factor) would, at least if used as the *means* to influence governmental action, suffice to deprive the activity of immunity

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71. 493 U.S. 411 (1990).

72. *Id.* at 418.

73. *Id.* at 424-25.

74. *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 129, 133, 142 (1961).

75. *Id.* at 133 (stating that the campaign "injured the truckers in ways unrelated to the passage or enforcement of law").

76. *Trial Lawyers*, 493 U.S. at 425 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 (1988)).

even if the activity occurred in a public, highly political context.<sup>77</sup>

The last case in the new trilogy is *City of Columbia v. Omni Outdoor Advertising*.<sup>78</sup> The defendant, the jury found, had conspired with municipal officials to obtain the enactment of zoning ordinances that restricted billboard construction by the defendant's competitor.

The Court decided that, with the possible exception of a case where the government acted as a market participant, no conspiracy exception should be recognized to antitrust's immunity for either state action or petitioning activity.<sup>79</sup> A general conspiracy exception, the Court reasoned, would swallow the immunity because any governmental action could be said to result from an agreement between government officials and those who petitioned for the action.<sup>80</sup>

This helped clarify the scope of the conspiracy exception. Unfortunately, Justice Scalia's opinion for the Court muddled the waters when it came to discussing the plaintiff's argument that the sham exception should apply. The opinion stated that the sham exception "encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon."<sup>81</sup> But, like the means/consequence distinction put forth in *Trial Lawyers*, this reasoning is unsatisfactory: it does not explain why immunity applied in *Noerr* when the process of petitioning the government was used to inflict direct injuries.

Justice Scalia's opinion tried to avoid this problem through two maneuvers. The first was to imply that the defendant's *motives* were determinative. The opinion stated, "Although [the defendant] indisputably set out to disrupt [the plaintiff's] business relationships, it sought to do so not through the very process of lobbying . . . but rather through the ultimate *product* of that lobbying and consideration . . . ."<sup>82</sup>

But these motives are not mutually exclusive. In *Noerr* and *Allied Tube*, the defendants were acknowledged to have both the motive of securing governmental action and the motive of directly harming competitors through the acts of petitioning.<sup>83</sup> One suspects that had the jury been asked to make findings on the issue, the *Omni* defendants might also have been found to have such mixed motives.

In any event, most petitioners are unlikely to have the purity of

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77. The Court also established that it would suffice if the collective market behavior was a *per se* antitrust violation: possession of market power was not necessary to lose antitrust immunity. *Id.* at 428-36.

78. 111 S. Ct. 1344 (1991).

79. *Id.* at 1351, 1353, 1355-56.

80. *Id.* at 1351 (citing *AREEDA & HOVENKAMP*, *supra* note 10, ¶ 203.3b, at 34 & n.1 (Supp. 1989); Elhauge, *supra* note 25, at 704-05).

81. *Id.* at 1354.

82. *Id.*

83. *Allied Tube*, 486 U.S. at 502-03; *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 142, 144 (1961).

motive attributed by Justice Scalia to the defendant in *Omni*. Petitioners seeking governmental action to stifle their competitors are (like the petitioners in *Noerr* and *Allied Tube*) likely to take pleasure in any expense, delay, and interference their activity directly inflicts on competitors. The *Omni* analysis does nothing to help guide courts in these mixed motive cases. As *Noerr* and *Allied Tube* demonstrate, immunity or non-immunity remain possible outcomes.

The second maneuver was to suggest that the exception for injuring competitors through the process of petitioning applied only when the defendant had "no expectation of achieving" the desired governmental result.<sup>84</sup> This, at least after *Allied Tube*, correctly describes the modern sham exception. But the cases that have denied immunity where the petitioning process directly injures competition—*California Motor*, *Walker Process*, *Allied Tube*, and *Trial Lawyers*—do not fit within this definition of a sham.

Justice Scalia mistakenly thought that at least *California Motor* could be squeezed into the modern sham exception. His *Omni* opinion noted that, despite language in *California Motor* about improper petitioning activities being shams, the actual case involved allegations that the defendants litigated "'with or without probable cause, and regardless of the merits of the cases.'"<sup>85</sup> Justice Scalia concluded from this that the defendants in *California Motor* had made no genuine effort to influence the courts, and that any language about an immunity exception for genuine but improper efforts to influence the government could be ignored as dicta.<sup>86</sup>

However, the factual premise for Scalia's analysis—that the defendants in *California Motor* had no expectation of obtaining favorable governmental action—is false. As previously noted, the defendants had in fact prevailed in twenty-one out of forty cases.<sup>87</sup> Not only did their litigations have a genuine chance of success, but they were batting over .500! This explains why Justice Douglas felt obliged in his *California Motor* opinion to assess the antitrust immunity for various genuine but invalid methods of petitioning.

*California Motor* denied immunity not because the petitioning there was not genuinely intended to secure governmental action, but because the petitioning was, under traditional adjudicative norms, an abuse of process: that is, litigation brought in order to impose costs and delays. Whether such a motive should be sufficient to lose immunity even if the defendant also has a motive of winning the adjudication, or whether the

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84. *Omni*, 111 S. Ct. at 1354-55.

85. *Id.* at 1355 (quoting *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 512 (1972)).

86. *See id.*

87. *See supra* text accompanying note 47.

“predominant” motive should govern, are complicated questions that I will discuss below.<sup>88</sup> But they are questions that *Omni*’s facile characterization does nothing to help answer.

One might be tempted to read *Omni* as overruling the holding in *California Motor*<sup>89</sup> to establish a new rule that genuine efforts to secure governmental action are always immune,<sup>90</sup> with a possible exception for cases where the petitioner seeks to influence the government’s actions as a market participant.<sup>91</sup> But such a sweeping expansion of antitrust petitioning immunity would have to overrule more than *California Motor*: it would also have to overrule *Walker Process*, *Allied Tube*, and probably *Trial Lawyers*.<sup>92</sup> In all of those cases, the defendants received no antitrust immunity even though they genuinely desired, and successfully obtained, favorable governmental action.

Unfortunately, Justice Scalia’s opinion simply ignored these contrary holdings. Surely the Court did not intend to overrule such an extensive line of cases without discussing the matter, especially since Justice Scalia himself had joined the Court opinions in *Allied Tube* and *Trial Lawyers*.<sup>93</sup> But the *Omni* opinion leaves unexplained what exactly the grounds for distinction were.

### C. The Remaining Doctrinal Confusion

The new trilogy of cases has helped settle some issues, but antitrust petitioning immunity remains a doctrine without any clear moorings. It is more certain than ever that *not all* activities genuinely aimed at influencing the government receive immunity for their direct effects. *Walker*

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88. See *infra* text accompanying notes 256-76.

89. The *California Motor* Court’s explanation for its holding, that improper petitioning activity is a sham, was overruled in *Allied Tube*. See *supra* text accompanying note 56. The holding itself, however, remained intact.

90. The opinion contains some loose language to support such an interpretation. It makes sweeping statements of immunity, e.g., *Omni*, 111 S. Ct. at 1354 (“[F]ederal antitrust laws . . . do not regulate the conduct of private individuals in seeking anticompetitive action from the government.”), limited only by the statement that there is a sham use-of-process exception, *id.* at 1354-55.

91. In rejecting the conspiracy exception to state action immunity, the Court explicitly left open the possibility that the immunity might not apply when the government acted as a market participant. *Id.* at 1351, 1353. The Court did not explicitly leave open this market participant exception when it rejected the conspiracy exception to antitrust petitioning immunity. See *id.* at 1355-56. But since the explanation for the latter rejection simply incorporated the reasoning used for the former, *id.* at 1355, presumably it also incorporated the limits of that reasoning and thus included the possibility of an exception where a petitioner conspires with a government acting as a market participant.

92. The holding in *Trial Lawyers* might be explained on the ground that the city government there was acting as a market participant, see *supra* note 91, in purchasing legal services. This distinction is only significant, however, if the government conspires with the petitioner. In *Trial Lawyers* the city was coerced by the defendants, not in conspiracy with them.

93. Chief Justice Rehnquist and Justice Kennedy also joined all three Court opinions and Justice Blackmun joined both *Allied Tube* and *Omni*, as well as those portions of *Trial Lawyers* that interpreted *Noerr*, *Allied Tube*, and *Claiborne Hardware*.

*Process*, *California Motor*, *Allied Tube*, and *Trial Lawyers* all denied immunity to activity that not only was genuinely intended to influence the government, but succeeded in doing so. But which such activities receive immunity and which do not? After decades of decisions, no clear rule has emerged.

The open-ended use of the sham and conspiracy exceptions to decide this question has correctly been rejected. But while the source-context-nature test focuses attention on some relevant factors, it cannot provide doctrinal certainty as long as the Court is unable to make any definitive statement about which sources, contexts, and natures lead to immunity and which do not. The means-consequence and process-outcome tests also identify some relevant factors, but fail to articulate other factors that are necessary to explain the Court's case law.

The opinions also leave mixed messages about various more particular doctrinal questions. For example, should it matter whether the government is acting as a market participant? *Omni* and *Continental Ore* suggest the answer may be "Yes." But *Pennington* granted immunity despite governmental participation in the market. And if market participation is not the measure of "commerciality," what is?

Where fraudulent means are used to obtain administrative or judicial action, should the petitioner be immune for the effects? Dicta in *Allied Tube* suggest the petitioner is immune for the effects of the governmental action, but not for any direct effects of such petitioning. Dicta in *Omni* suggest the petitioner is immune for both effects. Dicta in *California Motor* suggest the petitioner is not immune for either. And the only case to actually involve such a situation, *Walker Process*, held the petitioner liable for both effects, but did not discuss the issue.

When is a restraint incidental to petitioning efforts? This issue has never been explored by the Court. Perhaps the restraint must simply be connected to the petitioning effort. Perhaps it must be necessary for the petitioning. Or maybe the restraint's effects must be small compared to the political effect. The opinions do not resolve the question.

Finally, what about mixed motive cases, where the process of petitioning is used both in hopes of obtaining governmental action and in order to impose expense and delay on competitors? Does any motive to impose costs and delay suffice to lose immunity? Or must the motive be significant or predominant? And how does one resolve either question?

This degree of uncertainty would be troubling for any doctrine. But it is deeply disturbing for a doctrine that purports to define the scope of the freedom to petition the government.



## II

## THE BASIC STRUCTURE OF ANTITRUST PROCESS

The doctrinal confusion that besets antitrust petitioning immunity has a source. It stems not from a lack of judicial skill in resolving the doctrinal gaps and ambiguities, but from the lack of any coherent explanation of the policies defining the scope of antitrust petitioning immunity. Without some basic policy framework to guide resolution of doctrinal questions, it was entirely predictable that the doctrine would seem chaotic.

The Court has so far failed to provide this policy framework. The *Noerr* Court did, to be sure, articulate the affirmative reasons for immunity: assuring governments the information necessary to govern, and assuring citizens the ability to communicate their views to the government.<sup>94</sup> But the Court has never articulated a coherent policy justification for the *limitations* on this immunity.

Academics have not done much better. They typically frame issues of antitrust petitioning immunity as accommodating a tension between First Amendment freedoms and federal competition policy.<sup>95</sup> This conceptual framework obscures more than it illuminates. In cases of true conflict, fundamental constitutional principles require that any tension be resolved in favor of the First Amendment. In cases beyond the scope of constitutional protection, any tension must be resolved in favor of the governing federal statute.<sup>96</sup> In any event, explaining that issues must be adjudicated by accommodating a “tension” does nothing to structure doctrine, guide courts in adjudicating cases, or notify parties about how to conform their activities to the law.

To provide a more useful policy framework, I take an objective functional process approach. The aim is to chart, in line with functional criteria, the types of decisionmaking processes producing restraints that do and do not receive immunity. The approach is process-oriented in

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94. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 137-39 (1961).

95. See, e.g., Calkins, *supra* note 9, at 328; Hurwitz, *supra* note 10, at 66, 119; Ronald E. Kennedy, *Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests*, 55 S. CAL. L. REV. 983, 986, 1009, 1028-29 (1982); Kintner & Bauer, *supra* note 11, at 552.

96. Where the applicability of neither the Constitution nor a federal statute is clear, one canon of statutory construction counsels construing the statute to avoid constitutional questions. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 469 (1989). But this canon has been persuasively critiqued by others as an unjustified extension of the scope of constitutional limitations. See HENRY J. FRIENDLY, *BENCHMARKS* 210-12 (1967); RICHARD A. POSNER, *THE FEDERAL COURTS* 284-85 (1985). If the best, though not absolutely mandated, reading of a statute raises constitutional questions but ultimately *is* constitutional, construing the statute to avoid those questions will, without justification, deny the implementation of our best understanding of legislative policy. More persuasive is the canon that requires construing statutes to avoid only actual constitutional invalidity.

that (like, I will show, the case law) it focuses on the nature and incentive structures of the decisionmaking processes producing the restraint and not on the substance of those restraints. The approach is objective in the sense that it focuses on *objective* indicia about the incentives of the participants in the decisionmaking process. It does not, as the doctrine does not, focus on the purity of the participants' *subjective* motivations. From this process perspective, as we will see, much of the apparent tension disappears, and the more narrow conflict between the competitive and political processes can better be isolated and resolved.

Before beginning, a few words about nomenclature are appropriate. I describe the doctrine being analyzed simply as "antitrust petitioning immunity." I do not call it the *Noerr* doctrine or the *Noerr-Pennington* doctrine, because those designations misleadingly focus attention on cases that offer minimal guidance for the more complex issues now facing the courts and that have, to a large extent, been transcended by the subsequent Supreme Court case law. Moreover, I use the term "antitrust immunity" quite generally to signify when the ordinary standards of antitrust review, which impose liability unless the procompetitive effects outweigh the anticompetitive effects,<sup>97</sup> are inoperative. The standards may be inoperative for reasons inside or outside of antitrust, and inside or outside antitrust's rule of reason.<sup>98</sup>

I thus intentionally do not specify whether the doctrine is an "exemption." Nor do I specify whether it is an interpretation of the antitrust statutes or mandated by the First Amendment. Much ink has been spilt debating these questions,<sup>99</sup> and the Supreme Court's ambiguous statements on the issue have provided plenty of fodder for all sides in the debate. It is more fruitful, however, to focus not on the ambiguous dicta but on what practical import the answers have.

Here, the main implication drawn is that courts should narrow the

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97. See, e.g., *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688-96 (1978).

98. For example, the Supreme Court, while denying immunity under the state action doctrine to municipal action unauthorized by the State, see *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), has suggested that special liability rules might apply to municipal action, see *id.* at 56 n.20. If such special liability rules were developed to preclude municipal liability for any restraints that had no effect outside municipal boundaries, then, in the sense I use the term, an "immunity" would apply to municipal restraints lacking extraterritorial effects.

99. For the argument that antitrust petitioning immunity is based on the First Amendment, see, e.g., Fischel, *supra* note 14, at 81-84, 94-104; Lawrence D. Bradley, Note, *Noerr-Pennington Immunity from Antitrust Liability Under Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.: Replacing the Sham Exception with a Constitutional Analysis*, 69 CORNELL L. REV. 1305 (1984). For the argument that it is simply a matter of statutory interpretation, see, e.g., Handler & De Sevo, *supra* note 35, at 4-5; Robert A. Zauzmer, Note, *The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases*, 36 STAN. L. REV. 1243, 1251-53 (1984). For courts calling it an exemption to the Sherman Act, see Handler & De Sevo, *supra* note 35, at 5 n.16 (collecting cases).

doctrine whether it is an exemption<sup>100</sup> or co-extensive with the First Amendment.<sup>101</sup> This is because exemptions are, by antitrust tradition, construed narrowly,<sup>102</sup> and because the First Amendment provides limited protection against content-neutral regulations unless they unduly burden speech without leaving open alternative avenues of expression.<sup>103</sup> These implications suggest answers, on a descriptive level, to the debated questions because there is plainly no operative tradition of construing antitrust petitioning immunity narrowly and the immunity in fact does extend beyond the limits of First Amendment protection.<sup>104</sup>

These implications also suggest why the debated questions prove unhelpful on a normative level. Whether, as a matter of policy, the doctrine should be deemed an exemption depends on whether one believes it should be narrowly construed, and whether it should be deemed solely a First Amendment doctrine depends on whether one believes it should extend beyond the limits of the First Amendment. Nothing is gained by addressing the debated questions in their abstract sense rather than proceeding directly to the substantive issues, and much may be lost if doctrinal issues are mishandled because attention from the substantive issues is diverted. It is to those substantive issues about decisionmaking processes that I now turn.

#### A. *The Core Elements: Defining Private and Public Decisionmaking*

A framework for analyzing the complex issues of antitrust petitioning immunity from a process perspective should begin with certain core elements: namely, decisionmaking processes that clearly are or are not within the scope of antitrust. I begin with the sort of decisionmaking process that produces the restraints ordinarily adjudicated in antitrust cases: restraints set by private businesses without any governmental involvement in their decision. Two businesses, for example, agree to boy-

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100. See, e.g., Calkins, *supra* note 9, at 331-32.

101. See, e.g., Fischel, *supra* note 14, at 94-104, 122. Though beyond the scope of this Article, it should be noted that two other implications might follow if the doctrine were based in the First Amendment. First, such a basis might make the doctrine applicable to non-antitrust restrictions on petitioning activity. See Calkins, *supra* note 9, at 330-31 (collecting sources). See generally Zauzmer, *supra* note 99. Second, a First Amendment basis might render *Noerr* inapplicable to efforts to petition foreign governments. See Fischel, *supra* note 14, at 120-21; Kintner & Bauer, *supra* note 11, at 564-65, nn.63-65 (collecting cases and commentary). See generally Douglas M. Ely, Note, *The Noerr-Pennington Doctrine and the Petitioning of Foreign Governments*, 84 COLUM. L. REV. 1343 (1984).

102. E.g., *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982).

103. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 789-94 (2d ed. 1988). The First Amendment would also not protect deliberately deceptive petitioning. See Calkins, *supra* note 9, at 349-52.

104. See Handler & De Sevo, *supra* note 35, at 4 n.14; see also *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344, 1353, 1356 (1991) (making clear that antitrust immunity applied even if the activities were illegal under other statutes and laws that would pass constitutional muster).

cott another or to fix prices. Such a "private" decisionmaking process represents a classic case of non-immunity. There are questions about what the content of antitrust review should be in such cases, but no controversy about whether antitrust courts can review such restraints for substantive consistency with antitrust standards.<sup>105</sup>

At the other extreme is a restraint on competition set by the state. The state legislature, for example, might fix prices by making it illegal to sell milk below a minimum price or restrict entry by making it illegal to sell liquor without a license. Restraints produced by such a "public" decisionmaking process are immune from antitrust review under antitrust's state action doctrine.<sup>106</sup> This is true even if the restraints are identical in substance to restraints that routinely receive antitrust scrutiny when the product of a private decisionmaking process.<sup>107</sup>

Of course, not all cases are as clear as our paradigmatic cases. In the ambiguous cases, the key question is how one determines whether the restraint resulted from public or private action. Like other doctrines relying on public/private distinctions,<sup>108</sup> the question has proved difficult to resolve by any purely formal criteria.<sup>109</sup> But these formal difficulties do not mean, to use John Wiley's evocative phrase, "that no difference exists between . . . Congress and 535 strangers waiting for the bus."<sup>110</sup> Rather, we must identify the functional factors that, in each area of law, justify (and thus define) the distinction.

As I have argued elsewhere, the functional factors defining the scope of antitrust state action immunity conform to functional differences between different decisionmaking processes.<sup>111</sup> Although it has not always made its reasoning clear, the Court has denied state action immunity (even if formal indicia of public action seem present) whenever a financially interested decisionmaker controls the terms of the imposed restraint. Conversely, the Court has found "state action," and thus conferred immunity, whenever a financially disinterested and politically

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105. Technically, the scope of federal antitrust law is also limited by the requirement that the restraint affect interstate commerce. But because the interstate commerce requirement is so weak, as a practical matter it excludes very few restraints. See *Summit Health, Ltd. v. Pinhas*, 111 S. Ct. 1842 (1991); AREEDA & HOVENKAMP, *supra* note 10, ¶ 232.1a, at 263-65; 1 PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* ¶ 207, at 57 (1978). I will thus ignore the interstate commerce requirement, using the word "restraint" to refer to those restraints that have a sufficient impact on interstate commerce to provide federal jurisdiction.

106. See, e.g., *Hoover v. Ronwin*, 466 U.S. 558, 567-69 (1984).

107. See *Fisher v. City of Berkeley*, 475 U.S. 260, 266-67 (1986) (immunizing government rent control ordinance while noting that immunity would not apply to a private agreement to limit rents).

108. See generally Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1302 n.21 (1982) (collecting sources); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1426 (1982) (same).

109. See Elhauge, *supra* note 25, at 672-82.

110. John S. Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 773 (1986).

111. Elhauge, *supra* note 25, at 682-96.

accountable<sup>112</sup> actor has made a substantive decision in favor of the terms of the challenged restraint before it was imposed on the market.<sup>113</sup> "Private decisionmaking" is thus merely a shorthand for financially interested decisionmaking, and "public decisionmaking" is a shorthand for decisionmaking that is financially disinterested and politically accountable.<sup>114</sup>

This distinction between state and private action is process-oriented because it turns on objective indicia about the incentives of the decisionmakers. It does not turn, as noted above, on the substance of the restraint. Nor does it turn on subjective motives. Bad motives will not deprive disinterested accountable decisionmakers of their antitrust immunity.<sup>115</sup> Good motives will not save financially interested decisionmakers from antitrust review.<sup>116</sup>

One may begin to make sense of this antitrust definition of state action by asking why society allows financially interested producers the authority (enforced by state protection of property rights) to make important resource allocation decisions for society. A major reason is that competitive markets provide a mechanism for harnessing that financial interest in the public interest because the process of competition causes producers to provide goods at the lowest cost to those who value

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112. An actor is politically accountable in the special sense I mean if his or her authority can be traced to an election or some chain of appointment starting with elected officials. The accountability can be retrogressive rather than ongoing (it embraces judges with life tenure who were initially appointed by elected officials) and derivative rather than direct (it embraces officials appointed by officials appointed by elected officials). *See id.* at 671 n.10.

113. Supreme Court cases subsequent to my article have continued to hew to the distinction I there described. *See* *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992) (holding that no state action immunity applied where the disinterested state regulators made no substantive decision in favor of the challenged restraint on prices); *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344 (1991) (holding that state action immunity applied where the restraint was a governmental restriction on billboards in which the government had no financial interest).

114. This abstracts from two related issues. The first is whether antitrust review applies to restraints imposed by financially disinterested but politically unaccountable actors. Such restraints present certain process problems, but such problems should probably not be policed under antitrust standards. *See* Elhauge, *supra* note 25, at 738-46. In any event, the applicability of antitrust to disinterested "private" restraints is not yet resolved. I shall have more to say about this issue below. *See infra* Section III.B.

Second, political accountability may itself create a financial interest when the restraint imposes anticompetitive effects outside the relevant jurisdiction. A state or city may restrain trade to exploit outsiders. With certain doctrinal complications, the review applicable to such restraints is broadly consistent with providing judicial review of financially interested restraints. *See* Elhauge, *supra* note 25, at 729-38. The dormant Commerce Clause provides judicial review of extraterritorial restraints by states, and the municipal action doctrine provides antitrust review of extraterritorial restraints by municipalities. But the municipal action doctrine is not yet settled. Most importantly, it is not yet clear whether special liability rules will effectively immunize municipalities imposing restraints without extraterritorial effect. *See id.* at 732-38; *see also supra* note 98 (defining such special liability rules as an antitrust "immunity" because they except the restraint from ordinary antitrust standards).

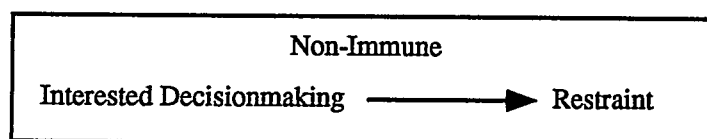
115. *See Omni*, 111 S. Ct. at 1352-53; *Hoover v. Ronwin*, 466 U.S. 558, 579-80 (1984).

116. *See, e.g., NCAA v. Board of Regents*, 468 U.S. 85, 101 n.23 (1984).

them the most. Our assurance that producers' financially interested decisions will be in the public interest, in other words, rests on their being subjected to a competitive process. Federal antitrust review applies to make sure that their actions conform to this competitive process rather than undermine it to reap monopoly profits. Because antitrust is the fundamental guarantor that financially interested decisionmaking will, through the competitive process, advance the public welfare, no antitrust immunity can apply to decisionmaking by financially interested actors.

Why, then, do we allow governments to restrain free market competition? The answer is that the competitive process may be harmful when one takes account of market imperfections or noneconomic conceptions of the public good. Competitive markets are but one means of collectively allocating resources.<sup>117</sup> There are others. We decide which means of collective resource allocation we will use—including how to define the market and when to deviate from it—through the government. Our assurance that the government will make sound decisions is provided by its accountability, political or procedural, to the affected parties. This political or procedural process is defined and policed by a host of legal doctrines, some constitutional in nature. Where governmental decisionmaking conforms to this process, and no financial interest is present, the functional concerns about the decisionmaking process are met and the rationale for antitrust review evaporates.<sup>118</sup>

In short, antitrust state action immunity helps serve to channel collective resource allocation decisions into either a competitive process (defined in large part by antitrust) or a political and procedural process (defined by bodies of law different from antitrust) that each provides some realistic assurance that the decisions will be in the public interest. We can represent the core elements of the decisionmaking processes that are and are not immune from antitrust scrutiny using simple diagrams. The decisionmaking process in the classic case of non-immunity is represented by Diagram A.



*Diagram A*

117. The resulting resource allocation is collective in the sense that the complex of legal doctrines that define and enforce market decisions (including antitrust, property, contract, tort, corporate, and criminal law) are established collectively.

118. See also Elhauge, *supra* note 25, at 697-708 (collecting legislative history demonstrating that the Sherman Act was aimed at policing financially interested decisionmaking).

The type of decisionmaking process receiving state action immunity is represented by Diagram B.

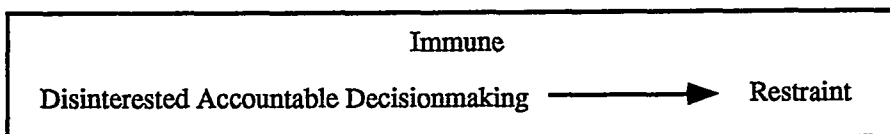


Diagram B

This basic framework has implications for antitrust petitioning immunity. In particular, it helps us to decipher what the *Allied Tube* Court meant in declaring that antitrust petitioning immunity depends on “the source, context, and nature” of the challenged activity.<sup>119</sup>

### B. Basic Petitions for Public or Private Decisionmaking

#### 1. Petitioning Disinterested Accountable Decisionmakers

Consider, to begin with, the simple decisionmaking process represented by Diagram C: private, financially interested actors petition a financially disinterested governmental actor, through the normal means of the relevant political or procedural process, to restrain trade. For example, dairy farmers petition the state legislature to set minimum milk prices. No restraint results directly from decisions by a financially

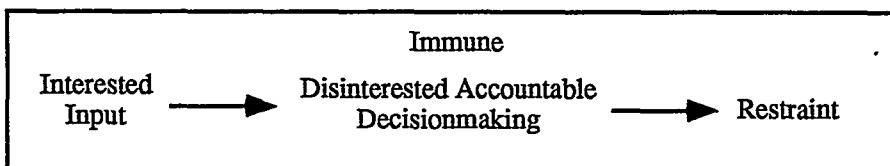


Diagram C

interested actor; rather the restraint is imposed only when a financially disinterested governmental actor decides in favor of the restraint. The restraint is accordingly immune under the state action doctrine. Because the decisionmaking process is thus sufficiently reliable to merit antitrust immunity, the petitioning that provided the input to that decisionmaking process should also be immune.<sup>120</sup> Petitioners’ financial interest in the government’s action is irrelevant because our assurance that the restraint furthers the public interest comes not from the petitioners’ decisionmaking process but from the government’s.<sup>121</sup>

119. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988).

120. To this extent, antitrust petitioning immunity is derivative of state action immunity. But this is not always true. See *infra* Parts III-IV (explaining when petitioning immunity does not apply even though state action immunity may), Section V.A (arguing that petitioning immunity may apply in certain cases where government conduct is not immunized).

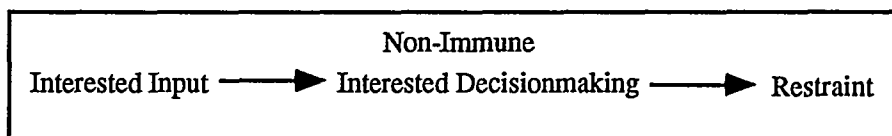
121. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 138-40

Here, then, we have a case where the "source" of the restraint, the normal governmental decisionmaking process, renders the petitioning immune. In the Supreme Court case law, this paradigmatic case for anti-trust petitioning immunity is illustrated by *Pennington*. There a union and various large coal operators sought to restrain trade to the detriment of competing small coal operators who paid lower wages. To achieve this restraint, they collectively petitioned the Secretary of Labor to set a minimum wage and petitioned the TVA to cease purchasing coal exempt from this minimum wage.<sup>122</sup> Although the actions of the Secretary of Labor and TVA restricted competition by small coal operators, their actions would plainly receive state action immunity because such actions were the product of decisionmaking by financially disinterested and politically accountable government officials. The immunity of the petitioners was thus similarly clear, and the Court so held.<sup>123</sup>

Since *Pennington* is the simplest and clearest case for petitioning immunity, it is not surprising that it contains the simplest and most sweeping language. Unfortunately, this language is all too often applied unthinkingly to cases involving much less pristine facts. The other Supreme Court cases, all of which involve complications absent in the *Pennington* opinion, express limitations on petitioning immunity which the *Pennington* Court had no occasion to explore.

## 2. *Petitioning Interested Decisionmakers*

Contrast decisionmaking process C with a case where the governmental actor is financially interested, as represented in Diagram D. In



*Diagram D*

that case the decisionmaking process producing the challenged restraint, while nominally public, is actually private within the meaning of anti-trust doctrine because the decisionmaker imposing the restraint is financially interested. The decisionmaker is considered a private actor not for any mystical reasons about the inherent nature of "state action," but because financially interested actors cannot be trusted to further the public interest unless subjected to a process of market competition policed by

(1961) (holding it irrelevant that petitioners sought governmental action because they hoped it would harm their competitors). This analysis applies not just when the petitioning influences the government to adopt a new restraint but also when it influences the government not to lift an old one. *See id.* at 130.

122. *United Mine Workers v. Pennington*, 381 U.S. 657, 660-61 (1972).

123. *See id.* at 669-72.



antitrust review. The “source” of the restraint being private action, no immunity applies.

Decisionmaking processes of type D are illustrated by *Continental Ore*.<sup>124</sup> Although in that case the influenced entity was an official governmental agent exercising governmental authority, the Court denied immunity on the ground that the defendant’s actions constituted “private commercial activity.”<sup>125</sup> This language has misled some into concluding that there is no immunity for influencing the government to act in the market as a purchaser.<sup>126</sup> But *Pennington*, which immunized efforts to influence the TVA’s coal purchases, definitively establishes that antitrust petitioning immunity may apply to efforts to influence the government’s actions as a market participant.<sup>127</sup> Nor can the cases be distinguished on the ground that *Pennington* involved governmental purchases by a public official, because that was true in both cases.<sup>128</sup>

The true operative difference is that in *Continental Ore* the public official imposing the challenged restraint was financially interested in the anticompetitive consequences of that restraint, whereas in *Pennington* the public official was not. The official in *Continental Ore* was a subsidiary of a corporation that would benefit financially from having its competitors excluded from government purchases.<sup>129</sup> *Pennington*, in contrast, involved the TVA, an entity with no financial interest in restricting competition between coal sellers. This difference in financial interest must be what the Supreme Court means in labelling the official in *Continental Ore* “commercial” but not the official in *Pennington*.

Whether or not it comports with ordinary understandings of what “commercial” means, it makes sense for the Court to focus on financial interest rather than on whether business activity is involved. The governmental/commercial distinction has never been workable.<sup>130</sup> More importantly, governments can further the interests of their citizens in both market and non-market fashions.<sup>131</sup> A government might, for

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124. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

125. *See id.* at 707-08; *see also supra* text accompanying note 37.

126. *See Hurwitz, supra* note 10, at 85-88 (collecting sources).

127. *Pennington* would also seem to foreclose an exception for policy implementation, which some courts have recognized. *See Kintner & Bauer, supra* note 11, at 563 n.56 (collecting cases).

128. *See supra* text accompanying notes 40-41.

129. One might also conclude that, because the defendant controlled its subsidiary, the process was merely one of type A: a financially interested actor directly imposing a restraint. The process would not merit the immunity accorded process B, despite the defendant’s governmental authority, because the decisionmaking process was financially interested. Consistent with this analysis, the Supreme Court not only denied antitrust petitioning immunity but state action immunity as well. *Continental Ore*, 370 U.S. at 706-07.

130. *See Elhauge, supra* note 25, at 682 n.66 (collecting sources showing unworkability of distinction in numerous legal fields).

131. *See Gerald E. Frug, Property and Power*, 1984 AM. B. FOUND. RES. J. 673, 687-90 (review essay) (suggesting that cities should operate banks, stores, housing units, and other typically private institutions).

example, provide health care for its citizens either by running low-priced public hospitals or by imposing taxes to fund health care subsidies. There is no *a priori* reason to think that governments are better able to further the public interest by taxation and regulation than by market participation. Nor is there any reason to think that governments are more likely to injure competition while running a business than through regulation. What justifies antitrust immunity is not the means chosen but a disinterested and accountable decisionmaking process for choosing those means. As long as neither the government nor its officials has a financial interest in the governmental action, antitrust immunity should apply to both the government and the petitioners.<sup>132</sup>

The above interpretation of *Continental Ore* and *Pennington* finds support in *Allied Tube*. The steel producers who influenced the standard-setting association in that case claimed immunity in part on the ground that the association itself should be treated as a public body because its code was routinely adopted into law by state and local governments.<sup>133</sup> Accordingly, the steel producers argued, their efforts deserved the same absolute immunity accorded those who persuade the government to restrain trade. The Supreme Court rejected this argument, reasoning that this immunity could not apply because "the decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade."<sup>134</sup> Further, the Court cited *Continental Ore* in support of its conclusion.<sup>135</sup>

The *Allied Tube* Court also noted that the association lacked official authority and was unaccountable to the public.<sup>136</sup> But *Continental Ore* demonstrates that conferring "official" authority on financially interested actors does not render them public actors for the purpose of determining whether their restraints are immune from antitrust scrutiny.<sup>137</sup> *Continental Ore* also demonstrates that accountability to disinterested higher officials will not immunize a restraint set by a financially interested actor: the actor there exercised authority delegated by the Office of Metals Controller, which retained both ultimate authority over the

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132. The government does not have a financial interest in the sense meant here unless the governmental action exploits or threatens to create market power against outsiders. See Elhauge, *supra* note 25, at 729-38 (arguing for the same test of a government's financial interest for the purposes of adjudicating state action immunity).

133. The other part of their argument, which I described in Section I.B, relied not on the claim that the association itself was a public actor, but on the claim that influencing the association's code deserved immunity as an indirect effort to petition the state and local governments, which usually adopted its code into law. See *supra* text accompanying notes 60-61.

134. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988).

135. *Id.*

136. *Id.* at 501-02.

137. See *supra* notes 36-37, 124-29 and accompanying text; see also Elhauge, *supra* note 25, at 687-90 (arguing that *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), cited by *Allied Tube*, supports the same proposition).

restraint being challenged and apparently the authority to remove the actor.<sup>138</sup>

In short, under the Supreme Court's case law, an actor's financial interest in a restraint that he or she controls seems *sufficient* to deprive the actor of state action immunity and to deprive those influencing the actor of the antitrust petitioning immunity accorded those who merely urge the government to restrain trade. Financial interest may not, however, be *necessary* to deprive an actor of state action immunity because the immunity may also not apply to disinterested but unaccountable actors who do not exercise official authority.<sup>139</sup> Accordingly, accountability and official status may sometimes be relevant to immunity, which explains why *Allied Tube* mentions them as possible factors. But, financial interest will vitiate immunity regardless of whether accountability and official status are present.

### C. The Interest Group Theory Critique

The Court's distinction between financially interested decisionmaking and interested input into a disinterested accountable decisionmaking process has recently come under fire because of interest group theory. Interest group theory concludes that small intense groups will make more political effort, and thus have more political influence, than will large diffuse groups because the latter face greater collective action problems.<sup>140</sup> The members of a large diffuse group have little incentive to make political efforts for the group because each member gains a small share of the group benefits from political victory and knows that the member's own individual efforts would have little impact on the chances of victory. Because they gain a larger share of group benefits and have more proportional impact on the chances of political victory, members of small groups are more likely to independently or interdependently contribute toward political efforts. Moreover, smaller groups have an easier time organizing collective agreements to overcome the incentive of members to free ride on the political effort of other members.

Based on this interest group theory, some scholars have recently argued that antitrust petitioning immunity should be narrowed to curb interest group influence that distorts or corrupts governmental decisionmaking.<sup>141</sup> Interest group theory, these scholars argue, overthrows the

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138. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 n.11 (1962); see also Elhauge, *supra* note 25, at 712-17 (arguing that public accountability does not and should not immunize a restraint controlled by a financially interested actor).

139. See Elhauge, *supra* note 25, at 738-46.

140. For a more thorough explanation of interest group theory, see Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 35-44 (1991).

141. See Minda, *supra* note 24; see also Wiley, *supra* note 110, at 739-76, 779-81 (arguing for antitrust invalidation of inefficient governmental restraints resulting from petitioning that constitutes interest group capture of the government, but not for imposing damages on the petitioners).

presumption that a disinterested accountable governmental actor represents all the affected parties. Instead, government actors are often disproportionately influenced by special interest groups, and in those cases governmental actions deserve no more immunity than those interest groups would receive if they restrained trade themselves.

Interest group theory cannot, however, justify this constriction of petitioning immunity.<sup>142</sup> The principal conceptual problem is that interest group theory cannot determine whether an interest group's political influence is distorting or disproportionate without some normative baseline to determine how much influence the interest group should have.<sup>143</sup> Public choice theory generally presumes that interest group influence is disproportionate when it exceeds the group's economic interest in a regulation.<sup>144</sup> But this baseline assumes that the group with the largest economic interest should win, which is the same as saying that governmental action should comport with the normative standard of economic efficiency—wealth maximization.<sup>145</sup> Nothing in antitrust law justifies imposing this standard, or any other normative standard, on all governmental decisionmaking.<sup>146</sup>

In dismissing the related argument that there should be an immunity exception when petitioning has "corrupted" the governmental process into acting against "the public interest,"<sup>147</sup> the *Omni* Court indicated that it understood this conceptual problem and explicitly rejected economic efficiency as a normative baseline imposable on the political process through antitrust review. The Court stated:

The fact is that virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners. . . . [D]etermination of "the public inter-

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Professor Minda also argues that corrupting, unethical, or deceptive *methods* of petitioning should be denied immunity. Minda, *supra* note 24, at 1011-24. But this argument does not truly rest on interest group theory because that theory predicts interest groups will be more effective at utilizing *whatever* methods of influencing the government are open to them. See Elhauge, *supra* note 140, at 49. For further discussion of Minda's argument for using antitrust to police improper methods of political petitioning, see *infra* Section IV.C.1.

142. The following discussion summarizes arguments I have made elsewhere. See Elhauge, *supra* note 140.

143. See *id.* at 48-66. The theory also shows that capture is incomplete: politically accountable decisionmaking may overrepresent special interest groups, but it will also give some representation to less politically powerful groups. See *id.* at 42-43. Thus, even if interest group theory narrows the difference between governmental and financially interested decisionmaking, it does not eliminate it. Disinterested accountable decisionmaking on restraints affecting special interest groups will not have the same bias as restraints directly adopted by those interest groups. Some distinction is thus warranted.

144. See *id.* at 52-53.

145. See *id.* at 53-55.

146. There are also more particular indications that Congress never intended the Sherman Act to be used to root out interest group capture. See Elhauge, *supra* note 25, at 722.

147. *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344, 1352-53, 1355 (1991).

est" in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment . . . .<sup>148</sup>

The second problem in using interest group theory to justify constricted petitioning immunity is that expanding antitrust review of governmental decisionmaking would, in effect, substitute the litigation process of decisionmaking for other governmental processes, even though interest group theory gives us no reason to think the litigation process is preferable.<sup>149</sup> Just as petitioning for legislative and executive action creates collective action problems because the action can confer benefits (or costs) on group members regardless of whether the members contribute to seeking (or opposing) the action, so too judicial precedent confers benefits (and costs) on groups regardless of individual members' contributions. Interest group theory thus predicts that small intense groups will have greater incentives than large diffuse groups to expend resources on frequent litigation, skillful counsel, strategic settlement, and influencing judicial appointments.<sup>150</sup> This should give small intense groups more influence over the litigation process.

To the extent judges' general political insulation protects them from this interest group influence,<sup>151</sup> litigation decisionmaking reflects judicial views unknown, unappreciated, or as yet undeveloped at the time of appointment. There is no reason to think this random collection of personal views will better reflect the will of the people than a political process allegedly distorted by interest group influence.<sup>152</sup> "Judges may be less biased, but dice are unbiased too."<sup>153</sup>

Again *Omni* seemed to recognize the problem, and it rejected the

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148. *Id.* at 1353. Although this reasoning was used to reject an exception to state action immunity, it was incorporated into the rationale for rejecting an equivalent exception to petitioning immunity. *See id.* at 1355-56.

149. *See* Elhauge, *supra* note 140, at 66-83.

150. *See id.* at 68-83. Class actions are an imperfect response to this problem because they cannot solve the problem of who represents the large diffuse group in choosing and guiding its class action representative. *See id.* at 72-76.

151. It cannot completely insulate the litigation process because interest groups can, through the above strategies, influence the litigation process even if they do not alter the opinions of any judges. *See id.* at 80.

152. *See id.* at 83-87. Other related arguments are (1) that more intrusive antitrust review would at least raise the transaction costs of interest group capture, and (2) that, because of Arrow's theorem and collective choice theory, judicial decisionmaking is more rational than political decisionmaking. The first argument fails because more intrusive antitrust review might lower the transaction costs of interest group capture (as when antitrust courts strike down legislation in a way that helps interest groups) and because increasing transaction costs can perversely encourage interest group activity by making capture more costly to undo, increase the relative advantage of interest groups because they are better able to meet higher transaction costs, and freeze into place a legal status quo that benefits interest groups. *See id.* at 34-35, 87-101. The second argument fails because the process defects identified by collective choice theory are normatively dubious and equally applicable to judicial review or to any status quo that is left in place by making legal change more difficult. *See id.* at 101-09.

153. Elhauge, *supra* note 25, at 725.

shift in decisionmaking power. An exception for governments "corrupted" by petitioners into acting contrary to the public interest must be rejected, the Court declared, because the exception is so malleable that it would shift decisionmaking power over basic value judgments "from elected officials to judges and juries."<sup>154</sup>

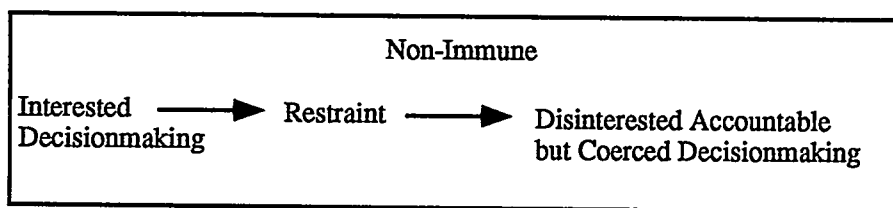
Accordingly, *Omni* immunized an established billboard company that persuaded the City Council, which it had long supported politically, to adopt zoning restrictions on new billboard construction that effectively excluded a new entrant, even though the restriction arguably reflected interest group pressure and was surely economically inefficient. This holding, coupled with *Omni's* reasoning, establishes an important doctrinal conclusion: namely, that whether or not one agrees with my conclusion that interest group theory does not justify more narrow antitrust immunity, the theory does not describe the current contours of antitrust petitioning immunity.<sup>155</sup>

### III

#### USING MARKET COERCION TO INFLUENCE PUBLIC DECISIONMAKING

##### A. Coercive Processes

Consider next the decisionmaking process presented when a financially interested private actor uses a restraint of trade as a means of influencing the government. For example, suppose doctors boycott a public clinic to stop it from using chiropractors to provide medical services. We might illustrate the situation with Diagram E. Here the terms of the



*Diagram E*

restraint are set by a financially interested decisionmaker, and no financially disinterested and publicly accountable actor made a substantive decision in favor of the restraint before it was imposed. Moreover, the influence of the restraint on the public decision relies, at least in part, on market coercion.

Because the decisionmaking process producing the restraint cannot

154. *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344, 1352 (1991).

155. Interest group theory also does not describe the contours of state action immunity case law. See Elhauge, *supra* note 25, at 720-21.

be trusted to operate correctly without antitrust scrutiny, and because the coercive nature of the restraint undermines rather than furthers the reliability of the decisionmaking process producing the governmental action, no immunity should apply to the restraint resulting from private decisionmaking. The nature of the activity intended to influence governmental action—a coercive privately set restraint—makes immunity inapplicable.<sup>156</sup>

The foregoing is true whether or not the government action itself produces a restraint. Nor is it relevant whether the government is being coerced as a market participant or as a regulator. A financially interested restraint that coerces governmental action is equally problematic whether the government responds to the coercion by regulating or by changing the terms at which it buys and sells. And where there is no such coercion, the governmental action is just as likely to advance the public interest whether regulatory or proprietary.<sup>157</sup>

An interesting question would, however, appear to be raised as to whether a restraint resulting from governmental action should receive state action immunity when the government action is disinterested but coerced by a private restraint that is not immune. This issue has not yet been resolved, but, as I argue elsewhere,<sup>158</sup> it seems that state action immunity should not apply to this governmental restraint because the coercion eliminates any assurance that the decisionmaking process was likely to further the public interest. Damages, however, would not and should not be available against the government in such a case.<sup>159</sup>

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156. See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 421-25 (1990); *United States v. North Dakota Hosp. Ass'n*, 640 F. Supp. 1028, 1040-43 (D.N.D. 1986) (concerted activity directed at the government as a consumer in the marketplace held not immune); *Michigan State Medical Soc'y*, 101 F.T.C. 191, 204-07, 314 (1983) (same). Other forms of coercing government officials, such as threats of violence, are also not entitled to antitrust immunity. See *Sacramento Coca-Cola Bottling Co. v. Chauffeurs Local 150*, 440 F.2d 1096, 1099 (9th Cir.), *cert. denied*, 404 U.S. 826 (1971).

157. See *supra* text accompanying notes 130-32. Other authors have argued that boycotts of the government should receive immunity when the government is purchasing and has monopsony power. See Hurwitz, *supra* note 10, at 112; Mitchell D. Raup, *Medicaid Boycotts by Health Care Providers: A Noerr-Pennington Defense*, 69 IOWA L. REV. 1393, 1396-97, 1414-15 (1984). But this argument fails on two scores. First, it has never been an accepted antitrust defense that a restraint of trade is necessary to countervail the market power of a monopsonistic private party. See PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS* 195 & n.24, 223 n.46 (4th ed. 1988). Second, the government has many monopolies, most importantly a monopoly on regulatory authority, and there is no reason why those groups that happen to have the economic power to exercise coercive influence should have an advantage over less powerful citizens in influencing the government's exercise of its monopoly powers. In any event, the argument seems legally untenable after *Trial Lawyers*, since there the city was effectively a monopsonistic purchaser of legal services for indigent criminal defendants in the District of Columbia. See *Trial Lawyers*, 493 U.S. 411.

158. See Elhauge, *supra* note 25, at 704.

159. See *id.* at 735, 736 n.322.

*B. Objective Financial Interest*

*Trial Lawyers*<sup>160</sup> illustrates decisionmaking process E and clarifies the focus on the objective financial interest of the defendants. The trial lawyers' collective refusal to represent indigent criminal defendants was, without doubt, genuinely intended to obtain government action: an increase in fees. But from an objective process perspective, the boycott was also coercive and financially interested. The subjective motivation behind the boycott may have been, as the trial lawyers claimed, their desire to make sure fees were high enough that indigent criminal defendants would receive effective representation. And the substantive result may have been to improve legal representation for indigent defendants and vindicate their Sixth Amendment rights. But the Court determined that neither the subjective motive nor the substantive merit of the restraint was relevant.<sup>161</sup> What mattered was that the trial lawyers had an objective financial interest in receiving higher fees. This rendered the decisionmaking process producing the challenged restraint the sort that must be subjected to a competitive process policed by antitrust ground rules.

The Court's refusal to use a subjective motive test to determine the applicability of antitrust immunity is sound. Such inquiries serve neither plaintiffs nor defendants. Allegations of a bad motive can always be made and are hard to dismiss on summary judgment. Moreover, it is difficult to determine what happens in a person's heart of hearts, and easy for that person to control evidence about it, skewing in his favor the mix of information that is presented.<sup>162</sup>

The problems with a subjective motive test, however, go beyond its unworkability. The graver problem is that judicial bias will infect immunity decisions. While persons do not always act based on their financial interests, they often do. Judicial decisions about whether particular defendants were subjectively motivated by their financial interest will likely reflect judicial biases that some groups are better than others in rising above their financial interests: for example, that professionals can put aside self-interest but non-professionals cannot; or that unions are public-spirited but management is not. Because subjective motive tests

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160. 493 U.S. 411 (1990).

161. *Id.* at 421-24, 427 & n.11.

162. See Stephen McG. Bundy & Einer R. Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CALIF. L. REV. 313, 323-26, 335-61 (1991); Louis Kaplow & Steven Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 567, 577-82 (1989); see also Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 881-82 (1990) (factfinding process biased toward underinclusion of relevant information). Courts can make adjustments for this skew, as they have done by making bad-motive allegations hard to dismiss. See Bundy & Elhauge, *supra*, at 383-91, 393. In general, though, adjudication will be more accurate if the information relevant to adjudication is available to both parties. See *id.* at 381-82, 392-93.



lend themselves to such judicial biases, they are not only a hindrance to antitrust enforcement but offensive to First Amendment principles. They threaten to create judicially imposed content-based discrimination,<sup>163</sup> and thus chill desirable forms of speech. Far better for courts to apply evenhandedly the same presumption about susceptibility to financial interest to all actors.

Where objectively the defendants have no financial interest at issue, private efforts to use restraints as a means of influencing governmental action stand in a different light. Because the competitive process relies on the financial interest of competitors driving them toward producing the right set of goods using the right inputs, one cannot say that using antitrust review to impose a competitive process on financially *disinterested* decisionmaking will lead to better results. True, the unaccountability of disinterested private decisionmakers raises the concern that their actions will be arbitrary, vindictive, overzealous, or in furtherance of an idiosyncratic view of the public interest. But it may be better to police such financially disinterested action with legal tools better suited for the task than antitrust review.<sup>164</sup>

To some extent such financially disinterested restraints are immunized under *Claiborne Hardware*.<sup>165</sup> There the Court held that the First Amendment immunized a consumer boycott of white merchants designed to force the merchants to end racial discrimination both in their businesses and in their roles as government leaders. The key factor, the Court stressed in *Trial Lawyers*, was that the *Claiborne Hardware* boycotters (unlike the *Trial Lawyers* boycotters) did not “‘stand to profit financially from a lessening of competition in the boycotted market.’”<sup>166</sup> The Court also mentioned that the *Claiborne Hardware* boycotters sought to vindicate constitutional rights.<sup>167</sup> But while such a constitutional objective may be necessary to confer immunity on a *disinterested* restraint, it is plain after *Trial Lawyers* that benign subjective motivations, whether or not they involve the vindication of constitutional rights, are not sufficient to confer immunity on a financially interested restraint

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163. Cf. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760-62, 769-72 (1988) (holding it unconstitutional to entrust city officials with unbridled discretion over speech regulation because of the risk of content discrimination).

164. See Elhauge, *supra* note 25, at 738-46. The legislators who enacted the Sherman Act discussed only one financially disinterested non-public restraint, a temperance society boycott of liquor retailers, and all agreed the Sherman Act should not cover it. See 21 CONG. REC. 2658-59 (1890) (statement of Sen. Sherman); 20 CONG. REC. 1458-60 (1889) (statements of Sens. George, Sherman, and Stewart).

165. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

166. *Trial Lawyers*, 493 U.S. at 427 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 (1988)); see also *Claiborne Hardware*, 458 U.S. at 915 (stressing same factor).

167. *Trial Lawyers*, 493 U.S. at 426; see also *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 (1988).

used to seek governmental action.<sup>168</sup>

This helps resolve what some<sup>169</sup> have regarded as an anomalous tension between *Noerr* and *Pennington*, which in conferring immunity emphasized the irrelevance of a defendant's financial motivation in seeking governmental action,<sup>170</sup> and *Allied Tube* and *Trial Lawyers*, which in denying immunity emphasized that the defendants were financially interested.<sup>171</sup> The latter cases are concerned about the objective incentives of the persons imposing the restraint on trade being challenged. Where those incentives create a financial interest in restraining trade, a competitive process of decisionmaking is required, and antitrust immunity cannot apply even if the defendants offer to prove that their subjective motivation was good. Where, however, the challenged restraint is *imposed* by persons without financial incentives and with accountability to the public, then the competitive process is inapt, and the political process is adequate even if those *seeking* the governmental action have financial incentives and motives. In either sort of case, the operative factor is whether the objective incentives of those making the ultimate decisions provide some realistic assurance that the decisions will further the public interest.<sup>172</sup> Subjective motivations—whether those of financially interested restrainers or petitioners for restraints—are irrelevant under the Court's objective process approach.

The process approach also explains why, if *Noerr* sounds in the First Amendment, its scope should differ so much from that of *Claiborne Hardware*, which unlike *Noerr* offers protection only to financially disinterested actors. *Noerr* provides immunity to input, financially interested or disinterested, into a disinterested accountable decisionmaking process because it is the decision of the latter that provides the assurance that any resulting restraint is in the public interest. Where the restraint precedes and is indeed aimed at coercing governmental action, however, such assurances of reliability do not exist. *Noerr* immunity thus does not apply, and the First Amendment protection that does apply is justifiably limited, given the greater danger posed by such restraints, to those

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168. See *Trial Lawyers*, 493 U.S. at 424, 427 & n.11; *Allied Tube*, 486 U.S. at 498 (denying immunity even though the defendants seeking governmental action "acted, at least in part, based on a genuine belief that plastic conduit was unsafe"); *infra* text accompanying notes 285-92 (discussing immunity for political boycotts that do not coerce the government).

169. See, e.g., *Allied Tube*, 486 U.S. at 512-13 (White, J., dissenting).

170. See *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 138-40 (1961).

171. See *Trial Lawyers*, 493 U.S. at 427; *Allied Tube*, 486 U.S. at 508-09.

172. Or, to put the matter more precisely, the issue is whether the objective incentives are sufficiently reliable that the decisionmaking process is unlikely to be improved by subjecting it to antitrust review. See *supra* text accompanying notes 140-55 (arguing that, even if distorted by interest group influence, disinterested accountable decisionmaking is unlikely to be improved by substituting a litigation process of decisionmaking); see also *supra* text accompanying note 164 (arguing that financially disinterested but publicly unaccountable decisionmaking may not be improved by being subjected to antitrust review).

imposed by financially disinterested parties.<sup>173</sup>

### C. The Market Power Defense

Another issue addressed by *Trial Lawyers* was whether to recognize a lack-of-market-power defense. The dissenters felt that symbolic boycotts should receive First Amendment protection from antitrust liability unless market power is proven.<sup>174</sup> The Court disagreed.<sup>175</sup> The oddity of this dispute was that the record contained clear evidence of anticompetitive effect: severe shortages of lawyers willing to take indigent defendants.<sup>176</sup> Such proof of actual anticompetitive effect should have obviated any need for proof of market power, which is only one means of inferring anticompetitive effect.<sup>177</sup>

In any event, the Court dispensed with proof of market power for

173. Further limits might also be justified. See Elhauge, *supra* note 25, at 744-45 (suggesting that the First Amendment protection might also be limited to cases where the disinterested restraint penalized an alleged constitutional violation and where the government had not already determined the legal penalties to apply to the violation); Michael C. Harper, *The Consumer's Emerging Right to Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law*, 93 YALE L.J. 409, 426-32 (1984) (arguing for limiting the *Claiborne Hardware* right to consumer boycotts designed to induce social decisions that are legal).

174. *Trial Lawyers*, 493 U.S. at 436-53 (Brennan, J., concurring in part and dissenting in part); *id.* at 453-54 (Blackmun, J., concurring in part and dissenting in part).

175. 493 U.S. at 428-36. This holding negated any implication that references to "market power" in *Allied Tube*, 486 U.S. at 507, required economic market power to deny immunity. The *Allied Tube* Court's references to market power apparently meant only that the defendants were directly exercising the power to stop association members' purchases of certain goods or services (in other words, that market behavior was involved).

176. Before the boycott, there was no shortage of lawyers willing to take indigent defendants at the governmental rate. *Trial Lawyers*, 493 U.S. at 415. With the boycott, 90% of the lawyers who usually took indigent defendants refused to accept new assignments. *Id.* at 416. The few lawyers taking indigent defendants were swamped, and key figures in the city's criminal justice system "became convinced that the system was on the brink of collapse." *Id.* at 418.

177. See *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986); 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1511, at 429 (1986). Justice Blackmun's dissenting opinion mistakenly concluded that the trial lawyers had no market power because the city had the power to order lawyers to represent indigent defendants on a pro bono basis. See *Trial Lawyers*, 493 U.S. at 453-54 (Blackmun, J., dissenting). However, such orders are not perfectly enforceable, and compulsion would not have produced the same product if unwilling lawyers provide worse representation than willing ones. Moreover, coercing lawyers to represent indigent clients has substantial political costs. That the administrative problems, quality concerns, and political costs of compelling legal services made the government willing to pay the financial costs of the trial lawyers' price-fixing scheme does not deprive the government of the right to a competitive price for contracted legal services. Alternatives, or substitutes, often exist for goods. People can, for example, always drink beer instead of wine. But the availability of beer does not mean that purchasers are not entitled to competition among wine producers. Like beer to wine, so too compelled legal services are an imperfect substitute for contracted legal services.

The implications of Justice Blackmun's position are even more disturbing once one considers that the government just about always has the power to intervene in a market to set rates and allocate supply. If market power does not exist whenever the government could rectify the results of an anticompetitive combination through regulation, then the Sherman Act would be a dead letter. Cf. Elhauge, *supra* note 25, at 712-17 (explaining why antitrust state action immunity applies only if the government approves a private restraint *before* it is imposed on the market).

the usual set of practical reasons. Per se violations pose a serious danger to competition unbalanced by any plausible procompetitive virtue, and inquiring into whether the defendants had the market power to make their restraint effective would complicate adjudication, raise litigation costs, and lessen deterrence.<sup>178</sup>

*Trial Lawyers* thus appropriately established that lack of market power would not confer immunity on financially interested restraints that, if they had market power, would coerce governmental action. But the market power defense should still apply if the issue is whether the defendant should be liable in damages for any restraint imposed by the coerced government.<sup>179</sup> Unless market power actually existed, there is no real coercion and no reason to doubt the reliability of the government's decision to impose its own restraint. Further, as we will see, proof of market power is also necessary to impose antitrust liability for the costs directly imposed on competitors by the process of litigating.<sup>180</sup>

#### IV

#### PRIVATE ACTION THAT BOTH RESTRAINS TRADE AND PROVIDES NONCOERCIVE INPUT TO GOVERNMENTAL DECISIONMAKING

We come next to a more complicated scenario. Sometimes the conduct of private, financially interested actors has dual effects that coincide with each other. One effect may be to influence government action without any coercion but through the normal course of the political or procedural process used to reach governmental decisions. Another effect may be to directly restrain market competition whether or not the government makes a substantive decision in favor of the restraint. We may represent such cases with Diagram F.

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178. See *Trial Lawyers*, 493 U.S. at 432-34 & n.16. Justice Brennan's dissent concluded that the boycott's message persuaded city residents to become sympathetic to the lawyers, see *id.* at 442, 445 (Brennan, J., dissenting), but it is more likely that the lawyer shortages produced sympathy for the indigent defendants. As long as there was no shortage, the "plight" of lawyers voluntarily earning \$20/hour was probably not moving to most city residents, most of whom earn far less. The dissent also emphasized that, before the boycott, many legal groups and government officials supported the fee increase, and no one spoke against it. See *id.* at 442-43. But this is hardly surprising. Interest group theory predicts that those with concentrated interests will be more successful in organizing testimony than those with diffuse interests. See Elhauge, *supra* note 140, at 35-39; cf. James L. Payne, *The Congressional Brainwashing Machine*, PUBLIC INTEREST, Summer 1990, at 3, 4 (out of a sample of 1060 witnesses before Congress, only 7 opposed spending, 39 were neutral, and 1014 favored it). That the City Council, despite the influence of concentrated interests, refused to enact a pay raise out of fear taxpayers would vote against the councilmembers in subsequent elections is arguably a triumph of the political process, not a malfunction of it.

179. See *supra* text accompanying notes 158-59.

180. See *infra* text accompanying notes 254-55.

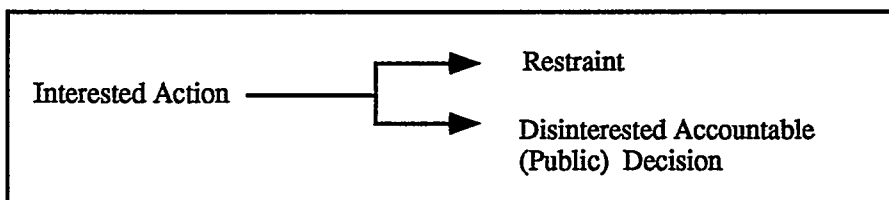


Diagram F

Three Supreme Court cases illustrate the problems posed when a Diagram F scenario results in antitrust litigation. The first is *Noerr* itself, where the railroad's publicity campaign both (1) fostered governmental decisionmaking that restrained trucker competition, and (2) directly restrained trade by interfering with trucker-customer relations.<sup>181</sup> The second is *California Motor*, where the defendants' strategy of automatically litigating to stop their competitors from getting licenses both (1) often succeeded in having their competitors denied licenses and (2) directly imposed delays and costs on their competitors that discouraged their entry into the market.<sup>182</sup> The third is *Allied Tube*, where the steel producers' influence on the standard-setting association both (1) resulted in governmental codes that legally restrained their competitors from selling plastic conduit, and (2) directly restrained trade because the associational standard (a) constituted an implicit agreement among association members not to buy or sell plastic conduit, and (b) discouraged non-members from insuring or purchasing plastic conduit.<sup>183</sup>

There is no legal difficulty as to the first type of effect: when the process leading to a restraint is disinterested and accountable, immunity applies. The difficult issue, which arises whether or not the influenced public decision restrains trade, is how to treat the second effect: the restraint resulting directly from financially interested decisionmaking. Here a potential conflict arises between the competitive process, which is fostered by judicial antitrust review of restraints produced by private decisionmaking, and the functioning of governmental processes, which are fostered by private input that would be deterred by antitrust review and penalties.

The response of the Supreme Court case law to the potential process conflict posed in such situations is quite nuanced. Unfortunately, these nuances can often be obscured because, in adjudicating interested private restraints that coincide with disinterested governmental action, courts often erroneously apply the sweeping language used by *Noerr* and

181. See *supra* notes 26-28 and accompanying text.

182. See *supra* notes 45-47 and accompanying text.

183. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495-96, 498-99 & n.2, 500, 507 (1988). The latter effects directly restrained competition by plastic conduit manufacturers in all the jurisdictions that did not prohibit the use of plastic conduit.

*Pennington* to describe the immunity accorded to restraints produced by disinterested governmental decisionmaking. By the same token, the relatively sweeping nature of petitioning immunity for restraints produced by disinterested (and uncoerced) governmental decisionmaking is sometimes obscured because courts mistakenly apply the nuanced review that the Court intended to apply only to interested restraints that coincide with disinterested governmental action. It is thus worth emphasizing that the following analysis applies not to restraints resulting from disinterested governmental decisionmaking but only to restraints resulting from financially interested action that also provides input into governmental decisionmaking.

#### A. *The Sham Limitation*

The Court grapples with the potential process conflicts raised by such restraints mainly through a series of tests that effectively establish whether a real process conflict exists. The first is the sham limitation.<sup>184</sup> Sometimes parties attempt to claim immunity when the alleged input into public decisionmaking is a "sham" in the sense it is not actually designed to influence the governmental decision. In such cases, represented in Diagram G, there is no real conflict between the decisionmaking processes because the private action provides no real input into the process of governmental decisionmaking.

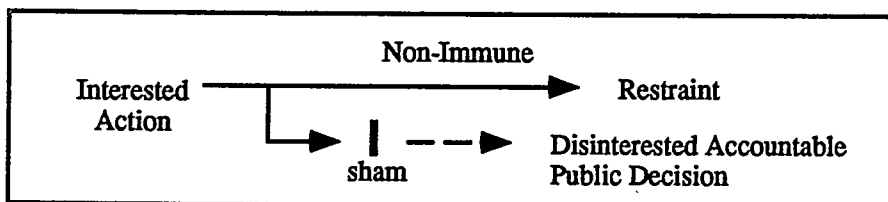


Diagram G

Indeed, once one recognizes the sham, the decisionmaking process in such cases reduces to the paradigmatic process represented by Diagram A. Because immunity for the restraints directly resulting from sham petitioning is not needed to further the process of governmental decisionmaking, it should, as the Court has stated, be denied.<sup>185</sup> Although this is often called the sham "exception," it is more accurate to term it a limitation because it marks not an exception to the immunity for efforts to influence officials but a definition of when the immunity

184. Some courts have misapplied this limitation to restraints that result from or coerce governmental decisionmaking, but it is truly applicable only to restraints that coincide with alleged input into such decisionmaking.

185. *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344, 1354 (1991); *Allied Tube*, 486 U.S. at 500 n.4, 508 n.10; *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 144 (1961).

does not, by its own terms, apply because no such effort is actually being made.

This should, of course, be distinguished from the so-called sham exception once used to police "improper" petitioning.<sup>186</sup> True shams are rare, particularly in the legislative context. Petitioners almost always genuinely desire government action, and seldom have no possibility of getting it. Otherwise the petitioning, particularly in a political forum, would usually not tie up the antitrust plaintiff enough to inflict injury.

Where there is no sham, the restraint resulting directly from private action is immune under *Allied Tube* only if "it is 'incidental' to a valid effort to influence governmental action."<sup>187</sup> This raises two questions whose answers are illuminated by the objective process approach. First, how can courts determine whether a restraint is "incidental" to an effort to influence the government? Second, if the restraint is deemed incidental, how can courts determine whether the effort to influence the government was "valid"?

### B. Incidental v. Nonincidental Restraints

The Court has not yet spelled out the contours of the requirement that restraints be "incidental" to petitioning. At a minimum, however, the incidental standard must mean that the defendant cannot claim immunity for restraints resulting from activities that were in fact separate from the valid effort to influence the government.<sup>188</sup> In other words, petitioning immunity does not cast a protective cloak over activities that did not contribute to (i.e., were separate from) the petitioning effort.

*Allied Tube* is illustrative. There the plaintiff alleged that the defendants did not stop at influencing the private electrical code widely adopted by state and local governments but also engaged in concerted efforts to "market" (directly to potential purchasers) the stigma that the plaintiff's product suffered from code exclusion. This marketing effort was likely to influence purchasers, but made no apparent contribution to the defendants' efforts to influence government decisionmakers. The Court accordingly suggested that the marketing effort might "alter the incidental status of the resulting anticompetitive harm," but did not reach the issue since it denied immunity on other grounds.<sup>189</sup>

A more common example of nonincidental restraints would be allegations that competitors jointly petitioning for governmental restrictions have, in the course of agreeing about what restrictions to ask the govern-

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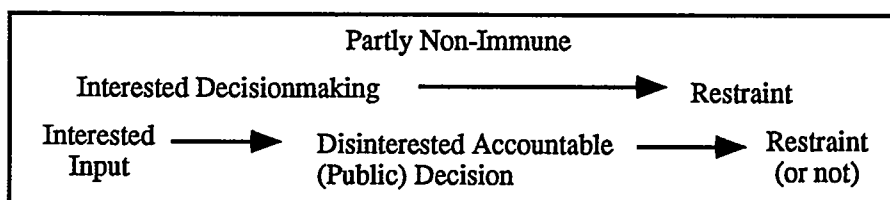
186. See *supra* text accompanying notes 5-6, 9, 49-52.

187. *Allied Tube*, 486 U.S. at 499 (quoting *Noerr*, 365 U.S. at 143).

188. See *Noerr*, 365 U.S. at 143 (concluding that the restraint was "incidental" to the publicity campaign because the direct anticompetitive injury complained of was an "inevitable" effect of the campaign).

189. *Allied Tube*, 486 U.S. at 503 n.8.

ment to provide, also agreed to adopt those restrictions themselves irrespective of government action. Milk producers, for example, might use discussions about petitioning for governmental milk price supports to agree on a cartel price that they will charge pending governmental action and/or if the government declines to adopt the proposed milk price support. Although such activity might be painted as a Diagram F case, in fact the agreement to impose the cartel price is separate from the petition, and thus the case is more accurately represented by Diagram H.



*Diagram H*

In other words, the restraints in fact result from two separate decisionmaking processes. Any restraint resulting from the disinterested accountable (public) decision is just like that described in Diagram C and should be immunized. But the parallel agreement set by the interested decisionmaker is separate from the petitioning effort and just like that described in Diagram A. It is thus not incidental to the effort to influence governmental action and should receive no antitrust immunity.<sup>190</sup>

This reasoning might seem belied by the fact that firms are commonly allowed to agree jointly on the rates they submit to governmental regulators. But if the government regulator already fixes the prices that can be charged, then any "parallel" agreement on prices can have no anticompetitive effect. In *Southern Motor Carriers*,<sup>191</sup> for example, the Court held that the state action doctrine immunized collective rate proposals authorized by a state commission. Such immunity is superficially inconsistent with the process standards put forth in this Article since those collectively making the rate proposals were financially interested. But, as the Court emphasized, the disinterested state commission was

190. *Accord Clipper Express v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240, 1263-65 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); *AREEDA & HOVENKAMP*, *supra* note 10, ¶ 206.1b, at 82-83 (collecting cases). Immunity also does not and should not apply where a monopolist implements an exclusionary practice pending regulatory approval. *See Litton Sys. v. American Tel. & Tel.*, 700 F.2d 785, 807-08 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Kintner & Bauer*, *supra* note 11, at 581 n.127 (collecting cases). Nor does it or should it apply after regulatory approval if that approval is not substantive. *See FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2177 (1992); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 601-02 (1976) (plurality opinion), *overruled on other grounds by California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980).

191. *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985).



responsible for setting all rates.<sup>192</sup> Any implicit private agreement on rates could thus have no effect without governmental approval. Nor could it have a coercive effect since the commission was not a purchaser but a rate-setter. The case thus involved the process protections normally present when a disinterested accountable actor makes a substantive decision in favor of the terms of the challenged restraint. Where the disinterested regulators have *not* made a substantive decision in favor of the rates before they are imposed on the market, these process protections are not present, and, as the Court recently made clear in *Ticor Title*,<sup>193</sup> antitrust immunity does not apply.

Similarly, to the extent rates are unregulated, we should condemn a parallel agreement on price that takes effect before or without substantive governmental approval.<sup>194</sup> One might think it would be impossible in such a case for a court to disaggregate the agreement on price charging from the agreement on rate proposals.<sup>195</sup> But petitioning the government to restrict prices would have no purpose if those prices could prevail in a freely competitive market. Thus, if the requested price support became the price charged in the market either before the government acted or after the government refused to intervene, then courts can presume an agreement on price charging was in fact reached. Since an agreement on price charging does not contribute to the petition for price supports, it can fairly be separated out from those petitioning activities.

The position here, that separate parallel restraints are not incidental and thus not immune, should be distinguished from the position that there is a preliminary discussion exception to petitioning immunity.<sup>196</sup> Such a preliminary discussion exception would deny immunity when the defendants are not petitioning but are preparing to petition. The exception was adopted and advocated with the aim of denying immunity to the sort of restraints that can be denied immunity under the separability test I have just described. But the preliminary discussion exception was overbroad. It would, for example, deny immunity to letters soliciting donations for a lobbying group or to meetings where private groups decide on the content of their petition, because such activities are preliminary to petitioning.

From a functional process perspective, it does not matter whether

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192. See *id.* at 65-66.

193. *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992); see Elhauge, *supra* note 25, at 695-96 & n.145 (stressing that the disinterested governmental actor must make some substantive decision in favor of the challenged restraint, though the *merits* of any substantive decision that is made should be beyond antitrust scrutiny).

194. This could be the situation even in a regime of governmental rate regulation if the parallel private agreement set prices higher than a governmental floor on rates.

195. Cf. Hurwitz, *supra* note 10, at 90 (describing distinction drawn by the cases as uncertain).

196. For discussions by scholars taking the latter position, see, e.g., Hurwitz, *supra* note 10, at 88-90; Kintner & Bauer, *supra* note 11, at 568, 579-80. See also Calkins, *supra* note 9, at 345 n.92 (collecting sources).

the activity is preliminary to, concurrent with, or even subsequently to the petitioning that directly reaches government officials. The key question is whether it was functionally separate from the petitioning (and any governmental restraint) so that antitrust review can apply without fear of chilling input into the governmental decisionmaking process. Because preliminary discussions are generally integral to petitioning, such input would be severely chilled by a preliminary discussion exception. Moreover, the beneficial aspects of the exception can be provided instead by reading the incidental test to exclude separate parallel restraints. In line with this analysis, the preliminary discussion exception now seems foreclosed by *Allied Tube*.<sup>197</sup>

Similarly, the position here should be distinguished from the position, urged by some commentators, that immunity should be denied if the party could have petitioned in an alternative manner that would have caused less direct anticompetitive harm.<sup>198</sup> The question under the separability test is not whether the *parties* could have separated the challenged activity from their petitioning efforts; rather, it is whether the *courts*, looking at the complex of activities claimed to be immune, can separate out some because they did not contribute to the petitioning effort. In a sense, the separability test is simply an extension of the sham limitation. Just as activities do not receive immunity when the entire petitioning effort was a sham not genuinely designed to influence the government, so too activities do not receive immunity when, even though some legitimate petitioning occurred, the alleged connection between the particular activities and the legitimate petitioning is a sham because those activities made no genuine contribution to the petitioning efforts.

A least restrictive alternative test of whether the activity is incidental to the petitioning should be rejected because it would embroil courts in the sort of case-by-case evaluation of petitioning that a functional process approach aims to avoid. A range of petitioning methods that can influence the government will generally exist. Which petitioning method causes the least direct injury is a matter of fine judgment that would require close scrutiny in each case. Worse, it seems likely that whatever method a defendant chooses, a court will always be able to find some less injurious alternative.

Moreover, the method causing the very least direct injury will often

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197. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 (1988) (rejecting claim that indirect petitioning may not be immunized).

198. See, e.g., 1 AREEDA & TURNER, *supra* note 105, ¶ 201, at 37 (arguing that antitrust immunity should not apply to "behavior that is 'unnecessarily harmful' to competition in the sense of being excessively dangerous without being indispensable to the political activity"); 1 *id.* ¶ 205, at 51-52 (same); David L. Meyer, Note, *A Standard for Tailoring Noerr-Pennington Immunity More Closely to the First Amendment Mandate*, 95 YALE L.J. 832, 838-41 (1986); see also *Allied Tube*, 486 U.S. at 498 (noting that the trial court had the jury determine whether the defendant's actions were "the least restrictive means" of expressing the defendant's opposition to the use of plastic conduit).

be one that has little chance of political success. Thus, unless antitrust review is to relegate petitioners to politically ineffective means of petitioning, courts applying the least restrictive alternative test must, explicitly or implicitly, balance the value to petitioners of using politically effective means of petitioning against the harm to competition.<sup>199</sup> But courts have no administrable standards for weighing political effectiveness and anticompetitive injury. Such open-ended balancing would leave petitioning chilled by the uncertain risk of treble damages. More troubling, because judges will likely deem petitioning for the political causes they support more valuable, such balancing will skew immunity toward petitions that correspond to the political views judges happen to hold.

Accordingly, the limitation of immunity to incidental effects appropriately does not require that the defendant alter his choice among valid petitioning strategies. It requires only that the defendant not claim immunity for restraints or anticompetitive effects that flow from activities separate from the valid petitioning method chosen. The First Amendment, it is true, does not require the government to leave open the most effective means of communication if adequate alternatives are available.<sup>200</sup> But antitrust allows petitioners to choose the most effective means among the ones the government has left open.

### C. *The Validity of the Petitioning*

The Court determines the “validity” of private petitioning efforts, and thus the applicability of antitrust petitioning immunity to the restraints that are incidental to (and directly result from) such efforts, by examining “the context and nature” of the efforts.<sup>201</sup> This should not be misconstrued as a general warrant for courts to reach their own normative judgments about the fairness of the petitioning effort. That would be inconsistent with the doctrine’s process-oriented framework. Rather, the Court in effect uses this test to determine whether the process conflict is so severe that the competitive process (and the antitrust review that ensures it) should yield to the process for providing input to governmental decisions.

Where the effort would be invalid *within the prevailing standards of the process providing input to governmental decisionmaking*, there is no real conflict between the two processes. The situation is represented by Diagram I. Antitrust scrutiny would not hamper the process of providing input to governmental decisionmakers because the input is, by the standards of the process at issue, invalid. Serious concerns about the

199. See 1 AREEDA & TURNER, *supra* note 105, ¶ 205, at 52 (concluding that courts must weigh “(i) the severity of the danger to competition, (ii) the obviousness of a less dangerous alternative, and (iii) the customary political character of the challenged behavior”).

200. See Meyer, *supra* note 198, at 840 n.40 (collecting cases).

201. *Allied Tube*, 486 U.S. at 499.

governmental process are thus not at issue.<sup>202</sup> In contrast, antitrust immunity would hinder the competitive process because the decision to impose the restraint is financially interested. Accordingly, immunity should not (and does not) apply to the restraint that directly results from the interested action.

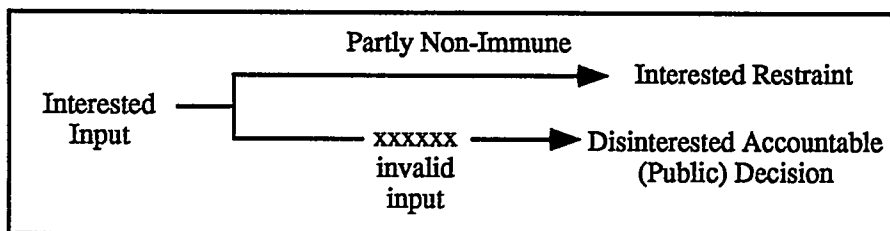


Diagram I

This does not mean, however, that invalid petitioning would vitiate immunity for any restraint that resulted from the disinterested accountable decisionmaking process. Invalidity only removes the shield of immunity over the restraint that *directly* resulted from the financially interested action. Where the restraint at issue resulted from the public (disinterested, accountable) process, then the grounds for antitrust review do not apply at all, even if that public decision is based on invalid input. Accordingly, the Court has stated, a petitioner's violation of state or federal law does not, standing alone, deprive the petitioner (or the government) of antitrust immunity for such a public restraint.<sup>203</sup>

Violating the standards applicable to the governmental process does, however, deprive the petitioner of immunity for the restraints that directly result from his actions. To be sure, this does not mean that antitrust liability necessarily applies. Unless the direct effects are anticompetitive and the invalid petitioner is financially interested, the competitive

202. Professors Areeda & Turner agree to the extent that they concede applying antitrust sanctions to conduct that has already been legally proscribed does not "deprive the government of anything useful," "chill permissible behavior," or "intrude upon legislative functions." 1 AREEDA & TURNER, *supra* note 105, § 204c, at 47. But they conclude that whether the petitioning conduct was already legally proscribed will generally be irrelevant because governmental action will be the supervening cause of the anticompetitive injury. See 1 *id.* § 204d, at 49-50. They also argue that inquiries into whether the illegal petitioning "caused" the governmental action are too fraught with difficulty to allow. See 1 *id.* The Court in *Omni* adopted these arguments in dicta. See *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344, 1353 (1991). These points have force, but they do not apply to the issue at hand, which is whether the independent illegality of the petitioning should deprive the petitioner of antitrust immunity for the injury that directly results from the petitioning activity. I shall have more to say about whether bribing and misleading government officials should render the petitioner liable for governmental actions below. See *infra* Part V.

203. See *Omni*, 111 S. Ct. at 1353; see also *Allied Tube*, 486 U.S. at 499 (where the restraint results from "'valid governmental action, as opposed to private action,' those urging the governmental action enjoy absolute immunity") (quoting *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 136 (1961)).

process and antitrust review need not apply. The ordinary penalties for violating the laws that make the petitioning invalid should suffice. But invalidity should remove the immunity that would otherwise apply to financially interested restraints.

Many commentators have taken issue with such a conclusion, arguing that, because numerous other laws regulate and punish invalid petitioning, there is no reason for antitrust to add "extra" penalties. They argue that it would be "irrationally piecemeal" to use the Sherman Act to police invalid petitioning because the evils of such petitioning are not limited to efforts to achieve anticompetitive ends.<sup>204</sup> Either the other laws regulating petitioning adequately deter abuses, in which case antitrust review is unnecessary, or they provide inadequate deterrence, in which case more systemic changes are required.

This argument is wrong on two scores. First, the deterrence critique ignores a distinguishing feature of anticompetitive activity: it can be enormously profitable. Because of this, the legal penalties that, in the ordinary case, suffice to deter abusive petitioning may be insufficient to deter abusive petitioning that achieves anticompetitive results.

The second and more fundamental reason is that all financially interested restraints raise the process concern that merits antitrust review. Financially interested restraints caused directly by parties seeking governmental action are no exception. The issue is not whether the antitrust laws should impose "additional" penalties but whether, given the existence of a restraint imposed by a financially interested process, the ordinarily applicable antitrust review should be set aside because the restraint is incidental to input into the governmental process. Where the conduct is invalid even within the rules of the governmental process, there is no reason for antitrust to defer.

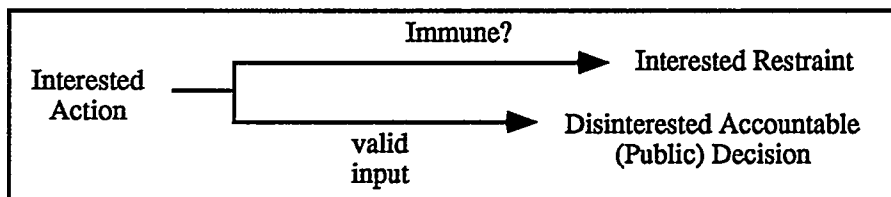
The Court's test of invalidity given the nature and context of the conduct should not be confused with the position it has correctly rejected: that the sham exception should be used to deny immunity when petitioning is deemed "improper." The problem with the improper means test was that it invited antitrust judges to make ad hoc judgments about what sorts of behavior they thought proper. Under the Court's present test, judges look at whether the conduct violates the legal standards already prevailing in that context. This helps assure that decisions comport with the functional process ideals underlying the doctrine. It also restrains courts from imposing their own substantive values and provides some meaningful guidance to persons seeking to comply with the law.

Where the effort to influence the government *is* valid under the pro-

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204. See Calkins, *supra* note 9, at 344 n.87; Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 HARV. L. REV. 847, 850-51 (1968); see also Sullivan, *supra* note 10, at 362 (arguing that it is wrong to use antitrust to police impropriety).

cess standards applicable given the context of the effort, but also has direct anticompetitive consequences, it raises a real conflict between policing the competitive process and fostering input into governmental processes. The situation is represented by Diagram J. The activity



*Diagram J*

producing the direct restraint is financially interested and would thus benefit from being channeled, by antitrust review, into a competitive process. But the same activity also provides valid input into the governmental process that would be deterred without antitrust immunity.

Some line has to be drawn in such cases of actual process conflict. The line effectively drawn by the Supreme Court turns on whether the interested action involves market behavior, such as collective agreements on price, output, or boycotts.<sup>205</sup> The competitive process defers to the need for input into the governmental process (and antitrust immunity applies) when the interested action does not involve such market behavior. The competitive process does not defer (and antitrust immunity does not apply) when the interested action does involve market behavior.

This line seems fairly sensible. Where the defendants have reached some collective agreement on their market conduct, antitrust concerns about the competitive process are paramount because such agreements directly interfere with free competition. Concerns about the governmental process are less important because any informational input provided by collective market behavior (such as the views expressed by a symbolic boycott or a product standard) can instead be provided through verbal communication.<sup>206</sup>

205. In first providing antitrust petitioning immunity, the *Noerr* Court stressed that the activity at issue there bore

very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.

*Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 136 (1961). *Allied Tube* cited this passage and echoed its sentiment in denying immunity to market behavior that provided input to the government. *See Allied Tube*, 486 U.S. at 507, 509-10 (stressing that the association comprised market participants whose behavior would be affected by the product standard); *see also id.* at 503-04 (citing various types of market behavior that could not receive antitrust petitioning immunity); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425 (1990) (same).

206. *See Trial Lawyers*, 493 U.S. at 426 (emphasizing that although immunity did not protect

On the other hand, where the defendants' conduct impinges on competition only because it disparages a competitor's goods or requires the competitor to endure the costs and delays of opposing the defendants' petitioning, antitrust concerns (while undeniably present) are less critical. The central nervous system of the market—competition over prices, output, and quality—is not directly hampered. In contrast, concerns about the governmental process are critical because reputational harms and the costs and delays imposed by opposition are inevitable whenever citizens petition their government for action.

To summarize, direct private restraints that are not separable from genuine petitioning are immune if the petitioning conforms to the norms applicable in the relevant process context and does not involve market behavior. The following explores the various contexts in which the Court has elaborated this doctrine.

### 1. *Validity in the Political Process*

Antitrust immunity has always been at its broadest in the political process. *Noerr* immunized a publicity campaign that used a deceptive tactic: circulating materials under the names of seemingly independent third parties to mask the fact that the railroads were behind the anti-trucking campaign. Although the Court felt such activity was unethical, it nonetheless immunized the campaign from antitrust scrutiny because it did not involve market behavior<sup>207</sup> and was valid under the standards applicable to the political process.<sup>208</sup> The third-party technique was “in widespread use” and apparently was not prohibited by the laws then applicable to lobbying.<sup>209</sup>

Many commentators have critiqued *Noerr*, and antitrust petitioning immunity in general, for protecting political tactics that are deceptive, unethical, or corrupting.<sup>210</sup> It may be true, these commentators argue, that we expect less honest or ethical behavior in the political arena than in litigation, but are our expectations really so low and, if so, why should antitrust be governed by these expectations?<sup>211</sup> The threat of antitrust liability may deter deceptive and unethical political conduct, but that

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the boycott itself it did protect “the association’s efforts to publicize the boycott, to explain the merits of its cause, and to lobby District officials to enact favorable legislation”); *Allied Tube*, 486 U.S. at 507 (stressing that the non-immune defendant “did not confine itself to efforts to persuade an independent decisionmaker; rather, it organized and orchestrated the actual exercise of the Association’s decisionmaking authority”) (citation omitted); *id.* at 510 (noting that the defendant was free to engage in “direct lobbying, publicity campaigns,” or “presenting and vigorously arguing accurate scientific evidence”); *Noerr*, 365 U.S. at 138-39 (describing the immune conduct as “mere solicitation”).

207. *Noerr*, 365 U.S. at 136-37.

208. *Id.* at 140-41 & n.20.

209. *Id.*

210. See, e.g., Calkins, *supra* note 9, at 348-52; Minda, *supra* note 24, at 911, 914-24, 1014-15.

211. See Calkins, *supra* note 9, at 348 & n.113, 352.

hardly seems a social loss. *Noerr*, these commentators point out, had two main justifications: the government's need to obtain the informational input necessary to govern, and the right of citizens to inform the government of their wishes.<sup>212</sup> But the government's ability to govern is not improved by obtaining deceptive information.<sup>213</sup> And the right of citizens to petition does not include the right to spread falsehoods.<sup>214</sup>

The reason for providing immunity to allegedly deceptive or unethical political conduct is obviously not that such lobbying is desirable. Nor does the reason rest on the naive belief that others will correct any false information; that is, that the marketplace of ideas is a perfect one.<sup>215</sup> For we know that some voices in the marketplace of ideas win out not because their messages are true but because they are more amplified.<sup>216</sup> And everyone would agree that deceptive and unethical tactics, even if often correctable by a vigilant opposition, are unlikely to further affirmatively the pursuit of truth.

The reason for immunity is the conviction that having antitrust courts police unethical or deceptive political petitioning would be worse than the problem. To begin with, such antitrust review might chill desirable speech. For example, the Court in *Noerr* condemned the tactic of petitioning under the names of third parties as falling "far short of the ethical standards generally approved in this country."<sup>217</sup> But such third party techniques can and have been used by groups to avoid persecution for voicing unpopular ideas.<sup>218</sup> Allowing antitrust courts to penalize third party techniques may thus deter unpopular speakers from adding their input into the process.

Judicial review of the veracity of political statements would be even more chilling. Many political statements depend on controversial assertions about social facts: for example, that licensing either is or is not necessary to protect public safety, that increasing taxes either will or will not seriously discourage production, and that environmental regulation imposes either high or low economic costs. Allowing antitrust courts to impose treble damages on those political statements that judges and

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212. See *Noerr*, 365 U.S. at 137-39.

213. See Fischel, *supra* note 14, at 100-01; Minda, *supra* note 24, at 1013.

214. See *McDonald v. Smith*, 472 U.S. 479, 484 (1985). For commentators arguing or suggesting that, because of this, intentionally false petitioning should not receive antitrust immunity, see Calkins, *supra* note 9, at 349-52; Fischel, *supra* note 14, at 100-04; Hurwitz, *supra* note 10, at 83-84.

215. See generally *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . ."); JOHN S. MILL, *ON LIBERTY* 75-118 (Gertrude Himmelfarb ed., Penguin Books 1985) (1859).

216. See, e.g., MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 283 (1988) (arguing that some voices "drown out" others).

217. *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 140 (1961).

218. Cf. *TRIBE*, *supra* note 103, § 12-26, at 1019-20 (collecting First Amendment cases that invalidated laws requiring organizations to disclose the identity of their members).



juries find deceptive would discourage citizens from offering input about the likely effects of economic regulation.

Some have argued, relying by analogy on the commercial speech cases, that we should be less concerned about chilling effects where petitioning is economically motivated.<sup>219</sup> An initial problem with this argument is that judicial inquiry into whether the subjective motive for petitioning was economic or political would itself chill speech and give judges power to favor some petitioning over others.<sup>220</sup>

But even if stricter antitrust review is limited to cases where parties have an objective financial interest in the political outcome, the chill will likely remain significant because of free rider problems. Although a group of petitioners, say, for example, physicians, might reap a net financial benefit from petitioning for anticompetitive but arguably desirable regulation, such as setting higher standards for licensing future physicians, individual petitioners might lack the necessary incentive to petition. The reason is that, acting individually, each bears the full costs of her own petitioning but must share the financial benefits of anticompetitive regulation (higher fees) with others.<sup>221</sup> Each thus has a financial incentive to free ride off of whatever political effort the others exert. Petitioning groups can offset this structural incentive to free ride only through collective agreements and social sanctions,<sup>222</sup> both of which would be undermined by the threat of legal penalties, let alone treble damages.

The analogy to commercial speech is accordingly inapt. Commercial speech faces no corresponding free rider problems. The speaker generally reaps all the financial gains from her advertising and can weigh those gains against the risk of legal penalties.<sup>223</sup> The risk of legal penalties causes less of a chill because it runs counter to the speaker's financial incentives rather than, as with a petitioner for political action, in line with them.<sup>224</sup>

More dangerous than the chilling effect, an open-ended power to

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219. See Minda, *supra* note 24, at 1008 n.375; Natalie Abrams, Note, *The Sham Exception to the Noerr-Pennington Doctrine: A Commercial Speech Interpretation*, 49 BROOK. L. REV. 573, 594 (1983); Meyer, *supra* note 198, at 852.

220. See *supra* text accompanying notes 162-63.

221. For a fuller explanation of free riding problems and collected sources, see Elhauge, *supra* note 140, at 36-37.

222. Some commentators have doubted that the individual right to petition justifies an immunity for combinations among petitioners. See 1 AREEDA & TURNER, *supra* note 105, ¶ 204b, at 46; Kintner & Bauer, *supra* note 11, at 553. The analysis in the text should dispel these doubts. If concerted petitioning did not enjoy antitrust immunity, free riding problems would make petitioning infeasible for all but petitioners who individually garner a very large share of the benefits of favorable governmental action.

223. See *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 340 (1986) (defining commercial speech as speech that proposes no more than a commercial transaction).

224. See generally Calkins, *supra* note 9, at 350 n.124 (collecting authorities concluding that economically motivated petitioning is not commercial speech).

review the ethics or accuracy of political petitioning might be used by antitrust courts to take sides in political debates. Indeed, the case history of *Noerr* itself amply demonstrates this danger: the trial court had held the railroads liable but not the truckers even though *both* sides conducted publicity campaigns that used the *same* third party techniques.<sup>225</sup> Similar dangers would be posed by judicial review of deception. Imagine, for example, claims and counterclaims by landlords and tenants alleging that the other lied by asserting that rent control is (or is not) socially efficient. Most economists may well agree with the landlords, but it is far better to have the veracity of such statements determined by the political process than by unelected judges and juries.

These problems with judicial review of petitioning do not apply powerfully when the question is whether antitrust immunity should apply to conduct that is already illegal under prevailing regulatory standards. One need not have much concern about chilling effects for conduct that is already prohibited under a law that passes constitutional muster, and any concerns about the constitutionality of such laws should be addressed under the complex constitutional precedent that has evolved concerning regulations of political conduct.<sup>226</sup> Moreover, if antitrust judges merely apply prevailing and pre-defined legal standards rather than formulate their own as they go along, the risk that some sides will be favored in political debates will be lower.

## 2. *Validity in the Adjudicative Process*

Antitrust immunity is narrower in the adjudicative process. *California Motor* refused to immunize petitioning efforts within the administrative or judicial processes that violated the standards of those processes, even though those efforts would have been valid within the political process.<sup>227</sup> In dicta the Court suggested that any unethical or deceptive conduct which was illegal under the rules governing the process in question would not receive antitrust immunity.<sup>228</sup>

In other words, process standards vary in stringency depending on the context, and lesser standards apply in the political context than in the adjudicatory one.<sup>229</sup> This is different from saying that lesser standards apply if the ultimate goal is legislative action instead of a court judgment. "A misrepresentation to a court would not necessarily be entitled to the same antitrust immunity allowed deceptive practices in the political arena simply because the odds were very good that the court's decision

225. *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 132-35 (1961).

226. *Id.* at 141 (arguing that antitrust review of political activities would upset the Court's cautious precedent concerning legislation that regulates political activities).

227. *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 512-13 (1972).

228. *Id.*

229. *See Allied Tube & Conduit Co. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988); *California Motor*, 404 U.S. at 512.

would be codified . . . .”<sup>230</sup> The key is the process context, not the type of governmental result.

The actual conduct before the *California Motor* Court was the defendants’ policy of instituting litigation, “with or without probable cause,” to oppose licenses for their competitors.<sup>231</sup> This, the Court held, was an “abuse of process” invalid within the standards historically applicable to courts or agencies acting in an adjudicatory capacity.<sup>232</sup> Accordingly, no antitrust immunity applied.<sup>233</sup> But the abuse of process rationale for denying immunity has proven confusing to the lower courts.<sup>234</sup>

In part the confusion has resulted because, following *California Motor*, courts and commentators continue to misname this the “sham” litigation exception.<sup>235</sup> This nomenclature has often produced strained efforts to treat strategic litigation as true shams; in other words, litigation not genuinely intended to win the adjudication. But as demonstrated above, the conduct in *California Motor* was genuinely intended to influence adjudication and was successful at it more than fifty percent of the time.<sup>236</sup> The fault with the conduct, rather, lay in the policy of automati-

230. *Allied Tube*, 486 U.S. at 504.

231. *California Motor*, 404 U.S. at 512.

232. *See id.* at 513.

233. *Id.*; *see also* *Otter Tail Power Co. v. United States*, 410 U.S. 366, 367, 380 (1973) (finding no immunity for repetitive insubstantial claims).

234. *See* Calkins, *supra* note 9, at 327-28 (noting courts’ confusion); Minda, *supra* note 24, at 965 (same).

235. *See, e.g., AREEDA & HOVENKAMP, supra* note 10, ¶ 203.1, at 18-34.

236. *See supra* text accompanying notes 46-47, 85-91. Nor is it fair to say that the Supreme Court in *California Motor* sustained the complaint only as to those of the 40 legal proceedings that lacked probable cause. For, as the district court made clear, the complaint carefully refrained from charging that any of the 40 proceedings was in fact instituted without probable cause. *See* *Trucking Unlimited v. California Motor Transp. Co.*, 1967 Trade Cas. (CCH) ¶ 72,928, at 84,744 (N.D. Cal.), *rev’d on other grounds*, 432 F.2d 755 (9th Cir. 1970), *aff’d on other grounds*, 404 U.S. 508 (1972). Rather, the gravamen of the complaint was that the defendants were instituting proceedings automatically, without really considering the merits or whether or not probable cause existed. *See id.* (Allegations that any specific proceeding lacked probable cause would have been difficult to sustain since all the proceedings concerned applications for trucking licenses, which could be denied under a relatively discretionary “public convenience and necessity standard,” and the defendant had obvious success in obtaining frequent denials under that standard in similar cases.) Nothing in the Supreme Court’s opinion suggested it disagreed with the district court’s interpretation of the complaint, nor that the complaint should be amended to include only proceedings instituted without probable cause. To the contrary, the fact that the Court in *California Motor* felt obliged to discuss whether other invalid means of actually influencing adjudication should get antitrust immunity, *see* 404 U.S. 508, 512-13 (1972), suggests it recognized that the case could not be disposed of merely by stating the defendants’ conduct was not genuinely intended to influence the government. Indeed, the Court explicitly stated that it was not using “sham” in the same sense as in *Noerr*, but that it had “adapted” the exception to fit the adjudicatory process. *See id.* at 516; *see also id.* at 512-13 (making clear that activities deemed a sham in the adjudicative process would differ from those deemed a sham in the political process). (Similarly, the court of appeals did not reject the district court’s interpretation of the complaint, but instead concluded that the sham exception applied because the defendant’s “primary” purpose was to directly harm competitors. *See* 432 F.2d 755, 762-63 (9th Cir. 1970) *aff’d*, 404 U.S. 508 (1972)).

cally litigating no matter what the chance of winning.<sup>237</sup> Thus even a suit with probable cause can be subject to antitrust liability under *California Motor*,<sup>238</sup> not because the suit is a true sham, but because of the special abuse of process standards applicable in litigation.<sup>239</sup>

This analysis helps resolve one issue that has confused courts: the applicability of the abuse of process rationale to the political process. Lobbying in the face of almost-certain defeat, no matter how often repeated, is not an abuse of process under governing political norms. Indeed, such determined political lobbying might be regarded as admirably fighting for one's cause. Few think that the Libertarian Party should be prohibited from fielding a presidential candidate because its candidates have repeatedly lost before. Nor is there anything to prohibit advocates from pressing for an Equal Rights Amendment even if it seems clear that they will lose again; after all, women's suffrage was finally extended after decades of repeated losses. In contrast, a policy of *litigating* regardless of the chance of winning is condemned because it imposes enormous costs on the particular individuals being sued.<sup>240</sup>

A second issue raised by the abuse of process rationale for denying immunity to strategic litigation is why the anticompetitive injury in such cases should be regarded as flowing from private action. Doesn't the injury actually result from governmental coercive power; namely, the power of courts and agencies to force parties to participate in adjudicatory proceedings? Why, then, is the injury not considered the result of governmental action?<sup>241</sup>

The answer is that the injury results no matter what the government official *decides*. The government has essentially delegated to litigants the

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237. See *California Motor*, 432 F.2d at 762-63 ("Since all applications were to be opposed, it is irrelevant that a valid basis existed for opposing some applications.").

238. See *In re Burlington N., Inc.*, 822 F.2d 518, 527-28 (5th Cir. 1987) (denying immunity even though petitioning had been partially successful), *cert. denied*, 484 U.S. 1007 (1988); Calkins, *supra* note 9, at 362 nn.178-79 (collecting sources holding or arguing that success should not be dispositive); sources cited *infra* note 239. The Ninth Circuit reached a contrary decision in *Columbia Pictures Industries v. Professional Real Estate Investors*, 944 F.2d 1525 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 1557 (Mar. 30, 1992), which is currently before the Supreme Court, and which I discuss *infra* at text accompanying notes 256-76.

239. See *Grip-Pak, Inc. v. Illinois Tool Works*, 694 F.2d 466, 472 (7th Cir. 1982) ("The existence of a tort of abuse of process shows that it has long been thought that litigation could be used for improper purposes even when there is probable cause for the litigation."), *cert. denied*, 461 U.S. 958 (1983); Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 HARV. L. REV. 715 (1973). The distinction between "sham" petitioning and "abuses of administrative or judicial processes" was recognized in *Allied Tube*, which treated them as separate reasons for denying immunity. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 & n.4 (1988).

240. See generally *California Motor*, 404 U.S. at 511.

241. Cf. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2082-87 (1991) (finding constitutional state action when private lawyers in civil cases use litigation procedures to exclude black jurors).

power to submit others to the costs and delays of litigation. True, these costs and delays reflect the exercise of an authority enforced by the government, but that is also true when antitrust defendants exercise their common law property rights in order to fix prices or restrict sales.<sup>242</sup> Because no disinterested accountable decisionmaker has made a substantive decision in favor of the terms of restraint, no immunity should or does apply.<sup>243</sup>

Of course, this means that the petitioner should enjoy immunity for any injury inflicted by substantive court decisions in such cases. The antitrust plaintiff seeking recovery for the defendant's strategic litigation can recover damages only for the costs and delays imposed by having to defend against that litigation.<sup>244</sup>

A third issue is why and when the costs and delays imposed by litigation, however injurious, should be considered *anticompetitive*. Sometimes, of course, this is relatively clear. The defendants' decision to litigate may delay a competitor from getting the regulatory approval necessary to enter the market. Entering a market nowadays can require approvals from a myriad of licensing boards, zoning commissions, and environmental regulators. A firm that is repeatedly opposed in such proceedings without regard to the legal merits can have its entry to the market delayed for a long time.

But anticompetitive injury can also result even when litigation delay does not directly bar market entry. Firms might litigate strategically to increase their competitors' costs.<sup>245</sup> An objection raised against this theory of strategic litigation is that litigation imposes expenses on both sides.<sup>246</sup> But there are two persuasive responses to this objection.

First, a threat to inflict proportionate costs on both sides can still deter competition if the threatener can make a credible commitment to inflict those costs regardless of the injury he himself suffers.<sup>247</sup> The nuclear deterrence of mutual assured destruction is one instance of such a strategy. For a less rarified example of the importance of commitment,

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242. See Elhauge, *supra* note 25, at 680-81.

243. Where the government has made such a substantive decision by controlling the duration of the delay, the Court has been willing to provide both petitioning and state action immunity from antitrust liability. See *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109-11 (1978).

244. See, e.g., *Rickards v. Canine Eye Registration Found.*, 783 F.2d 1329, 1334-35 (9th Cir.) (declaring that the cost of defending against sham litigation constitutes antitrust injury), *cert. denied*, 479 U.S. 851 (1986).

245. See Hurwitz, *supra* note 10, at 70-73; Christopher C. Klein, *Strategic Sham Litigation: Economic Incentives in the Context of the Case Law*, 6 INT'L REV. L. & ECON. 241 (1986). These costs include not only legal fees but also the time costs of participating in litigation, which distracts management from business operations, and possible capital costs if the litigation makes it harder or more expensive for the defendant to raise capital.

246. See Minda, *supra* note 24, at 964 n.206.

247. See Klein, *supra* note 245, at 244. See generally THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 22-28 (1960) (explaining how a prior commitment can improve one's bargaining power).

consider the game of "chicken." In this game two persons drive their cars toward each other with the result that either a head-on collision occurs or one driver pulls off the road and becomes the "chicken." The driver who can make a binding commitment to stay on the road despite the risk of head-on collision should win because the costs to the other driver of a head-on collision far outweigh the costs of being called "chicken." One such commitment might consist of taking one's hands off the wheel. A better commitment would be removing the steering wheel and throwing it out the window.

In *California Motor*, the commitment consisted of forming a joint trust fund to oppose all applications by competitors for operating rights.<sup>248</sup> This committed the defendants to spending money on litigation by turning the legal authority to do so over to the trustee. Of course, such commitments can only have their desired effect if they are communicated to the parties sought to be deterred. Thus, in *California Motor*, the defendants explicitly warned their competitors about their plan and informed them that they could avoid the costs of litigation only by refraining from entering the market.<sup>249</sup>

Second, litigation can often *disproportionately* raise the competitor's costs. Sometimes litigation expenses are asymmetric: opposing the litigation may cost more than initiating it.<sup>250</sup> Further, imposing the same expenses on both sides can have asymmetric effects. If, for example, the litigation is between a large and small producer, then imposing the same litigation expenses on both sides will increase the small producer's *cost per output* more than the large producer's.<sup>251</sup>

Such strategic litigation is actually a far more useful tool for driving competitors out of business than predatory pricing.<sup>252</sup> Predatory pricing costs a large producer *more* than a small producer, because the large producer must lower prices on more sales. Predatory litigation does not have this limitation, and can thus inflict greater per unit costs on small producers than the large producer suffers.<sup>253</sup>

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248. See *Trucking Unlimited v. California Motor Transp. Co.*, 1967 Trade Cas. (CCH) ¶ 72,298, at 84,740 (N.D. Cal.), *rev'd on other grounds*, 432 F.2d 755 (9th Cir. 1970), *aff'd on other grounds*, 404 U.S. 508 (1972).

249. *Trucking Unlimited v. California Motor Transp. Co.*, 432 F.2d 755, 762 (9th Cir. 1970), *aff'd*, 404 U.S. 508 (1972).

250. Hurwitz, *supra* note 10, at 71.

251. See AREEDA & HOVENKAMP, *supra* note 10, ¶ 203.1a, at 21 n.20; Hurwitz, *supra* note 10, at 71; Klein, *supra* note 245, at 248.

252. See 24 TRADE REG. REP. (CCH Extra Edition, Nov. 10, 1988) (Department of Justice Guidelines, International Operations Antitrust Enforcement Policy); ROBERT H. BORK, *THE ANTITRUST PARADOX* 357 (1978).

253. Using litigation to raise rivals' costs does not affect the *marginal* cost of their production, and thus should not directly affect market prices. See Klein, *supra* note 245, at 244. It can, however, affect market prices indirectly if the competitor sues for peace, for example by not charging certain prices or by not competing for certain customers. It can also affect market prices if the competitor is driven out of the market or deprived of the funds it needs to expand.

Of course, using litigation to impose costs on competitors cannot, in general, have any anticompetitive effect unless the defendants exercise or orchestrate the market power to raise prices once their rivals' costs (or behavior or existence) have been changed.<sup>254</sup> Because the warrant for imposing antitrust liability—rather than ordinary tort liability for abuse of process—is that strategic litigation abuse might affect competition, this suggests that market power should be a necessary element to finding antitrust liability for abuse of process litigation. Moreover, market power is a prerequisite to liability under the Sherman Act except for certain per se violations,<sup>255</sup> and it would be inappropriate to treat abuse of process litigation as a per se violation because such litigation is often difficult to distinguish from meritorious litigation.

This brings us to the fourth issue, which is the one that has most perplexed courts and commentators, and which is currently pending before the Supreme Court: how can a court determine when a litigant has engaged in abuse of process litigation?<sup>256</sup> A typical statement is that "[t]he line is crossed when [the 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."<sup>257</sup> But it is hard to find the litigant who does not have both aims. The most strategic of litigants genuinely hope they win, even if the odds may not look good, and the most nonstrategic of litigants usually dislike their opponents enough to take some pleasure in inflicting litigation costs on them.

If a genuine hope of winning sufficed to receive immunity, then abuses of process would effectively go undeterred, and predatory litigation would flourish. If, on the other hand, a purpose of harassing opponents sufficed to lose immunity, then firms would fear to bring even meritorious litigation against their competitors. The mere existence of either motive should thus not suffice to establish immunity or non-immunity. Some weighing of the motives must be made.

One method is to determine the defendant's subjective intent,<sup>258</sup> which where motives are mixed means determining which motive subjectively dominated the defendant's mind. This approach is in some tension with the general objective process approach, but is perhaps justified

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254. See Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 564 (1991).

255. AREEDA & HOVENKAMP, *supra* note 10, ¶ 203.6, at 61.

256. See *Columbia Pictures Indus. v. Professional Real Estate Investors*, 944 F.2d 1525 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 1557 (Mar. 30, 1992).

257. *Grip-Pak, Inc., v. Illinois Tool Works*, 694 F.2d 466, 472 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983); see also *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344, 1354 (1991) (making a similar statement).

258. See Kintner & Bauer, *supra* note 11, at 571-72 nn.97-98 (collecting sources focusing on intent). See generally Gilson, *supra* note 162, at 880-82 (discussing inherent difficulties in determining the subjective intent of plaintiffs).

because the prevailing regulatory standards—abuse of process norms—incorporate a primary intent test.<sup>259</sup> Nonetheless, an objective test for determining intent is preferable for the reasons articulated above.<sup>260</sup> Subjective intents are too easy to hide—and allege. Courts required to determine subjective intents will thus be forced to speculate about something that is, in truth, largely unknowable. Worse, because the inquiry is so unstructured, determinations of subjective motive will likely be influenced by the hidden biases of judges and juries against (or for) certain types of litigation or litigants.

Three principal efforts have been made to give objective content to the process/outcome intent test. One asks whether the chances of winning were “reasonable,”<sup>261</sup> which can be much the same as asking whether there was “probable cause” to bring the suit.<sup>262</sup> This test entails examining the extent of legal and factual support for the party’s position.<sup>263</sup> But penalizing litigation whenever the chances of success are low would bar “creative” legal arguments from legal discourse.<sup>264</sup> And it is hard to see what plausible test based on the chances of winning could possibly explain excluding a litigant with a 52.5% success rate, as *California Motor* did.<sup>265</sup> If, in response to these problems, one interprets the reasonable expectation test as referring to something other than the likelihood of success, then the test offers no guidance at all because which expectations are “reasonable” becomes a completely conclusory judgment.<sup>266</sup>

A second test asks whether the motive of securing judicial relief was a “significant” factor behind the decision to sue.<sup>267</sup> Unfortunately, this test also leaves the judicial inquiry unstructured. Not only is there no definition of what “significant” means, but the criteria that would go into deciding significance are left uncertain. The test does suggest that courts

259. See RESTATEMENT (SECOND) OF TORTS § 682 (1976).

260. See *supra* text accompanying notes 162-63.

261. See *Litton Sys. v. American Tel. & Tel.*, 700 F.2d 785, 810 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); see also AREEDA & HOVENKAMP, *supra* note 10, ¶ 203.1, at 23.

262. See, e.g., *Columbia Pictures Indus. v. Professional Real Estate Investors*, 944 F.2d 1525, 1532 (9th Cir. 1991) (equating probable cause and reasonable basis), *cert. granted*, 112 S. Ct. 1557 (Mar. 30, 1992).

263. See Gilson, *supra* note 162, at 879-80.

264. See AREEDA & HOVENKAMP, *supra* note 10, ¶ 203.1e, at 31; Gilson, *supra* note 162, at 879-80; Hurwitz, *supra* note 10, at 98.

265. See *supra* text accompanying notes 46-47, 85-91; see also note 236 and accompanying text. The Ninth Circuit’s opinion in *Columbia Pictures* contains no mention of the success rate of the litigants in *California Motor*, suggesting the appellate panel was perhaps unaware of it.

266. Professors Areeda and Hovenkamp, for example, reject a test based on the probability of winning, reasoning: “[O]ne must not penalize the assertion of novel legal claims. Such claims sometimes prevail. That a claim is novel or against the weight of precedent does not make it unreasonable.” AREEDA & HOVENKAMP, *supra* note 10, ¶ 203.1e, at 31. Unfortunately, Areeda and Hovenkamp do not tell us what *does* suffice to make a claim unreasonable.

267. See *Coastal States Mktg. v. Hunt*, 694 F.2d 1358, 1372 (5th Cir. 1983).



should look not only at the chances of success but also at the stakes for the litigating party, since both no doubt affect decisions to litigate.<sup>268</sup> But the test fails to explain how courts should weigh these factors.

Judge Posner has offered a more structured approach. In *Grip-Pak*, he stated that there should be no immunity when the value of a favorable judgment, discounted by the uncertainty of prevailing, is less than the cost of suit.<sup>269</sup> The main objection to this test is that it discourages the filing of legitimate or novel claims,<sup>270</sup> especially when one takes into account the possibility of judicial error. But this objection is not dispositive because any doctrine can offer at best imperfect regulation. Efforts to deter undesirable conduct inevitably deter some desirable conduct, and the best we can hope for is a system that achieves the optimal trade-off.<sup>271</sup> Here the unavoidable tradeoff is between deterring predatory litigation and deterring legitimate suits; we cannot deter the former without deterring some of the latter.<sup>272</sup>

Nonetheless, a number of factors suggest that Posner's test overly constricts immunity. His test effectively denies immunity whenever the prospect of victory is not a sufficient motive for litigation, or, to put the matter another way, whenever the direct injury to competitors is *necessary* to motivate litigation. But if *both* this direct injury and the prospect of favorable judgment are necessary motives for litigation (and thus neither is a sufficient motive), one cannot say that one motive is greater than the other.

Posner's objective test accordingly seems somewhat biased toward finding an abusive intent. If anything, the opposite bias seems advisable. Legitimate suits are already somewhat deterred by their costs, and those same costs offer some self-deterrence to strategic litigation. This suggests a greater need to encourage legitimate suits than to deter strategic suits.

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268. See Sullivan, *supra* note 10, at 363.

269. See *Grip-Pak, Inc. v. Illinois Tool Works*, 694 F.2d 466, 472 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983); see also *Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n*, 814 F.2d 358, 372 (7th Cir. 1987) (Easterbrook, J.) (reaffirming Posner's position).

270. See Klein, *supra* note 245, at 245.

271. See Einer Elhauge & Stephen Bundy, Knowledge About Legal Sanctions 3-11 (John M. Olin Working Paper in Law & Economics, No. 91-9) (on file with the *California Law Review*) (Part I); Einer Elhauge, *The Triggering Function of Sale of Control Doctrine*, 59 U. CHI. L. REV. (forthcoming Fall 1992) (manuscript at 33-37, on file with author) (Section III.A).

272. See Klein, *supra* note 245, at 245-51; see also Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979) (arguing that antitrust bans on predatory pricing must balance the benefit of deterring predatory pricing against the cost of deterring desirable price-cutting). The same tradeoff is present for non-antitrust doctrines that deal with the problem of frivolous suits and strategic litigation. See Gilson, *supra* note 162, at 877-82 (arguing with respect to malicious prosecution and professional rules of conduct that any definition of strategic litigation must trade off over- and underinclusion); Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT'L REV. L. & ECON. 3, 26 (1990) (concluding that the English rule of assessing legal expenses against the loser may help deter frivolous suits, but only at the cost of deterring meritorious suits). The discussion in the text thus also applies to those doctrines.

Further, an antitrust suit brought to challenge strategic litigation carries with it the threat of treble damages. These treble damages, coupled with the direct costs inflicted on an opponent by a suit alleging strategic litigation, mean that the threat of a "sham-sham" suit (i.e., a suit falsely alleging the other side engaged in strategic litigation) will likely carry greater weight than the threat of a "sham" (i.e., strategic) suit.<sup>273</sup>

A better test would deny antitrust immunity only if the direct injury was a necessary *and* sufficient objective motivation for the allegedly strategic litigation. Under this two-part test, the antitrust plaintiff alleging strategic litigation would (in addition to defendant market power) have to show: (1) that the antitrust defendant would not have brought the original suit but for the direct injury imposed on his competitor, and (2) that the defendant would have brought suit even without any prospect of winning in order to inflict the direct costs or delays on his competitor. This test fits better with the significant motive test,<sup>274</sup> and provides some objective content to the reasonable expectation test. It also lessens the risk that antitrust suits will deter novel and legitimate litigation because it denies immunity only if the direct injury *alone* would cause the antitrust defendant to sue (and the expected value of winning would not), which is certainly not true for most novel or imaginative claims. The risk is further lessened under my test because litigants would suffer no antitrust liability unless they have been proven to have a market power to raise prices that will be maintained, created, or strengthened by the infliction of litigation costs or delays on their competitors.<sup>275</sup> While there will no doubt be uncertainties in the test's application, it structures the judicial inquiry far more than the conclusory reasonable expectation or significant motive tests ever could.<sup>276</sup>

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273. See Klein, *supra* note 245, at 249. Treble damages pose a threat because of the inevitable possibility of false positives: that is, unwarranted findings that the original suit was strategic or predatory.

274. The courts using the significant motive test have relied not just on evidence that the suit was not reasonably founded but also on evidence that the defendant would have sued to impose direct costs even without any prospect of winning. See *In re Burlington N., Inc.*, 822 F.2d 518, 528 (5th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988).

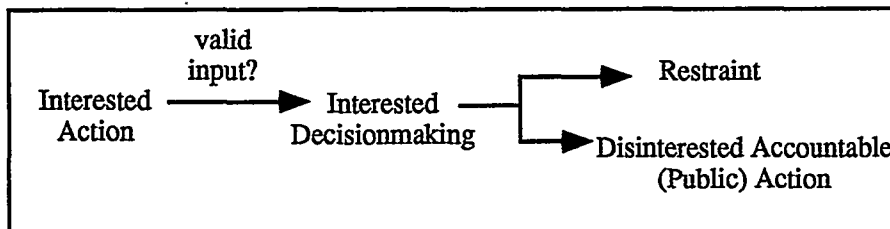
275. See *supra* text accompanying note 254-55.

276. Proving strategic litigation will be easier if the defendant has engaged in repetitive litigation, but one-shot lawsuits can also constitute strategic litigation outside the scope of petitioning immunity. See AREEDA & HOVENKAMP, *supra* note 10, ¶ 203.1e, at 31-32 (collecting cases); Handler & De Sevo, *supra* note 35, at 28-30 (same); Hurwitz, *supra* note 10, at 101 & n.160 (same); Kintner & Bauer, *supra* note 11, at 574 n.110 (same). Nor, despite some language in *California Motor Transportation Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972), does it seem necessary to show that the defendant's actions barred the antitrust plaintiff from access to the adjudicatory process. See AREEDA & HOVENKAMP, *supra* note 10, ¶ 203.1b, at 22-23 & n.31 (collecting cases); Hurwitz, *supra* note 10, at 101-02 & n.165 (same). Both these legal conclusions comport with the analysis offered here. Competitors (and, through them, competition) can be hurt by enduring the costs of strategic litigation even though only one suit is brought and even if the costs are not so high as to totally deprive the party of access to the courts.

### 3. *Validity in the Private Process*

*Allied Tube* presented a somewhat more perplexing case. The defendants there chose to influence the government and the market indirectly, by influencing a private standard-setting association to adopt an electrical code that excluded plastic conduit. To some extent, this injured the plaintiffs because the code constituted an implicit agreement by association members to boycott the plaintiff's product. To that extent, the defendants' conduct involved market behavior which, as discussed above, is outside the scope of antitrust immunity.<sup>277</sup>

Had the plaintiff's entire injury resulted solely from this collective market behavior, the Court could have stopped with that observation. But much of the plaintiff's injury was reputational. The code's conclusion that plastic conduit was unsafe had a strong influence on non-association members: if a product fell outside the code, private certification laboratories would not certify it, underwriters would not insure it, and many inspectors, contractors, and distributors would not use it.<sup>278</sup> To determine whether the defendant was immune from damages for these reputational injuries required determining whether the defendant's conduct was valid within the ordinary standards applicable to the context. Here the context was a standard-setting association that was "private" in the sense that the Court uses the term because it comprised market participants and was thus financially interested.<sup>279</sup> One might represent this decisionmaking process by Diagram K.



*Diagram K*

277. See *supra* note 205 and accompanying text.

278. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495-96 (1988).

279. In denying immunity, the Court emphasized that the defendants exercised decisionmaking authority over an association that comprised market participants with financial interests at stake. *Id.* at 501-02, 506-07. Although Professors Areeda and Hovenkamp suggest that immunity might still apply to "normal" voting" by financially interested association members, AREEDA & HOVENKAMP, *supra* note 10, ¶ 206.2, at 86-87, this suggestion is unfounded. The Court explicitly rejected the notion that complying with association rules should provide immunity. *Allied Tube*, 486 U.S. at 509. Moreover, the Court held that where "an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace." *Id.* at 509-10. Anyone voting clearly exercises "decisionmaking authority," and voting by financially interested actors—whether "normal" or not (assuming that could be defined)—creates the sort of decisionmaking process calling for antitrust review.

The question was what provides the ordinary process standards in this context. In part such standards are provided by the rules of the standard-setting association, under which the defendants' conduct in packing the meeting (while unsavory) was valid.<sup>280</sup> But the perplexing facet of the case was that, irrespective of association rules, the legal standards governing the private standard-setting process are largely those provided by antitrust law itself.<sup>281</sup> Accordingly, when the Court incorporated the process' prevailing regulatory standards to decide whether the conduct was invalid in a way that abrogated antitrust immunity, it had to incorporate the standards of antitrust review itself. In short, "[t]he issue of immunity in this case thus collapses into the issue of antitrust liability."<sup>282</sup>

This conclusion should not be misinterpreted as meaning, as the lower court held in *Allied Tube*,<sup>283</sup> that indirect efforts to petition the government by petitioning a private organization should not receive antitrust immunity. Imagine, for example, that DuPont petitions the Democratic Party or the Sierra Club to adopt organizational platforms calling for governmental restrictions on fluorocarbons. An antitrust suit is brought alleging that DuPont is financially interested because, unlike its competitors, it has alternative means of producing spray cans that do not use fluorocarbons. Under the Court's doctrine, antitrust immunity would still apply as long as DuPont's efforts conformed with the ordinary political standards governing efforts to influence political parties and organizations.<sup>284</sup> Under the lower court's direct/indirect distinction, immunity would not have applied because no public official was directly petitioned. Such a direct/indirect distinction would have seriously restricted petitioning rights because the real movement of political ideas generally occurs not in legislative hearings but in the countless private fora that create organizational agendas and mold public opinion. A denial of immunity for indirect petitioning would thus have been chilling indeed to First Amendment freedoms.

We are now in a position to unpack what has been lumped together as a "commercial" exception to antitrust petitioning immunity. Commerciality, the discussion so far demonstrates, may be relevant in no less than three distinct senses. First, the governmental action may be commercial in the sense that the government or its officials have a financial interest in the government's restraint of trade. This would deprive the petitioner of immunity for any direct restraints and, where it shares deci-

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280. See *Allied Tube*, 486 U.S. at 509.

281. See *id.* at 500-01, 506-07.

282. *Id.* at 509.

283. *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938, 945-46 (2d Cir. 1987), *aff'd on other grounds*, 486 U.S. 492 (1988).

284. Accordingly, the *Allied Tube* Court rejected the direct/indirect distinction, noting that the petitioning in *Noerr* itself was indirect. *Allied Tube*, 486 U.S. at 503.

sional responsibility, for the government's restraint. Second, the defendant's conduct may involve financially interested market behavior. The petitioner would still be immune for the government's restraint unless the government was coerced, but would not have immunity for any direct effects of the market behavior. Finally, the commerciality of the governmental activity or the petitioning may determine the appropriate contextual standard to judge the validity of the petitioning. Where this commercial context means the petitioning is invalid, its direct effects enjoy no immunity, but the governmental action normally does.

#### 4. *Political Boycotts that Do Not Coerce the Government*

We come next to the topic of non-coercive political boycotts; that is, boycotts designed to raise consciousness and influence public opinion which do *not* coerce the government. For example, suppose gas stations agree to close during certain periods to protest governmental price regulations. Should this boycott be immune? So far, courts have split on the issue.<sup>285</sup>

The issue is distinguishable from that in *Trial Lawyers* because here the boycotters are not boycotting or coercing the government directly. The restraint on the public has coercive aspects, but the input into the government may not be coercive. The issue is thus closer to that in *Allied Tube*: market behavior that produces both a financially interested restraint and persuasive input into the political process. Nonetheless, there may be some indirect coercion of the government if the boycott coerces voters to in turn exert pressure on the political process.

In any event, whether under *Allied Tube* or *Trial Lawyers*, the analysis above suggests that if the boycotters have a financial interest in the boycott, no immunity should apply. This is supported by dicta in *Allied Tube*, which listed a parade of horrors intended to show the unacceptable consequences of the absolutist position that immunity applies to all activity genuinely intended to influence the government. Among the unacceptable horrors, the Court included:

Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action.<sup>286</sup>

The two sentences signal the Court's understanding of the distinction

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285. Compare *Osborn v. Pennsylvania-Del. Serv. Station Dealers Ass'n*, 499 F. Supp. 553, 558 (D. Del. 1980) (not immune) with *Crown Cent. Petroleum Corp. v. Waldman*, 486 F. Supp. 759, 769 (M.D. Pa.) (immune), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980).

286. *Allied Tube*, 486 U.S. at 503 (citation omitted).

between two different sorts of political boycotts, those that coerce the government and those that do not. They also indicate the Court's sentiment that (at least where financially interested) neither merits immunity. *Trial Lawyers* echoed both sentiments,<sup>287</sup> as well as providing the holding that cemented the first.

Where the boycotters have no financial interest in the anticompetitive consequences of the boycott—that is, they do not benefit financially either from lessening competition in the boycotted market or from inducing the boycotted parties to lessen competition in other markets—the issue is different. To some extent, such financially disinterested boycotts are immunized under *Claiborne Hardware*, where the boycott to end racial discrimination was aimed not only at government officials but also at private merchants.<sup>288</sup> And, as I argue above, because such disinterested action cannot usefully be channeled into a competitive process, antitrust review may be unhelpful from an objective process standpoint.<sup>289</sup>

This distinction between financially interested and disinterested boycotts provides a sounder basis for the decision in *Missouri v. National Organization for Women (NOW)* than the Eighth Circuit was able to provide.<sup>290</sup> That case concerned a boycott, organized by NOW, of convention facilities located in states that had not ratified the Equal Rights Amendment. The Eighth Circuit held that the boycott was immune because (1) the ultimate goal was political, not economic, legislation and (2) the boycotters were motivated by political objectives, not profit.<sup>291</sup>

Unfortunately, both these tests are ambiguous and raise the specter of *sub rosa* judicial bias. How can we tell that the Equal Rights Amendment is political and not economic? Surely it would re-order economic relations in employment. And what about other boycotts, like one designed to encourage bans on allegedly unsafe products? Such bans may have noneconomic objectives, but they restrict competition. The inevitable risk is that judges will tend to conclude that the sort of legislation they favor is political and the sort they disfavor is merely economic. Perhaps judges can discipline themselves to avoid this tendency, but without any intelligible criteria for sorting political from economic legislation, they have little else to rely on besides their gut intuitions. In any event, the judicial ability to resist the temptation to impose judicial views is not limitless. Like other scarce items, it should be economized. Similar problems beset a test focusing on whether the boycotters were subjec-

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287. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425 (1990) (quoting *Allied Tube*, 486 U.S. at 503).

288. See *supra* text accompanying notes 165-67.

289. See *supra* text accompanying note 164.

290. 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

291. *Id.* at 1311-12.

tively motivated by financial gain or by political objectives, and for that reason subjective motives are not used under the functional process approach—or the Court’s case law—in determining whether antitrust immunity applies.<sup>292</sup>

What should have been considered decisive was the fact that, objectively speaking, the boycotters in *NOW* had no financial interest in any anticompetitive consequences of the boycott. They did not compete with convention facilities and had nothing financial to gain from lessening competition in the convention market.<sup>293</sup> To be sure, some of the boycotters might have gained financially if the Equal Rights Amendment had been enacted because they would have gotten better jobs or pay.<sup>294</sup> But one could have said the same about the boycotters in *Claiborne Hardware*. In both cases, however, this financial interest was never actually established and would in any event have been attenuated and inapplicable to many of the boycotters, especially those who were male in *NOW* and white in *Claiborne*.

More importantly, the question here is whether the boycotters had a financial interest in the anticompetitive consequences of the restraint imposed by *their* actions, not whether they had a financial interest in whatever governmental action might have ultimately resulted. They are immune for any results of the government action, absent evidence that the government was coerced by a boycott that had market power.<sup>295</sup> But they lose their immunity for the direct results of their boycott, with or without a showing of market power, if they would have benefitted financially from a lessening of competition in the boycotted market or from inducing the boycotted parties to lessen competition. In *NOW*, the boycotters had no financial stake at all in the boycott’s nongovernmental consequences, and thus rightly received immunity.

In *Claiborne Hardware*, the boycotters had no financial interest in lessening competition among white merchants. And although some boycotters may have had a financial interest in directly inducing white merchants to end job discrimination, the end of such discrimination does

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292. See *supra* text accompanying notes 161-63. See generally AREEDA & HOVENKAMP, *supra* note 10, ¶ 113.1, at 7 (noting difficulty of parsing mixed motives). Also raising problems of ambiguity and *sub rosa* judicial bias would be a doctrine that immunized boycotts with an “expressive component.” Such a doctrine was appropriately rejected in *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 428-32 (1990).

293. *NOW*, 620 F.2d at 1303 (summarizing lower court’s factual findings). If, instead, the boycotters included hotels from states that had ratified the Equal Rights Amendment, who would have benefited financially from the shift in business from non-ratifying states, those hotels would not have merited antitrust immunity, no matter how pure they claimed their subjective motives were. Cf. AREEDA & HOVENKAMP, *supra* note 10, ¶ 113.1, at 6 (arguing that immunity should presumptively, but not conclusively, be denied to such hotels).

294. See AREEDA & HOVENKAMP, *supra* note 10, ¶ 113.1, at 6; Minda, *supra* note 24, at 984 n.288.

295. See *supra* text accompanying note 179.

not lessen competition but increases it by making jobs available to more applicants. If instead the boycott aimed to induce white merchants to hire a minimum quota of blacks, then any financial interest for boycotters who were black job seekers *would* flow from direct anticompetitive consequences of the boycott (because competition for certain slots would be decreased) and no immunity would have applied.<sup>296</sup>

## V

### LIABILITY FOR GOVERNMENTAL ACTION?

The final issue is whether there are any circumstances where petitioners should be liable for restraints imposed by governmental decision. I have already adverted to one such issue: petitioners should be liable for governmental restraints that resulted from petitioner coercion.<sup>297</sup> But where the petitioner urges, rather than coerces, governmental action, then one must contend with the following language from *Allied Tube* (quoting *Noerr*): “[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from anti-trust liability for the anticompetitive restraint.”<sup>298</sup> This raises the question of what, within the functional process framework, constitutes “valid,” instead of invalid, governmental action.

#### A. *Petitioning for Invalid Governmental Action*

One possible meaning of invalid governmental action, which might seem to correspond to the meaning of invalid petitioning described above, would focus on whether the governmental action was legal within the procedural, administrative, or constitutional standards that apply to that government action. And indeed, in the past, some commentators have argued that there should be no immunity when the petitioner seeks government action outside the scope of the government’s authority.<sup>299</sup> Immunity would, for example, be denied under this position if the petitioner obtains legislative action that violates the state constitution or agency action that exceeds the agency’s statutory authority.

This position should, however, be rejected. From a functional process perspective, all that matters is whether the restraint was politically accountable and financially neutral. If it is, it should be immune from

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296. See *Hughes v. Superior Court*, 339 U.S. 460 (1950) (upholding injunction of boycott that demanded 50% hiring of blacks); see also *NAACP v. Claiborne Hardware*, 458 U.S. 886, 915 n.49 (1982) (distinguishing *Hughes*).

297. See *supra* text accompanying notes 158, 179.

298. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (quoting *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 121, 136 (1961)) (alteration in original).

299. See, e.g., L. Barry Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 MICH. L. REV. 333, 340-43 (1967).



antitrust review because the rationale for antitrust scrutiny does not apply. The other legal remedies for exceeding the government's authority should be adequate. If the so-called governmental restraint is instead financially interested, then it should be denied antitrust immunity even if the action is otherwise legally authorized by the Constitution or by state or local law.<sup>300</sup>

Professors Areeda and Hovenkamp, and several courts, have reached a similar conclusion, arguing that immunity should apply to unauthorized governmental action, even if the defendant "knew" the action was unconstitutional or unauthorized.<sup>301</sup> But their reasons are pragmatic. They argue that the motivational inquiry will be difficult, will rarely turn up such knowledge where governmental action was obtained, and will deter petitioning.<sup>302</sup> The rationale here, in contrast, is conceptual. Without evidence that a financially interested process produced the restraint, the rationale for reviewing it under antitrust standards simply does not apply. This is not to deny that there are important practical arguments for antitrust courts' refusal to deny petitioning immunity even to bad faith petitions for unauthorized government action, just as there are for antitrust courts' refusal to deny state action immunity even when the government has exceeded its authority in bad faith.<sup>303</sup> But these sorts of ad hoc pragmatic arguments do not form the basis of a consistent doctrine. A far clearer explanation is that financial interest, not governmental authority, is the real test.

More pertinent to the "validity" of the governmental action is whether it would receive immunity under antitrust's state action doctrine.<sup>304</sup> As I have argued in another article, state action immunity does and should apply whenever the governmental actor is politically accountable and financially disinterested, but does not and should not apply when the governmental actor is financially interested.<sup>305</sup> It follows that if the state action doctrine immunizes the restraint causing the injury, then the functional process standards described above have been met, and the efforts to procure that restraint should be immune from any antitrust

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300. If the governmental action is authorized by federal statute, then we obviously have a question of whether the statute implicitly repeals the application of federal antitrust law. The tradition is to construe such implicit repeals narrowly. See *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982).

301. AREEDA & HOVENKAMP, *supra* note 10, ¶ 203.2, at 34-37; see also *id.* ¶ 203.2, at 36-37 nn.5 & 7 (collecting supporting cases).

302. See *id.* ¶ 203.2, at 35-37; see also 1 AREEDA & TURNER, *supra* note 105, ¶ 202b, at 39.

303. See Elhauge, *supra* note 25, at 692 (noting courts hold that the "clear authorization" requirement for state action immunity is met even when the state actors have exceeded or abused their authority in bad faith). This position has been confirmed in *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344, 1349-50 (1991).

304. For cases holding or suggesting that petitioning immunity should hinge on the existence of state action immunity, see AREEDA & HOVENKAMP, *supra* note 10, ¶ 203.2a, at 35 n.1. For cases holding or suggesting the opposite, see Meyer, *supra* note 198, at 843 n.54.

305. See Elhauge, *supra* note 25, at 682-729.

liability flowing from it. This is the best way of interpreting what the Court means when it states the governmental action must be "valid."

But this does not mean, as is sometimes simplistically said, that petitioning immunity is just the flip side of state action immunity.<sup>306</sup> For sometimes, as we have seen above, petitioning immunity is denied (to restraints directly produced by the petitioning) even though the petitioning also produced governmental action that does and should receive state action immunity.<sup>307</sup> Other times, the petitioner may simply be urging a financially interested government to impose a restraint. For example, suppose resident producers of a product mainly sold to out-of-towners encourage their city to set a minimum price at which the product can be sold. In that case there should be no state action immunity because the government is financially interested,<sup>308</sup> but the petitioners should still be immune because the governmental decision is the one that sets the terms of the restraint.<sup>309</sup> Where, on the other hand, the petitioner determines the terms of the restraint jointly with a financially interested government (say, for example, by fixing the same sale price for goods sold by both the petitioner and the government) then petitioning immunity does not apply.<sup>310</sup>

Some commentators have argued that the key question in evaluating petitioning immunity is whether governmental action is the "supervening" or "proximate" cause of the anticompetitive injury.<sup>311</sup> Although such doctrinal formulations can provide a handy means of reaching the correct conclusions, I do not rely on causation because it is a formal conclusion driven by functional considerations.<sup>312</sup> One could often reach opposing conclusions about who "caused" the restraint and whether the cause was "supervening." The real key is what functional considerations underlie the causal inquiry.

Suppose, for example, the question is whether immunity should

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306. See, e.g., *Omni*, 111 S. Ct. at 1355; Donald I. Baker, *Exchange of Information for Presentation to Government Agencies: The Interplay of the Container and Noerr Doctrines*, 44 ANTITRUST L.J. 354, 356 (1975).

307. See *supra* Part IV.

308. See Elhauge, *supra* note 25, at 729-38. For reasons peculiar to financially interested municipal restraints, state action immunity still applies if the restraint was authorized by the state. See *id.* at 736-38. But even with such state authority, dormant Commerce Clause review should strike down the price floor if it mainly affects persons residing out-of-state. See *id.* at 732-35; Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563, 575-626 (1983).

309. Accord AREEDA & HOVENKAMP, *supra* note 10, ¶ 212.8, at 198.

310. See *supra* text accompanying notes 124-39 (discussing *Continental Ore*); accord Sullivan, *supra* note 10, at 365-66. Under my analysis, though perhaps not Professor Sullivan's, immunity would be denied only if the price-fixing exploited market power against nonresidents of the government since the government would have no financial interest in exploiting its own residents.

311. See AREEDA & HOVENKAMP, *supra* note 10, ¶ 201, at 14-15; Hurwitz, *supra* note 10, at 123.

312. See Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975).

apply to a monopolistic practice for which the monopolist sought and received substantive approval from a disinterested state regulator. Having received approval, the monopolist directly imposes the practice itself, so it seems debatable whether the state regulator was the "cause" of the practice, supervening or otherwise, particularly if it is not clear whether the regulator's approval was required before the practice could be implemented.<sup>313</sup> However, the real question in such cases is whether the decisionmaking process producing the restraint is sufficiently reliable to merit antitrust immunity, or whether instead its reliability depends on being subjected, via antitrust review, to the competitive process. Here, the monopolistic practice should be immunized because a disinterested accountable actor has made a substantive decision in its favor before the practice was imposed on the market. "Causation" is besides the point.

Likewise, causation explains neither the existence of immunity in some cases where a restraint flows directly from the petitioning nor the factors that determine whether such immunity for direct restraints applies. For that, we must look to the functional process framework articulated above in Part IV.

### B. Bribery

Suppose an unscrupulous liquor store bribes a state commissioner to deny a liquor license to a potential competitor. The bribe has produced a governmental restraint on competition. Are the briber and commissioner immune from antitrust liability for this restraint because, however invalid the bribe, the denial of the liquor license resulted from valid governmental action?

Under the objective process approach of this Article, the clear answer is "No." The decisionmaking process producing the restraint was financially interested, and thus not likely to advance the public interest unless subjected (via antitrust review) to the competitive process. The decision by the bribed official should not get state action immunity, and the effort to bribe the official should not receive petitioning immunity. This conclusion conforms to lower court decisions.<sup>314</sup>

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313. See generally AREEDA & HOVENKAMP, *supra* note 10, ¶ 206.1, at 80-81 (discussing causation issue).

314. See *Instructional Sys. Dev. Corp. v. Aetna Casualty & Surety Co.*, 817 F.2d 639, 650 (10th Cir. 1987); *Associated Radio Serv. Co. v. Page Airways*, 624 F.2d 1342, 1358 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851, 856-57 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966); *Cipollone v. Liggett Group, Inc.*, 668 F. Supp. 408, 410 (D.N.J. 1987). But see *Cow Palace, Ltd. v. Associated Milk Producers, Inc.*, 390 F. Supp. 696, 702 (D. Colo. 1975). Campaign contributions, on the other hand, do not make a government official sufficiently self-interested to lose antitrust immunity. See *Boone v. Redevelopment Agency*, 841 F.2d 886, 895 (9th Cir.) (Sherman Act inapplicable to campaign contributions), *cert. denied*, 488 U.S. 965 (1988); *Metro Cable Co. v. CATV of Rockford*, 516 F.2d 220, 231 (7th Cir. 1975) (same); *Elhauge*, *supra* note 25, at 704 n.176 (same). There are two reasons for this conclusion. First, such contributions do not so much redound to the personal financial interest of the official as help that

The issue has not yet been resolved by the Supreme Court because it has never adjudicated an antitrust state action or petitioning immunity case involving the bribery of a public official.<sup>315</sup> The Court has, however, issued conflicting dicta on the topic. In *California Motor and Allied Tube*, the Court recognized that a bribery exception to petitioning immunity existed.<sup>316</sup> The *Omni* opinion, on the other hand, contained dicta to the contrary. In the course of (correctly) rejecting the general proposition that immunity should be denied to governmental action when a petitioner has violated some other state or federal law,<sup>317</sup> the Court rejected the specific proposition that immunity should be denied when a government official is bribed.<sup>318</sup> The statements were dicta because there was

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official stay in office. Since most legislators could earn far more outside office, presumably their desire to stay in office reflects their desire to exercise their political judgment on other issues, not a desire for financial gain. Second, campaign contributions are a thoroughly legal (indeed constitutionally protected, see *Buckley v. Valeo*, 424 U.S. 1, 58-59 (1976)) method of influencing the governmental process. See *Boone*, 841 F.2d at 895. Thus, if the official is regarded as financially interested, the situation presents a true conflict between the competitive process and political process which, where no market behavior is involved, the case law resolves on behalf of the political process by granting immunity. See *supra* text accompanying notes 205-06.

Although no petitioning immunity applies, some lower courts have held that bribing merely to procure a government contract does not amount to a Sherman Act restraint of trade. See generally Franklin A. Gevurtz, *Commercial Bribery and the Sherman Act*, 42 U. MIAMI L. REV. 365, 373-95 (1987) (collecting and analyzing case law). But this view is not universal, and, would not, in any event, immunize the briber from liability under other antitrust statutes like the Robinson-Patman Act or the Federal Trade Commission Act. See *id.* at 366 n.3, 377. Moreover, in the cases finding no restraint of trade, arguably competition was not harmed because the bribe merely influenced which party got a government contract that would, no matter which party was chosen, have excluded competitors. These cases would thus seem inapplicable when instead the bribed government official does impose a clear restraint on competition, such as restrictions on price, output, or entry.

315. The Court did decide an antitrust case involving the bribery of a foreign official, ruling that the act-of-state doctrine provided no immunity because the suit was against those who bribed the official and thus did not require a court to declare invalid the official act of a foreign sovereign. See *Kirkpatrick Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405-06 (1990).

316. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 502 n.7, 504 (1988). This recognition of a bribery exception might seem to contradict the language in *Allied Tube* indicating that those urging valid public restraints enjoy absolute immunity for those restraints. *Id.* at 499. The reconciliation is that a bribed governmental official is "private" within the meaning of antitrust immunity because he is financially interested and should thus enjoy no state action immunity. Consistent with this interpretation, the *Allied Tube* case cited the bribery exception along with *Continental Ore* to support the proposition that "[t]he dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious." See *id.* at 501-02 & n.7; see also *id.* at 501 (holding that the association was not public because the decisionmaking body comprised "persons with economic incentives to restrain trade"). Another possible doctrinal reconciliation is that bribery does not constitute merely "urging" governmental action.

317. This of course does not mean that antitrust immunity would extend to the direct effects of such illegal petitioning (as opposed to the effects of governmental action), but the *Omni* case did not concern such direct effects. See *supra* text accompanying notes 81-82.

318. See *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344, 1353 (1991) (stating that state action immunity would still apply); see also *id.* at 1355-56 (incorporating this proposition by reference for petitioning immunity).

no evidence the defendant had engaged in bribery,<sup>319</sup> but the Court's reasoning is nonetheless worth exploring because, to the extent it indicates the present Court's opinion on the subject, it may represent a departure from the functional process approach.

The Court listed three reasons for its conclusion. First was that proving bribery or other independent legal violations bears no relation to the purposes of the Sherman Act.<sup>320</sup> But one cannot indiscriminately lump bribery together with other legal violations. While other legal violations may in fact bear no relation to the purposes of the Sherman Act,<sup>321</sup> bribery does. This is not because bribery violates other state and federal laws—that is besides the point. The distinctive feature of bribery is that it makes the decisionmaking process a financially interested one, and thus one that should be policed by antitrust to ensure that the competitive process is not needlessly undermined.

Second, the Court argued that bribery does not necessarily mean that the resulting governmental action is contrary to the public interest.<sup>322</sup> But again this is besides the point. Antitrust review applies not because private restraints on trade are never in the public interest, but rather because financially interested parties generally cannot be trusted to determine which restraints are in the public interest and which are not. Nor does antitrust immunity apply because governmental restraints are always in the public interest; it applies because disinterested accountable decisionmakers are generally better positioned to decide which restraints are in the public interest than courts. Where the governmental decisionmaker has been bribed, the grounds for immunity are absent because the decisionmaking process is financially interested and thus can be improved by being subjected, via antitrust review, to the competitive process.

Lastly, the Court argued that it would be difficult to determine the effect of bribes when they are given to a minority of a multi-member governmental body.<sup>323</sup> Suppose, for example, a firm bribes five legislators and a law restricting trade to the firm's benefit passes by 53-47. Should the law be struck down on the theory that, had the bribed legislators voted the opposite way, the law would have failed 52-48? Or should one simply strike out the bribed votes, concluding that the law would still have passed 48-47? Alternatively, one might conclude that the legislature as a whole is not financially interested unless a majority voting for

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319. There was evidence of campaign contributions, but those stand on a different footing. *See supra* note 314.

320. *See Omni*, 111 S. Ct. at 1353, 1356.

321. They do, however, bear a relation where they are used by actors with market power to impose direct costs or delays that hinder competitors. *See supra* text accompanying notes 245-55.

322. *See Omni*, 111 S. Ct. at 1353.

323. *See id.*; *see also* 1 AREEDA & TURNER, *supra* note 105, ¶ 204d, at 49-50 (discussing difficulties of establishing whether bribes caused legislation).

the law has received a bribe. After all, with a majority of disinterested accountable supporters, one can hardly say that the concerns are the same as with a fully interested decisionmaker.

These problems are difficult, but do not justify granting antitrust immunity whenever bribes are given to governmental actors. To begin with, the difficulties have no application where the sole governmental decisionmaker has been bribed. Nor do they justify denying an antitrust plaintiff damages from the briber and the bribed legislators for the harm caused by the legislative restraint.<sup>324</sup> A closer question is whether these problems justify refusing to invalidate legislative restraints produced by partial bribery. But the arguments against invalidation are not, I think, ultimately persuasive given the process ideals that underlie the case law.

There may be considerable doubt about what would have actually happened without the bribery. But if an antitrust court strikes down a statute passed in part by financially interested legislators, the issue is effectively remanded back to the legislature to see whether it wishes to re-enact the same statute.<sup>325</sup> This latter decision will give us our best evidence of what would have happened without the bribery, and it comes from a decisionmaking process better than either a partially bribed legislature or a disinterested but unaccountable antitrust court. I thus conclude that antitrust courts should invalidate anticompetitive legislative restraints whenever legislators who could have potentially changed the result have been bribed.<sup>326</sup>

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324. Cf. *Kirkpatrick Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405-06 (1990) (holding that the act-of-state doctrine did not immunize a party who bribed a foreign official from antitrust liability). These damages should, however, cease for anticompetitive injuries suffered after a disinterested legislature has been alerted to the past bribery but declined to repeal the legislative restraint.

In any event, even if, under *Omni*, antitrust immunity applies to statutes procured by bribery, nothing in the opinion suggests this immunity should extend to any direct effects of the petitioning. Bribery should thus be sufficient grounds (as a means of petitioning that is invalid in all contexts) to impose liability on the petitioner for injuries caused not by the legislation, but by any reputational injury or costs and delays imposed by the bribing petitioner. See *supra* Part IV. This would include liability for the costs of opposing the bribing petitioner in governmental fora.

325. Damages, treble or single, would not and should not be available against the legislature or the state because they would injure taxpayers whom the government restraint did not benefit and indeed may well have harmed as consumers. See Elhauge, *supra* note 25, at 735, 736 n.322.

326. The ancient case of *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), cited in *Omni*, 111 S. Ct. at 1353, is not to the contrary. The history of the dispute in *Fletcher* began when some buyers got the Georgia Legislature to sell them state land by promising numerous legislators parts of the land. See 10 U.S. (6 Cranch) at 129. The buyers then re-sold the land to bona fide purchasers who did not know the land was originally procured by bribery. *Id.* When the bribes came to light, the Georgia Legislature responded by passing an act annulling the original sale. See *id.* at 131.

The relevant questions before the Court were whether a downstream bona fide purchaser should be divested of title to the land either because the "corruption" of the Legislature made the original sale inherently void or because the statute annulling the sale was constitutional. In the course of holding that the purchaser's title was unaffected, the Court did express concern about what to do if a minority of legislators are bribed and how to decide what should be sufficient corruption to invalidate a statute. See *id.* at 130. But these concerns were asides, on which the Court explicitly

*C. Lies, Damned Lies, and Statistics*

Many cases have held that a petitioner who knowingly submits false information to a governmental decisionmaker is not immune from antitrust liability.<sup>327</sup> The grounds for these decisions have not, however, been well articulated. Usually they proceed on the unelaborated assertion that such activity is a sham, but this is not very helpful as we have seen above. Nor have the courts been very precise in distinguishing between anticompetitive injury that resulted directly from the defendant's conduct—such as the costs of uncovering the true facts and opposing the defendant's facts or petition when that would have otherwise been unnecessary—and antitrust injury that resulted from a restraint the government imposed in a decisionmaking process infected by the false information.<sup>328</sup> *Allied Tube*, which makes petitioners absolutely immune for restraints resulting from valid governmental action but liable for restraints directly resulting from invalid petitioning, highlights the crucial nature of this distinction.

Where the injury is direct and the lies are illegal under other laws, as they are in adjudication or regulatory proceedings, antitrust immunity is inapplicable,<sup>329</sup> just as it is for direct injuries resulting from abuses of process.<sup>330</sup> This direct injury might, for example, consist of the costs of countering the defendant's false information in agency proceedings.<sup>331</sup>

The more difficult question is whether, and when, the petitioner should be liable for governmental restraints adopted in response to his false petitioning. Clearly, petitioners are generally not liable for governmental responses to invalid petitioning.<sup>332</sup> But immunity might be denied on two doctrinal grounds: (1) that governmental action procured

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did not rely, in an opinion mainly concerned about the inequities, and unconstitutionality under the Contracts Clause, of allowing courts or the state to annul a prior conveyance of title now held by a bona fide downstream buyer because of alleged corruption in a prior legislature. *See id.* at 129-39. These inequities have no necessary connection to the bribery of legislators. The same inequities have led courts to protect bona fide purchasers when past title transfers that on their face looked legal were procured by mere private fraud rather than by bribing public officials. *See id.* at 133-35. And these inequities are not nearly so weighty when the question is not whether to deprive a bona fide purchaser of title but rather whether to remove a present legislative restraint on competition.

*Fletcher* is thus not binding on the antitrust issue discussed here. Nor are the concerns it expressed persuasive on that issue. The first concern, about how many legislators must be bribed, is addressed in text. The second concern, about how much corruption should be enough, is a powerful argument against a court simply striking down a statute because of what it finds to be "corruption." But in *Fletcher* there was no legal or constitutional authority to invalidate the legislation for corruption. Here antitrust provides the authority and defines the type of activity within its scope.

327. *See AREEDA & HOVENKAMP, supra* note 10, ¶ 204.1, at 68 nn.1-2 (collecting cases).

328. *See Calkins, supra* note 9, at 342 & nn.78 & 80-81 (collecting cases).

329. *Accord AREEDA & HOVENKAMP, supra* note 10, ¶ 204.1e, at 73-74.

330. *See supra* Section IV.C.2.

331. The injury will only be anticompetitive, however, if the defendant has the market power to take advantage of his rival's cost increases. *See supra* text accompanying note 254.

332. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-511 (1988) (denying immunity to defendant for damages resulting directly from petitioning activity invalid

by fraud is not "valid"; or (2) that a restraint does not truly "result from" governmental action when that action is procured by private fraud. Formal logic, however, cannot tell us when governmental action that does not itself violate any independent rule of law should nonetheless be considered "invalid" under antitrust law because of the type of petitioning that procured it. Nor can it tell us who "caused" an injury.<sup>333</sup> Rather, both sorts of doctrinal questions must be settled by functional factors. The functional questions are the familiar ones: whether we have the assurance normally provided by a disinterested accountable decisionmaking process, and if not, whether that process would be improved by judicial antitrust review.

At one pole, consider deceptive comments made in the political process. These might admittedly mislead legislatures. But the social facts upon which legislative decisions are made are highly contestable. One is reminded of Disraeli's famous statement that "there are three kinds of lies: lies, damned lies, and statistics."<sup>334</sup> It is hard to find any policy debate where one side does not accuse the other of distorting the statistical evidence. That is the normal process of fighting for public opinion.<sup>335</sup> Allowing antitrust courts to review the accuracy of political statements would not only chill political debate generally, but distort the debate by penalizing those statements with which the courts did not agree. Indeed, immunity for governmental acts produced by allegedly false statements in the political process follows *a fortiori* from the immunity for the direct effects of such statements.<sup>336</sup>

At the other pole, consider cases where the government has in effect delegated to a financially interested party the factual determinations that trigger governmental action. This situation is illustrated by *Walker Process*,<sup>337</sup> where the antitrust defendant allegedly obtained a patent by filing false information with the Patent Office and then enforced the patent by instituting a patent infringement suit that was not ultimately adjudicated because the patent expired before the case could be adjudicated. The functional process approach allows us to reconcile the *Walker Process* Court's holding—that proving these allegations would make the defendant liable under the Sherman Act for the damages caused to the plaintiff by the existence and enforcement of the patent—with the

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within its context but stressing that no damages were predicated on harm caused by governmental restraints adopted in response to the invalid petitioning).

333. See *supra* text accompanying notes 311-13.

334. RESPECTFULLY QUOTED 333 (Suzy Platt ed., 1992).

335. See AREEDA & HOVENKAMP, *supra* note 10, ¶ 204.1c, at 70.

336. See *First Am. Title Co. v. South Dakota Land Title Ass'n*, 714 F.2d 1439, 1447 (8th Cir. 1983) (allowing immunity where the antitrust plaintiff had "equal access to the legislature to lobby against the [proposed legislation] and to correct any 'misrepresentations' which may have been made"), *cert. denied*, 464 U.S. 1042 (1984); *Mark Aero, Inc. v. TWA*, 580 F.2d 288, 297 (8th Cir. 1978) (no antitrust liability for lies told to city officials); *supra* Section IV.C.1.

337. *Walker Process Equip. Co. v. Ford Mach. & Chem. Corp.*, 382 U.S. 172 (1965).



Court's repeated statements in other cases that petitioners are immune from antitrust liability for governmental acts.

In *Walker Process*, the relevant governmental action, granting the patent and then enforcing it pending adjudication, did not rest on any substantive decision by a disinterested official about the accuracy of the defendant's patent filing. Such filings are *ex parte*, and while the Patent Office can check its own records, it lacks access to other information that would be necessary to disprove a filing's assertions.<sup>338</sup> In effect, then, for facts not covered by its own record, the Patent Office determined whether, given the defendant's filings, the invention was patentable. Accordingly, the Patent Office had effectively delegated to the antitrust defendant the factual determinations necessary to gain a patent. When, in such cases, the antitrust defendant falsifies the information, the governmental action is being triggered by a financially interested decision, and antitrust review should apply.<sup>339</sup>

The *Walker Process* exception for false petitioning is thus very narrow. It applies only when the lie effectively results in a restraint produced by a financially interested process because the government has delegated to financially interested parties the factual determinations that trigger the governmental restraint.<sup>340</sup> Thus, in such a case, one could say that the restraint results "directly" from the lie,<sup>341</sup> just as one says that the costs and delays imposed by litigation result "directly" from a litigant's decision to bring strategic litigation.<sup>342</sup> But it is the implicit functional process view that leads to these doctrinal conclusions.

Between these two poles are adjudications where lies could have been challenged by opposing litigants but nonetheless succeeded in procuring adjudicative action that restrained trade. Because, unlike legisla-

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338. See 3 AREEDA & TURNER, *supra* note 105, ¶ 707a, at 134 (1978).

339. If the lie did not trigger the government action because the invention would have been patentable even with accurate information, antitrust immunity would apply to the patent restraint on competition. See 3 *id.* ¶ 707d, at 137-38. Enforcement of the patent might, however, be denied as a matter of patent law. See 3 *id.* ¶ 707b, at 135-36. There might also be occasions where the false procurement of a patent does not result in any harm to competition, such as when the only effect is to alter which firm gets a monopoly. See AREEDA & HOVENKAMP, *supra* note 10, ¶ 707'd, at 588-89.

340. See also *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1292-98 (5th Cir. 1971) (denying antitrust immunity to lying petitioner where the agency apportioned allowable production levels based on producers' forecasts of how much gas they were capable of producing), *cert. denied*, 404 U.S. 1047 (1972); *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 178 (D. Del. 1979) (emphasizing that the defendant would be liable for submitting false information to the Treasury only if the Treasury made no independent inquiry but rather relied heavily on the defendant's submission).

341. See *Woods Exploration*, 438 F.2d at 1295 (concluding that because the agency relied on the defendant's false statement, the action could not be "said to have flowed from state rather than private action"); *Outboard Marine*, 474 F. Supp. at 178 (suggesting that a Treasury decision would not be "the product of agency action" if the Treasury made no independent factfinding but simply relied on the defendant's false information).

342. See *supra* text accompanying notes 241-43.

tors, judges and agencies adjudicate on a formal record often accompanied by a statement of reasons for the decision, it is easier to determine whether the lie affected the result.<sup>343</sup> Further, the veracity of adjudicative facts tends to be less debatable than that of social facts. But antitrust review would nonetheless be inappropriate. The reason is not that the standards of conduct are lower in adjudication than in *ex parte* administrative processes like those in *Walker Process*. Rather, the reason is that a disinterested government official has made a substantive determination about the facts, in a forum that provided an interested opponent with the opportunity to dispute the alleged lies. Antitrust review in such circumstances would not so much police financially interested decisionmaking as it would substitute decisionmaking by antitrust courts for decisionmaking by the first court. Nothing in the antitrust statutes authorizes that substitution, and nothing in the objective process ideals suggests the substitution would be desirable.

### CONCLUSION

Defining the scope of antitrust petitioning immunity is not just a question of reconciling antitrust concerns about free competition with First Amendment concerns about the freedom to petition. Antitrust immunity extends beyond First Amendment protections because the competitive process guarantees of antitrust are fundamentally inapplicable to disinterested accountable governmental processes of decisionmaking. From a functional process perspective, courts adjudicating antitrust immunity issues emerge as the switchmen of democratic capitalism: guiding decisionmakers down the tracks of either the competitive or governmental process depending on which is most appropriate, but not substituting a track of judicial decisionmaking for either process.

This functional process approach fits and explains the result in every Supreme Court case adjudicating antitrust petitioning immunity. It also justifies many features of current doctrine. It justifies the Court's refusal to assess the substantive merit of restraints produced by disinterested accountable decisionmakers. It justifies the Court's focus on the objective incentives, rather than subjective motives, of decisionmakers. And it justifies the Court's refusal to second-guess the prevailing standards for providing input into alternative decisionmaking processes. Alternative positions on all these issues would embroil antitrust courts in making substantive decisions about how societal resources are allocated rather than allowing the political or competitive process to make those decisions.

Further, the functional process approach resolves many doctrinal questions and anomalies. It explains why some market activities are con-

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343. See 1 AREEDA & TURNER, *supra* note 105, ¶ 204c, at 48-49; 1 *id.* ¶ 204d, at 50.

sidered “commercial” and others not. It explains when restraints are “incidental” to petitioning, and when they “directly result” from that petitioning rather than from governmental action. It also explains how to determine whether the petitioning is “valid” for the purposes of antitrust immunity, particularly where strategic litigation is alleged. Finally, it helps resolve a host of still open questions about how the Court should treat petitioning that involves either boycotts aimed at private parties or bribes and lies that influence governmental decisions.

Perhaps most fundamentally, the objective process approach permits a more accurate understanding of the relationship between antitrust petitioning immunity and antitrust state action immunity. These immunities are not, as has so often been asserted, mere flip sides of each other. State action immunity sometimes applies when petitioning immunity does not, and vice versa. But the two immunities do both share the basic functional process view that the competitive process imposed by antitrust law is only necessary, and useful, when financially interested decision-making is afoot.

