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ARTICLES

ANTITRUST IMMUNITY, THE FIRST AMENDMENT AND SETTLEMENTS: DEFINING THE BOUNDARIES OF THE RIGHT TO PETITION

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INTRODUCTION

In the United States, the First Amendment[1] and the antitrust laws[2] serve as twin pillars upholding our political and economic liberty.[3] What happens, however, when these powerful laws collide? This Article examines the interplay of the antitrust laws and the First Amendment right to petition,[4] or what is more commonly referred to as *Noerr-Pennington* immunity.[5] In brief, *Noerr* provides

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1. U.S. CONST. amend. I.

2. *See* Sherman Anti-Trust Act, 15 U.S.C. § 1 (1994 & Supp. IV 1998) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."); 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .").

3. *See* United States v. Topco Assoc., Inc., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.").

4. "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and *to petition the Government for a redress of grievances.*" U.S. CONST. amend. I (emphasis added).

5. The *Noerr-Pennington* doctrine, hereinafter *Noerr*, refers to a series of decisions by the United States Supreme Court beginning with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657

immunity from antitrust liability for anticompetitive harms that flow from exercising the right to petition.[6] While significant attention has been paid to the potential for *Noerr* immunity to be misused in efforts to use governmental processes to impose costs upon competitors,[7] there has been virtually no discussion with respect to whether the First Amendment right to petition may be used to immunize cooperative/collusive behavior that could nonetheless adversely impact competition.[8] This has been compounded by the Supreme Court's failure to articulate a clear explanation for when private conduct is considered immune under the First Amendment.[9] Moreover, while there have been scholarly efforts to provide a coherent doctrine governing when private conduct is immune from antitrust liability, none has provided a doctrinal explanation of *Noerr* immunity through the lens of the right to petition that is consistent with its historic role in Anglo-American government.[10] Specifically,

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(1965), in which the Court recognized antitrust immunity for certain conduct related to the right to petition.

6. *See generally* 2 ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 989-1016 (3d ed. 1992) (discussing *Noerr* doctrine) [hereinafter ALD].

7. *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 347-64 (1993); 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 (1977); James D. Hurwitz, *Abuse of Governmental Process, the First Amendment, and the Boundaries of* Noerr, 74 GEO. L. J. 65 (1985); David L. Meyer, *A Standard for Tailoring* Noerr-Pennington *Immunity More Closely to the First Amendment Mandate*, 95 YALE L. J. 832 (1986); *see also* City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 380 (1991) ("The 'sham' exception to *Noerr* encompasses situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.").

8. For one of the few examples of such a discussion, see Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996), examining collusion between class action counsel with respect to attorneys' fees and whether such abuse is sanctionable. *See also* Harry M. Reasoner & Scott J. Adler, *The Settlement of Litigation as a Ground for Antitrust Liability*, 50 ANTITRUST L. J. 115 (1981).

9. *See, e.g.*, Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177, 1178 (1992) ("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."); David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J. L. & PUB. POL'Y 293, 298 (1994) (noting that the area of law is replete with "doctrinal confusion").

10. *See, e.g.*, Elhauge, *supra* note 9, at 1202 ("What justifies antitrust immunity is not the means chose '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."); Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the* Noerr-Pennington *Doctrine*, 41 HASTINGS L.J. 905 (1990) (analyzing petitioning immunity under public choice theory).

this Article examines whether settlement agreements and consent decrees resulting from what would otherwise be immunized litigation are protected from antitrust scrutiny and liability under *Noerr*. In order to conduct this analysis, this Article develops a methodology for determining immunity by focusing the immunity examination upon the means used to petition government and the source of the alleged injuries.[11] Ultimately, private conduct is immune from antitrust scrutiny when it represents a valid attempt to persuade an independent governmental decision-maker in an effort to solicit government action, and the alleged injuries result from that persuasive effort.[12] The validity of any effort depends upon the forum in which the petitioning is conducted without reference to antitrust. By focusing upon the means used to petition government, this analysis ensures that *Noerr* immunity protects the people's right to petition their government for the redress of grievances without unnecessarily limiting the protection afforded by the antitrust laws.

One commentator has observed that "[t]he notion that the settlement of litigation—a practice so favored in the administration of justice—is in itself a ground of antitrust liability rings strange to the ear."[13] Before we decide whether the instrument needs tuning or our hearing needs testing, consider two hypotheticals:

1) Netscape sues Microsoft in private antitrust litigation raising antitrust, intellectual property, and state unfair competition claims. During the course of the litigation, the parties begin to negotiate and realize that it would be mutually advantageous for the two leading providers of Internet browser software to divide the market between themselves rather than continue litigating and competing against one another. For example, Microsoft might agree to cease distribution of its browser and instead incorporate Netscape's browser into its Windows operating

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In one of the most lucid discussions on this topic, Professor Elhauge argues for a functional process approach in which immunity is primarily determined by examining the "incentive structure underlying the decisionmaking process that produces the restraint . . ." Elhauge, *supra* note 9, at 1180. Others have argued that immunity should be examined under principles akin to public fora analysis in free speech cases. *See* McGowan & Lemley, *supra* note 9. More often, commentators attempt to interpret *Noerr* immunity through the filter of federal antitrust policy. *See, e.g.*, Meyer, *supra* note 7, at 832 (proposing that "immunity [should] not be granted when . . . petitioning produces unnecessary direct antitrust injury *and* the governmental action sought is illegitimate.") (emphasis added); James S. Wrona, *A Clash of Titans: The First Amendment Right to Petition vs. the Antitrust Laws*, 28 NEW ENG. L. REV. 637, 656 (1994) ("When analyzing antitrust cases involving petitioning to the government, courts focus on whether the activity's effect would seriously offend traditional antitrust policies. . . . This approach maintains a delicate balance between two important principles.").

11. *See infra* Part II.

12. *See infra* Part II.

13. Reasoner & Adler, *supra* note 8, at 115.

system. In exchange, Netscape would agree to drop its lawsuit and share revenues with Microsoft. The end result of course would be an agreement between the two dominant players in the browser industry effectively dividing the market between themselves.

2) A group of small to mid-size book sellers sue the various publishing companies alleging price discrimination in response to an industry practice in which book publishers sell various titles to larger retail establishments such as Barnes & Noble at significantly discounted prices. During the litigation, the plaintiffs enter into settlement agreements with each of the various publisher defendants setting an appropriate wholesale price for books with each of the settlement agreements containing a most favored nation clause that incorporates the most favorable price reached in the negotiations of each agreement. Once the final settlement is reached, there will effectively be a single, uniform wholesale price for books throughout the entire industry. In the final *coup de grace*, the parties could even ask the court to approve the terms of the settlement agreement and enter them as part of a consent decree.

If entered into outside of the context of litigation, these hypothetical agreements would almost certainly be subject to antitrust scrutiny, and could potentially result in significant antitrust liability.[14] The critical question, therefore, is whether the context and nature of entering into these agreements with respect to the settlement of litigation are sufficiently distinct under constitutional principles to remove them from the purview of antitrust laws.

The implications if such immunity is recognized are staggering. If settlement agreements such as these are immune from antitrust scrutiny under *Noerr* and the participants immune from liability, no one, not the Federal government, the various state governments, let alone competitors, would be permitted to challenge or even examine the terms and consequences of the agreements—this immunity is the essential promise of the right to petition as recognized under *Noerr*.[15] When combined with the growing use of protective orders to cloak settlement agreements in secrecy,[16] entire industries may be monopolized, prices fixed, and have their markets divided, without anyone being the wiser. So, while the notion

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14. The first hypothetical could be considered a horizontal restraint of trade or a conspiracy to monopolize the web browsing industry. *See* 1 ALD, *supra* note 6, at 60-77, 195-96. The second hypothetical could be considered an unreasonable restraint of trade as a result of price fixing. *See id.* at 63-67.

15. *See infra* Part I.B.

16. *See, e.g.*, Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999) (discussing secrecy in the settlement process).

that settlement agreements may be the basis for antitrust liability "may ring strange to the ear," the opposite conclusion also strikes a rather discordant note. Immunity under these circumstances represents a loophole large enough to swallow the Sherman Act itself. Despite this potential, the highest court to touch upon this issue to date suggested that so long as the litigation itself is not a sham, immunity is compelled by Constitutional principles.[17]

This Article analyzes the right to petition and the *Noerr* doctrine and suggests that immunity under *Noerr* is justified only when the conduct in question represents valid petitioning, and argues that settlement agreements and consent decrees should not be immune from antitrust scrutiny even when a court is asked to approve the agreement prior to dismissal. Part I examines the history of the right to petition and doctrinal development of the right in the antitrust context, and how that case law could be used to support a claim for immunity. Part II develops from the right's history and the Supreme Court's case law, a methodology for determining when private conduct is immune from antitrust scrutiny under *Noerr* and the right to petition. Part III examines the context of private settlements under the proposed methodology and concludes that in the context of the settlement of litigation, the historical, jurisprudential, and doctrinal justifications for immunity are noticeably absent. After examining whether judicial approval of settlements and their incorporation into consent decrees are sufficient to justify *Noerr* immunity, Part IV concludes that the right to petition is still insufficient to justify antitrust immunity.

I. ORIGINS

Before examining whether settlement agreements and consent decrees should be protected by the right to petition, a brief discussion of the origins of the right is in order. The right to petition is the capstone right of the First Amendment, but, outside the context of antitrust, it is seldom discussed or invoked in constitutional jurisprudence.[18] When it is discussed, it is usually treated as

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17. *See* Columbia Pictures Indus. v. Professional Real Estate Investors, Inc., 944 F.2d 1525, 1528-29 (9th Cir. 1991), *aff'd on other grounds*, 508 U.S. 49 (1993). The Supreme Court has never directly addressed this issue. In *Standard Oil Co. v. United States*, 283 U.S. 163 (1931), the Court examined whether certain cross-licensing agreements between patent holders entered into in order to settle infringement suits violated the Sherman Act. *See id.* at 168. While the decision could be interpreted to recognize that settlement agreements are not immune from antitrust laws, the decision predates *Noerr*, and as such, the Court was not directly confronted with the issue of immunity. Similarly in *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963), decided after *Noerr*, the Court once again examined whether cross-licensing agreements entered into to end litigation violated the antitrust laws. *See id.* at 177-78. Despite being asked, the Court specifically refused to address whether the settlement agreements themselves could form the basis for antitrust liability. *See id.* at 190 n.7.

18. *See, e.g.*, Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153 (1998); Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN.

simply part of the rights of free expression and association.[19] Even in the context of antitrust law, the development of the right to petition is a relatively recent event. It was not until 1961 in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[20] that the Supreme Court slowly began to interpret the right to petition and how it impacts antitrust law.

A. The History

1. The Classical Right of Petitioning.—Historically, the right to petition was considered one of the most fundamental of English and colonial American rights.[21] In England, the petition was used to secure the Magna Carta, and its abuse by James II "led directly to the Glorious Revolution of 1688 and to the Bill of Rights that fully confirmed the right to petition as an element of the British constitution [sic]."[22] By the Seventeenth Century, petitioning was considered an ancient right and was part of the regular political life of the English.[23] According to one commentator, unlike freedom of speech, press, and assembly which were in practice constantly restrained, by the Eighteenth Century, the right to petition was an absolute right in England.[24]

Likewise, in the American colonies and the United States prior to the Civil War, the right to petition was equally esteemed. For example, in 1641 the Massachusetts Bay Colony Assembly became the first colony to affirm the right explicitly, and, by its terms, the right applied to residents and non-residents, free and not free alike.

> Every man whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publique Court, Councell, or Towne meeting, and either by speech or writing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information, where of that meeting hath proper cognizance, so it be done in convenient time, due order, and respective

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L. REV. 1153 (1986); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 17 (1993); Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986). For a general overview of the Supreme Court's interpretation of the right to petition, see John E. Theuman, Annotation, *Right of Petition and Assembly Under Federal Constitution's First Amendment—Supreme Court Cases*, 86 L.Ed.2d 758 (1985); Jean F. Rydstrom, Annotation, *The Supreme Court and the First Amendment Right to Petition the Government for a Redress of Grievances*, 30 L.Ed.2d 914 (1973).

19. *See* Rydstrom, *supra* note 18, at 915.

20. 365 U.S. 127 (1961).

21. *See* Mark, *supra* note 18, at 2169; Smith, *supra* note 18, at 1153; Spanbauer, *supra* note 18, at 17; Higginson, *supra* note 18, at 155.

22. Smith, *supra* note 18, at 1160.

23. *See id.* at 1157.

24. *See id.* at 1162-68; *see also* Spanbauer, *supra* note 18, at 17 (arguing that "[h]istorically, the right to petition was a distinct right, superior to the other expressive rights.").

manner.[25]

As one commentator notes, the "Colonial experience appears not only to have replicated England's widespread use of the petition, it likely extended it in both law and practice."[26] In part, this was because the petition was a useful means for colonial assemblies to expand their sphere of influence by expanding both the types of matters the assemblies had jurisdiction to consider and their power to gather facts relating to the petitions.[27] Petitions covered all sorts of subject matter from disputes over land, termination of entail, and financial assistance to emancipation.[28]

Additionally, the right to petition not only covered diverse subject matter but was exercised by the elite as well as individuals and groups who were otherwise excluded from voting and other means of formal political participation.[29] For example, in the colonies and the fledgling United States, the right was exercised by disenfranchised groups such as women, blacks, Native Americans, and children.[30] The fact that the right to petition extended to such disenfranchised groups may be surprising to us today, but it is quite understandable given the origins of petitioning. Petitioning originally arose under Monarchial rule when everyone was subordinate to the divine authority of the King.[31] No one had the right to vote, participate in ruling, or any of the other political rights recognized in the United States today.[32] As such, petitioning arose as the original, and for a time, the only protected means for subjects to seek limited political change.[33] While the subjects could not change or challenge their ruler's authority short of revolution, the right of petition allowed them to attempt to change the rules and how they were applied. Given the origins of the right and the important role it played in English and colonial American history, it should not come as a surprise,

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25. Mark, *supra* note 18, at 2177 (citation omitted).

26. *Id.* at 2175.

27. *See* Higginson, *supra* note 18, at 146-47.

28. *See* Mark, *supra* note 18, at 2182-85.

29. *See id*. at 2182-87.

30. *See id*.

31. *See id*. at 2164 ("Magna Carta is, however, hailed as the progenitor of English constitutional liberty because it came to provide a formal check on royal authority that could be exercised by other segments of English society as well.").

32. *See id*. at 2165.

> By requiring the petitioners to acknowledge the primacy of the king's authority, even the barons' petitions thus reinforced the hierarchy of the community to which all belonged. Although the barons' petitions could force the King's attention, their petitions . . . do not . . . immediately appear to have contained within themselves the empowering or dignity-enhancing features we today associate with the exercise of liberties.

Id.

33. *Cf.* Spanbauer, *supra* note 18, at 32 ("[P]etitions were the only authorized channel through which criticism of the government was funneled.").

therefore, that it was expressly included in the vast majority of state declarations of rights, or that Maryland, New York, North Carolina, and Virginia, specifically insisted that the right be guaranteed when they ratified the Federal Constitution.[34]

The debates surrounding the adoption of the First Amendment also demonstrate that the right maintained its significance even in the new republic. "The democratic experience of the Confederation period led not to a belief that petitioning was irrelevant, but instead renewed the question of whether, as it were, the ante should be upped. Should petitions become instructions rather than mere prayers?"[35] In the debates that ensued, Congress rejected the notion that the people should have the right to instruct their representatives, but reaffirmed the principle that their petitions must be respected.

> Instruction, then, was the enemy of deliberation, and not just because each state's or each district's parochialism might subvert the common, national good. Instruction also rendered deliberation superfluous because the representative could do only what his instructions mandated. Better, said the Federalists, to avoid this problem and take the advice and wisdom of the people through their speech and the press, and, when they assembled among themselves and conveyed their grievances, through the time-honored method of petition. Congress was meant to be not a "mere passive machine," but rather a "deliberative body." Petition would serve that end, instruction would destroy it.[36]

In rejecting the right of instruction while embracing petitioning, Congress implicitly recognized that individuals, through petitioning, could command the government's attention, but not any particular result. In the early years, Congress put this understanding into practice as it "attempted to pass favorably or unfavorably on every petition . . .,"[37] a practice which continued until the swell of emancipation petitions overwhelmed Antebellum Congresses,[38] and Americans had informally replaced the classical conception of petition and reciprocal obligation with "[b]rute political power grounded in the franchise."[39]

2. The Promise.—Two features, the right to be heard and immunity, are central to the classical right of petition. Functionally, the right to petition "was an affirmative, remedial right which required governmental hearing and response."[40] Petitioning was a means by which individuals could have the King, the Commons, colonial assemblies, state legislatures, Congress, and the courts redress private and public grievances.[41] In England, the right represented "a mechanism that bound the English together in a web of mutual obligation and

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34. *See* Smith, *supra* note 18, at 1174.
35. Mark, *supra* note 18, at 2206.
36. *Id.* at 2211-12 (footnotes omitted).
37. Higginson, *supra* note 18, at 143.
38. *See id*. at 158-165; Mark, *supra* note 18, at 2212-26.
39. Mark, *supra* note 18, at 2226.
40. Higginson, *supra* note 18, at 142.
41. *See* Mark, *supra* note 18, at 2168.

acknowledgment of certain commonalities."[42] The right

> reflected an element of reciprocal obligation, embodying the recognition of hierarchy both in that every petition was a prayer to authority for the grace of assistance as well as an implicit acknowledgment by the petition that the King . . . had authority—that is, legitimate power—to resolve the complaint. In accepting the petition, the King, in turn, acknowledged a duty to subjects, one that had come to mean both hearing the complaint and not exercising power in an arbitrary fashion.[43]

Likewise in colonial America:

> Petitioning provided not just a method whereby individuals . . . might seek reversal of harsh treatments by public authority, judicial or otherwise, but also a method whereby such individuals could seek the employment of public power to redress private wrongs that did not fit neatly into categories of action giving rise to a lawsuit. In that sense, even individual grievances embodied in petitions carried powerful political weight simply because of the individual's capacity to invoke public power.[44]

Accordingly, the petition was a formal mechanism that allowed individuals to focus government attention on public or private issues of their choosing with a corresponding right to be considered. In other words, the right to petition allowed individuals to exert some control over legislative agendas.[45]

Given the right's grounding in the principle that those who govern owe some duty to the governed, it is not surprising that petitioning's development is linked to the development of popular sovereignty both in England and the American colonies.[46] While originally based upon the mutual obligations between the divine authority of the King and those he governed, grounded in the principles of natural hierarchy and deference to higher authority, petitioning evolved with the emergence of popular sovereignty.[47] Madison described petitioning's role in the American Constitutional order as recognizing that "[t]he people may therefore publicly address their representatives, may privately advise them, or declare their sentiment by petition to the whole body; in all these ways they may communicate their will."[48] Consequently, in the United States, petitions were no longer "the prayers of supplicants, but the missives 'of a free people [to] their

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42. *Id.* at 2169.

43. *Id.*

44. *Id.* at 2182 (citations omitted).

45. *See* Higginson, *supra* note 18, at 142-54.

46. *See* Smith, *supra* note 18, at 1180-81.

47. *See generally* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988) (discussing the history of popular sovereignty in England and the United States).

48. Smith, *supra* note 18, at 1182 (quoting 1 ANNALS OF CONG. 738 (Joseph Gales ed., 1789)).

servants.'"[49]

Supplementing the affirmative right to command government attention was the necessary corollary of the right—immunity from government prosecution. Beginning with the English petition in 1013 to Aethelred the Unready who promised not to retaliate against the petitioners, freedom from punishment has been one of the "central features of the history of petitioning."[50] If the right to ask government to redress grievances, including grievances against the government, was to have any meaning, those exercising that right had to be immune from prosecution particularly for crimes against the state such as treason and sedition.

While the history of petitioning records instances in both England and the United States in which petitioners were in fact prosecuted for petitioning, ultimately, those punished were generally released and their prosecution only served to provide greater recognition for the right.[51] For example, in the Case of the Seven Bishops, the bishops petitioned James II asking to be relieved from his declaration that they read the Liberty of Conscience during their services, and were prosecuted for seditious libel. Not only were the bishops ultimately acquitted after their counsel argued that subjects have the right to petition the King, their prosecution "led directly to the Glorious Revolution of 1688 and to the Bill of Rights that fully confirmed the right of petition as an element of the British constitution [sic]."[52]

Similarly, in the United States, of the seventeen cases prosecuted under the Alien and Sedition laws only one involved petitioning activity.[53] Jedediah Peck was indicted under the Sedition Act[54] for circulating a petition to Congress advocating the repeal of the Alien and Sedition laws. Crowds of supporters not only cheered for him upon his arrest, public demonstrations and pressure led the prosecution to drop the case.[55] Following Peck's case, no other petitioners were indicted for challenging the constitutionality of those laws.[56] In contrast, Thomas Jefferson had to issue a presidential pardon for those convicted based upon their

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49. Mark, *supra* note 18, at 2205 (quoting Philadelphiensis, No. 5, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 116 (Herbert J. Storing ed., 1981)).

50. Smith, *supra* note 18, at 1154-55.

51. *See id*. at 1162-66, 1175-77.

52. *Id.* at 1160-61.

53. *See id*. at 1176.

54. The Sedition Act

> [M]ade it a crime, punishable by a $5000 fine and five years in prison, if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . ., or the President . . ., with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.

New York Times Co. v. Sullivan, 376 U.S. 254, 273-74 (1964) (quoting 1 Stat. 596 (1798)).

55. *See* Smith, *supra* note 18, at 1176.

56. *See id*. at 1177.

speech,[57] and it was almost 200 years before the United States Supreme Court explicitly recognized that the Sedition laws violated principles of free speech.[58] Therefore, even during eras and regimes in which speech was prosecuted and the press thoroughly regulated, petitioning was afforded significantly greater protection.[59] Consequently, the classical right to petition operated both as a sword to invoke public power and a shield to protect against government prosecution.

3. The Historical Limits.—Even classical petitioning, however, was not without its limits. Because the classical right to petition imposed upon government formal obligations to hear the petition and refrain from prosecuting the petitioners, petitions had to be differentiated from other forms of communication. As Professor Mark has noted:

> A petition was the beginning of an official action, part of a "course of justice," not just a passing of information, even though the conveying of information *to the proper authority* was a powerful justification for petitions. Just as a claim brought in court required submission in a certain manner, so did a complaint brought by petition, even if the forms required of petitioners never quite equalled [sic] in punctiliousness those required of plaintiffs at common law.[60]

As developed in English law, therefore, "[a] petition was a communication that, 1) had to be addressed to an authority such as the King, 2) had to state a grievance, and, 3) had to pray for relief."[61] Petitions had to have "petitionary parts"[62] and had to be signed by those "legitimately allowed to request a redress of grievances."[63] Parliament also placed limits on the number of signatures that could appear on a petition and on the number of individuals allowed to present it.[64] According to Blackstone, these restrictions were justified "as a means of avoiding riots or disruptive presentation of petitions."[65]

The English were not the only ones to place restrictions on the right to petition; the American colonies also placed limited restrictions upon the right. In colonial America, colonial assemblies adopted rules and regulations punishing

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57. *See New York Times Co.*, 376 U.S. at 276.

58. *See id.* ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. . . . These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.").

59. *See* Smith, *supra* note 18, at 1168-69; Spanbauer, *supra* note 18, at 34-40.

60. Mark, *supra* note 18, at 2174 (citations omitted).

61. *Id.* at 2173.

62. *Id.* at 2228 n.358.

63. *Id.* at 2220.

64. *See* Spanbauer, *supra* note 18, at 27.

65. *Id.* at 26-27 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 138-39 (Univ. of Chicago Press 1979)).

the filing of meritless petitions.[66] Under these rules, the petitioner could be fined and made to bear the cost of filing the meritless petition.[67] These limitations, however, were not intended or applied to punish individuals based upon the viewpoints expressed in the petitions. Instead, they were attempts to ensure "that petitions with merit would be heard while individuals would be protected from defending baseless actions."[68] Despite these limitations, as the principal means for criticizing government and seeking political change, the classical right to petition was one of the most important rights of its time.

B. The Noerr Doctrine

In the context of antitrust law, the development of the right to petition begins with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[69] in which the Supreme Court considered whether the Sherman Act should be applied to a publicity and lobbying effort conducted by twenty-four railroads to restrict competition from the trucking industry.[70] The railroads carried out their campaign through deceptive and unethical means with the sole aim of pursuing legislation that would destroy the trucking competition.[71] However, because "the railroads were making a genuine effort to influence legislation and law enforcement practices," the Court held that their conduct was absolutely immune from antitrust liability.[72]

Writing for the Court, Justice Black emphasized that there is an "essential dissimilarity" between agreements to petition for laws that would restrain trade and private agreements that directly restrain trade, and that to condemn the lobbying effort "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act."[73] A contrary conclusion "would raise important constitutional questions,"[74] as the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."[75]

In reaching this conclusion the Court recognized the structural importance of the right to petition. In a representative democracy, government represents the will of the people. If the people cannot make their wishes known to their agents, especially when they seek changes to the existing legal order, government would

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66. *See id.* at 31.
67. *See id.*
68. *Id.*
69. 365 U.S. 127 (1961).
70. *See id.*
71. *See id.* at 129.
72. *Id.* at 144-45.
73. *Id.* at 136-37.
74. *Id.* at 138.
75. *Id.*

no longer represent the people in their sovereign capacity.[76] "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."[77] Punishing individuals for efforts to "influence the passage or enforcement of laws" even by the deceptive publicity adopted by the railroads, therefore, would be inconsistent with the principles of free government.[78]

The Court, however, was unwilling to immunize any and all efforts to influence government. The Court cautioned that "[t]here may be situations in which a . . . campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to *interfere directly* with the business relationships of a competitor and the application of the Sherman Act would be justified."[79] Widely known as the "sham" exception, the Court's reservation has been the subject of extensive discussion notably for the Court's failure, until recently, to provide any additional guidance as to what sorts of activities fell within the exception.[80]

In a series of decisions, following *Noerr Motor Freight*, the Supreme Court extended immunity from antitrust liability to attempts to influence members of the executive branch of government as well as the judiciary. In *United Mine Workers v. Pennington*,[81] the Court concluded that *Noerr* applied to the efforts of large coal mine operators and the United Mine Workers to persuade the Secretary of Labor to establish a higher minimum wage and convincing the Tennessee Valley Authority to curtail certain market purchases in order to eliminate smaller competitors.[82] The Court held that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme violative of the Sherman Act."[83]

Subsequently, in *California Motor Transport Co. v. Trucking Unlimited*,[84] the Court concluded that:

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76. *See id.* at 137.

77. *Id.*

78. *Id.* at 140-41 ("[A] publicity campaign to influence governmental action falls clearly into the category of political activity.").

79. *Id.* at 144 (emphasis added).

80. *See, e.g.*, Robert P. Faulkner, *The Foundations of* Noerr-Pennington *and the Burden of Proving Sham Petitioning: The Historical-Constitutional Argument in Favor of a "Clear and Convincing" Standard*, 28 U.S.F. L. REV. 681 (1994); Milton Handler & Richard A. De Sevo, *The* Noerr *Doctrine and Its Sham Exception*, 6 CARDOZO L. REV. 1 (1984); James B. Perrine, Comment, *Defining the "Sham Litigation" Exception to the* Noerr-Pennington *Antitrust Immunity Doctrine: An Analysis of the* Professional Real Estate Investors v. Columbia Pictures Industries *Decision*, 46 ALA. L. REV. 815 (1995).

81. 381 U.S. 657 (1965).

82. *See id.* at 660.

83. *Id.* at 670.

84. 404 U.S. 508 (1972).

> [I]t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.[85]

"Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition."[86] However, despite reaching that conclusion, the Court found that the alleged conduct would fall outside *Noerr* protection under the "sham" exception.[87] The controversy in *California Motor Transport* was between intrastate and interstate trucking firms in which the interstate firms allegedly conspired to oppose all applications filed by the intrastate firms for operating rights before the California Public Utilities Commission or the Interstate Commerce Commission.[88] According to the Court, "[A] pattern of baseless, repetitive claims . . . effectively barring respondents from access to the agencies and courts" would not qualify for immunity under the "umbrella of 'political expression.'"[89]

Following its initial trilogy, the Court has taken some steps to define what it meant by "sham." Based on the Supreme Court's decisions, the sham exception became a catchall limit to petitioning immunity.[90] Lack of a clear definition led primarily to a split over the extent to which the petitioning party's intent could form the basis for denying immunity.[91] For example, Judge Posner concluded that even lawsuits presenting colorable claims could constitute sham conduct if the principal aim in bringing to suit was to burden competitors with the cost of litigation regardless of the outcome of the case.[92] In contrast, the Sixth Circuit ruled that the "sham exception does not apply merely because a party files a suit with the principle purpose of harming his competitor."[93] In its initial response, the Court made clear that private activity can only be considered a sham if it is "not genuinely aimed at procuring favorable government action."[94]

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85. *Id.* at 510-11.

86. *Id.* at 510.

87. *See id.* at 511-12.

88. *See id.* at 509.

89. *Id.* at 513.

90. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 203.1a, at 19 (1996 Supp.) ("Some courts and commentators use it as a catchall for any activity that is not afforded *Noerr* protection."); Handler & De Sevo, *supra* note 80 (employing expansive definition of sham).

91. *See* ALD, *supra* note 6, at 1002-05.

92. *See* Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 471-72 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983).

93. Westmac, Inc. v. Smith, 797 F.2d 313, 317 (6th Cir. 1986), *cert. denied*, 479 U.S. 1035 (1987).

94. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 n.4 (1988).

Subsequently, the Court finally provided a definitive definition for what constitutes a "sham" in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc*.[95] The Court adopted a two-part test:

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere directly with the business relationships of a competitor" . . . through the "use [of] governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.[96]

Accordingly, the Supreme Court clarified that *Noerr* immunity protects all objectively reasonable acts of petitioning government regardless of intent.

Lastly, in addition to protecting the "act" of petitioning itself, courts recognize that *Noerr* immunity protects what can be described as "incidental" acts associated with "a valid effort to influence governmental action."[97] For example, the Supreme Court in *Noerr Motor Freight* concluded that even the deceptive advertising aimed at the public could not form the basis for antitrust liability because it was "incidental" to a valid effort to solicit government action.[98] Along these lines, in the context of litigation, courts have held that the decision not to settle a law suit could not form an independent basis for antitrust liability,[99] nor could the publicity associated with a lawsuit.[100]

The application of petitioning immunity to all three branches of government is consistent with the classical right to petition.[101] As discussed above, one of the primary protections offered by the right to petition was immunity from formal

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95. 508 U.S. 49 (1993).

96. *Id.* at 60-61 (citations omitted).

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

98. *Id.* at 505.

99. *See* Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc., 944 F.2d 1525, 1528-29 (9th Cir. 1991).

100. *See* Aircapital Cablevision, Inc. v. Starlink Communications Group, 634 F. Supp. 316, 324 (D. Kansas 1986) (holding that publicity associated with an antitrust lawsuit could not form the basis for antitrust liability).

101. *But see* McGowan & Lemley, *supra* note 9, at 384-89 (arguing that the right to petition should not apply to the courts). McGowan & Lemley's argument, however, overlooks the fact that historically the right to petition was recognized as applying to the judiciary. Moreover, their argument overlooks that functionally and occasionally in name as well, pleadings filed with courts are the closest example of classical petitioning as they not only ask "government for the redress of grievances" but they command its attention as well.

efforts to invoke governmental power.[102] As petitions could be filed with the King, legislatures, or courts, immunity followed in all three contexts. Historically, the right was recognized by each of the branches as an effort to draw more power unto themselves.[103] Its modern day application is consistent with the principle of popular sovereignty and that all three branches of government are subordinate to and agents of the sovereign people.[104] This conclusion is also consistent with the drafting of the First Amendment. The original draft stated, "The people shall not be restrained . . . from applying to the legislatures by petitions, or remonstrances for redress of their grievances."[105] The Senate rewrote the petition language with perhaps the most significant change being the replacement of "Legislature" with "Government."[106] By replacing legislature with government, Congress clearly intended that the right should apply to all three branches. Consequently, the Supreme Court's development of the right under *Noerr* is consistent with the right's Anglo-American history.

The Supreme Court's treatment of the right to petition does differ, however, from the classical right in one important aspect: as the preceding decisions demonstrate, the Court has extended immunity beyond the formal act of written petitioning itself to what can be described as informal petitioning.[107] With the exception of *California Motor Transport* in which the defendants had in fact filed formal "petitions" in the form of court documents,[108] neither *Noerr Motor Freight* nor *Pennington* involved formal written petitions to the governmental bodies at issue. Instead, they dealt primarily with lobbying and other informal avenues of political persuasion. In *Noerr*, for example, the primary conduct immunized by the Court was a deceptive public relations campaign designed to

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102. *See supra* Part I.A.2.

103. *See* Mark, *supra* note 18, at 2191; Higginson, *supra* note 18, at 150-53.

104. *See generally* MORGAN, *supra* note 47 (describing the differences in popular sovereignty between England and the United States); Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535, 547-57 (1995) (discussing the role of popular sovereignty in creating a Constitutional scheme of government). *See also* Smith, *supra* note 18, at 1177 (noting that Madison critiqued the Alien and Sedition laws as "retreating toward the exploded doctrine that the administrators of the Government are the masters and not the servants of the people") (citation omitted).

105. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 1789-1791, at 10, 16 (Charlene B. Bickford & Helen E. Veit eds., 1986).

106. *See* Smith *supra* note 18, at 1175; Spanbauer, *supra* note 18, at 40.

107. The extension of petitioning immunity to encompass informal acts of petitioning is in part responsible for the doctrinal confusion surrounding *Noerr*. If the court had concluded that the right to petition protected only the formal act of submitting a classical petition, it would be a simple matter to determine whether the right was implicated or not. By also protecting informal acts, it is now necessary to come up with a means to distinguish between informal acts of petitioning and other non-protected conduct. To date, the Court has failed to clearly articulate a method for making such a determination.

108. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972).

influence Pennsylvania's Governor, Legislature, and people,[109] while, in *Pennington*, the immunized conduct was the lobbying of the Secretary of Labor and the Tennessee Valley Authority.[110] More recently, the Court has recognized that even letters to the President of the United States could be considered protected under the right to petition.[111] However, according to Justice Douglas, the right "is not limited to writing a letter or sending a telegram to a congressman; it is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor."[112]

This extension of petitioning immunity beyond formal acts of petitioning is consistent with the adoption of the First Amendment. For example, James Madison, who is often considered one of the principal architects behind the petitioning clause of the First Amendment,[113] noted in the debates over whether the people should have a right to instruct their representatives that "[t]he people may [instead] publicly address their representatives, may privately advise them, or declare their sentiment by petitions to the whole body; in all these ways they may communicate their will."[114] In this statement, Madison explicitly recognized that the people's right extended beyond formal petitioning to informal acts such as publicly addressing them or privately advising them.

The protection of informal acts of petitioning is also consistent with current State recognition of petitioning. For example, a growing number of states protect individuals from SLAPP suits (Strategic Lawsuits Against Public Participation).[115] SLAPP suits are lawsuits brought in retaliation for the defendant's attempt to influence governmental action by, for example, testifying at a public hearing to have property rezoned to the disadvantage of the plaintiff.[116] As such they clearly implicate the right to petition as efforts to punish individuals for exercising that right.[117] The legislative response to such

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109. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 130-33 (1961).

110. *See* United Mine Workers v. Pennington, 381 U.S. 657, 659-60 (1965).

111. *See* McDonald v. Smith, 472 U.S. 479, 484 (1985).

112. Adderley v. Florida, 385 U.S. 39, 50 (1966) (Douglas, J., dissenting).

113. *See* Spanbauer, *supra* note 18, at 39-40; Higginson, *supra* note 18, at 155-56.

114. Smith, *supra* note 18, at 1182 (quoting 1 ANNALS OF CONG. 738 (1789)).

115. *See* Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC'Y REV. 385 (1988) (coining the term SLAPP suits); Aaron R. Gary, *First Amendment Petition Clause Immunity from Tort Suits: In Search of a Consistent Doctrinal Framework*, 33 IDAHO L. REV. 67, 131 (1996) (noting that SLAPP suits are a growing public concern). Currently, eight states have statutes protecting individuals from SLAPP suits. *See generally* LIBEL DEFENSE RESOURCE CENTER, 50 STATE SURVEY 1998-99: MEDIA PRIVACY AND RELATED LAW (1998).

116. *See* Westfield Partners, Ltd. v. Hogan, 740 F. Supp. 523, 524-25 (N.D. Ill. 1990) ("A SLAPP suit is one filed by developers, unhappy with public protest over a propose development, filed against leading critics in order to silence criticism of the proposed development.").

117. *See id.* at 526 (holding that defendant in SLAPP suit was immune from liability under the right to petition).

suits is typically to establish a procedure for the early dismissal of such suits and for the imposition of costs upon the plaintiff.[118] In defining the exercise of the right to petition, Massachusetts, for example, includes:

> [A]ny written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.[119]

The need to protect informal acts of petitioning is, therefore, recognized by the States as well.

The protection of informal acts of petitioning, however, is in part responsible for the confusion surrounding the current attitude towards petitioning because it blurs the line between petitioning and speech. As discussed above, when the right to petition has been invoked by the Supreme Court, more often than not it is in the same breath as freedom of speech.[120] In fact, the Court has stated that "[t]he right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression."[121] This confusion is understandable because some types of publicity and public relations campaigns are considered "petitioning" and not simply speech.[122] Moreover, it is also understandable given that the right to petition is no longer the only protected avenue for seeking political change or criticizing government. The First Amendment now guarantees a wider range of freedom of expression than was recognized during petitioning's golden era. Likewise, the rise of popular

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118. *See, e.g.*, MASS. GEN. LAWS. ch. 231, § 59h (West. Supp. 1999).

> In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) that the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) that the moving party's acts caused actual injury to the responding party. . . .

Id.

119. *Id.*

120. *See* Rydstrom, *supra* note 18.

121. McDonald v. Smith, 472 U.S. 479, 482 (1985).

122. *But see* Spanbauer, *supra* note 18, at 66 (arguing that the extension of petitioning immunity to such efforts is overinclusive).

sovereignty and universal suffrage broadened the accepted means for political participation. The extension of these other rights, however, should not obscure petitioning's continued importance. The right to petition remains the principal textual guarantee of the individual's right directly to seek government action and for immunity from prosecution for those efforts.

C. The Problem

Against this backdrop, an argument could be made that parties involved in an objectively reasonable lawsuit who enter into a settlement agreement with anticompetitive consequences, are nonetheless, immune because the agreement is incidental to their Constitutionally protected right to petition the government for redress. In making this argument, litigants would find support in the Ninth Circuit's decision in *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc*.[123] In that case, the court held that "[a] decision to accept or reject an offer of settlement is conduct incidental to the prosecution of the suit and not a separate and distinct activity which might form the basis for antitrust liability."[124] So long as the litigation itself is not a sham and entitled to immunity, any settlement would likewise be immune.

Second, litigants could point to the fact that, as a general rule, the antitrust laws do not preclude settlement by agreement rather than by litigation,[125] and emphasize the "general policy favoring settlement of litigation."[126] Lastly, at least one commentator has argued that "[t]oo great a willingness to find antitrust violations in settlement arrangements would significantly inhibit settlements of many types of cases at real cost to the administration of justice, with little likelihood of any countervailing benefit to the public interest."[127] In other words, denying immunity in the context of settlements would impose significant costs upon society either through the increased transaction costs associated with litigation or by limiting the ability of private actors to order their affairs. Despite the facial plausibility of this argument, a more probing examination of the right to petition reveals that the settlement of litigation is not the sort of activity that the right protects.

II. DEFINING THE SCOPE OF PETITIONING IMMUNITY

In order to determine whether the settlement of litigation is an activity that falls outside the protection of the First Amendment's right to petition, an understanding of the scope and limits of petitioning immunity is necessary. However, as noted by numerous commentators, this area of law is replete with

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123. 944 F.2d 1525 (9th Cir. 1991).

124. *Id.* at 1528.

125. *See* Standard Oil Co. v. United States, 283 U.S. 163, 171 (1931).

126. United States v. Singer Mfg. Co., 374 U.S. 174, 199 (1963) (White, J., concurring); Dore, *supra* note 16, at 290-91. *But see* Owen M. Fiss, *Against Settlements*, 93 YALE L.J. 1073 (1984) (criticizing the movement towards alternative dispute resolution).

127. Reasoner & Adler, *supra* note 8, at 126.

"doctrinal confusion"[128] as a result of the Supreme Court's "failure to set forth clear general rules for defining the scope of the immunity."[129] Currently, the clearest guidance provided by the Court is that the scope of *Noerr* immunity depends upon "the source, context, and nature of the anticompetitive restraint at issue."[130] In dissent, Justice White noted that under this rule, "[D]istrict courts and courts of appeals will be obliged to puzzle over claims raised under the doctrine without any intelligible guidance about when and why to apply it."[131] To flesh out this rule, this section examines the underlying premises of the *Noerr* doctrine and articulates some general rules and a methodology for determining the scope of petitioning immunity.

Despite the general ambiguity surrounding *Noerr*, the history of the right to petition and the Supreme Court's case law demonstrate that immunity is justified based upon the nature of the activity in question and the source of the injury to competition. This Article proposes that immunity attaches when:

> 1) the conduct represents valid petitioning. Valid petitioning is defined as a formal or informal attempt to persuade an independent governmental decision maker consistent with the rules of the political forum in question, and
>
> 2) any anticompetitive harms flow directly or indirectly from those persuasive efforts.

Under this means/source test, the Supreme Court recognizes that: 1) individuals have a constitutional right to petition government for any end, and 2) the antitrust laws do not apply when restraints upon trade are a) the result of government action, or b) result directly from the act of petitioning.[132] Immunity under *Noerr* is justified in circumstances in which both of prongs of the means/source test are satisfied.[133] Moreover, if these requirements are not satisfied, conduct is not immune even if "genuinely aimed at procuring favorable government action"[134] and therefore not a sham.[135]

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128. *E.g.*, McGowan & Lemley, *supra* note 9, at 298.

129. Elhauge, *supra* note 9, at 1178.

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

131. *Id.* at 513 (White, J., dissenting).

132. *See* discussion *infra* Part II.A & Part II.B.

133. *See* discussion *infra* Part II.A & Part II.B.

134. *Allied Tube*, 486 U.S. at 500 n.4. Additionally, *Noerr* immunity is based implicitly on at least two assumptions. First, the process in which the anticompetitive result is being advocated is open to all sides. Second and closely related to the first, the outcome of the allegedly immunized activity must be subject to revision and reconsideration. Both of these assumptions are closely rooted to the political nature of the right. Harm to competition cannot be legitimately attributed to government, if those who are injured or simply oppose the "harm" do not have an avenue for being heard, and government cannot subsequently alter the outcome if it is inconsistent with the public good or any other reason.

135. *See infra* text accompanying notes 142-45.

A. The Means

Logically, the first step in determining whether the challenged activity is insulated under the First Amendment's right to petition is to determine whether the activity can be considered protected petitioning.[136] Historically, this would have meant a formal act of submitting a petition to a governmental body, in the appropriately deferential tone, seeking the redress of some public or private issue, separate from the cognate acts of speech and assembly.[137] However, as the prior summary of the Supreme Court's original trilogy in this area reveals, the Court has recognized that petitioning encompasses other means of communication in addition to the formal act of petitioning in the 18th century sense.[138] The right to petition extends to all valid efforts to solicit "governmental action with respect to the passage and enforcement of laws" whether they be formal or informal.[139] The threshold inquiry under *Noerr*, therefore, requires a determination that the private conduct represents an effort to solicit government action and that the means employed are considered valid.[140]

At the outset it should be noted that determining whether the means are valid and therefore protected petitioning is not necessarily equivalent to determining whether the motives are genuine. If private action is not genuinely aimed at soliciting governmental action, it is considered a sham, and therefore unprotected by the First Amendment even if the means utilized would otherwise be considered valid for purposes of petitioning.[141] Correspondingly, however, a genuine motive to "procure favorable governmental action" will not insulate private action if the means employed are not protected. As the Supreme Court made clear in *Allied Tube* and *Federal Trade Commission v. Superior Court*

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136. Some commentators and courts have treated this question as a determination into whether the conduct in question is a sham. *See, e.g.*, AREEDA & HOVENKAMP, *supra* note 90, at 19 ("Some courts and commentators use [sham] as a catchall for any activity that is not afforded *Noerr* protection."); Minda, *supra* note 10, at 1013-15 (arguing for the sham exception to include methods that distort the deliberative process of government). However, as discussed earlier, sham conduct has been narrowly defined to circumstances in which the private actor does not genuinely intend to secure governmental assistance. *See supra* notes 90-96 and accompanying text. Accordingly, the sham category is both over inclusive and underinclusive. Moreover, it fails to provide any substantive guidance into what activities should be protected under the First Amendment.

137. *See supra* Part I.A; *see also* Mark, *supra* note 18, at 2170-74.

138. *See supra* text accompanying notes 107-19.

139. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961).

140. *See* Elhauge, *supra* note 9, at 1215-23 (noting the need to determine whether the restraint is incidental and valid) (relying upon *Allied Tube*).

141. *See* Professional Real Estate Investors v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60 (1992) (defining sham); Allied Tube & Conduit Corp. v. Indiana Head, Inc., 486 U.S. 492, 500 n.4 (1988).

Trial Lawyers Ass'n,[142] protection under the right to petition may be denied even if the conduct in question was, in fact, intended and successfully results in government action.[143]

But what exactly is protected petitioning? What means for soliciting government action are valid? As the following discussion demonstrates, the method for determining whether private conduct represents valid petitioning is a two step process. First, courts must determine the "nature" of the conduct in question—is the conduct primarily an effort to persuade an independent governmental decision-maker? If so, the next step is to determine whether that conduct is otherwise permissible within the rules of the political arena in which the petitioning is occurring without reference to antitrust.[144] Specific conduct that is considered acceptable varies depending upon whether the legislative, executive, or judicial branches are involved. Therefore, as the Supreme Court has recognized, context is crucial. A detailed analysis of cases from the Supreme Court's original trilogy as well as subsequent cases brings this initial two part inquiry into sharper focus.

1. Is the Petitioning Valid?—As discussed earlier, the *Noerr Motor Freight* decision examined the struggle between railroads and the heavy trucking industry. The trucking industry contended that the railroads conspired "to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers."[145] The complaint alleged that this campaign was conducted through unethical and fraudulent means including the circulation of material which appeared to be spontaneously expressed views of independent persons and groups when, in fact, they were produced by and for the railroads.[146] The truckers claimed that, as a result of this conduct, they sustained damages in the form of lost revenue when the Governor of Pennsylvania vetoed legislation favorable to trucking and by incurring costs in responding to the publicity effort.[147] In response, the railroad counter-claimed, among other things, that the truckers engaged in similar publicity and through similarly unethical and fraudulent means.[148] Despite finding that both sides had engaged in similarly deceptive publicity, the trial court found for the truckers and against the railroad based upon evidence that the railroads intended to harm trucking while the truckers were merely seeking self-serving legislation.[149]

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142. 493 U.S. 411 (1990).

143. *See infra* text accompanying notes 188-225.

144. *Cf.* AREEDA & HOVENKAMP, *supra* note 90, at 73-82; Elhauge, *supra* note 9, at 1223-35.

145. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 129 (1961).

146. *See id.* at 130.

147. *See id.* at 130-31.

148. *See id.* at 132.

149. *See id.* at 134.

In finding the railroads' conduct immunized from antitrust scrutiny, the Court began with the proposition that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws."[150] The Court noted that:

> In a representative democracy such as this, [the] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity . . . .[151]

Accordingly, with due consideration for the right to petition, the Court held that "activities [which] comprised mere solicitation of governmental action with respect to the passage and enforcement of laws" would be immune from antitrust scrutiny.[152] Because there was no question in *Noerr* that the "nature" of the railroads' activities, the publicity campaign, was in fact an effort to influence governmental decision-making (an effort that was at least in part a successful), the Court was not confronted with whether petitioning was involved. As the Court noted in its subsequent decision in *Pennington*, the evidence in *Noerr Motor Freight* consisted "entirely of activities of competitors seeking to influence public officials."[153] However, that did not end the inquiry, and the decision went on to address whether the intent behind the petition and the means employed were "sufficient to take the case out of the area in which the principle is controlling."[154]

First, the Court rejected the district court's conclusion that the railroads' purpose of seeking to destroy their competition through legislation was somehow impermissible. According to the Court:

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual or illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. [155]

This passage is important because the Court found that no rules or laws outside of antitrust prohibited petitioning based upon the intent of the petition, and therefore, a "bad motive" would not be sufficient to remove immunity for the

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150. *Id.* at 135.
151. *Id.* at 137.
152. *Id.* at 138.
153. United Mine Workers v. Pennington, 381 U.S. 657, 669 (1965).
154. *Noerr Motor Freight*, 365 U.S. at 138.
155. *Id.* at 139.

railroads' petitioning activity.[156]

Next, the Court went on to reject the contention that the "deception" involved in the publicity campaign was sufficient to subject the conduct to antitrust scrutiny. While the Court found the practices to fall "far short of the ethical standards generally approved in this country," the technique employed by the railroads (and the trucking industry) was apparently "in widespread use among practitioners of the art of public relations" at the time.[157] Once again, in the absence of any rule prohibiting the use of the so called "third-party technique," the Sherman Act could not prohibit such conduct. To use the Court's language, "Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity."[158] Accordingly, beginning with *Noerr*, the Court examined both whether the conduct in question could be considered petitioning, and if so whether the petitioning activity was consistent with the rules of the "political arena" in which it occurred.

Following *Noerr*, the Court next examined the means of petitioning in two cases involving the judicial arena: *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*[159] and *California Motor Transport Co. v. Trucking Unlimited*.[160] Unfortunately, neither opinion is very detailed, and both fail to provide a coherent explanation for why petitioning immunity was denied in each instance. Nonetheless, both decisions can be readily explained by the fact that the petitioning conduct, the filing of a lawsuit, violated rules and norms within the judicial arena without reference to antitrust laws.

Rather than concluding that the truckers' litigation efforts were a sham, *California Motor Transport* is better understood as recognizing that while their conduct represented petitioning, it was invalid petitioning under the rules governing adjudication. As discussed earlier, *California Motor Transport*, involved allegations that certain trucking companies had violated the Clayton Act by conspiring to "institute state and federal proceedings to resist and defeat applications" by their competitors to acquire competing trucking rights.[161] In that decision, the Supreme Court made clear that access to courts and administrative agencies were clearly protected by the right to petition.[162] Despite that conclusion, the Court nonetheless found against the interstate truckers for filing their claims against the intrastate truckers even though they had a "right of access to the agencies and courts to be heard on applications sought by competitive

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156. In so doing, the Court also appears to imply that even if such a rule did exist it would impermissibly interfere with the right to petition. *See id.*

157. *Id.* at 140.

158. *Id.* at 140-41.

159. 382 U.S. 172 (1965).

160. 404 U.S. 508 (1972).

161. *Id.* at 509.

162. *See id.* at 510.

highway carriers."[163]

Nominally, the Court concluded that because the complaint alleged that the interstate truckers instituted proceedings "with or without probable cause, and regardless of the merits of the cases,"[164] the alleged conduct fell within the sham exception. The Supreme Court reached this conclusion despite the fact that the truckers had been successful in the majority of their challenges winning twenty-one out of forty cases.[165] Given the defendant's successes, as Professor Elhauge observed, "[I]t could not be denied that the suits were genuine efforts to influence adjudicators."[166] Nor could it be argued that the claims raised were objectively without merit as required under the Supreme Court's most recent definition of sham.[167] Accordingly, the conduct in *California Motor* does not satisfy the doctrinal definition of sham as it is understood today.

California Motor can best be understood as concluding that while the means used by the defendants were unquestionably petitioning, as alleged they could nonetheless be considered invalid under the rules of administrative and judicial proceedings. In an effort to distinguish the fact that in *Noerr* the railroads used deception, misrepresentation, and unethical tactics to secure favorable legislation, the Court emphasized the context of the activity at issue. While unethical conduct may be permitted in the political arena, "unethical conduct in the setting of the adjudicatory process often results in sanctions."[168] For example, "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."[169] While *California Motor* did not involve perjury or other misrepresentations, it potentially involved the common law tort of abuse of process which would be impermissible without reference to antitrust laws or principles.[170] Because conduct such as perjury, fraud, and abuse of process are prohibited in the judicial arena, they "cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'"[171] In other words, conduct inconsistent with the rules governing adjudicative proceedings would not be considered valid or protected petitioning activity.

Similarly in *Walker Process*, the Supreme Court examined whether the maintenance and enforcement of a patent obtained by fraud on the Patent Office

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163. *Id.* at 513.

164. *Id.* at 512.

165. *See* Trucking Unlimited v. California Motor Transport 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).

166. Elhauge, *supra* note 9, at 1184.

167. *See* Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 60-61 (1993).

168. *California Motor Transport*, 404 U.S. at 512.

169. *Id.* at 513.

170. *See id.*

171. *Id.* at 513.

could form the basis for a Sherman Act violation.[172] In finding that the antitrust claim could proceed, the Court relied upon a well established body of patent law involving the invalidity of patents procured by fraud which recognizes that the validity of patents is always subject to attack.[173] "The far-reaching social and economic consequences of a patent . . . give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope."[174] Consequently, the Court concluded that if the plaintiff, Food Machinery, obtained its patent by knowingly and willfully misrepresenting facts to the Patent Office, it would not be immune from the antitrust laws.[175] "By the same token, Food Machinery's good faith would furnish a complete defense."[176] In the former case, a plaintiff knows or should know that the patent is invalid as a matter of law and, therefore, subsequent efforts to maintain and enforce that patent against others would have no objective legal basis. While some may label this conduct a sham[177] because the plaintiff would certainly be seeking government action in its favor (i.e., the enforcement of the patent against a competitor), denial of immunity is better understood as based upon the unprotected status of the alleged petitioning conduct. Accordingly, even though the Court's decision does not even mention *Noerr*, its conclusion is consistent with the principle that petitioning immunity only attaches when the petitioning conduct is considered valid.

Outside the context of antitrust, the Supreme Court's decision in *McDonald v. Smith*[178] is also consistent with examining whether the challenged petitioning conduct was considered valid. The defendant in *McDonald* sent letters to President Reagan, Presidential Advisor Edwin Meese, Senator Jesse Helms, and other public officials opposing the plaintiff's consideration for the position of United States Attorney.[179] The letters accused the plaintiff of violating the civil rights of individuals while serving as a state court judge, committing fraud, conspiring to commit fraud, extortion and blackmail, and other violations of professional ethics.[180] Following the rejection of his nomination, the plaintiff sued for libel.[181]

On appeal, the Supreme Court was asked to determine whether the statements made in the defendant's letters should be entitled to absolute

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172. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 173 (1965).

173. *See id.* at 176-77.

174. *Id.* at 177 (quoting Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 816 (1945)).

175. *See id.*

176. *Id.*

177. *See* AREEDA & HOVENKAMP, *supra* note 90, ¶ 204.1, at 74–76; Minda, *supra* note 10, at 971-72.

178. 472 U.S. 479 (1985).

179. *See id.* at 481.

180. *See id.*

181. *See id.*

immunity or subject to the qualified immunity afforded by the constitutional malice standard recognized in *New York Times Co. v. Sullivan*.[182] In determining the scope of immunity to be afforded to the defendant's petitioning efforts, the Court began by noting the historical significance of the right and that it "is implicit in '[t]he very idea of government, republican in form.'"[183] The historical importance of the right, however, was not dispositive.[184] Instead, the Court examined whether the common law of defamation recognized absolute immunity for letters to public officials, noting that the authorities on that subject were mixed and that it had rejected a claim for absolute immunity in a prior defamation decision.[185] In light of this case law, the Court concluded that absolute immunity was not justified, and that the statements made in the letters could lead to liability if the plaintiff satisfied the *New York Times* standard and demonstrated that they were made with knowing or reckless disregard for the truth.[186] In support of its conclusion that some limitations on petitioning are legitimate, the Court relied on its "decisions interpreting the Petition Clause in contexts other than defamation" including *California Motor Transport* which did not "indicate that the right to petition is absolute."[187]

2. Is the Conduct Petitioning?—In the preceding cases the nature of the private conduct was admittedly petitioning activity: lobbying, a publicity campaign directed at public officials, the filing of lawsuits, and instituting administrative proceedings. The question, therefore, was whether those petitioning activities were conducted in accordance with the rules and procedures of the petitioning forum, and, therefore, valid. In the following two cases, the Supreme Court confronted which types of conduct could in fact be considered petitioning, let alone valid petitioning.

In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,[188] manufacturers of steel conduits used to house electrical wiring conspired with other steel interests to exclude plastic conduits from the National Electric Code. The Code, published by the National Fire Protection Association (a private organization representing industry, labor, academia, insurers, organized medicine, firefighters, and government), establishes product and performance requirements for electrical wiring.[189] State and local governments routinely adopted the Code with

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182. *See id.* at 481-82.

183. *Id.* at 482-83 (quoting United States v. Cruikshank, 92 U.S. 542, 552 (1876)).

184. *See id.* at 483 ("Although the values in the right of petition as an important aspect of self-government are beyond question, it does not follow that the Framers of the First Amendment believed that the Petition Clause provided absolute immunity from damages for libel.").

185. *See id.* at 483-84. *But see* Smith, *supra* note 18, at 1183 (arguing that the Supreme Court's analysis was flawed and that common law did recognize absolute immunity for letters to public officials); Spanbauer, *supra* note 18, at 52-58 (same).

186. *See id.* at 485 ("The right to petition is guaranteed; the right to commit libel with impunity is not.").

187. *Id.* at 484.

188. 486 U.S. 492, 497 (1988).

189. *See id.* at 495.

little or no revisions, and private industry often required electrical products to be consistent with the Code.[190]

The controversy began when manufacturers of plastic conduits sought to have their conduits included as an approved type of electrical conduit in the 1981 edition of the Code. As described by the Supreme Court:

> Alarmed that, if approved, respondent's product might pose a competitive threat to steel conduit, petitioner, the Nation's largest producer of steel conduit, met to plan strategy with, among others, members of the steel industry, other steel conduit manufacturers, and its independent sales agents. They collectively agreed to exclude respondent's product from the 1981 Code by packing the upcoming annual meeting with new Association members whose only function would be to vote against the [plastic conduit] proposal.[191]

To that end, they recruited 230 persons to join the Association and paid over $100,000 in expenses for these recruits. The strategy was successful and, while unethical, apparently was not prohibited by the Association's rules.[192] Allied Tube subsequently brought an antitrust action seeking damages for injuries resulting from the exclusion of plastic conduits by the Code itself, but not for any injuries stemming from the adoption of the Code by governmental entities.[193]

Beginning with the now accepted proposition that "[c]oncerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability," Justice Brennan, writing for the Court, stated that the "scope of this protection depends, however, on the source, context, and nature of the anticompetitive restraint at issue."[194] Because Allied Tube was not seeking damages for the governmental adoption of the Code, any injury to competition arose from private action as opposed to governmental action. Under those circumstances, the Court stated that "the restraint cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence governmental action. The validity of such efforts, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity."[195] The central issue in *Allied Tube*, therefore, was whether the defendant's conduct represented petitioning—a valid effort to influence governmental action.

For the purposes of its analysis, the Court accepted the defendant's arguments that efforts to influence the Association's standards-setting process represented the most effective means of influencing legislation and that any effect the Code had in the marketplace of its own force was, in general, incidental

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190. *See id.* at 495-96.

191. *Id.* at 496.

192. *See id.* at 497.

193. *See id.* at 498.

194. *Id.* at 499.

195. *Id.* (construing Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 143 (1961)).

to a genuine effort to influence governmental action.[196] As such, there was no issue that the defendant was not genuinely attempting to influence government. Accepting these arguments, however, did not end the inquiry. According to the Court:

> We cannot agree with [the] absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors 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 on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms.[197]

The method in which the defendant attempted to influence government, therefore, was critical in determining whether petitioning immunity would be recognized.

Given the context and nature of the activities, the Court ultimately concluded that *Noerr* immunity did not apply. The Court stated that "[w]hat distinguishes this case from *Noerr* and its progeny is that the context and nature of petitioner's activity make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves."[198] In other words, the private conduct in *Allied Tube* was not simply petitioning but, instead, commercial conduct. First, the context of the conduct in question was the standard-setting process of a private association which the courts have traditionally examined because of their independent potential to restrain trade.[199] As the Court stated, an "agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products," and, therefore, a classic example of a restraint upon trade.[200] Because the conduct occurs in a private forum in which the actors have economic incentives to restrain trade, it is a far cry from an open political arena in which divergent viewpoints may be heard.[201]

Along those same lines, the nature of the activity at issue could not be classified as an effort to persuade "an independent decision-maker." Instead, the defendant "organized and orchestrated the actual exercise of the Association's decision-making authority in setting the standard."[202] The Association's rejection of plastic conduits was not accomplished through debate and discussion on the

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196. *See id.* at 502.
197. *Id.* at 503.
198. *Id.* at 505.
199. *See id.* at 500, 504.
200. *Id.* at 500.
201. *See id.* at 506-07.
202. *Id.* at 507.

merits. Rather, the steel industry packed the Association meeting with paid agents whose only role was to vote against plaintiff's proposal. The steel companies paid individuals to become members of the Association, paid for their expenses, instructed them where to sit, and instructed them when to vote.[203]

In reaching this conclusion, the Court emphasized that subjecting this type of behavior to antitrust scrutiny in no way diminished the defendant's ability to engage in actual petitioning against plastic conduits. According to the Court, "[P]etitioner, and others concerned about the safety or competitive threat of polyvinyl chloride conduit, can, with full antitrust immunity, engage in concerted efforts to influence those governments through direct lobbying, publicity campaigns, and other traditional avenues of political expression."[204] Additionally, defendant could take advantage of the forum provided by the association "by presenting and vigorously arguing accurate scientific evidence before a nonpartisan private standard-setting body."[205] While this latter approach would not be immune from antitrust scrutiny, it might deflect antitrust liability under the rule of reason.[206]

As a result, even though the defendant genuinely intended to influence governmental action, was in fact successful in obtaining governmental action, and accomplished its objectives without violating any rules of either the Association or the legislative arena, the Court concluded that its activities were not insulated from antitrust scrutiny. It did so because the defendant's conduct did not represent petitioning. At best it could be characterized "as commercial conduct with a political impact."[207] At worst, it was a purely selfish economic decision accomplished through the exercise of raw market power. Either way, it was not protected by the right to petition.

Petitioning immunity also turned on the nature of the private conduct in *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*.[208] Once again, the Court was confronted with the issue of whether the conduct in question could be considered petitioning. In *Superior Court*, approximately 100 lawyers who regularly represented indigent defendants in the District of Columbia sought an increase in the hourly rates paid under the District of Columbia Criminal Justice Act (CJA).[209] The CJA lawyers employed a three-fold strategy. First, they prepared and signed a petition seeking an increase in the hourly wages; second, they agreed to refuse any new CJA assignments until they received their raise; and third, they arranged a series of events to publicize their plight.[210] As a result of the collective decision to stop taking cases, the District's criminal justice system was eventually overwhelmed, prompting the Mayor to agree to an

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203. *See id.* at 497.
204. *Id.* at 510.
205. *Id.*
206. *See id.* at 500-01.
207. *Id.* at 507.
208. 493 U.S. 411 (1990).
209. *See id.* at 415-16.
210. *See id.* at 416.

increase in CJA rates as demanded.[211]

In response, the Federal Trade Commission (FTC) filed a complaint against the lawyers arguing that they had engaged in unfair methods of competition through "a conspiracy to fix prices" and conducting a boycott.[212] It should be noted at the outset that the FTC did not claim that the formal act of petitioning itself or the publicity efforts violated the antitrust laws. The Supreme Court stated that "[i]t is, of course, clear that the association's efforts to publicize the boycott, to explain the merits of its cause, and to lobby District officials to enact favorable legislation . . . were activities that were fully protected by the First Amendment."[213] Accordingly, the sole issue before the Court was whether the boycott itself was protected by the First Amendment.

Although the boycott certainly represented an effort to influence government, the Supreme Court concluded that the boycott was not protected petitioning. According to the Court, this issue was "largely disposed of" by *Allied Tube*, in which the Court explained that *Noerr* does not protect every effort genuinely intended to influence government. Otherwise, "[h]orizontal 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."[214] The CJA boycott was a horizontal agreement among competitors that was unquestionably "a 'naked restraint' on price and output."[215] As explained by the appellate court, the constriction in price created by the boycott is the "essence of 'price-fixing,' whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered."[216]

The Supreme Court also rejected the argument that the boycott was protected speech. Although the Court in *NAACP v. Claiborne Hardware Co.*[217] recognized some First Amendment protection for boycotts seeking to vindicate constitutional rights, it did so "[o]nly after recognizing the well settled validity of prohibitions against various economic boycotts . . . ."[218] In general, the regulation of economic boycotts only incidentally effects the rights of speech and association. Accordingly, the government has "power to regulate [such] economic activity," especially when a clear objective of the boycott is economic gain for the participants.[219] In the Court's view, the boycott represented economic rather than

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211. *See id.* at 417-18.

212. *Id.* at 418.

213. *Id.* at 426.

214. *Id.* at 425 (quoting Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 503 (1988)).

215. *Id.* at 423.

216. *Id.*

217. 458 U.S. 886 (1982).

218. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 428 (citing *Claiborne Hardware*, 458 U.S. at 912).

219. *Id.*

political activity.

Another way to interpret *Superior Court* is to recognize that with the boycott, the CJA attorneys had gone beyond merely attempting to persuade an independent decision-maker. Instead of limiting their efforts to persuading the District through the presentation of facts and arguments or through public pressure, the attorneys used the boycott to economically coerce the government into action. This distinction is made clear by Justice Brennan's opinion.[220] According to Justice Brennan:

> The Petition and Free Speech Clauses of the First Amendment guarantee citizens the right to communicate with the government, and when a group persuades the government to adopt a particular policy through the force of its ideas and the power of its message, no antitrust liability can attach. . . . But a group's effort to use market power to coerce the government through economic means may subject the participants to antitrust liability.[221]

This distinction between persuasion and coercion is clearly consistent with the historical origins of the right to petition. Historically, petitions were rejected by the King and Parliament if their requests for government action were not sufficiently deferential.[222] If a petition could be rejected because its request was not sufficiently deferential, demands and coercion would certainly be refused. Today, while the acceptance of popular sovereignty has changed the relationship between the people and government, unless the people are acting in their sovereign capacity, public questions are to be resolved by government through a representative and deliberative process.[223] Coercion, like the right to instruct representatives, necessarily undermines the deliberative process.[224] Consequently both *Allied Tube* and *Superior Court* stand for the proposition that while various efforts to persuade an independent governmental decision maker are protected

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220. Justice Brennan agreed with the majority that the boycott was not insulated from antitrust scrutiny either as petitioning or speech. His disagreement with the Court was over whether the conduct must necessarily lead to antitrust liability. *See id.* at 437 (Brennan, J., concurring in part and dissenting in part). In his opinion, although the expressive component of an economic boycott did not render the boycott absolutely immune, it cautioned in favor of applying the rule of reason to determine whether the boycott achieved its objective through political persuasion or through market power. *See id.* at 446.

221. *Id.* at 437-38.

222. *See, e.g.*, Spanbauer, *supra* note 18, at 32 ("Early petitions presented by the colonies to England were composed with respectful language and began with expressions of the petitioners' subservience, loyalty, and support for the crown. Such petitions were the only authorized channel through which criticism of the government was funneled.").

223. *See* Ku, *supra* note 104, at 557-76 (discussing when constitutional change can legitimately claim to represent an act of popular sovereignty); Cass. R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (arguing that law making must be based on reasoned deliberation).

224. *See supra* text accompanying notes 35-39.

under the right to petition, efforts to dictate the result either directly through market power or indirectly through governmental coercion will be subjected to scrutiny.[225]

The means analysis employed by the Supreme Court examines whether the challenged conduct is in fact petitioning—an effort to persuade an independent governmental decision-maker through the presentation of facts and arguments. If the conduct is petitioning, a court must then determine whether that petitioning is valid according to the rules and procedures of the forum in which the activity occurs. This two-step examination ensures that the conduct in question does not subvert the political process and governmental accountability. As Professor Elhauge has noted, we allow private, financially interested actors to make important decisions about resource allocation in the market because free competition "causes producers to provide goods at the lowest cost to those who value them the most."[226] Under those circumstances, antitrust review ensures that those private "actions conform to this competitive process rather than undermine it to reap monopoly profits."[227] In contrast, we allow government to determine the public good even through restraints of trade because, in theory, its decision-making takes place in a political process with procedures that ensure that government remains accountable to the people.[228] By determining whether the conduct represents persuasion rather than coercion and that the means employed are consistent with the rules and norms of the governmental forum, the means analysis protects both the individual's right to petition and governmental accountability.[229]

B. The Source of the Antitrust Injury

In addition to the means employed, *Noerr* immunity depends upon the source

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225. *See also* Wigwam Assocs., Inc. v. McBride, 24 Mass. Law. Wkly. S2 (Feb. 5, 1996) (Mass. Super. Ct. 1995) (holding that the "badmouthing" of a developer to prospective home buyers fell outside the context of petitioning government).

226. Elhauge, *supra* note 9, at 1197-98.

227. *Id.*

228. *See id*.

229. Professor Minda argues that the *Noerr* doctrine should be reconsidered in light of interest group theory because of the potential for business interests to capture the political process. *See* Minda, *supra* note 10, at 1027-28. Instead, he proposes that "courts should adopt a standard and an understanding of the first amendment that carefully limits petitioning activity of business when such activity is part of a profit-maximizing strategy for *monopolizing* markets, *regardless of context.*" *Id.* at 911. The problem with this approach is that it places too much faith in the judicial process and undervalues the role that petitioning and other political rights play in protecting against the very evil that concerns Professor Minda—unresponsive government. Instead of relying upon the political process to eliminate governmental capture, Professor Minda would rely upon judges to determine when business has gone too far. However, this approach elevates the policies embodied in antitrust laws to the level of constitutional law and overlooks the potential for judicial capture.

of the harm to competition. As the Supreme Court has noted, there is a "dividing line between restraints resulting from governmental action and those resulting from private action . . . ."[230] Presumably, private actors can not be held responsible for the former, while they are responsible for the latter. However, this distinction between public versus private action unnecessarily clouds the immunity analysis and provides an incomplete picture of petitioning immunity. Arguably, any time petitioning conduct is challenged as a violation of law the costs imposed upon competitors or other injuries to competition can be said to originate from private conduct or the original petitioning activity. Independent of the source of the ultimate restraint, the act of petitioning itself, whether it be the filing of a formal petition, a lawsuit, informal lobbying, or a publicity campaign, imposes costs on competition simply by requiring competitors to respond.[231] Yet, immunity for these types of "injuries" is required even though they cannot be attributed to government.[232] Moreover, petitioning immunity insulates private actors even when their petitioning efforts fail, and any resulting restraint upon competition clearly cannot be attributed to government.[233] Although the public/private distinction provides justification for immunity under certain limited circumstances, it hardly explains when and why protection should be granted in the vast majority of cases. Consequently, the question should not be whether the restraint can be attributed to public versus private decision-making. Instead, the source prong should focus on determining whether the restraint results from valid petitioning.

Unfortunately, the source of this doctrinal confusion stems from the Supreme Court's decision in *Noerr* itself. In justifying immunity, the Court stated that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out."[234] This conclusion was required because "under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the

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

231. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 143-44 (1961).

232. *See id.*

> It is inevitable, whenever an attempt is made to influence legislation . . . that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. . . . To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

Id.

233. *See* AREEDA & HOVENKAMP, *supra* note 90, ¶ 201, at 16 ("Even if the proposed action is rejected and a rival has been burdened by being forced to oppose the measure or defend himself in a lawsuit, such a burden is the normal result of governmental processes and its imposition on a rival is not wrongful.").

234. *Noerr Motor Freight*, 365 U.S. at 136.

Constitution."[235] In support, the Court relied upon its decision in *Parker v. Brown*,[236] in which it recognized state action immunity, or in other words, that the Sherman Act does not apply to state programs that impose unreasonable restraints upon trade. This reflects the understanding that a governmental decision to act "reflects an independent governmental choice, constituting a supervening 'cause' that breaks the link between a private party's request and the plaintiff's injury."[237] Along these lines, the Court characterized *Noerr* as merely a "corollary to *Parker*" required because it would be "peculiar in a democracy, and perhaps in derogation of the constitutional right 'to petition the Government for a redress of grievances,' . . . to establish a category of lawful state action that citizens are not permitted to urge."[238]

Petitioning immunity is more than a mere corollary to state action immunity. As mentioned earlier in *Noerr*, the Court was not asked to consider whether the railroads could be held responsible for damages resulting from the Governor's legislation of a bill favorable to the trucking industry, but instead whether the railroads could be held responsible for injuring the truckers' relationships with their customers through their publicity campaign and costs incurred by the truckers in responding to that campaign with a publicity effort of their own.[239] In other words, the truckers were seeking damages resulting directly from the act of petitioning rather than indirectly through governmental action.[240]

Nonetheless, the Court concluded that the petitioners were immune from liability for those direct injuries because they inevitably result from any effort to petition government, and "[t]o hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns."[241] In other words, the fact that customers may be lost because of a lawsuit or negative public relations campaign and that defendants will incur expenses in defending against a lawsuit or hiring lobbyists of their own, are inevitably associated with any effort to solicit government action. Holding a petitioner responsible for such costs simply because they are not caused by government would eviscerate the right to petition. Accordingly, in order to protect the act of petitioning itself, the Court concluded that petitioners could not be punished for any injuries resulting directly from protected petitioning activities. Because the Court concluded earlier that the conduct of the railroads satisfied the means prong as valid petitioning activity, it rejected the truckers' claims.

A similar analysis was followed in both *Allied Tube* and *Superior Court*, even though in both cases the defendants were successful in obtaining governmental action in their behalf. In determining whether the defendant could

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235. *Id*.
236. 317 U.S. 341 (1943).
237. AREEDA & HOVENKAMP, *supra* note 90, ¶ 201, at 14.
238. City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 379 (1991).
239. *See Noerr Motor Freight*, 365 U.S. at 133-34.
240. *See id.* at 143.
241. *Id.* at 143-44.

be held responsible for damages resulting from the exclusion of plastic conduits from the 1981 Code, the Court emphasized that "where, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence governmental action."[242] Because the Court concluded that Indian Head's manipulation of the private standard setting association was not a valid petitioning effort, the Court held that its conduct was not immunized, and the defendant was held responsible for $3.8 million in lost profits suffered by the plaintiff.[243]

Similarly, because the economic boycott in *Superior Court* was found to be an invalid means of petitioning, the CJA lawyers could be subjected to antitrust liability for the restraint upon trade resulting from their boycott. In particular, the Court noted that the restraint was not the "intended consequence of public action," but was "the means by which respondents sought to obtain favorable legislation," and that "the emergency legislative response to the boycott put an end to the restraint."[244] Once again, because the defendants' conduct was not considered a valid means of petitioning, they were held responsible for the injury to competition directly resulting from that conduct. The critical question in the source prong, therefore, is whether the injury results from a valid effort to influence government, not whether the government or a private actor is the source of the harm, or whether the harm is characterized as direct or incidental.

When the alleged injury results not only from valid petitioning activities but from government's response to that petition, the argument for immunity is even stronger. Not only is the right to petition implicated, but the causal chain is broken by the decision of an independent, financially disinterested, public decision-maker.[245] As the Supreme Court recognized, it is "beyond the purpose of the antitrust laws to identify and invalidate lawmaking" because it may have been infected by selfish motives.[246] While this certainly adds an additional arrow to the defendant's quiver of immunity arguments, the pivotal question is whether the challenged conduct is considered valid petitioning. If the conduct is considered valid petitioning, the petitioner is immune from all liability, regardless of whether the injuries are caused by the defendant directly through the act of petitioning itself or indirectly by governmental adoption of the petitioner's position.[247] In contrast, if the activity does not represent valid

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

243. *See id.* at 498.

244. Federal Trade Commission v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 425 (1990).

245. *See* AREEDA & HOVENKAMP, *supra* note 90, ¶ 201, at 14.

246. City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 383 (1991).

247. Some commentators have argued that given the importance of competitive economic policy in this country, *Noerr* immunity should be narrowly tailored, especially given the possibility for imposing considerable costs upon competitors directly through petitioning. *See, e.g.*, Hurwitz, *supra* note 7; Meyer, *supra* note 7. At least one commentator has argued that *Noerr* immunity should not be granted if the defendant's conduct is in effect not the least restrictive means for

petitioning, defendants are subject to antitrust scrutiny even if they are ultimately successful in obtaining governmental action. As such, the means/source test can be collapsed into a single inquiry: Is the private conduct a valid effort to influence government?[248]

III. THE METHODOLOGY APPLIED TO SETTLEMENTS

Having proposed a methodology for determining whether immunity is justified under the right to petition, the next step is to apply the analysis to the settlement of litigation. Because settlements vary in "source, context, and nature," this section examines whether the right to petition immunizes purely private settlement agreements—those entered into between private litigants in which no court approval is sought or required.[249] An analysis of private settlements under the means/source test clearly leads to the conclusion that such agreements are not protected by the right to petition.

When private parties enter into settlement agreements, the right to petition is not implicated. For the purposes of this discussion, private settlements are settlements arrived at between parties to the litigation in which dismissal of the action is accomplished by stipulation under Rule 41(a)(1) of the Federal Rules of Civil Procedure.[250] Under those circumstances, judicial approval of the

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achieving governmental action *and* the action sought is illegitimate. *See* Meyer, *supra* note 7, at 832. These arguments diminish the importance of the right to petition while elevating the values of free-market economics. The right to petition is guaranteed in our Constitution to ensure that government remains responsive to the people. If the people want to eliminate the Sherman Act, impose a command economy, or even eliminate government altogether, it is their prerogative to do so. Similarly, while it may make sense as a matter of economic policy to require defendants to choose the least costly means of petitioning government, such a requirement would impermissibly chill the right to petition by subjecting petitioners to SLAPP suits in which the government or private parties are allowed to second guess the means by which political or private change is sought.

248. By focusing on whether challenged conduct is valid petitioning without reference to antitrust laws or principles, the means/source test is equally useful for identifying conduct that falls under the protection of the right to petition when that conduct is alleged to have violated other laws.

249. Court approved settlement agreements or consent decrees in the context of: 1) voluntary dismissals under Rule 41 of the Federal Rules of Civil Procedure; 2) class action settlements under Rule 23 of the Federal Rules of Civil Procedure; and 3) government prosecutions under the Antitrust Procedures and Penalty Act, 15 U.S.C. § 16, are the subject of Part IV.

250. FED. R. CIV. P. 41(a)(1) provides:

> Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an

settlement agreement is neither required nor permitted.[251] While the antitrust laws do not preclude parties from entering into settlement agreements, that does not mean that those parties are necessarily absolved from any anticompetitive harm resulting from those agreements. Applying the means/source test to settlements demonstrates that such conduct should not be immune from antitrust scrutiny.

The first step in the means/source analysis is to determine whether the conduct in question can be considered petitioning.[252] Private settlements fail to satisfy this first prong because they are in fact the antithesis of efforts to solicit government action. While lobbying legislatures or public officials, conducting publicity campaigns, and filing lawsuits are all attempts to persuade an independent government decision-maker to adopt one's view, no similar claim can be made when private parties enter into a settlement agreement. When private parties enter into a settlement agreement, they are affirmatively withdrawing consideration of the matter from the decisionmaking authority of government. Under those circumstances, the parties are no longer attempting to persuade government to adopt a potentially anticompetitive policy, nor are they soliciting government action. Instead, they have officially given up any such effort and are acting on their own. As the nature of the conduct does not represent petitioning, there is no need to determine whether that petitioning activity was in accordance with the rules of the judicial forum. Consequently, private settlement agreements clearly fail the means prong of the *Noerr* analysis.

Even though failure of the means prong is sufficient to deny immunity, private settlement agreements also fail the source prong of the *Noerr* analysis.[253] When private parties enter into a settlement agreement without judicial participation, any anticompetitive effects arising from the agreement can in no way be fairly attributed to valid petitioning activity. As the Supreme Court has recognized in another context, a settlement agreement is simply a contract, for which part of the consideration is the dismissal of a lawsuit.[254] Given the private nature of these agreements, we can legitimately question whether the public's interests are being considered, let alone vindicated, by these private attorneys general.[255] As recognized by Professor Fiss, "[T]he bargain is at best contractual and does not contain the kind of enforcement commitment already embodied in

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action based on or including the same claim.

Id.

251. *See* 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2363, at 270-72 (2d ed. 1994) [hereinafter WRIGHT & MILLER].

252. *See supra* Part II.A.

253. As discussed earlier, the means/source test can actually be collapsed into a single inquiry: does the private conduct represent valid petitioning. This, however, does not make the source prong irrelevant. There may be circumstances in which the conduct in question represents valid petitioning, but is not the source of the antitrust injury. The source prong, therefore, is necessary to protect competitors from injurious conduct not protected under the First Amendment.

254. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994).

255. *See generally* Fiss, *supra* note 126.

a decree that is the product of a trial and the judgment of a court."[256] Consequently, any resulting harm to competition finds its source in that contract and the market power wielded by the signatories.[257] Under those circumstances, government action is not solicited, nor will it be unless a court is subsequently asked to enforce the terms of that contract in the event of a disagreement between the parties.[258]

Consequently, the central justifications for *Noerr* immunity are absent in the context of settlement agreements. This conclusion should be the same even if a court would have ordered the same remedy. "The fact that Congress through utilization of the precise methods here employed could seek to reach the same objectives sought by respondents does not mean that respondents or any other group may do so without specific Congressional authority."[259] Immunity from antitrust scrutiny or any other laws for that matter is not based upon whether the outcomes are acceptable or permissible, but depends upon the means used to achieve those outcomes.[260] By withdrawing the matter from government consideration, parties to a private settlement agreement have steered a course outside the protection of the right to petition.

The conclusion that private settlement agreements are not insulated from antitrust scrutiny is consistent with existing case law. The only court decision on point is *In re New Mexico Natural Gas Antitrust Litigation*[261] that involved five antitrust lawsuits against various producers and suppliers of natural gas. The plaintiffs alleged that the defendants had engaged in price fixing in violation of the Sherman Act.[262] The price fixing was allegedly the result of the settlement of claims in a separate litigation brought by the producers of natural gas against the supplier.[263] The separate litigation involved, among other things, the interpretation of "favored nations (or price equalization) clauses" in the contracts between the producers and the supplier.[264] The defendants in the subsequent action claimed that the initiation, prosecution, and settlement of the earlier lawsuits were exempt from antitrust liability under the *Noerr* doctrine.[265]

The court disagreed and held that "a private settlement accomplished without Court participation should not be afforded *Noerr-Pennington* protection."[266]

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256. *Id.* at 1085.

257. Additionally, disparities in power between the parties may also lead us to question whether the terms of the agreement are even just between them. *See id.* at 1075-82 (noting that the settlement process may be infected by coercion, unequal bargaining power, and the absence of authoritative consent).

258. *See id.*

259. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225-26 (1940).

260. *See supra* Part II.A.

261. No. 403, 1982 WL 1827 (D.N.M., Jan. 26, 1982).

262. *See id.* at *4.

263. *See id.*

264. *Id.* at *4 n.8.

265. *See id.* at *5.

266. *Id.* at *6.

According to the court:

> When parties petition a Court for judicial action [Noerr] protection attaches, but when they voluntarily withdraw their dispute from the court and resolve it by agreement among themselves there would be no purpose served by affording Noerr-Pennington protection. The parties by so doing must abide with any antitrust consequences that result from their settlement. The defendants have pointed to no case which would afford Noerr-Pennington protection to private settlement of litigation, and logic would indicate no reason why there should be such protection.[267]

The court opined, however, that the result may be different when "the settlement was submitted to the Court and approved in an order of dismissal of the case."[268] The defendants argued that because the settlement had been submitted and incorporated as part of the order of dismissal the settlement is immunized, while the plaintiffs argued that the sham exception would apply.[269] The court declined to reach the issue at that stage of the litigation.[270] The district court's decision in *In re New Mexico Gas*, therefore, clearly supports the conclusion that private settlements are not immune merely because the parties to the agreement have "voluntarily" withdrawn their request for governmental decision-making and acted on their own.

The FTC has also concluded that private settlement agreements are not exempt from antitrust scrutiny. In *In re YKK, Inc.*,[271] the FTC concluded that the terms of a settlement offer constituted unfair competition. The case involved competitors, YKK Incorporated and Talon Incorporated, who manufactured and sold zippers.[272] An attorney for YKK sent a letter accusing Talon of "unfair and predatory sales tactics" by offering free equipment to customers.[273] Apparently, YKK offered to drop the matter if both agreed to stop providing free equipment.[274] The Commission concluded that "[a]n agreement between Talon and YKK to cease this form of discounting would have constituted an unreasonable restraint of competition."[275] The concurring opinion of Commissioner Deborah K. Owen notes that any agreement between YKK and Talon would have represented the settling of "allegations of unlawful price discrimination."[276] The fact that the agreement would have represented such a

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267. *Id.*

268. *Id.* at *7.

269. See *infra* Part IV for a discussion whether court approval of settlements justifies immunity.

270. *See In re New Mexico Natural Gas Litig.*, 1982 WL 1827, at *7.

271. F.T.C. 628 (1993).

272. *See id.* at 629.

273. *See id.*

274. *See id.* at 641 (concurring statement of Comm'r Starek).

275. *Id.* at 629.

276. *Id.* at 641.

settlement did not, however, prevent the FTC from scrutinizing its anticompetitive nature.

> The context of private settlement, however, does not remove from antitrust scrutiny inherently suspect conduct that lacks an efficiency justification. In civil cases generally, a legitimate intent or purpose would not justify a restraint that has unreasonably anticompetitive effects. Moreover, even a good faith attempt to avoid Robinson-Patman liability will not excuse anticompetitive conduct that is clearly inconsistent with the broader purposes of the U.S. antitrust laws.[277]

Commissioner Starek also noted that even if YKK's invitation was a good faith offer of settlement, the terms of that settlement exceeded the scope of what was "reasonably necessary to achieve a settlement. The potential effects of such an invitation are unambiguously anticompetitive."[278]

> Assuming arguendo that YKK's threats of litigation were made in good faith, the appropriate quid pro quo for the competitor's commitment to cease from engaging in the putative violation was YKK's commitment to forgo initiating litigation. YKK, however, went further, offering to discontinue an important form of discounting in exchange for the competitor's commitment to discontinue such discounting. This conduct poses a substantial threat to competition, particularly in cases such as this where the evidence strongly suggests that the relevant firms, acting in concert, have market power.[279]

Commissioner Starek concluded by stating that "competitors attempting to resolve claims of unlawful discounting under the Robinson-Patman Act [should] understand that any settlement or attempted settlement must pass scrutiny under U.S. antitrust laws forbidding unreasonable restraints of trade. . . ."[280]

Commissioner Dennis A. Yao, in his concurring statement, also stressed that YKK went beyond requesting that Talon cease any allegedly unlawful practices.[281] He stressed that:

> Although the Commission must take care in cases like this to avoid any misimpression that mere settlement discussions could lead to a Section 5 action, the Commission cannot abdicate its responsibility to challenge an unlawful invitation to collude solely because it occurs during an otherwise lawful conversation.[282]

Both concurrences make clear that even good faith efforts at settling disputes and

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277. *Id.* at 642 (footnote omitted).

278. *Id.* at 643.

279. *Id.* (footnotes omitted).

280. *Id.* at 643-44.

281. *See id.* at 645 (concurring statement of Comm'r Yao) ("Most importantly, the lawyer's actions here went beyond requesting that his client's competitor cease an allegedly unlawful practice . . . .").

282. *Id.* at 646.

the agreements that arise from those efforts are subject to antitrust scrutiny. They also establish a rule, or at least a presumption, that settlement agreements represent unreasonable restraints if they require more than the cessation of the allegedly unlawful practice in exchange for not bringing or dismissing a lawsuit.

The only appellate court decision to touch upon this question is the Ninth Circuit's decision in *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*[283] In that case, the defendant in a private antitrust suit argued that the plaintiff's refusal to settle the litigation violated the antitrust laws.[284] In rejecting this argument, the court stated that, "[a] decision to accept or reject an offer of settlement is conduct incidental to the prosecution of the suit and not a separate and distinct activity which might form the basis for antitrust liability."[285] Because the Supreme Court held that beginning a lawsuit cannot be the basis for antitrust liability, the Ninth Circuit's holding that refusing to settle an ongoing lawsuit cannot form the basis for antitrust liability is not only consistent with that rule, but required. The rejection of a settlement offer represents nothing less than a decision to continue the petitioning effort. It would be strange indeed if the First Amendment protected the right to begin petitioning but not the right to continue to engage in petitioning conduct. Unfortunately, the same cannot be said for the court's dicta that a decision to accept a settlement is likewise insulated.

While the symmetry of "accept or reject" is facially appealing, it is not consistent with the overall thrust of *Noerr* immunity which, as discussed above, only applies: (1) to legitimate efforts to persuade the government as an independent decision-maker, and (2) when the alleged antitrust injury results from valid petitioning activity.[286] With the exception of the unsupported dicta in *Professional Real Estate Investors*, the conclusion that private settlement agreements are not immunized by the right to petition is consistent not only with Supreme Court interpretation but also with the only decision to actually address the issue.

IV. THE METHODOLOGY APPLIED TO CONSENT DECREES

The main wrinkle in the argument that the settlement agreements are subject to antitrust scrutiny and not exempt under the First Amendment arises when the agreements are approved by a court and entered as consent decrees. As one court recognized, there is an argument that agreements approved by a court should have a different status under *Noerr* than purely private agreements.[287]

Judicial approval of settlements is required in several different contexts. First, under Rule 41 of the Federal Rules of Civil Procedure, judicial approval is

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283. 944 F.2d 1525 (9th Cir. 1991), *aff'd on other grounds*, 508 U.S. 49 (1992).

284. *See id.* at 1528.

285. *Id.*

286. *See supra* Part III.A-B.

287. *See In re* New Mexico Natural Gas Antitrust Litig., No. 403, 1982 WL 1827, at *7 (D.N.M., Jan. 26, 1982).

required when dismissal is sought unilaterally.[288] Second, in class actions, a court must determine whether the entry of a judgment is in the public interest under Rule 23(e) of the Federal Rules of Civil Procedure.[289] Lastly, under the Antitrust Procedure and Penalty Act, a court is authorized to enter a final judgment and consent decree only after the receipt of comments on the competitive impact of the proposed settlement and a judicial determination that the consent decree is in the public interest.[290] Assuming that the parties would not abide by the terms of the settlement absent judicial approval and incorporation into a court order, it would be difficult to separate the source of the antitrust harm from government as opposed to private action. Court approval, however, still does not bring settlement agreements within the scope of the *Noerr* doctrine because, as the following discussion demonstrates, the First Amendment justifications are still absent. First, the conduct in question still does not represent an attempt to solicit government action. Second, even if seeking judicial approval of a private agreement could be considered petitioning, doing so to insulate anticompetitive conduct would not be considered valid petitioning.

A. Non-petitioning Means

Agreements approved by a court and incorporated into a judicial order should not be immunized for the same reasons that private settlements were not immune under the right to petition—the means associated with and culminating in the settlement do not represent petitioning. Whereas private settlement agreements clearly represent private contracts, consent decrees represent a hybrid between contract and judicial decree.[291] Despite the judicial involvement, the means employed in reaching the agreement are still the same as those used to enter into private settlement or any private commercial contract. Accordingly, the means used still do not represent an effort to solicit government action by presenting the merits of their claims for a judge to decide. The parties to the settlement are affirmatively withdrawing the merits of the decision from the judge and jury, and resolving the dispute among themselves to acquire "a bargained for arrangement

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288. *See* FED. R. CIV. P. 41(a) & (b).

289. *See id.* Rule 23(e) ("A class action shall not be dismissed or compromised without the approval of the court . . . .").

290. *See* 15 U.S.C. § 16(e) (1994).

291. *See* Lorain NAACP v. Lorain Bd. of Educ., 979 F.2d 1141, 1148 (6th Cir. 1992) ("The consent decree is . . . 'a voluntary settlement agreement which could be fully effective without judicial intervention' and 'a final judicial order . . . plac[ing] the power and prestige of the court behind the compromise struck by the parties.'" (quoting Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983))); Jed Goldfarb, *Keeping* Rufo *in Its Cell: The Modification of Antitrust Consent Decrees After* Rufo v. Inmates of Suffolk County Jail, 72 N.Y.U. L. REV. 625, 630 (1997) ("The prevailing modern view is that a consent decree is a hybrid, possessing attributes of both a contract and a judicial decree."); Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 324 (1988) (noting the dominance of the hybrid view).

[which] more closely resembles a contract than an injunction."[292] In so doing, the parties can be treated as orchestrating the decision-making process by privately negotiating the terms of the settlement and then presenting them to the court as a *fait accompli* which any court would be hard-pressed to reject.[293] Settlement resolves the ongoing dispute before a court by depriving the "court of the occasion, and perhaps even the ability, to render an interpretation" of the law and the facts.[294] Given that "[p]arties might settle while leaving justice undone,"[295] the context and nature of judicially approved consent decrees is closer to the quintessential private economic agreement unprotected by the First Amendment and subject to antitrust scrutiny than a judicial decree following a trial on the merits.

Moreover, as demonstrated by both *Allied Tube* and *Superior Court*, subsequent governmental approval does not immunize otherwise non-petitioning conduct.[296] Under these circumstances, court-approved settlements could be analogized to the conduct found wanting in *Allied Tube* where the producer of steel conduits orchestrated the decision-making process of the private association. As discussed earlier, the Supreme Court concluded that immunity was not justified even though the defendant actually sought government approval of the Code as adopted by the association, influencing the association was the most effective means of influencing government, and the defendant was successful in obtaining governmental approval in numerous instances.[297] Similarly, in *Superior Court*, the Court found that the CJA attorneys' boycott was not petitioning because it was a quintessential horizontal restraint of trade and an attempt to coerce governmental action rather than an effort to persuade on the merits.[298] Even though parties to a lawsuit may genuinely seek governmental approval of the terms of their settlement and successfully obtain approval, the non-petitioning nature of their conduct should be sufficient to subject them to antitrust scrutiny.[299]

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292. Fiss, *supra* note 126, at 1084.

293. *See id.* at 1085 ("A court cannot proceed (or not proceed very far) in the face of a settlement.").

294. *Id.*

295. *Id.*

296. *See supra* text accompanying notes 188-225.

297. *See supra* text accompanying notes 188-207.

298. Although both cases may be distinguished because they dealt with conduct that independently imposed restraints of trade regardless of whether or not government acted and a proposed settlement would have no adverse impact on competition until it is approved by a court, the reasoning in both decisions is still applicable.

299. This does not mean that the parties' actual presentation to the court for judicial approval cannot be considered protected petitioning, but rather that the prior acts of negotiating the settlement and ultimately the settlement itself would not be considered protected petitioning.

B. Invalid Means

Even assuming that asking a court to approve a settlement could nonetheless be considered petitioning and that the petitioning would include the act of negotiating and entering into the settlement itself, it is by no means clear that the petitioning would be considered valid if the parties are seeking judicial approval of the anticompetitive consequences of the settlement. First, as the following discussion demonstrates, judicial approval of settlement agreements does not usually represent judicial approval of the anticompetitive effects of the agreement. Second, in general, courts do not have the authority to immunize anticompetitive conduct. Under those circumstances, private parties know or should know that judicial approval does not mean approval of the anticompetitive consequences of their agreement, and their effort to claim authorization is therefore fraudulent. Furthermore, if the court specifically "approves" any resulting restraint upon trade, such approval is beyond the court's authority. In either case, the petitioning activity would be considered invalid.

1. Approval of What?—To begin with, it is not necessary to assume that judicial "approval" of a settlement agreement represents government sanctioning of anticompetitive harm for the purposes of *Noerr* immunity. As the Supreme Court consistently reminds us, "Immunity from the antitrust laws is not lightly implied."[300] Determining whether a court can be said to have approved any restraint upon competition embodied in a settlement would be a necessary predicate to determining whether the agreement can be immunized as an effort to solicit valid governmental action.

In general, when asked to approve a settlement agreement, a court is not being asked to determine liability or approve the substance of the agreement. In fact, most agreements expressly deny any admission of liability. Consequently, the court is not being asked to enforce the law.[301] Nor is the court specifically being asked to approve the anticompetitive effects of the agreement. When the dismissal is accomplished by stipulation pursuant to Rule 41(a)(1), judicial approval is not required, and courts cannot impose additional conditions.[302] Unless the parties mutually agree to court approval, a district court is not even permitted to enter that the agreement "So Ordered."[303] Likewise, while Rule 41(a)(2) does require judicial approval when a party unilaterally moves for dismissal, approval under those circumstances merely represents a judicial determination that the non-moving party will not be prejudiced by the dismissal.[304] Approval under Rule 41 is, therefore, at best limited to the conclusion that the agreement is fair with respect to the parties entering into the

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300. California v. Federal Power Comm'n, 369 U.S. 482, 485 (1962).

301. *See* Eastern RR. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961) ("[T]he Sherman Act does not apply to the . . . mere solicitation of governmental action with respect to the . . . enforcement of laws.").

302. *See* WRIGHT & MILLER, *supra* note 251, at 270-72.

303. Gardiner v. A.H. Robins, Co., 747 F.2d 1180 (8th Cir. 1984).

304. *See* WRIGHT & MILLER, *supra* note 251, at 278-79.

agreement. Consequently, the scope of judicial approval of settlement agreements under Rule 41 is exceptionally narrow, and the court is under no obligation, and arguably has no authority, to evaluate the anticompetitive effects of settlements.

While the judicial role in class actions is noticeably greater, its scope of review is likewise insufficient to justify antitrust immunity. Under Rule 23(e), a district court acts as a fiduciary guarding the rights of absent class members and the public in general.[305] It cannot accept a settlement agreement that the proponents have not demonstrated to be "fair, reasonable, and adequate."[306] However, "neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute."[307] A court, therefore, does not have the power or the authority to review the underlying facts and law to determine whether a settlement violates the antitrust laws. "[U]nless, the terms of the agreement are per se violations of antitrust law," the court may only apply a reasonableness standard of review.[308] As such, even in the context of Rule 23, judicial approval is quite limited.

In contrast to both Rule 41 and Rule 23, section 16 of the Antitrust Procedure and Penalty Act establishes detailed procedures for judicial review of anticompetitive harms resulting from consent decrees and specifically requires court's to determine whether such agreements are in the public interest.[309] For example, the statute provides for publication of the terms of the proposed consent decree, publication of a competitive impact statement, written comments by the United States, publication of the procedures for modifying the proposed consent decree, and a requirement that the court determine that the entry of the consent decree is in the public interest considering the competitive impact of the judgment.[310] In making the public interest determination, the court is not limited to the parties before it, but may rely upon expert witnesses, appoint a special master, and authorize the participation of "interested persons."[311] Unlike consent decrees entered under Rules 41 and 23, with section 16 agreements it would be possible to argue that court approval included approval of the anticompetitive consequences of the agreement. Not only is the court allowed to consider any restraint upon competition, it has a duty to make that inquiry, and cannot enter judgment unless it concludes that the agreement is in the public interest.

Petitioning immunity, however, would not apply with respect to consent decrees entered under section 16 for a very simple but very different reason.

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305. *See* FED. R. CIV. P. 23(e).

306. Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).

307. *Id.* at 123 (citations omitted).

308. *Id.* at 124.

309. *See* 15 U.S.C. § 16 (1994).

310. *See id.* § 16(b)-(f).

311. *Id.* § 16(e)-(f).

Section 16 only applies in cases brought by or on behalf of the United States.[312] In other words, section 16 is limited to civil and criminal prosecutions. The defendants in such cases, therefore, are not exercising their right to petition, but are instead defending themselves from government prosecution. As demonstrated by the history of the right to petition, petitioning immunity exists to protect affirmative efforts to invoke governmental power. The right to petition government for redress is, therefore, not implicated under section 16 agreements. If immunity is to be granted under these circumstances it would be under the "state action" doctrine rather than petitioning.

Given the limited nature and authority of court "approval" under Rule 41 and Rule 23, it would be difficult to argue that judicial approval of a settlement represents approval of any potential restraint upon trade embodied in the settlement.

2. The Limits of Judicial Approval.—Moreover, in addition to questioning whether a court has in fact "approved" a restraint upon competition embodied in a consent decree, it is questionable whether a court has the power to give such approval. As a general matter, courts cannot enforce illegal agreements, and the Supreme Court has consistently held agreements that violate the antitrust laws unenforceable.[313] Consequently, petitioning immunity could be denied on the basis that asking a court to approve a settlement that restrained trade is an invalid form of petitioning under the rules governing the judicial system.

While there is some disagreement among the Justices as to the appropriateness of illegality as a defense to contract law,[314] there is universal agreement that courts cannot lend their authority to acts which would make "the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act."[315] The disagreements among the Justices and the exceptions to this rule involve cases in which the defense is raised by a defendant who has benefitted from a plaintiff's performance under the challenged contract seeking to enjoy the benefits of that performance without the corresponding obligation to perform its part of the bargain.[316] In those cases, the disagreement among the Justices is not whether the courts may enforce agreements in violation of the

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312. *See id.* § 16(b).

313. *See, e.g.*, Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 79-80 (1982) (holding that a collective bargaining agreement which restrained trade could not be enforced); Kelly v. Kosuga, 358 U.S. 516, 520 (1959) (recognizing that a contract cannot be enforced if "the judgement of the Court would itself be enforcing the precise conduct made unlawful" by the antitrust laws.); Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 261-62 (1909) (holding that a contract for the sale and purchase of wallpaper which was an integral part of a scheme to monopolize the wallpaper industry could not be enforced).

314. *See Kosuga*, 358 U.S. at 518 ("As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court.") (footnote omitted).

315. *Id.* at 520 (citation omitted).

316. *See id.* at 518.

Sherman Act, but whether the particular promise is such an agreement.[317]

For example, in *Kelly v. Kosuga*, the plaintiff and defendant were both engaged in the business of marketing onions.[318] Defendant admittedly purchased fifty cars of onions from the plaintiff, but refused to pay. Instead, the defendant argued that the sale was made pursuant to a general agreement between himself, the plaintiff, and other marketers of onions not to deliver plaintiff's onions to the futures market for the remainder of the season.[319] According to the defendant such an agreement pertained to the prices of onions and limited the quantity of onions sold in Illinois.[320] The Supreme Court rejected the defense noting "the narrow scope in which the defense is allowed in respect to the Sherman Act . . . ."[321] Interpreting its prior precedents, the Court noted that the defense has been upheld only when "the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act."[322] Because the sale of onions could be separated from the agreement not to restrict the supply of onions available on the market, the defense did not apply.[323]

Even recognizing the narrow scope of the illegality rule, efforts to seek judicial approval and enforcement of settlements agreements which themselves embody the prohibited restraint upon trade clearly violate the rule. In that respect, the situation is closer to the facts of *Continental Wall Paper Co. v. Louis Voight & Sons Co.*[324] In that case, the plaintiff sought the enforcement of a contract for the sale and purchase of wallpaper which it admitted "was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme [to restrain trade]."[325] The plaintiff corporation was created by nearly all of the wallpaper manufacturers at the time and sold the wallpaper to "jobbers."[326] The plaintiff and the jobbers entered into an agreement in which the jobbers would purchase all their wallpaper from the plaintiff. The jobbers further agreed that they would not sell the wallpaper at terms better or prices lower than those offered by the plaintiff.[327] Jobbers who were not part of this

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317. *See, e.g.*, *id.* at 521 (allowing the enforcement of a contract for the sale of onions at a fair price because the sales agreement was separate from another agreement between the parties not to deliver onions to the futures market); *Continental Wall Paper*, 212 U.S. at 267-68 (Holmes, J., dissenting) (arguing that "[t]he actual contracts by which the plaintiff bound itself to deliver, and the sales under which it did deliver, the specific goods for which it seeks to recover the price," were a separate transaction from the general agreement restraining trade).

318. *See Kosuga*, 358 U.S. at 517.

319. *See id.*

320. *See id.*

321. *Id.* at 520.

322. *Id.* (citation omitted).

323. *See id.* at 521.

324. 212 U.S. 227 (1909).

325. *Id.* at 261.

326. *Id.* at 267-68.

327. *See id.*

combination were driven out of business.[328] According to the Court, the plaintiff sought "a judgment that will give effect . . . to agreements that constituted the combination, and by means of which the combination proposes to accomplish forbidden ends."[329] This, the Court could not do. "[S]uch a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality . . . ."[330]

This conclusion is consistent with the principle that public "officials have no independent authority to exempt conduct from the antitrust laws."[331] As the Supreme Court held:

> [T]hough employees of the government may have known of those [restraints of trade] and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise manner and method of securing immunity. None other would suffice. Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers.[332]

Accordingly, the Supreme Court has consistently held that before state or federal officials can be considered to have granted immunity from antitrust liability to private actors, their authority to do so must be clearly and expressly articulated either as a matter of state law[333] or federal statute.[334]

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328. *See id.*

329. *Id.* at 262.

330. *Id.*

331. ALD, *supra* note 6, at 964.

332. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226-27 (1940).

333. *See, e.g.*, Patrick v. Burget, 486 U.S. 94, 100 (1988) ("The challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.'" (quoting California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980))). These decisions involved whether private conduct can be considered immunized under the state action doctrine which, as articulated by *Midcal*, not only requires that the anticompetitive policy be clearly articulated by the state, the conduct must be "actively supervised by the state itself." *Midcal*, 445 U.S. at 105. Interestingly, under this analogous doctrine, the Supreme Court has questioned whether "state courts, acting in their judicial capacity, can adequately supervise private conduct for purposes of the state-action doctrine." *Patrick*, 486 U.S. at 103.

334. *See, e.g.*, California v. Federal Power Comm'n, 369 U.S. 482, 485-86 (1962) (concluding that the Natural Gas Act provided no express exemption from antitrust laws and that the Federal Power Commission was not given the power to enforce the antitrust laws); United States v. Radio Corp. of Am., 358 U.S. 334, 352-53 (1959) (Harlan, J., concurring) (concluding that FCC approval of a contract between NBC and Westinghouse to acquire certain television stations under a "public interest, convenience, and necessity" standard did not bar antitrust review). For a detailed discussion of these to doctrines as applied to the approval of settlements, see Koniak & Cohen,

Consequently, when the settlement agreement itself represents the restraint of trade, courts cannot lend their aid or authority to such agreements. Under those circumstances, even if the conduct can be considered petitioning, it cannot be considered valid petitioning. The parties to the agreement would either be fraudulently concealing the anticompetitive nature of their agreement because they know that the court could not otherwise approve it, or they would be asking the court itself to engage in clearly prohibited conduct by approving an otherwise illegal agreement. Under either circumstance, petitioning immunity would not be justified.[335]

CONCLUSION

While the right to petition was once considered the most fundamental right of the English because it was the principal means for criticizing government and seeking political change, its importance under the United States Constitution has been overshadowed by other cognate rights. Freedom of speech and expanded rights of political participation provide additional avenues for seeking the ends once protected by petitioning alone. Despite this diminished prominence, the *Noerr* doctrine demonstrates that the right to petition remains a vital part of our constitutional system of government by affording immunity for efforts to solicit government action. It is unfortunate, therefore, that the boundaries of the right are so poorly defined.

By examining petitioning's history and the development of the *Noerr* doctrine, this Article suggests a methodology for determining whether conduct is protected by the right to petition. Focusing on whether the private conduct is a valid effort to influence government, the means/source analysis both clarifies and simplifies the immunity analysis while remaining true to petitioning's constitutional status and its history. By limiting petitioning immunity to valid persuasive efforts, the means/source analysis also minimizes any potential conflict between the First Amendment and the antitrust laws without overemphasizing the values embodied in the antitrust laws. Lastly, by applying this analysis to the settlement of litigation, we see that while the symmetry of immunizing decisions to either "accept or reject" a settlement is facially appealing, it does not withstand deeper analysis. By affirmatively withdrawing their dispute from governmental deliberation, parties to settlements are responsible for any restraints upon competition that may result from their agreements even if a judge approves the settlement.

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supra note 8.

335. *See supra* Part II.A.1.